

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

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

**JOINT COMMENTS FILED BY THE LEAGUE OF CALIFORNIA CITIES, THE CALIFORNIA  
STATE ASSOCIATION OF COUNTIES AND SCAN NATOA REGARDING THE FCC'S  
NOTICE OF PROPOSED RULEMAKING**

**Comment Date: February 3, 2014**

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## SUMMARY

The League of California Cities, the California State Association of Counties and the States of California and Nevada Chapter of National Association of Telecommunications Officers and Advisors (“NATOA”) offer these comments in response to the Federal Communications Commission’s (the “Commission”) Notice of Proposed Rulemaking (“NPRM”) adopted and released on September 26, 2013.<sup>1</sup>

The League of California Cities (“League”) is an association of 470 California cities united in promoting the general welfare of cities and their citizens.

The California State Association of Counties (“CSAC”) is a non-profit corporation whose membership consists of all of California’s 58 counties. The mission of CSAC is to represent county government before the California Legislature, U.S. Congress, state and federal agencies and other entities, while educating the public about the value and need for county programs and services.

The States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors (“SCAN”) is an association with a history spanning over 20 years representing the interests of over 300 members consisting primarily of local government telecommunications officials and advisors located in California and Nevada. Accordingly, SCAN’s members have a keen interest and stake in this proceeding and its outcome.

The League, CSAC and SCAN are collectively referred to in these comments as “California Local Governments.”

**Section 6409(a).** In its brief existence, Section 6409(a) appears to facilitate *de minimis* changes to legally established wireless facilities without much controversy. A diligent search revealed that only three cases even address the statute. The Commission should therefore find, at least at this early stage, that it should neither interpret the terms in Section 6409(a) nor adopt any related mandatory rules.

In the event that the Commission determines that it should exercise its regulatory authority with

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<sup>1</sup> See In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, *Notice of Proposed Rulemaking*, 2013 WL 5405395 (F.C.C.), ¶ 102 (adopted Sep. 26, 2013) [hereinafter “NPRM”].

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respect to Section 6409(a), California Local Governments counsels the Commission to (1) narrowly interpret the statutory terms to afford them the narrow and common definition that Congress intended; (2) affirm the primacy of local authorities to define a “substantial” change; (3) bear in mind that the statute mandates a specific result without any reference to any specific process; (4) acknowledge local courts as the most appropriate and efficient means to resolve wireless land use disputes; and (5) consider the federalism and Tenth Amendment limits on federal power over the States and their political subdivisions.

Additionally, although Section 6409(a) contains few words and virtually no legislative history, the Commission should not view it as a blank slate. Congress enacted Section 6409(a) within the context of the Telecommunications Act of 1996 (“Telecom Act”), and the Commission should interpret any new rules to govern Section 6409(a) in manner consistent with the policies, objectives, history, and well-developed case law connected with the Telecom Act. Section 6409(a) exists as a very narrow exception the rule of local authority explicitly reserved in the Telecom Act, and the Commission should not interpret the statute so broadly that the exception swallows the rule.

As a summary, California Local Governments recommends that the Commission should not adopt any rules at this point in time. However, if the Commission decides to act, it should:

1. refine its proposed interpretation of “transmission equipment” to (i) limit its scope to electronic components that actually transmit or receive communications signals and (ii) clarify that State and local governments retain their discretionary authority over “other” equipment that does not transmit or receive communication signals, such as backup power generators;
2. revise its proposed interpretation of “wireless tower or base station” to clearly distinguish between a “wireless tower” and a “base station”;
3. interpret a “wireless tower” to mean a structure built solely or primarily to support antennas—not any structure that could hypothetically support wireless equipment;
4. interpret a “base station” to mean a system of fixed equipment that transmits and receives wireless signals;
5. interpret “collocation” so that it applies to only wireless towers or other structures that actually support or house *existing* wireless communication facilities;

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6. affirm that local governments retain their traditional authority to determine whether a particular eligible facilities request will substantially change the physical dimensions of an existing wireless tower or base station;
7. interpret a “substantial change” to consider changes to *all* physical dimensions and the effect of those changes on public safety and generally applicable laws;
8. eliminate needless loopholes for “interference,” “inclement weather,” and “tower creep” in any proposed test for what constitutes a substantial change;
9. apply the same standards in the *2009 Declaratory Ruling* to permit requests under Section 6409(a);
10. reject any proposals for a deemed-granted remedy; and
11. affirm that the proper venue to resolve wireless land-use disputes lies in local courts.

**Section 332(c)(7)(B).** The Commission also seeks comment on whether to modify its *2009 Declaratory Ruling* that interprets the term “reasonable time” as used in Section 332(c)(7)(B). For the most part, State and local governments adapted well to the *2009 Declaratory Ruling*, and no factual record before the Commission provides a basis for change. California Local Governments recommends that the Commission should not adopt any new rules.

In the event that the Commission determines that it should exercise its regulatory authority with respect to Section 332(c)(7)(B), California Local Governments advises the Commission carefully preserve local control over and flexibility in the permit process to encourage government, industry, and community stakeholders to cooperate towards creative wireless solutions. Any finally-adopted rules must preserve enough local authority to bring wireless applicants to the negotiating table.

As a summary, California Local Governments recommends that the Commission should not adopt any rules at this point in time. However, if the Commission decides to act, it should:

1. harmonize “collocation” with the recommended definition so that it applies to only wireless towers or other structures that actually support or house *existing* wireless communication facilities;
2. affirm local authority to define what constitutes a “complete” permit application;

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3. affirm that the “reasonable time” for permit review under Section 332(c)(7)(B) does not run concurrently with a reasonable and nonprohibitory moratorium;
4. find that reasonable zoning distinctions between municipal and private property serve important purposes rationally related to public health and safety; and
5. reject a deemed-granted remedy, just as it did in the *2009 Declaratory Ruling* and for the same reasons

The Commission is well-intentioned in seeking to clarify various aspects of Section 6409(a) and Section 332(c)(7). California Local Governments endorse certain proposed rules, such as the proposal to find that Section 6409(a) does not affect the proprietary capacities of governments. However, in some respects the Commission proposes to define terms too broadly, and in many instances the Commission proposes to act when it need not. Most importantly, the Commission can avoid constitutionally-questionable issues if it adopts the appropriately narrow interpretations and exercises an appropriate degree of regulatory restraint. In those instances discussed below, the Commission should embrace the proposition that “less is more.”<sup>2</sup>

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<sup>2</sup> Robert Browning, Andrea del Sarto (called the “Faultless Painter”) 2 *The Poems & Plays of Robert Browning*, 352, 353 (J.J. Dent & Sons Ltd. ed. 1932).

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## COMMENTS OF THE CALIFORNIA LOCAL GOVERNMENTS

### I. INTERPRETATION AND IMPLEMENTATION OF SECTION 6409(A) ISSUES

The Commission seeks comment on a wide range of Section 6409(a)-related issues. California Local Governments offer this guidance on how the Commission should address those issues, and on whether the Commission should even act at this time.

In some instances, the Commission need not act at all because the facts about wireless deployment show that the industry does not require strong new federal regulatory intervention to flourish. The plain fact is that the Telecom Act, as it existed before Section 6409(a), facilitated an explosive growth in the number and reliability of wireless communication facilities.<sup>1</sup> For example, since Congress enacted the Telecom Act some eighteen years ago, the number of wireless communication facilities increased from fewer than 52,000 in 1997 to over 300,000 in 2013.<sup>2</sup> Such exponential growth argues against the need for strong federal regulatory intervention.

In adopting Section 6409(a), Congress's narrow intent was to facilitate *de minimis* changes to existing wireless towers or base stations. The Commission need not adopt any new legislative rules to accomplish that purpose. Should the Commission feel compelled to adopt new rules, however, it should afford the plain and common meanings to technical terms and preserve local authority to enforce generally applicable laws under valid police powers. The comments in this section address some of the critical issues related to Section 6409(a) raised in the NPRM.<sup>3</sup>

#### A. An “Eligible Facilities Request” Means a Request to Place or Remove Equipment that Actually Transmits or Receives Communication Signals On or From a Structure that Currently Supports a Wireless Facility

The Commission should carefully consider what constitutes an “eligible facilities request”

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<sup>1</sup> See Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. ON LEGIS. 289, 293 (2011) (describing the success of the Telecom Act and the correspondingly successful growth of our national wireless infrastructure).

<sup>2</sup> See *Wireless Quick Facts*, CTIA: THE WIRELESS ASSOCIATION, <http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts> (last visited Jan. 22, 2014).

<sup>3</sup> To the extent that the California Local Governments do not discuss specific questions raised in the NPRM, the Commission should not draw any inference of support or a lack of support. California Local Governments anticipate providing additional comments during the NPRM reply comment period.

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because, as the NPRM noted, how it defines this term significantly impacts the scope and applicability of Section 6409(a).<sup>4</sup> The following subsections highlight several critical areas where the Commission should clarify the narrow meaning of specific terms.

### 1. **“Transmission Equipment” Means an Electronic Component that Transmits or Receives Communication Signals**

The Commission proposes to expansively define the phrase “transmission equipment” as “antennas and other equipment associated with and necessary to their operation, including, for example, power supply cables and a backup power generator.”<sup>5</sup> California Local Governments believe the use of the word “transmission” signifies that the equipment must actually transmit and receive radio frequency communications, and does not include nonessential equipment that does not actually transmit or receive communication signals. The Commission should refine its proposed interpretation to (1) limit its scope to electronic components that actually transmit or receive communications signals and (2) clarify that State and local governments retain their discretionary authority over “other” equipment that does not transmit or receive communication signals, such as backup power generators.

The term “transmission equipment” commonly refers to a component part of a base station, such as the antennas, radios, and connector cables. The capability to transmit a signal distinguishes “transmission equipment” from other equipment at the wireless communication facility.

The Commission proposes, however, to define “transmission equipment” to include objects that do not actually transmit or receive radio frequency signals.<sup>6</sup> A wireless facility does not necessarily require all the equipment that would fall under the proposed definition. For example, even though a wireless facility requires a primary power source, it does not necessarily require a backup power source. Standby power generators with their attendant fuel source, power transfer switching, fuel catch basins, and the like typically occupy hundreds of cubic feet, which virtually always results in a substantial change

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<sup>4</sup> See NPRM, *supra* note 1, ¶ 102.

<sup>5</sup> See NPRM, *supra* note 1, ¶ 105.

<sup>6</sup> See NPRM, *supra* note 1, at ¶ 104.

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to the physical dimensions of a wireless site. Backup power generators are non-transmission accessories rather than transmission equipment necessities.

Various types of backup power generators also raise environmental, safety, and zoning issues more properly suited to a discretionary review process. A diesel generator emits caustic noise, noxious fumes, and environmentally-toxic chemicals. A hydrogen fuel cell standby power generator requires zoning setbacks for fire safety purposes. A State or local government may legitimately seek to channel such generators to facilities into more appropriate areas, such as industrial zones, and encourage other cleaner and quieter power solutions in areas inappropriate for diesel generators, such as residential or open space zones.

The Commission should clarify its proposed definition of “transmission equipment” to include only those elements necessary to actually transmit and receive wireless services, and exclude those elements not required for those limited purposes.

### **2. The Commission Should Refine Its Proposed Comingled Definition of a “Wireless Tower or Base Station” Because Congress and Common Usage Distinguish Between a “Wireless Tower” and a “Base Station”**

The Commission proposes to expansively define a “wireless tower or base station” to mean “structures that support or house an antenna, transceiver, or other associated equipment that constitutes part of a base station, even if [those structures] were not built for the sole or primary purpose of providing such support.”<sup>7</sup> This definition is ill-advised because it conflates two distinct statutory terms under one single test (*i.e.*, whether the structure supports or houses wireless equipment). In addition, a wireless tower is a structure—whereas a base station is a system of transmission equipment, and distinct from the structure that supports or houses it.

Contrary to the Commission’s analysis, the proposed rule in the NPRM does not actually distinguish between a “wireless tower” and a “base station.”<sup>8</sup> A “cardinal principal” of statutory interpretation requires that two different words in the same statute receive two different meanings “so that

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<sup>7</sup> See NPRM, *supra* note 1, at ¶¶ 107–08.

<sup>8</sup> See NPRM, *supra* note 1, at ¶¶ 107–08.

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no provision is rendered inoperative or superfluous, void or insignificant.”<sup>9</sup> Yet the Commission’s proposed test does not distinguish between the two terms. Instead, whether something qualifies as a “wireless tower or base station” under the proposed rule effectively depends on whether it supports or houses a piece of wireless equipment.<sup>10</sup> This singular view of a “wireless tower or base station” as anything that supports or houses wireless equipment impermissibly and confusingly lumps together two distinct statutory terms.

Congress intended the terms “wireless tower” and “base station” in Section 6409(a) to mean different things because it inserted the disjunctive “or” rather than the conjunctive “and” between them.<sup>11</sup> Accordingly, the Commission should not adopt the its proposed definition because it must afford the different words different meanings.<sup>12</sup>

### **3. Congress Intended “Wireless Tower” to Mean a Structure Solely or Primarily Built to Support Antennas, Just as the Commission and the Wireless Industry Already Defines That Term**

Consistent with congressional intent, FCC rules, and common usage, the Commission should interpret a “wireless tower” to mean a structure built solely or primarily to support antennas—not any structure that could hypothetically support wireless equipment.<sup>13</sup>

First, Congress intended a “wireless tower” to narrowly refer to a structure specifically built to support wireless antennas because it chose a narrower statutory term than it adopted in other statutes.<sup>14</sup> In a different part of the Middle Class Tax Relief and Job Creation Act of 2012, Section 6206(c)(3) directs

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<sup>9</sup> See *Miller v. Clinton*, 687 F.3d 1332, 1347 (D.C. Cir. 2012) (citing *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

<sup>10</sup> See NPRM, *supra* note 1, at ¶ 108 (stating too broadly that Congress intended “to streamline the facilities application process” without acknowledging the explicit limits in the statute itself).

<sup>11</sup> See 47 U.S.C. § 1455(a).

<sup>12</sup> See *Miller*, 687 F.3d at 1347.

<sup>13</sup> See INTERGOVERNMENTAL ADVISORY COMM., ADVISORY RECOMMENDATION NO. 2013-13, RESPONSE TO NOTICE OF PROPOSED RULEMAKING ADOPTED AND RELEASED SEPTEMBER 26, 2013 at 5 (2013) [hereinafter “IAC No. 13”] (“The Commission must define [“wireless tower”] in a way that makes clear that a wireless tower is a structure built for the primary purpose of attaching antennas and other ancillary wireless equipment.” (emphasis in original)).

<sup>14</sup> See *id.* at 5 (“The Congressional use of the term “wireless towers” does not suggest that the Commission should interpret a Congressional intent to define the term any way other than a vertical tower structure built for the primary purpose of housing wireless communications facilities.”).

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FirstNet to utilize “existing . . . commercial or other communications infrastructure . . . and . . . Federal, State, tribal, or local infrastructure” to build, deploy, and operate a nationwide public safety broadband network.<sup>15</sup> This language refers to a much broader class of structures than the language in Section 6409(a). The word “communications” is broader than “wireless,” and “infrastructure” is broader than “tower.”<sup>16</sup> Just as Congress understood the difference between “wireless” services and “personal wireless services” in two different statutes enacted nearly a decade apart, Congress differentiated between generalized commercial, communication, and government infrastructure and specific wireless towers described in the same public law.<sup>17</sup>

Second, the proposed definition conflicts with how the Commission defines a wireless tower in nearly every other context. Both the Nationwide Programmatic Agreement and the Collocation Agreement define a tower as one built solely or primarily to support antennas.<sup>18</sup> Although the NPRM suggests that Congress intended a broader term, the comparative analysis above shows that Congress intended the narrower definition consistent with the Nationwide Programmatic Agreement and the Collocation Agreement approach.<sup>19</sup> The Commission should continue to define a “wireless tower” to mean a structure built solely or primarily to support wireless antennas, as Congress intended.

Lastly, the Commission’s proposed definition conflicts with the common use of the term. The word “tower” is defined in the dictionary as follows: “a building or structure typically higher than its diameter and high relative to its surroundings that may stand apart (as a campanile) or be attached (as a church belfry) to a larger structure and that may be fully walled in or of skeleton framework (as an

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<sup>15</sup> See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6206(c)(3), 126 Stat. 156; see also *id.* § 6206(b).

<sup>16</sup> Compare *id.* § 6207(c)(3), with 47 U.S.C. § 1455(a).

<sup>17</sup> Compare 47 U.S.C. § 6409(a), with 47 U.S.C. § 332(c)(7)(C)(i).

<sup>18</sup> See 47 C.F.R. Part 1, App. C § II.A.14 [hereinafter “Nationwide Programmatic Agreement”]; FCC, NATIONWIDE PROGRAMMATIC AGREEMENT FOR THE COLLOCATION OF WIRELESS ANTENNAS (2001) [hereinafter “Collocation Agreement”].

<sup>19</sup> See *supra*, notes 14–16, and accompanying text.

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observation or transmission tower.”<sup>20</sup> That dictionary definition clearly distinguishes the word “tower” from “base station.” Furthermore, in a letter written to T-Mobile by its legal counsel—and subsequently provided to a local government as part of a permit application packet and made part of the public record—the Channel Law Group stated that:

Although questions may arise regarding some of the terms or concepts employed in [Section 6409(a)], in fact *their meaning is well established*. The Federal Communications Commission (“FCC”) has relied for years on these same terms or concepts in connection with the regulation of wireless broadcasts and communications. . . . In the Collocation NPA, the FCC has defined the term ‘tower’ as ‘any structure built for the *sole or primary purpose* of supporting FCC-licensed antennas and their associated facilities.’<sup>21</sup>

This analysis demonstrates that even members of the wireless industry who would benefit from such an overly broad standard proposed by the Commission do not believe that Section 6409(a) applies to structures not built solely or primarily to support wireless antennas.<sup>22</sup> Thus, the clarity of the definition in the Nationwide Programmatic Agreement and the Collocation Agreement reflects actual usage among significant members of the wireless industry, and align with the traditional usage by local governments.

Although many structures *may be able* to support wireless equipment, a structure does not become a “tower” merely because it supports an antenna. For example, a commercial office building does not somehow morph into a wireless tower simply because a wireless carrier has affixed antennas to that building. That illogical result would change the way safety codes apply to structures, and even open the door to building owners wanting to add height to a building for office space purposes to claim that they are subject to the non-substantial change element of Section 6409(a). Congress could not have intended this result. The Commission should continue to define a “wireless tower” as a structure built solely or primarily to support antennas.

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<sup>20</sup> See MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/tower> (last visited Jan. 28, 2014). Courts will often look to the dictionary to interpret an undefined statutory term. *See, e.g., Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct.1997, 2003–04 (2012) (surveying various dictionaries published in the effective year of a statute to find the commonly understood meaning of a term at the time).

<sup>21</sup> *See* Letter from Robert Jystad, Channel Law Group, LLC, to Joseph Thompson, T-Mobile (Oct. 5, 2012) (attached as Exhibit \_ to these comments) (emphasis added).

<sup>22</sup> *See id.*

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### 4. A “Base Station” Means a Discrete System of Transmission Equipment in a Fixed Location, but It Does Not Mean the Location Itself

A base station generally refers to a system of fixed equipment that transmits and receives wireless signals.<sup>23</sup> This equipment includes the transmission equipment (*i.e.*, transmitters and receivers, mobile telephone switching center interfaces, and the cables that interconnect them). Equipment also optionally found at base stations, but not necessary for transmission and reception of wireless signals, includes work lights, backup power systems, and environmental control equipment. Just as wireless providers customize wireless towers to fit within the spatial limits and aesthetic character of the site, they also customize base stations to the particular circumstances of the site. Common places to find base stations include mechanical penthouses, outdoor equipment shelters, underground vaults, exposed concrete pads, and building equipment rooms. Wireless providers also typically install a security fence or wall around exposed outdoor base stations.

A base station is a unified system of component parts because one base station corresponds to one wireless communication facility. This concept becomes critically important in circumstances where the particular features of the site require the wireless provider to distribute the base station equipment in different areas of the same physical location.

The definition of a base station must also be distinguished from the structure that supports or houses it. Although the base station consists of equipment at a particular place or in a particular structure, like the discussion, *supra*, a non-purpose built place or structure does not become a base station merely because it subsequently supports or houses one.<sup>24</sup>

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<sup>23</sup> See, e.g., Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Wireless Services, *Fifteenth Report*, 26 FCC Rcd. 9664, 9841, ¶ 308 (adopted June 24, 2011) (“A base station generally consists of radio transceivers, antennas, coaxial cable, a regular and backup power supply, and other associated electronics. These base stations are generally placed atop a purpose-built communications tower, or on a tall building, water tower, or other structure providing sufficient height above the surrounding area.”); INTERGOVERNMENTAL ADVISORY COMM., ADVISORY RECOMMENDATION NO. 2013-9, RESPONSE TO THE WIRELESS TELECOMMUNICATIONS BUREAU’S GUIDANCE ON INTERPRETATION OF SECTION 6409(A) OF THE MIDDLE CLASS TAX RELIEF AND JOB CREATION ACT OF 2012 at 3 (2013) [hereinafter “IAC NO. 9”] (“A base station by the Commission’s own definition is a set of equipment components that collectively provides a system for transmission and reception of personal wireless services).

<sup>24</sup> See IAC NO. 9, *supra* note 23, at 3 (“A mere equipment or power supply box, for example, is not in and of itself a base station, nor is a structure that supports or houses such boxes.”).

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A few examples will help illustrate the point: Consider first a five-story building that hosts a wireless communication facility, which consists of an equipment room with radio equipment on the third floor connected to antennas on the roof via cables that run through a duct system. The entire building is not a “wireless tower” because it was not built solely or primarily to support the antennas. Indeed, in this case, no tower exists. The “base station” consists of the equipment physically distributed throughout the equipment room, the duct system, and the rooftop, but the office building does not become a base station because it merely houses one.

In contrast, consider a monopine that supports antennas from two different wireless providers with a single equipment shelter adjacent to the monopine to house the radios and other equipment for each provider. In this case, the monopine constitutes the “wireless tower” because it was built solely to support wireless antennas. And in this case, although this site involves one tower and one equipment shelter, it hosts two base stations (one for each provider).

The examples above illustrate that a base station is not only distinct from the tower, but that it is distinct from the places that wireless carriers install them. A structure or building does not become a base station merely because it houses one, just as a structure or building would not become an air conditioner merely because it supports one on the rooftop. The Commission should interpret the term consistent with these practical realities.

Another troubling aspect of the Commission’s proposed definition of the term “base station” is its proposal to consider the recommendation in the *Section 6409(a) PN* that it is reasonable to interpret a “base station” to include a structure that supports or houses an antenna, transceiver, or other associated equipment that constitutes part of a base station under Section 6409(a).<sup>25</sup> The Commission proposes to interpret “‘the term wireless tower or base station’ . . . to encompass structures that support or house an antenna, transceiver, or other associated equipment that *constitutes part of a base station*, even if they

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<sup>25</sup> See NPRM, *supra* note 1, at ¶ 109 (citing 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, at 3 (released Jan. 25, 2013) [hereinafter “*Section 6409(a) PN*”]).



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were not built for the sole or primary purpose of providing such support.”<sup>26</sup>

That such an odd construction of Section 6409(a) could lead to absurd results in the real world is currently on display in the Superior Court of the City and County of San Francisco. In a pending lawsuit that just completed a trial by the Court, plaintiffs T-Mobile, Crown Castle, and ExteNet challenged a city ordinance that requires city-issued permits to install wireless facilities on utility poles in the public rights-of-way.<sup>27</sup> The ordinance also requires a permit to modify facilities after they are initially permitted.

During a recent deposition connected with that trial, a senior T-Mobile engineer who was testifying as an expert witness for all of the plaintiffs testified that in his opinion the term “base station” means “any part of a base station.” He then testified that, although a DAS node is not a base station unto itself, it is a “spatially separate” *part* of base station and therefore falls within the ambit of Section 6409(a). He further discussed how T-Mobile installs fiber optic lines on existing utility poles to connect its DAS nodes to the three T-Mobile hubs in San Francisco. According to the T-Mobile expert, a DAS node—miles away from the T-Mobile hub and physically interconnected only via a strand of fiber optic cable—constitutes part of the base station. For that reason, San Francisco would have to approve a request to install antennas or other equipment on each of those utility poles, provided the proposed equipment did not substantially change the physical dimensions of the structure.<sup>28</sup> At the logical extreme of T-Mobile’s definition, any object that touches part of the telephone or electrical utility lines connected to a wireless facility would also constitute a base station that a wireless carrier could collocate on as a matter of right. The Commission must refine and narrow its proposed concept of a base station to prevent such absurd results, and needless litigation.

### **B. “Collocation” for the Purposes of Section 6409(a) Only Applies to Towers that Actually—Not Merely Could—Support or House Wireless Facilities**

The Commission should not define “collocation” for the purposes of Section 6409(a) as “the

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<sup>26</sup> *See id.*

<sup>27</sup> A copy of Article 25 of the San Francisco Public Works Code is attached hereto as Exhibit \_\_ to these comments.

<sup>28</sup> A copy of the relevant excerpts from the deposition of Mr. Daniel Paul taken on December 19, 2013 in *T-Mobile West Corp. v. City and County of San Francisco* is attached hereto as Exhibit \_\_ to these comments.

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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 communication purposes,” as proposed in the NPRM.<sup>29</sup> Under this view, with errant support from Verizon Wireless, Section 6409(a) would require State and local governments to approve a permit request to place wireless transmission equipment in or on anything that *could* house or support any component of a base station.<sup>30</sup> Instead, the Commission should find, consistent with common usage and Congressional intent, that Section 6409(a) only applies to wireless towers or other structures that actually support or house *existing* wireless communication facilities.

The principal fact that distinguishes a new site from a collocated site is whether the structure currently hosts a wireless communication facilities. A wireless provider constructs a new site where no other provider currently operates, and it collocates its wireless equipment where one or more other providers already operate.

The Commission’s proposed rule would eviscerate legitimate local land use authority preserved under Section 6409(a) because it will allow wireless providers to masquerade new sites as collocations. As the Commission noted, many structures offer convenient support for new antennas.<sup>31</sup> The proposed rule would sweep all new facilities on those structures within the ambit of Section 6409(a) and therefore outside the reach of a rational discretionary process that could allow for a more reasoned and thoughtful deployment of wireless facilities consistent with local zoning requirements.

Verizon also asserts that Section 6409(a) should somehow apply to any structure, regardless of whether it currently supports wireless equipment.<sup>32</sup> This argument ignores the limited sense in which the Commission presently defines a tower and, more importantly, Congressional intent that “wireless towers”

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<sup>29</sup> See NPRM, *supra* note 1, at ¶ 113.

<sup>30</sup> See IAC NO. 13, *supra* note 13, at 6; *see also* Letter from Tamara Preiss, Verizon Wireless, to Marlene H. Dortch, FCC (May 14, 2013) (on file with the FCC).

<sup>31</sup> See NPRM, *supra* note 1, at ¶ 113.

<sup>32</sup> See Letter from Tamara Preiss, Verizon Wireless, to Marlene H. Dortch, FCC (May 14, 2013) (on file with the FCC); *see also* NPRM, *supra* note 1, at ¶ 111.

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mean a purpose-built structure that actually support wireless antennas.<sup>33</sup> Just how a structure without wireless equipment could constitute an “existing wireless tower or base station” escapes California Local Governments, but this impossibility should not escape the Commission.

### **II. THE COMMISSION SHOULD CONFIRM LOCAL AUTHORITY TO DEFINE A SUBSTANTIAL CHANGE RATHER THAN ADOPT AN UNWORKABLE NATIONAL STANDARD**

The Commission also seeks comments on whether to promulgate a standard for what constitutes a “substantial change” to a wireless tower or base station.<sup>34</sup> Any potential rules should allow local authorities to define what constitutes a substantial change in the context of their local communities, local needs, and local values.

#### **A. Local Governments Should Define Non-Prohibitory Standards for a Substantial Change Because the Issue Does Not Lend Itself to a National Standard**

Local authorities should retain their traditional authority to determine whether a particular eligible facilities request will substantially change the physical dimensions of an existing wireless tower or base station. Whether a given carrier’s collocation, removal, or replacement of transmission equipment amounts to a substantial change depends on the character and circumstances of a particular wireless tower or base station. The issue does not lend itself to a national standard or centralized control, and the Commission should therefore exercise regulatory restraint if it wants to avoid becoming the national zoning board.

The Telecom Act reflects the careful balance between policies to promote facilities-based infrastructure and equally important land-use and public-safety priorities. Although the Commission may be well-suited to address the needs of wireless services providers, it should recognize that it lacks the expertise and the resources to appropriately and adequately evaluate the unique and individual needs of more than 30,000 local communities that host these facilities. The Commission should allow local agencies to reasonably control the issues within their expertise, experience, and values.

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<sup>33</sup> See *supra*, Part I.A.3., and accompanying text.

<sup>34</sup> See NPRM, *supra* note 1, at ¶ 116.

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Rational regulatory restraint in this matter will not leave catastrophic gaps in the wireless siting statutory scheme. Local authorities would continue to define what constitutes a substantial change in their communities. The same substantive limits on local authority would apply; the local authorities could not define a substantial change in a prohibitory, effectively prohibitory, or unreasonably discriminatory manner.<sup>35</sup> The same procedural limits on local tribunals would apply; permit denials would require a written decision based on substantial evidence in the record.<sup>36</sup> The same remedial checks on local authority would apply; aggrieved parties could still challenge local approaches on both substantive and procedural grounds.<sup>37</sup>

As a practical matter, the Commission should also bear in mind that how it defines a substantial change will indirectly affect the process to permit new wireless communication facilities.<sup>38</sup> Should the Commission eliminate local control over changes to existing wireless communication facilities, local communities will naturally grow more hostile towards new facilities that they will eventually lose control over. Elected local officials will be left to explain at public meetings that the federal government imposed a federal program for the local officials to implement and took their local decisionmaking out of their hands. In plain terms: the more draconian the federal rules, the more local communities will likely resist new wireless facilities.

### **B. The Informal Guidance Test Entirely Fails to Consider Several Important Aspects of a Substantial Change in Physical Dimensions and Contains Loopholes that Undermine Any Actual Limits**

The Commission seeks comment on whether it should adopt the test articulated by the Wireless Telecommunications Bureau (“Informal Guidance Test”) and whether it should refine any of its aspects.<sup>39</sup> A federal agency must consider all the important aspects of a problem when it promulgates a legislative

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<sup>35</sup> See 47 U.S.C. §§ 332(c)(7)(B)(i), 332(c)(7)(B)(iv).

<sup>36</sup> See *id.* §§ 332(c)(7)(B)(ii)–(iii).

<sup>37</sup> See *id.* § 332(c)(7)(B)(v).

<sup>38</sup> See IAC NO. 13, *supra* note 13, at 5 (describing “unintended consequences” of the proposed rules).

<sup>39</sup> See NPRM, *supra* note 1, at ¶ 119; see also Section 6409(a) PN, *supra* note 25 1 (released Jan. 25, 2013).

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rule.<sup>40</sup> As an initial matter, Congress chose not to adopt the Informal Guidance Test when it chose not to incorporate its standards into Section 6409(a). Additionally, the Informal Guidance Test entirely fails to consider (1) physically small changes that produce legally substantial problems and (2) all the measures within the plain meaning of the term “physical dimensions.” Additionally, the test includes several substantial loopholes and shortfalls that render any limits in the Commission’s proposed rules merely illusory.

### **1. Congress Did Not Intend to Incorporate the Informal Guidance Test into Section 6409(a)**

The significant textual differences in the Informal Guidance Test, when juxtaposed with Section 6409(a), indicates that Congress did not intend to adopt that test into that statute. The Informal Guidance Test uses the defined phrase “substantial increase in the *size* of the tower”—a phrase that does not exist in Section 6409(a).<sup>41</sup> Instead, Congress used “substantially change the *physical dimensions* of the tower or base station.”<sup>42</sup> If Congress intended to incorporate the Informal Guidance Test into Section 6409(a), Congress could have done so either by quoting the definition found in the Informal Guidance Test or using the exact same defined phrase. Congress did not, and since it is presumed that Congress is aware of FCC regulations, the Commission should therefore conclude that Congress meant something different from the Informal Guidance Test.

### **2. The Informal Guidance Test Does Not Account for Circumstances When Physically Small Changes Produce Legally Substantial Problems Because They Violate Generally Applicable Laws**

Even a relatively small change can constitute a substantial one when it threatens to harm public safety or otherwise violates a general law.<sup>43</sup> The Commission should not adopt the Informal Guidance Test because it does not account for circumstances in which the applicant proposes a relatively small

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<sup>40</sup> See *Motor Vehicle Manufacturers’ Ass’n of the U.S. v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 44 (1983).

<sup>41</sup> Compare 47 U.S.C. § 1455(a) (emphasis added), with *Section 6409(a) PN*, *supra* note 25 (emphasis added).

<sup>42</sup> See 47 U.S.C. § 1455(a).

<sup>43</sup> See IAC NO. 13, *supra* note 13, at 5 (“Any change in physical dimensions that would (1) violate a building or safety code; (2) violate a federal law or regulation . . . ; or (3) violate the conditions of approval under which the site construction was initially authorized, should be considered a substantial change in the physical dimensions.”).

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change that could nevertheless cause a substantial impact.

General zoning and building codes exist not only to protect the aesthetics of a community, but to protect the lives and property of the public. In the context of wireless sites, overbuilt towers and pole attachments can cause severe damage, as happened in 2007 in California when a utility pole overloaded with wireless transmission equipment collapsed and started a fire that ravaged nearly 4,000 acres and caused millions of dollars in property damage.<sup>44</sup> The Informal Guidance Test would bind the hands of local officials to prevent such dangerous overbuilding construction.

Two hypothetical examples further illustrate this issue. First, consider a 50-foot-tall tower separated 55 feet from the nearest structure in a commercial zone with a 70-foot height limit and a required 110% fall zone setback. An increase in the height of the tower would not violate the Informal Guidance Test or the zone limit, but would encroach into the fall zone and violate a law designed to protect public safety. Next, consider a 50-foot-tall tower 200 feet from the nearest structure in a zone with no height limit for wireless towers. A wireless carrier requests a permit to collocate on the tower with additional antennas mounted at the same height as the current antennas, but the structural analysis of the tower indicates that the additional weight will violate wind-load standards in TIA-222 Revision G.<sup>45</sup>

In both of these examples, a permissible change under the Informal Guidance Test would significantly threaten public health and safety. The Commission should not adopt the Informal Guidance Test because it entirely fails to capture these kinds of substantial changes to the physical dimensions of a wireless tower or base station.

### **3. The Informal Guidance Test Does Not Reflect the Plain Words in Section 6409(a) Because It Does Not Account for All “Physical Dimensions”**

In its current form, the Informal Guidance Test only considers changes in height, width, number

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<sup>44</sup> See Melissa Caskey, *CPUC Approves \$51.5-Million Malibu Canyon Fire Settlement*, MALIBU TIMES (Sep. 23, 2013), available at [http://www.malibutimes.com/news/article\\_3d62067a-2175-11e3-86b6-001a4bcf887a.html](http://www.malibutimes.com/news/article_3d62067a-2175-11e3-86b6-001a4bcf887a.html).

<sup>45</sup> See, e.g., *Cell Tower Near Ski Resort Collapses in High Winds*, SPOKESMAN-REVIEW (Jan. 13, 2014), available at <http://www.spokesman.com/stories/2014/jan/13/in-brief-cell-tower-near-ski-resort-collapses-in/> (describing a cell tower that fell onto a nearby house in high winds).

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of equipment cabinets, and footprint.<sup>46</sup> Congress expressly intended to capture more than this limited formula when it chose the expansive term, “physical dimensions,” as the point of reference for a substantial change.<sup>47</sup> At a minimum, the Commission should afford the term its plain meaning and include (1) height, (2) width, (3) depth, (4) volume, (5) surface area, (6) weight, and (7) visual impact.<sup>48</sup>

#### **4. Loopholes for “Interference” and “Inclement Weather” Threaten to Eviscerate Any Practical Limits on a Substantial Change Under the Informal Guidance Test**

In addition to an unreasonably narrow view of the terms “substantial” and “physical dimensions,” the Informal Guidance Test also contains arbitrarily broad exceptions that would permit carriers to expand their facilities to heights and widths greater than the prescribed limits based on claims of interference or the need to protect their facilities from inclement weather.<sup>49</sup> The Commission should close these loopholes because (1) Congress explicitly limited the degree to which carriers could expand and (2) exceptions for interference and inclement weather threaten to eviscerate any practical limit on how much a carrier can expand their facilities.

Under the Informal Guidance Test, for example, the height and width limits do not apply when the carrier seeking to collocate its facilities identifies the need for additional space to avoid interference or shelter the antennas from inclement weather.<sup>50</sup> These issues pose technically complex and fact-intensive questions that many local governments cannot resolve without the aid of technical experts. Moreover, the facts that would support or refute these claims reside in the hands of the wireless applicants—the party that would benefit from groundless or even false claims of interference or risk of weather damages. A local government that cannot independently evaluate such claims, afford an advisor, or even retain one within the limited review period forecloses the opportunity to explore a smaller or less intrusive wireless

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<sup>46</sup> See Section 6409(a) PN, *supra* note 25.

<sup>47</sup> See 47 U.S.C. § 1455(a).

<sup>48</sup> See IAC NO. 13, *supra* note 13, at 5 (“A change in physical dimensions, whether it is height, weight, bulk, or visual impact, must be considered.”).

<sup>49</sup> See NPRM, *supra* note 1, at ¶ 118.

<sup>50</sup> See *id.* at ¶ 118.

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facility.

### **C. Any Rule Must Include a Cumulative Limit to Prevent a Series of Small Changes that Cumulatively Result in a Substantial Change the Tower or Base Station**

The Informal Guidance Test also encourages “tower creep,” a scenario where a wireless service provider could achieve whatever size facility it desires through a series of successive changes to its wireless tower or base station.<sup>51</sup> Any potential rule should include a cumulative limit because Congress expressly did not intend to limit local authority over substantial changes to a wireless tower or base station that could result from successive insubstantial changes.<sup>52</sup>

A cumulative limit should be placed as an invisible boundary on each and every dimension of the wireless tower or base station, but not necessarily as a limit on the number of changes a wireless service provider may request within that cumulative limit. This balance allows wireless service providers to modify and upgrade their wireless facilities as many times as they please so long as the changes do not expand the tower or base station beyond a rational limit.

### **III. THE COMMISSION MUST NARROWLY INTERPRET THE PREEMPTIVE EFFECT ON LOCAL AUTHORITY**

Tension between the Commission’s obligations and local land use control lies at the heart of the Section 6409(a) debate. The Commission must narrowly interpret the preemptive effect of Section 6409(a) on other aspects of State and local governments’ legitimate land use authority.

#### **A. The Commission Correctly Acknowledged that Section 6409(a) Does Not Regulate State or Local Governments Acting in a Proprietary Capacity**

As the Commission proposed to correctly interpret, Section 6409(a) does not impair the property rights of State and local governments.<sup>53</sup> Congress intended to affect local land use policies, rather than to abrogate governmental property rights. Moreover, a statute that forces State and local governments to approve new or expanded tenancies on their real property would raise serious Fifth Amendment Takings

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<sup>51</sup> See *id.* at ¶ 120 (recognizing at least the theoretical problem of tower creep).

<sup>52</sup> See 47 U.S.C. § 1455(a).

<sup>53</sup> See NPRM, *supra* note 1, at ¶ 129.



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Clause issues.<sup>54</sup> California Local Governments also caution the Commission not to attempt to craft a rule that distinguishes regulatory and proprietary capacities because it should leave those difficult constitutional questions to the courts.<sup>55</sup>

### **B. The Commission Need Not Wade into the Constitutionally Questionable Local Preemption Issues So Long as It Defines a Substantial Change to Include Changes that Violate Generally Applicable Laws**

The Commission sought comment on the extent to which Section 6409(a) requires State and local government to approve a permit request that violates, for example, land use codes and other generally applicable laws related to public health and safety.<sup>56</sup> This question implicates serious constitutional questions best left to the courts, but which the Commission can handily avoid so long as it defines a substantial change to include any change that violates a generally applicable law.

Whether a federal agency may constitutionally adopt a rule that requires State and local governments to approve a permit for a wireless facility that endangers public safety raises serious federalism concerns. In order for the Commission to preempt local police powers, especially in the area of public health and safety, there must be “clear and manifest Congressional intent.”<sup>57</sup> No such “clear and manifest congressional intent” exists in Section 6409(a). Moreover, the courts construe such preemptive intent as narrowly as possible.<sup>58</sup>

Although Section 6409(a) includes the words “[n]otwithstanding . . . any other provision or law,” a rule that preempts all local authority to enforce all generally applicable laws under its traditional police powers would not be the narrowest possible construction.<sup>59</sup> Rather, the narrower and more appropriate construction would find that Congress intended Section 6409(a) to very narrowly preempt the local

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<sup>54</sup> See *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) (construing “private property” under the Fifth Amendment to include State and local government property when the federal government condemns it).

<sup>55</sup> See NPRM, *supra* note 1, at ¶ 129.

<sup>56</sup> See *id.* at ¶ 125.

<sup>57</sup> See *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

<sup>58</sup> See, e.g., *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (holding that some state damage claims were preempted and others were not).

<sup>59</sup> See 47 U.S.C. § 1455(a)(1).

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authority to deny a permit to modify, remove, or collocate wireless equipment on a lawfully existing wireless tower or base station only when the proposed changes would result in a structurally and legally *de minimis* change.<sup>60</sup>

To avoid this quagmire altogether and promote rational wireless policies, the Commission should clarify that any proposed change that violates a generally applicable law constitutes a substantial change. As discussed above, even small physical changes can create substantial land use issues. If the Commission required State and local governments to approve unsafe and otherwise illegal wireless facilities, it would only exacerbate those local land use issues and the already problematic constitutional questions.

The Commission should interpret a substantial change to include whether the change would violate a law. This approach would narrowly construe the statute to avoid the constitutional questions and provide a clear path for wireless service providers to collocate, remove, or replace their transmission equipment in a safe, legal, and reasonable manner.

#### **IV. THE COMMISSION SHOULD NOT IMPOSE ANY PROCEDURAL RULES OR LIMITS ON PERMIT APPLICATIONS BECAUSE SECTION 6409(A) MANDATES A RESULT BUT NOT A PROCESS**

As the Commission correctly recognized in the NPRM, the mandate to approve certain eligible facilities requests presupposes that the wireless provider would memorialize the request in a permit application.<sup>61</sup> The Commission should also acknowledge that the plain terms of Section 6409(a) mandate a particular result, but not any particular process to achieve that result.<sup>62</sup> Section 6409(a) on its face does not invite the Commission to impose rules on the permit application and review process.<sup>63</sup> The following subsections respond to some of the fundamental application and review process issues raised in the

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<sup>60</sup> See NPRM, *supra* note 1, at ¶ 47; IAC No. 13, *supra* note 13, at 4.

<sup>61</sup> See NPRM, *supra* note 1, at ¶ 131; [cite to informal guidance]; see also *McKay Brothers, LLC v. Zoning Bd. of Adjustment of Tp. of Randolph* (JLL), 13cv1383, 2013 WL 1621360, \*3 (D.N.J. Apr. 12, 2013) (observing that Section 6409(a) placed the Zoning Board of Adjustment in an initial factfinder role).

<sup>62</sup> See 47 U.S.C. § 1455(a).

<sup>63</sup> See NPRM, *supra* note 1, at ¶ 132; see also IAC No. 13, *supra* note 13, at 6.

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NPRM.

### **A. Section 6409(a) Does Not Require a Ministerial Permit Review Process**

The NPRM sought comment on whether the Commission should limit permit review to administrative staff rather than an elected board or commission.<sup>64</sup> Not a single word in the statute requires a State or local government to enact a ministerial review process or, for that matter, any other process. No record before the Commission supports such a rule. Moreover, a mandatory ministerial review process would naturally limit public notice and opportunity to participate in municipal business. The Commission should not entertain any proposals to dictate how a State or local government processes a Section 6409(a) request.

### **B. The Commission Should Not Limit the Content of Permit Applications Because Local Authorities Need Sufficiently Detailed Disclosures to Fulfill Their Initial Factfinder Role Under Federal Law**

The Commission sought comment on whether Section 6409(a) requires local authorities to act as the initial factfinders and determine whether a permit request (1) qualifies as an eligible facilities request, (2) will substantially change the physical dimensions of the wireless tower or base station, and (3) implicates any environmental or historic concerns.<sup>65</sup> To determine these factual issues and evaluate whether the carriers comply with the local requirements, the local authorities often require wireless service providers to submit necessary disclosures designed to allow the local reviewers to evaluate the applicable legal requirements.

In general, the Commission tends to favor more flexible rules when the local authority must act as a factfinder. Just as a State or local government may require data to determine whether a proposed facility will comply with the FCC Rules, local authorities must require disclosures about the scope of the

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<sup>64</sup> See NPRM, *supra* note 1, at ¶ 132.

<sup>65</sup> See *McKay Brothers, LLC v. Zoning Bd. of Adjustment of Tp. of Randolph*, 13cv1383 (JLL), 2013 WL 1621360, \*3 (D.N.J. Apr. 12, 2013) (noting that “the [local authority] would have to determine whether the installation of the antennae would ‘substantially change the physical dimensions’ of the lattice tower in which Plaintiff seeks to install the antennae. See 47 U.S.C. § 1455(a).”).

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proposed project to determine whether it actually falls under Section 6409(a).<sup>66</sup> The Commission should reaffirm that State and local governments may legitimately seek information from the carriers to perform their factfinding duties and to confirm compliance with legal requirements in the wireless siting process.

### **C. The Commission Should Not Limit Permit Review Fees Because Congress Intended to Streamline—Not Subsidize—Small Changes to Wireless Towers and Base Stations**

The Commission seeks comment on whether Section 6409(a) warrants any new federal limits in wireless permit review fees.<sup>67</sup> The new review burdens that Section 6409(a) imposes on local authorities will necessarily create new review costs for State and local governments. Although Section 6409(a) may obviate some review costs, it does not eliminate them and nothing in the statute requires local authorities to internalize permit fees as an effective subsidy to wireless service providers. Moreover, any new limit that forces localities to expend more than they can recover from a wireless applicant would constitute an impermissible unfunded mandate to shift the costs of a federal program onto State and local governments.<sup>68</sup>

## **V. TIME LIMITS ON 6409(A) REVIEW**

### **A. The 2009 Declaratory Ruling Does Not Apply to All Covered Requests Because Presumptively Reasonable Review Periods Apply Only to Personal Wireless Services Facilities**

As a threshold matter, the Commission should recognize that (1) it proposes to expand the scope of Section 6409(a) to wireless services beyond the reach of the *2009 Declaratory Ruling*, and (2) Section 6409(a) does not impose any limit on the time to review covered requests not related to personal wireless

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<sup>66</sup> See, e.g., *New York SMSA Limited Partnership v. Town of Clarkstown*, 603 F. Supp. 2d 715, 730–31 (S.D.N.Y. 2009) (holding that a municipality may legislatively use radiofrequency data to determine whether a proposed facility will comply with the FCC Rules); see also 47 C.F.R. § 1.1307 *et seq.*; In the Matter of Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934, *Report and Order*, 15 FCC Rcd. 22821, 22825–26, ¶ 11 (adopted Nov. 13, 2000) (declining to adopt a rigid standard to govern the kind and amount of data a State or local government may require to [hereinafter “*RF Procedures Order*”]).

<sup>67</sup> See NPRM, *supra* note 1, at ¶ 131 (inquiring “whether . . . section 6409(a) permits and warrants Federal limits on applicable fees”).

<sup>68</sup> See generally Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48.

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services.<sup>69</sup>

Section 332(c)(7) requires State and local governments to act within a “reasonable time” on permit requests related to only “personal wireless service” facilities.<sup>70</sup> However, the NPRM proposes to broaden the scope of Section 6409(a) to include facilities for all “wireless” services.<sup>71</sup> Thus, whether any presumptively reasonable time for review applies depends on whether the covered request seeks to provide personal wireless services or some other wireless service.

Alternatively, the Commission should find that Section 6409(a) applies only to personal wireless services as defined in Section 332(c)(7)(C)(i). This approach would harmonize the scope and intent of Section 6409(a) with Section 332(c)(7), and obviate the need for local governments to determine whether some presumptively reasonable review period applies to the proposed service.

### **B. Covered Requests Require More Time for Review Because They Add a New and Different Layer of Analysis to the Permit Process**

The Commission should not adopt a shorter presumptively reasonable time for review because (1) no fully developed factual record exists to show that Section 6409(a) review subjects applicants to unreasonable delays and (2) the plain terms of that statute require local governments to act as factfinders on complex and technical issues.

Section 6409(a) already imposes new burdens on State and local governments, and the Commission should not pile on additional hardships without a clear factual basis in a fully developed record. Unlike the factual record attached to the *2009 Declaratory Ruling*, no factual record exists to show any need for a federal rule in this instance. Moreover, in the nearly two years since Congress enacted Section 6409(a), only three known court decisions even address the statute and none found it dispositive.<sup>72</sup> Simply no real-world evidence supports the need for a shorter review period.

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<sup>69</sup> See NPRM, *supra* note 1, at ¶¶ 103–04 (proposing not to limit the term “wireless” to “personal wireless services” as defines in Section 332(c)(7)(C)(i) of the Telecom Act).

<sup>70</sup> See 47 U.S.C. § 332(c)(7)(B).

<sup>71</sup> See NPRM, *supra* note 1, at ¶¶ 103–04.

<sup>72</sup> See *New Cingular Wireless PCS, LLC v. City of West Haven*, No. 3:11cv1967 (MPS), 2013 WL 3458069, \*8 (D. Conn. July 9, 2013) (noting in *dicta* that Section 6409(a) “buttressed” the order to grant a wireless permit, but did

(continued....)

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The Commission found in the *2009 Declaratory Ruling* that a State or local government could reasonably process a collocation request within ninety days.<sup>73</sup> However, Section 6409(a) requires additional time because it requires the permit authority to perform new factual inquiries not previously part of the permit review process, such as whether the applicant submitted an eligible facilities request and whether the proposed design will substantially change the physical dimensions of the wireless tower or base station.<sup>74</sup> Additionally, if the Commission adopts the proposed broader definition of “wireless,” State and local governments will now likely require a process to distinguish more generic “wireless” providers from the more specific “personal wireless services” providers.

The necessary time for review becomes even longer under the proposed Informal Guidance Test because local governments will presumably need to evaluate complex technical claims that a wireless provider requires additional height or width to avoid interference or inclement weather.<sup>75</sup> In such a case, a shorter presumptively reasonable review period to complete a more difficult analysis would force State and local governments to afford preferential status to wireless permit requests—a result the Commission explicitly attempted to avoid in the *2009 Declaratory Ruling*.<sup>76</sup> The Commission should not adopt any shorter review periods than it established in the *2009 Declaratory Ruling*.

### **C. The Rules Must Toll the Presumptively Reasonable Review Period When an Applicant Submits an Incomplete Application, the Parties Mutually Consent to Extend the Review Period, or the Municipality Enacts a Moratorium to Tailor its Process to New Federal Laws**

Regardless of any procedural rules the Commission decides to adopt, to allow for a meaningful review, the rule must toll the presumptively reasonable review period when (1) an applicant submits an

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not retroactively apply to the case); *Hempstead*, 2013 WL 1148898, at \*6; *McKay Bros.*, 2013 WL 1621360, at \*3 (holding that a cause of action under 6409(a) was not ripe for review because the plaintiff did not exhaust its administrative remedies).

<sup>73</sup> See In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposal as Requiring a Variance, *Declaratory Ruling*, 24 FCC Rcd. 13994, 14012, ¶ 46 (adopted Nov. 18, 2009) [hereinafter “*2009 Declaratory Ruling*”].

<sup>74</sup> See *McKay Bros.*, 2013 WL 1621360, at \*3.

<sup>75</sup> See *supra*, Part II.B.4, and accompanying text.

<sup>76</sup> See *2009 Declaratory Ruling*, *supra* note 73, at 14010–11, ¶ 42.

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incomplete application, (2) the parties mutually consent to extend the review period, or (3) the municipality enacts a temporary moratorium to amend or otherwise revise its permit review process, rules, and policies.

The Commission noted in its *2009 Declaratory Ruling* that wireless applicants must submit complete permit applications to allow the municipality a fair opportunity to review the request.<sup>77</sup> Similarly, the Commission cannot fairly expect municipalities to determine whether Section 6409(a) applies *and* conduct its normal review without a complete application. Any other rule would provide applicants with the perverse incentive to masquerade all its applications as Section 6409(a)-covered requests without any substantive facts to verify the claim and then simply wait for the clock to expire, especially when coupled with a potential deemed-granted remedy.<sup>78</sup> Such strong-but-perverse incentives frustrate the Commission’s consistent goal to foster cooperative partnerships between governments and the wireless carriers.

To allow local authorities an opportunity to fulfill its role as the initial factfinder, and to discourage applicants who would game the process, the Commission should adopt a rule that tolls the review period when the municipality notifies the applicant within a reasonable time that it submitted an incomplete application.

California Local Governments also recognizes that the rules must protect applicants against “last minute” denials on the basis of incompleteness.<sup>79</sup> Consistent with the *2009 Declaratory Ruling*, the Commission should apply the thirty-day notice period for incomplete applications to Section 6409(a).<sup>80</sup>

At the same time, the Commission should adopt the rule from its *2009 Declaratory Ruling* that permits the parties to extend the time for review through mutual consent to foster cooperative partnerships

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<sup>77</sup> See *id.* at 14014.

<sup>78</sup> See NPRM, *supra* note 1, at ¶ 137; see also *infra* VI (discussing the problems associated with the proposed “deemed granted” remedy).

<sup>79</sup> See *2009 Declaratory Ruling*, *supra* note 73, at 14014–15, ¶¶ 52–53.

<sup>80</sup> See *id.* at 14015, ¶ 53.

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between wireless applicants and local authorities.<sup>81</sup> In that order, the Commission acknowledged that the rules should allow the government and industry to mutually toll the review period because the facts and circumstances can vary greatly among each wireless permit request.<sup>82</sup> A rigid rule that forced governments and industry out of a cooperative and into an adversarial context would therefore harm the public interest and frustrate Congressional intent.<sup>83</sup>

Lastly, the Commission should toll the time for review when a municipality enacts a temporary moratorium to revise its permit process, rules, and policies because Section 6409(a) fundamentally changes the way local authorities must approach wireless siting.

### **VI. THE COMMISSION SHOULD NOT IMPOSE A DEEMED-GRANTED REMEDY**

#### **A. Section 332(c)(7)(v) of the Telecom Act Already Provides an Expedited Remedy**

Section 6409(a) does not allow for a deemed-granted remedy. Any suggestion that it does directly conflicts with the express Congressional intent to allow federal courts to craft individualized remedies based on the unique facts and circumstances of each wireless-facilities dispute.<sup>84</sup>

A federal agency may interpret a statute only when (1) the statute contains some gap or ambiguity that Congress intended the agency to resolve and (2) the agency does not construe the statute arbitrarily, capriciously, or manifestly contrary to Congressional intent.<sup>85</sup> Although it appears that the rule proscribes agency authority to interpret a rule at all when no gap or ambiguity exists, the Supreme Court recently clarified in *City of Arlington v. FCC* that a court always reviews whether the agency went beyond what Congress permitted it to do.<sup>86</sup>

Congress already provided an adequate and efficient remedy for when a State or local

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<sup>81</sup> See *id.* at 14013, ¶ 49.

<sup>82</sup> See *id.* at 14009, ¶ 39.

<sup>83</sup> See *id.* at 14013, ¶ 49.

<sup>84</sup> See 47 U.S.C. § 332(c)(7)(B)(v); 2009 *Declaratory Ruling*, *supra* note 73, at 14009, ¶ 39 (rejecting a deemed granted remedy for a failure to act because it would frustrate the “Congressional intent that courts should have the responsibility to fashion appropriate case-specific remedies”).

<sup>85</sup> See *Chevron U.S.A., Inc. v. Nat’l Resources Defense Council, Inc.*, 467 U.S. 837, at 842 (1984).

<sup>86</sup> See *City of Arlington, Tex. v. FCC*, 133 S.Ct. 1863, 1868–69 (2013).



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government allegedly fails to act or improperly denies a permit request for a wireless facility.<sup>87</sup> Congress did not specify the remedy for a “failure to act” or an “impermissible denial” because the current remedy in Section 332(c)(7)(B)(v) already affords “expedited” relief.<sup>88</sup> Indeed, the one district court that already dealt with a Section 6409(a) claim disposed of the matter within 36 days.<sup>89</sup> Nothing in Section 6409(a) or the record before the Commission warrants a different remedy, and the Commission should not go beyond the already adequate and efficient judicial remedy.

### **B. A Deemed Granted Remedy Exacerbates the Questionable Constitutionality of Section 6409(a) Under the Tenth Amendment**

Even when Congress may constitutionally regulate a subject matter, a statute may violate the Tenth Amendment and principles of federalism.<sup>90</sup> A court will invalidate a law when it compels the States or their officials to enact or enforce a federal regulatory program.<sup>91</sup>

The Constitution generally contemplates that a representative form of government, not necessarily judicial review, protects the States’ rights under the Tenth Amendment.<sup>92</sup> However, the Court must intervene when a federal statute (1) directly regulates the States or their officials rather than control through a generally applicable law and thus (2) allows the federal government to avoid political accountability.<sup>93</sup>

The Supreme Court of the United States in *Printz v. United States* and in *New York v. United States* struck down federal statutes that coerced state officials to facilitate a politically unpopular federal program under threat of a federal punishment because the laws violated State sovereignty.<sup>94</sup> The law in

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<sup>87</sup> See 47 U.S.C. § 332(c)(7)(B)(v).

<sup>88</sup> See *id.*.

<sup>89</sup> See *McKay Bros.*, 2013 WL 1621360, at \*4.

<sup>90</sup> See *Printz v. United States*, 521 U.S. 898, 933–34 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992); see also *Reno v. Condon*, 528 U.S. 141, 149 (2000).

<sup>91</sup> See *New York*, 505 U.S. at 188.

<sup>92</sup> See *South Carolina v. Baker*, 485 U.S. 505, 512 (1988); *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 550–52, 556 (1985).

<sup>93</sup> See *New York*, 505 U.S. at 160, 168.

<sup>94</sup> See *Printz*, 521 U.S. at 933–34 (1997); *New York*, 505 U.S. at 188.

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*Printz*, which obliged local law enforcement officials to perform background checks on handgun purchases, and the law in *New York*, which forced States to implement nuclear waste disposal programs, violated the Tenth Amendment because they both pressed States into federal service and blurred the lines of political accountability—undermining the structure of government to protect States’ rights.

Here, Section 6409(a) mirrors the unconstitutionally coercive laws struck down in *Printz* and *New York* because it compels State and local officials to administer a federal wireless deployment program. Just as the federal law in *Printz* required State law enforcement officers to perform background checks and the law in *New York* required States to enact a nuclear waste disposal program, Section 6409(a) directly regulates the States because it compels State officials to approve covered requests.<sup>95</sup> Just as the federal laws in *Printz* and *New York* required local governments to administer or enact what may be politically unpopular programs, Section 6409(a) forces local governments to shepherd politically unpopular permits through the land use process. Thus, Section 6409(a) appears to fall on the unconstitutional side of the line drawn in *Printz* and *New York*.

The deemed-granted remedy considered in the NPRM pushes Section 6409(a) even farther to the unconstitutional side of the spectrum because it blurs the lines of political accountability between communities and their local government representatives.<sup>96</sup> Wireless land use permits can create substantial controversy in many instances and often force politically unpopular choices. Aggrieved local communities will not likely blame Congress or the Commission for their wireless woes; they will blame the local officials they believe approved the permit, or at least did not block the approval. The political accountability problem will become especially acute in the event the Commission requires mere ministerial review without a public notice or hearing.<sup>97</sup> Section 6409(a) will likely face a constitutional challenge in the courts, and a deemed granted remedy would only add fodder for the argument that the statute forces States and their instrumentalities to administer a federal program. The Commission should

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<sup>95</sup> See *Printz*, 521 U.S. at 933–34 (1997); *New York*, 505 U.S. at 188.

<sup>96</sup> See John W. Pestle, *Section 6409(a) of the Middle Class Tax Relief Act is Unconstitutional*, MUNICIPAL LAWYER, Jan. 10, 2013, at 22.

<sup>97</sup> See *supra*, Part IV.A, and accompanying text.

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not adopt a deemed granted remedy.

### **VII. A DECLARATORY RELIEF PROCEDURE IS UNNECESSARY AND INAPPROPRIATE GIVEN THE AVAILABILITY OF MORE ACCESSIBLE COURTS**

To enforce Section 6409(a), the Commission proposes to permit aggrieved applicants to petition for declaratory relief.<sup>98</sup> The Commission should not permit aggrieved applicant to petition for declaratory relief because (1) Congress already provided an expedited judicial remedy,<sup>99</sup> (2) the Commission lacks the local expertise to competently adjudicate local disputes, and (3) the proposed procedure places an unreasonable burden on State and local governments.

As discussed above, Congress already provided expedited judicial review for aggrieved applicants.<sup>100</sup> Unlike Section 332(c)(7), which grants a party the right to petition the Commission for denials allegedly based on RF emissions, Section 6409(a) does not contain any evidence that Congress intended to allow an aggrieved applicant to petition the Commission for declaratory relief from any alleged violation of Section 6409(a).<sup>101</sup> Thus, the proposed declaratory relief procedure conflicts with Congress' apparent intent to maintain the status quo for remedies.

Additionally, the Commission inherently lacks the institutional expertise to strike the appropriate balance between the federal interest in facilities deployment and the equally strong countervailing local interests. The current Congressionally-prescribed judicial remedy channels these disputes into the courts, which have the demonstrated ability to fairly evaluate these issues.<sup>102</sup> Moreover, the Commission should carefully consider the burden of its proposal to establish a declaratory ruling process to review Section 6409(a) complaints, and its slippery slope towards its role as a "national zoning board."<sup>103</sup>

Lastly, local governments should not bear the expense to obtain counsel in Washington, D.C. or

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<sup>98</sup> See NPRM, *supra* note 1, at ¶ 142.

<sup>99</sup> See 47 U.S.C. § 332(c)(7)(B)(v).

<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

<sup>102</sup> See IAC NO. 13, *supra* note 13, at 2, 5, 8.

<sup>103</sup> See NPRM, *supra* note 1, at ¶ 142; see also IAC NO. 13, *supra* note 13, at 4–5.

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travel long distances to defend a local land use dispute. These burdens are especially unreasonable given the lack of explicit Congressional intent and the availability of more appropriate and more accessible venues in the courts. For all these reasons, the Commission should not permit aggrieved applicants to petition for declaratory relief under Section 6409(a).

The Commission should look to the legislative history of the Telecom Act to understand Congressional intent because Congress enacted Section 6409(a) with virtually no legislative history or debate—much less the kind of legislative history that accompanied the Telecom Act. When the Senate debated Section 253 of the Telecom Act, which regulates the relationship between local governments and carriers in the public right-of-way, Senator Feinstein expressed deep concern over whether the Commission should preside over State-law preemption claims. She stated that:

[C]ities [would have] to send delegations of city attorneys to Washington to go before a panel of telecommunications specialists at the FCC, on what may be [a] very broad question of state or local government rights. In reality, this preemption provision is an unfunded mandate because it will create major new costs for cities and for states.<sup>104</sup>

Respecting Senator Feinstein’s concern, Senator Groton offered an amendment—now law—designed to allow cities to defend preemption claims in local federal district courts. He stated that his amendment “retains not only the right of local communities to deal with their rights-of-way, but their right to meet any challenge on home ground in their local district courts.”<sup>105</sup>

Senator Feinstein’s concerns in 1995 over Commission authority to hear preemption claims mirror the same concerns in Section 6409(a). Without legislative history to Section 6409(a), there is good reason to apply Senator Feinstein’s sound reasoning then to similar issues today. Without an express delegation, such as in Section 332(c)(7)(B)(v), or any supportive legislative history, the Commission should not entertain petitions for declaratory relief on Section 6409(a) claims.

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<sup>104</sup> See *Bell South Telecom., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1190 (quoting 141 Cong. Rec. S8306 (June 14, 1995) (Statement of Sen. Groton)).

<sup>105</sup> See *Bell South Telecom.*, 252 F.3d at 1190 (quoting 141 Cong. Rec. S8170 (June 12, 1995) (Statement of Sen. Feinstein)).

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### A. The Commission Should Allow an Adequate Grace Period to Allow State and Local Governments to Adjust to Any New Rules Through Reasonably Temporary Moratoria

The Commission sought public comment on whether it should provide a transition period to allow States and localities time to implement any finally-adopted rules.<sup>106</sup> The Commission should provide local governments with at least twelve months to adjust local land use ordinances, policies, and procedures to reflect any new rules adopted as a result of this NPRM. State and local governments require at least this much time to revise and enact new substantive rules, the Commission routinely provides a transition period, and at least one federal court recently found that any delay would not pose an immediate and substantial hardship to the wireless providers or the public.<sup>107</sup>

The Commission consistently provides State and local governments with a grace period to adjust to new federal rules.<sup>108</sup> In the *2009 Declaratory Ruling*, the Commission allowed a 60-day grace period that began after a wireless applicant notified the permit authority of a failure to act. The proposed rules in the NPRM would fundamentally impact many local ordinances and policies in a way far beyond the effect of the *2009 Declaratory Ruling*. The Commission should provide significantly more time for State and local government to implement such significantly different finally adopted rules.

Moreover, neither wireless providers nor the public will suffer an “immediate and significant hardship” that might justify a shorter grace period.<sup>109</sup> In *McKay Brothers, LLC v. Zoning Bd. of Adjustment of Tp. of Randolph*, a wireless provider sought to compel a township to grant a permit under Section 6409(a) a mere forty-one days after the township returned the application as incomplete. Thirty-eight days later, that federal court denied the complaint and noted that any interrupted deployment would not likely produce such hardship because the process to obtain a land use permit usually includes

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<sup>106</sup> See NPRM, *supra* note 1, at ¶ 100.

<sup>107</sup> See *McKay Bros.*, 2013 WL 1621360, at \*4.

<sup>108</sup> See, e.g., *2009 Declaratory Ruling*, *supra* note 73, at 14014, ¶ 51.

<sup>109</sup> See *McKay Bros.*, 2013 WL 1621360, at \*4.

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delays.<sup>110</sup> Assuming the *2009 Declaratory Ruling* applied to that application, the township would receive an additional 90 days to process the permit request, and thus the judge effectively found no hardship when the wireless provider must wait at least 169 days for a permit.

In the interest of fairness and cooperation, and in light of the significant changes to local policies and the absence of any significant hardship to carriers, the Commission should provide State and local governments with at least twelve months to implement any requirements after adoption.

### VIII. IMPLEMENTATION OF SECTION 332(C)(7)

#### A. The Commission Should Globally Interpret “Collocation,” for Sections 332(c)(7) and 6409(a), as a Wireless Facility Shared with an Existing Wireless Tower or Wireless Structure

The Commission should read Sections 332(c)(7) and 6409(a) with a holistic, plain language approach, and define “collocation” as a wireless facility placed at a location shared with an existing wireless tower or other wireless structure. This is consistent with the Commission’s 1999 interpretation of the term “collocation” as relating to “competitors’ equipment” for the purpose of rules implementing local exchange carriers’ statutory duty to provide physical or virtual collocation for competitors, through the “Collocation Order.”<sup>111</sup> If there is no personal wireless service equipment already at a site, how could a new wireless facility be “collocated” there?

A common sense reading of the term “collocation” avoids conflicting interpretations for the related statutes. If the Commission were to impose conflicting interpretations, it may cause conflicting results between interpretations of what is “collocation of new transmission equipment” under, say, Section 6409(a), with a “collocation application” under the *2009 Declaratory Ruling*. The Commission should adopt a global reading, requiring existing wireless “equipment” at the site.

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<sup>110</sup> See *McKay Bros.*, 2013 WL 1621360, at \*4 (citing *Trinity Resources v. Township of Delanco*, 842 F. Supp. 782, 800 (D.N.J. 1984)).

<sup>111</sup> See *Deployment of Wireline Services Offering Advanced Telecom. Capability (“Collocation Order”)*, 14 FCC Rcd at 4761 (1999) (interpreting 47 U.S.C. § 251(c)(6) (requirement that incumbents allow collocation by competitors); *GTE Service Corp. v. F.C.C.*, 205 F.3d 416, 424-425 (D.C. Cir. 2000) (noting that “collocation” under Section 251 relates to “competitors’ equipment”).

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### **B. The Commission Should Confirm Traditional Local Authority to Determine the Completeness of a Wireless Facility Application**

The Commission could clarify that an application is complete, for the purposes of the 2009 *Declaratory Ruling*, when the State or local government receives an application containing information that is complete to the State’s or local government’s satisfaction. This would be similar to levels of discretion afforded governmental decisionmakers in, for example, land use applications to the City of Stockton, California,<sup>112</sup> Santa Cruz, California,<sup>113</sup> and National Pollutant Discharge Elimination System (“NPDES”) permit applications to the EPA.<sup>114</sup> States and local governments are responsible for processing wireless facility applications, and they are best situated to use their discretion to confirm whether an application is complete.

A recent court decision cited by the Commission in the Notice of Proposed Rulemaking is also instructive in this regard. In *McKay Bros., LLC v. Township of Randolph*,<sup>115</sup> when a carrier was informed to contact a town staff person “for the necessary paperwork,” the carrier filed suit in lieu of submitting the required paperwork.<sup>116</sup> 36 days after filing suit, the district court dismissed the carrier’s lawsuit because the case was not ripe, and no immediate and significant hardship would result.<sup>117</sup> The court also noted that “[t]he Zoning Board of Adjustment should have the opportunity to consider Plaintiffs’ application without premature judicial intervention.”<sup>118</sup>

Since the *McKay Bros.* court found no hardship from dismissing the carrier’s case before “the necessary paperwork” was submitted, the Commission should similarly avoid premature intervention by regulating municipalities’ “necessary paperwork.” Congress only imposed a remedy on a “final action or

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<sup>112</sup> Stockton Municipal Code § 16.84.050(A)(1) provides as follows: “The Director shall review the application material to determine if the application is complete.”

<sup>113</sup> Santa Cruz Municipal Code § 24.04.052(1) provides as follows: “Staff shall determine whether an application for a development project is complete . . .”

<sup>114</sup> 40 C.F.R. 122.21(e) requires applications to the EPA Director to be “completed to his or her satisfaction.”

<sup>115</sup> 2013 WL 1621360 (D. N.J. 2013).

<sup>116</sup> *Id.* at \*1.

<sup>117</sup> *Id.* at \*4.

<sup>118</sup> *Id.* at \*2.

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failure to act.”<sup>119</sup> The Commission should similarly stay out of such premature intervention into municipalities’ discretion to determine whether an application contains the “necessary paperwork.”

The Commission should resist the temptation to obfuscate a simple issue that is best left in State and local decisionmakers’ hands. The Commission should confirm that municipalities retain their discretion to decide what constitutes a “complete” application.

### **C. The 2009 Declaratory Ruling Should Not Run Concurrently with Moratoria Because the Two Principles Should Not be Comingled**

The Commission should not apply its *2009 Declaratory Ruling* to run concurrently with moratoria. The relevant purpose of the *2009 Declaratory Ruling* (accelerating the process to decide the application of an individual carrier) is wholly different from the general purpose of moratoria (to study existing regulations and/or develop new regulations, to apply to all carriers). If the Commission erroneously went ahead as it proposes, it would undercut the purpose of moratoria, for the short-term benefit of a few carriers, but to the detriment of all other current and future carriers, and the community-at-large. Therefore, the time periods from the *2009 Declaratory Ruling* should not run during the pendency of moratoria.

Even prior to the *2009 Declaratory Ruling*, the courts, relying on case-specific facts, readily distinguish valid moratoria from invalid moratoria under the “reasonable time” requirement of the Telecommunications Act of 1996. Accordingly, the Commission should not (1) set limits on the length, or maximum cumulative time, of moratoria; nor (2) limit moratoria that were put in place prior to the submission of an application. “There is nothing to suggest that Congress, by requiring action ‘within a reasonable period of time,’ intended to force government procedures onto a rigid timetable where the circumstances call for study, deliberation, and decision-making among competing applicants.”<sup>120</sup> In

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<sup>119</sup> 47 U.S.C. § 332(c)(7)(B)(v).

<sup>120</sup> *Sprint Spectrum, L.P. v. City of Medina*, 924 F.Supp. 1036, 1040 (W.D. Wash 1996) (denying motion for preliminary injunction, and upholding moratorium where city sought time “to deal with an expected flurry of applications”); *Sprint Spectrum, L.P. v. Jefferson County*, 968 F.Supp. 1457, 1466 (N.D. Ala. 1997) (granting petition for declaratory judgment and writ of mandamus, striking down moratorium where county failed to follow state procedural requirements, had already imposed two prior moratoria, and had “not offered a legitimate reason for not processing pending applications under existing regulations, while new amendments are being considered”);

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multiple instances, the courts have acted within only a few months (and as little as 22 days) from the filing of lawsuits challenging moratoria, by motions alone, without the need for a trial.<sup>121</sup>

The local interests served by moratoria include preserving the status quo to allow for the development of and implementation of a comprehensive plan, or a revision to the existing plan. These needs often arise after an unexpected increase in wireless facility applications, or a change in applicable rules. It would obviously frustrate the purpose of a moratorium if, during the interim period when the new plan is developed, the Commission allowed carriers to evade the new local regulations – and instead permitted carriers to install wireless facilities which might possibly defeat, in whole or in part, the ultimate execution or purpose of new wireless facility regulations.

Additionally, a State or local government’s development of new regulations can often serve to clarify the process for all carriers to obtain permits, through a thorough and open discussion among industry, government, and community members. The carrier-specific rights to a speedy local decision on individual applications through the *2009 Declaratory Ruling* should not be confused with the carrier-wide interests (not a right) in seeking the lifting of a moratorium, which is traditionally accompanied by the study of amendments to (or a re-write of) existing regulations. The Commission should not combine these two principles.

At some point, the Commission’s effort to clarify the five limitations on local authority of 47 U.S.C. § 332(c)(7)(B), including the “reasonable time” requirement, will only serve to confuse carriers, State and local governments, and members of the public. In 2009, the Commission defined a “reasonable time” by way of its 35-page *2009 Declaratory Ruling*. Following that, in 2013, the Wireless Telecommunications Bureau issued guidance on Section 6409(a) through its five-page *Section 6409(a)*

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*Sprint Spectrum, L.P. v. Town of West Seneca*, 172 Misc.2d 287, 288, 659 N.Y.S.2d 687 (Sup. 1997) (granting application for preliminary injunction, striking down moratorium adopted “[f]or reasons that [were] not clear in the record. . .”).

<sup>121</sup> See *City of Medina*, 924 F.Supp. at 1039 (decided 22 days after filing of lawsuit); *Jefferson County*, 968 F.Supp. at 1463 (decided 51 days after filing of lawsuit) *Town of West Seneca*, 172 Misc.2d 287, 659 N.Y.S.2d 687 (decided five months after town’s adoption of moratorium, lawsuit filing date not stated in the record).

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*PN.* Now, in 2014, the Commission seeks to provide further guidance on these issues through this even larger Notice of Proposed Rulemaking.

Though the Commission is well-intentioned, its efforts may only serve to confuse, not clarify. Therefore, as applied here, the Commission should decline to wade into moratoria waters, instead leaving that as an issue for the courts. Courts have proven the ability to swiftly resolve disputes over moratoria, and on a case-by-case basis.

### **D. Qualifying DAS Facilities Could be Subject to the 2009 Declaratory Ruling, if the Commission Adopts the California Local Governments' Proposed Global Definition of "Collocation"**

The Commission should harmonize its regulations in this rulemaking. To that end, it could treat qualifying DAS and small cell facilities as subject to the *2009 Declaratory Ruling*, provided that it adopts the California Local Governments' proposed definition of "collocation" for Sections 332(c)(7) and 6409(a), as described above.

Most DAS facilities are placed in the public right-of-way, and are installed on existing light, traffic, and electric poles. None of those poles, at the time of the first DAS installation, host any personal wireless service equipment.

However, under Verizon's misguided proposal, all of these new DAS facilities would qualify for the unreasonably short 90-day review period. On the other hand, under the California Local Governments' proposed global definition of "collocation," these DAS facilities would not be considered "collocated" under either Section 6409(a) or Section 332(c)(7). Applied to the *2009 Declaratory Ruling*, this even-handed approach would permit States and local governments the reasonably-necessary-150-day process for a new DAS facility application, just as they would need to process other new wireless facility applications.

### **E. Municipal Property Preferences for Wireless Facilities are Reasonable and Necessary**

The Commission should decline to act on ordinances establishing preferences for the placement of wireless facilities on municipal property. Such preferences are reasonable and necessary for several reasons.

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First, there are many benefits to a municipal property preference, such as the possibility of less land use restrictions on the type of wireless facilities that could be installed, and swifter application and approval processes. In fact, even PCIA, which raised the concern that the Commission is now seeking comment upon, concedes that “the siting on municipal property generally can have many benefits,”<sup>122</sup> such as reducing the aesthetic impact of a facility in an area where it may otherwise be difficult to find a suitable location.

Second, a municipal property preference is not *per se* unreasonably discriminatory. PCIA’s comments, raising concerns yet, at the same time, describing the “many benefits” of a municipal property preference, do not, somehow, amount to a *per se* “unreasonably discriminatory” finding by the Commission:

Congress’ command that local authorities “shall not” discriminate indicates that it wants local decisionmakers to consider how their zoning decisions affect the marketplace for communications services. Congress, however, has not placed competition above all local concerns as the Act nonetheless strikes a balance between local zoning power and promotion of free competition. The Act prohibits such local discrimination only if it is “unreasonable.”<sup>123</sup>

Finally, where a carrier does claim unreasonable discrimination, the courts are well-equipped to act – on a case-by-case basis. For example, the Fourth Circuit dispensed with an unreasonable discrimination claim where the denial was based

. . . on traditional bases of zoning regulation: preserving the character of the neighborhood and avoiding aesthetic blight. If such behavior is unreasonable, then nearly every denial of an application such as this will violate the Act, an obviously absurd result.<sup>124</sup>

There is just no need for the Commission to weigh in here.

### **F. The Commission Should Not Adopt a “Deemed Granted” Injunctive Relief Remedy for Violations of Section 332(c)(7)**

The Commission should not adopt a “deemed granted” injunctive relief remedy for violations of Section 332(c)(7). In its *2009 Declaratory Ruling*, the Commission stated that “case law does not

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<sup>122</sup> PCIA comments, WT Docket 11-59, at 35 (July 19, 2011).

<sup>123</sup> *Jefferson County*, 968 F.Supp. at 1468 n.16 (citation).

<sup>124</sup> *AT&T Wireless, PCS, Inc. v. City of Virginia Beach*, 155 F.3d 423, 437 (4th Cir. 1998) (emphasis added).

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establish that an injunction granting the application is always or presumptively appropriate when a ‘failure to act’ occurs.”<sup>125</sup> Case law has not changed in that regard, and no compelling facts have come forward, even after the Commission solicited comments through a Notice of Inquiry in 2011,<sup>126</sup> that even suggests the Commission should change its approach here.

The courts are properly and solely suited to fashion remedies for violations of Section 332(c)(7), as the Commission noted in this Notice of Proposed Rulemaking. While the Commission adopted the “shot clock” through the *2009 Declaratory Ruling*, there is nothing more the Commission can do now, in its own shot clock parlance, to “move the ball forward.”

### IX. CONCLUSION

To promote certainty and facilitate Congressional intent in Section 6409(a) to streamline the permit process for *de minimus* changes to a narrow class of existing purpose-built structures, the Commission should narrowly define the elements of an eligible facilities request as discussed above. Local communities should also retain their traditional land use authority to define a substantial change and develop procedures to flexibly respond to new technologies that will inevitably follow from Section 6409(a). After all, the most technologically neutral rule the Commission could adopt is no rule at all.

Moreover, the Commission should carry forward the current timeframes under Section 332(c)(7), as interpreted in the *2009 Declaratory Ruling*. The Commission should recognize that the wireless facility permitting process works with the “presumptively reasonable” times it established in 2009, with a far more complete record than the one before it through this proceeding.

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<sup>125</sup> *2009 Declaratory Ruling*, 24 FCC Rcd at 14012 para. 39.

<sup>126</sup> Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting, WC Docket No. 11-59, *Notice of Inquiry*, 26 FCC Rcd 5384 (2011).

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Although the Commission should clarify some issues here, it should tread lightly. The Commission should limit its rulemaking to only those areas where it can balance a respect for local zoning authority with an interest in deploying wireless facilities.

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