No. 15-1240 (L) (Cons. No. 15-1284) (FCC 14-153)

In the
United States Court of Appeals
For the Fourth Circuit

MONTGOMERY COUNTY, MD.; CITY OF BELLEVUE, WA.; CITY OF LOS ANGELES, CA.; CITY OF MCALLEN, TX.; CITY OF ONTARIO, CA.; CITY OF REDWOOD CITY, CA.; CITY OF SAN JOSE, CA.; AND TEXAS COALITION OF CITIES FOR UTILITY ISSUES,
Petitioners,

and

CITY OF BURLINGTON, CA. AND TOWN OF APPLE VALLEY, CA.,
Intervenors,

v.

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION,
Respondents,

and

CTIA-The Wireless Association; PCIA – The Wireless Infrastructure Association,
Intervenors.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF PETITIONERS AND SUPPORTING INTERVENORS

Joseph Van Eaton
Nicholas P. Miller
Best Best & Krieger LLP
2000 Pennsylvania Avenue N.W., Suite 5300
Washington, DC 20006
Phone (202) 785-0600

Counsel for Petitioners and Supporting Intervenors

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 15-1240 cons. 15-1284 Caption: Montgomery County, Maryland v. US and FCC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Montgomery County, Maryland
(name of party/amicus)

who is petitioner, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☑ YES ☐ NO
If yes, identify entity and nature of interest:

Corporate entities engaged in building and leasing wireless towers and base stations; providers of commercial mobile radio and similar services; and owners of towers that could support antennas, such as broadcast stations, have a direct financial interest in the outcome of the proceedings either as service providers, or as lessors of structures. See attached list.

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Joseph Van Eaton Date: March 20, 2015

Counsel for: Montgomery County, Maryland

CERTIFICATE OF SERVICE

****

I certify that on 3/20/2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Maureen K. Flood
Richard Kiser Welch
Federal Communications Commission
445 12th Street, S.W., Room 8-A820
Washington, D.C. 20554

Steven J. Mintz
Robert B. Nicholson
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

s/ Joseph Van Eaton
(signature)

3/20/2015
(date)

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ATTACHMENT 1 TO PETITIONER'S DISCLOSURE STATEMENT

Based on the service list for this matter at the FCC, we believe the following entities would have a direct financial interest in the outcome of this proceeding.

1.	AT&T Services Inc.
2.	Cox Communications, Inc.
3.	Crown Castle
4.	ExteNet Systems, Inc.
5.	Fibertech Networks, LLC
6.	John Strand - Strand Consult
7.	QUALCOMM Incorporated
8.	Rama Communications, Inc.
9.	Sprint Corporation
10.	Steel in the Air, Inc.
11.	Steven Magee
12.	T-Mobile USA, Inc.
13.	Towerstream Corporation
14.	Verizon and Verizon Wireless

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 15-1284 cons. / 15-1240 Caption: Bellevue, WA, et al. v. US and FCC

Pursuant to FRAP 26.1 and Local Rule 26.1,

City of Bellevue, WA
(name of party/amicus)

who is petitioner, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Joseph Van Eaton Date: March 27, 2015

Counsel for: Petitioners

CERTIFICATE OF SERVICE

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Washington, DC 20530

s/ Joseph Van Eaton
(signature)

3/27/2015
(date)

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11.	Steven Magee
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14.	Verizon and Verizon Wireless

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 15-1284 cons. / 15-1240 Caption: Bellevue, WA, et al. v. US and FCC

Pursuant to FRAP 26.1 and Local Rule 26.1,

City of Los Angeles, CA
(name of party/amicus)

who is petitioner, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☑ YES ☐ NO
If yes, identify entity and nature of interest:

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5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Joseph Van Eaton Date: March 27, 2015

Counsel for: Petitioners

CERTIFICATE OF SERVICE

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Robert B. Nicholson
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Washington, DC 20530

s/ Joseph Van Eaton
(signature)

3/27/2015
(date)

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7.	QUALCOMM Incorporated
8.	Rama Communications, Inc.
9.	Sprint Corporation
10.	Steel in the Air, Inc.
11.	Steven Magee
12.	T-Mobile USA, Inc.
13.	Towerstream Corporation
14.	Verizon and Verizon Wireless

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 15-1284 cons. / 15-1240 Caption: Bellevue, WA, et al. v. US and FCC

Pursuant to FRAP 26.1 and Local Rule 26.1,

City of McAllen, TX
(name of party/amicus)

who is petitioner, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Joseph Van Eaton Date: March 27, 2015

Counsel for: Petitioners

CERTIFICATE OF SERVICE

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Washington, DC 20530

s/ Joseph Van Eaton
(signature)

3/27/2015
(date)

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7.	QUALCOMM Incorporated
8.	Rama Communications, Inc.
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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 15-1284 cons. / 15-1240 Caption: Bellevue, WA, et al. v. US and FCC

Pursuant to FRAP 26.1 and Local Rule 26.1,

City of Ontario, CA
(name of party/amicus)

who is petitioner, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☑ YES ☐ NO
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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Joseph Van Eaton Date: March 27, 2015

Counsel for: Petitioners

CERTIFICATE OF SERVICE

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Washington, DC 20530

s/ Joseph Van Eaton
(signature)

3/27/2015
(date)

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 15-1284 cons. / 15-1240 Caption: Bellevue, WA, et al. v. US and FCC

Pursuant to FRAP 26.1 and Local Rule 26.1,

City of Redwood City, CA
(name of party/amicus)

who is petitioner, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

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If yes, identify entity and nature of interest:

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5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Joseph Van Eaton Date: March 27, 2015

Counsel for: Petitioners

CERTIFICATE OF SERVICE

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s/ Joseph Van Eaton
(signature)

3/27/2015
(date)

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 15-1284 cons. / 15-1240 Caption: Bellevue, WA, et al. v. US and FCC

Pursuant to FRAP 26.1 and Local Rule 26.1,

City of San Jose, CA
(name of party/amicus)

who is petitioner, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Joseph Van Eaton Date: March 27, 2015

Counsel for: Petitioners

CERTIFICATE OF SERVICE

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s/ Joseph Van Eaton
(signature)

3/27/2015
(date)

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No. 15-1284 cons. / 15-1240 Caption: Bellevue, WA, et al. v. US and FCC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Texas Coalition of Cities for Utility Issues
(name of party/amicus)

_____

who is petitioner, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☑ YES ☐ NO
If yes, identify entity and nature of interest:

Corporate entities engaged in building and leasing wireless towers and base stations; providers of commercial mobile radio and similar services; and owners of towers that could support antennas, such as broadcast stations, have a direct financial interest in the outcome of the proceedings either as service providers, or as lessors of structures. See attached list.

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

Petitioner is an unincorporated, non profit association of 110 Texas cities.

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Joseph Van Eaton Date: March 27 , 2015

Counsel for: Petitioners

CERTIFICATE OF SERVICE

****

I certify that on 3/27/2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Maureen K. Flood
Richard Kiser Welch
Federal Communications Commission
445 12th Street, S.W., Room 8-A820
Washington, D.C. 20554

Steven J. Mintz
Robert B. Nicholson
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

s/ Joseph Van Eaton
(signature)

3/ 27 /2015
(date)

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ATTACHMENT 1 TO PETITIONER'S DISCLOSURE STATEMENT

Based on the service list for this matter at the FCC, we believe the following entities would have a direct financial interest in the outcome of this proceeding.

1.	AT&T Services Inc.
2.	Cox Communications, Inc.
3.	Crown Castle
4.	ExteNet Systems, Inc.
5.	Fibertech Networks, LLC
6.	John Strand - Strand Consult
7.	QUALCOMM Incorporated
8.	Rama Communications, Inc.
9.	Sprint Corporation
10.	Steel in the Air, Inc.
11.	Steven Magee
12.	T-Mobile USA, Inc.
13.	Towerstream Corporation
14.	Verizon and Verizon Wireless

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 15-1240 cons. 15-1284 Caption: Montgomery County, Maryland, et al. v. US and FCC

Pursuant to FRAP 26.1 and Local Rule 26.1,

City of Burlingame, CA
(name of party/amicus)

who is Intervenor, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☑ YES ☐ NO
If yes, identify entity and nature of interest:

Corporate entities engaged in building and leasing wireless towers and base stations; providers of commercial mobile radio and similar services; and owners of towers that could support antennas, such as broadcast stations, have a direct financial interest in the outcome of the proceedings either as service providers, or as lessors of structures. See attached list.

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Joseph Van Eaton Date: April 9, 2015

Counsel for: Intervenor

CERTIFICATE OF SERVICE

****

I certify that on 4/9/2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

See attached list.

s/ Joseph Van Eaton
(signature)

4/8/2015
(date)

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ATTACHMENT 1 TO INTERVENOR'S DISCLOSURE STATEMENT

Based on the service list for this matter at the FCC, we believe the following entities would have a direct financial interest in the outcome of this proceeding.

1.	AT&T Services, Inc.
2.	Cox Communications, Inc.
3.	Crown Castle
4.	ExteNet Systems, Inc.
5.	Fibertech Networks, LLC
6.	QUALCOMM Incorporated
7.	Rama Communications, Inc.
8.	Sprint Corporation
9.	Steel in the Air, Inc.
10.	T-Mobile USA, Inc.
11.	Towerstream Corporation
12.	Verizon and Verizon Wireless

MONTGOMERY COUNTY, MARYLAND, et al. v. U.S. and FCC,
4th Circuit Court of Appeals, Consolidated No. 15-1240 (FCC 14-153)

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 15-1240 cons. 15-1284 Caption: Montgomery County, Maryland, et al. v. US and FCC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Town of Apple Valley, CA
(name of party/amicus)

who is Intervenor, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Joseph Van Eaton Date: April 9, 2015

Counsel for: Intervenor

CERTIFICATE OF SERVICE

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I certify that on 4/9/2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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MONTGOMERY COUNTY, MARYLAND, et al. v. U.S. and FCC,
4th Circuit Court of Appeals, Consolidated No. 15-1240 (FCC 14-153)

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JURISDICTIONAL STATEMENT

In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, WT Docket No. 13-238, Report and Order, 29 FCC Rcd 12865 (2014) ("*Order*") (JA-___), the Federal Communications Commission: adopted rules implementing Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, 47 U.S.C. §1455(a) ("Section 6409"); modified existing rules implementing 47 U.S.C. §332(c)(7); and adopted exemptions to obligations that otherwise apply under federal environmental and historical preservation laws.

Jurisdiction is proper under 47 U.S.C. §402(a) and 28 U.S.C. §2344. The *Order* was adopted on October 17, 2014, and published January 8, 2015 in the Federal Register. On March 6, 2015, Montgomery County, Maryland timely filed a petition for review in this Court. On March 9, 2015, the City of Bellevue, Washington; City of Los Angeles, California; City of McAllen, Texas; City of Ontario, California; City of Redwood City, California; City of San Jose, California; and the Texas Coalition of Cities for Utility Issues timely filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit. For each appeal, venue was proper under 28 U.S.C. §2343. That appeal was transferred to this Court on March 17, 2015, and the cases were consolidated on March 19, 2015.

STATEMENT OF ISSUES

Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012[1] commands that state and local governments "may not deny" and "shall approve" applications to make specified modifications to existing wireless towers and base stations if the modifications will not "substantially change" the physical dimensions of the towers or base stations. The Court is asked:

1. Whether the *Order* implementing Section 6409 should be set aside, *inter alia* because:

   (a) the FCCs defined what constitutes a "substantial change" in "physical dimensions" to promote deployment, and without proper regard for the ordinary meaning of those terms;

   (b) notwithstanding Congress' limitation of the rule to towers, the FCC requires approval of modifications to *any* structure to which an antenna is attached; and

   (c) the FCC grants private owners of existing structures the right to significantly modify structures whose existence is conditioned on non-modification?

2. Whether Section 6409, as written, or as interpreted violates the Tenth Amendment to the Constitution of the United States?

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[1] 47 U.S.C. §1455(a). Because the provision is referred to as "Section 6409" in the *Order*, we do the same in this brief.

STATEMENT OF CASE

This appeal focuses on the portion of the *Order* implementing Section 6409, although other portions of the order - interpreting 47 U.S.C. §332(c)(7)(B)(iii) and (B)(v) and adopting new or modified rules for federal environmental and historic preservation review of placement of certain wireless facilities – are relevant to understanding why the Section 6409 rules should be set aside.

A. Section 6409

In its 1996 rewrite of the Communications Act of 1934,[2] in a section titled "Preservation of local zoning authority," Congress chose to specifically preserve local and state authority to control the "placement, construction, and modification of personal wireless service facilities."[3]

In 2012, as part of a tax stimulus package, Congress adopted Sections 6003 and 6409. Section 6409 applies only to modifications of certain previously approved wireless installations. Section 6409(a)(1)-(2) provides: "Notwithstanding [§332(c)(7)] or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not

[2] Pub. L. 104-104, 110 Stat. 56 (Feb. 8, 1996).

[3] 47 U.S.C. §332(c)(7).

substantially change the physical dimensions of such tower or base station."[4] An "eligible facilities request" is defined as "any request for modification of an existing wireless tower or base station that involves (A) collocation of new transmission equipment; (B) removal of transmission equipment; or (C) replacement of transmission equipment."[5] Congress also provided that the FCC's obligations under the National Historic Preservation Act ("NHPA")[6] and the National Environmental Policy Act of 1969 ("NEPA")[7] continue to apply and were not modified by Section 6409.[8] Section 6003[9] permits the FCC to implement Section 6409, which is not part of the Communications Act of 1934.

While the law compels approval of certain projects, it also necessarily *preserves* local and state authority and circumscribes FCC authority for applications that fall outside of Section 6409 – *e.g.*, where an applicant proposes to "substantially change" the physical dimensions of an existing wireless tower or base station.

None of the key terms used in the law were defined, except for "eligible facilities request." But none of the terms used were legal *terra nova*; and the

[4] 47 U.S.C. §1455(a)(1).

[5] 47 U.S.C. §1455(a)(2).

[6] 54 U.S.C. §§300101 *et seq*.

[7] 42 U.S.C. §§4321 *et seq*.

[8] §6409(a)(3); 47 U.S.C. §1455(a)(3).

[9] 47 U.S.C. §1403.

issue of collocation on towers has been addressed by the agency before, albeit in different circumstances.

B. Prior Agency Approaches

1. *The Programmatic Agreements*

The FCC has recognized that its grant of a license resulting in deployment of a wireless facility qualifies as a federal action triggering review under NEPA and NHPA.[10] The FCC has developed two Programmatic Agreements to define the circumstances when a provider is required to prepare a detailed assessment of the impact of a placement, and circumstances when a project is treated as categorically exempt, subject to more detailed examination through a complaint procedure.[11]

The Nationwide Programmatic Agreement for the Collocation of Wireless Antennas[12] ("Collocation Agreement"), signed in 2001 by the FCC, the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers, sets streamlined procedures for review of the potential historic preservation impact of collocations of antennas on existing towers and other structures. Subsequently, the FCC entered into a broader agreement to address the impact of FCC undertakings – including impacts

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[10] *Order*, ¶36. (JA-___).

[11] *Order*, ¶37. (JA-___).

[12] 47 C.F.R. Part 1, App. B.

associated with the placement of wireless towers – more generally.[13] Both Agreements are part of the FCC's rules.

Under the Collocation Agreement, an applicant need not automatically prepare an environmental assessment under the NHPA to add – "collocate" – facilities on an existing tower so long as the modifications do not involve a "substantial increase" in the "size" of the tower, and certain other tests are met. Assuming no other modifications are made, collocations that increase the height of a tower less than 20 feet (or less than 10% if the tower is more than 200 feet tall) are treated as insubstantial.[14]

The Collocation Agreement defines a tower as "any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities."[15] In the Fact Sheet to the Collocation Agreement, the Commission explains that "[a] water tower, utility tower, or other structure built primarily for a purpose other than supporting FCC-licensed services is not a 'tower' for purposes of the Agreement, but is a non-tower structure."[16] At the

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[13] 47 C.F.R. Part 1, App. C. Collectively, the Agreements are referred to as the "Programmatic Agreements." The agreements are in the Statutory Appendix.

[14] Collocation Agreement, I.C.1.

[15] Collocation Agreement, I.B.

[16] *Wireless Telecommunications Bureau Announces Workshop: Promoting Mobile Broadband in Your Community by Collocating Wireless Antennas on Communications Towers and Other Structures*, Public Notice, 27 FCC Rcd 3998

time the Collocation Agreement was adopted, antennas were "huge" and bolted to "enormous" towers.[17] As a result, the portions of the Collocation Agreement addressing towers were dealing with structures typically removed from residential neighborhoods and, vehicular and pedestrian traffic.[18] The Collocation Agreement did not consider "substantiality" in the context of installations in areas and neighborhoods where smaller changes in size might have significant impacts. Indeed, in the Collocation Agreement, a different set of standards apply to attachments to non-tower structures, where the focus is on the visibility of the attachment, and the age of the structure to which the antenna is attached.[19]

Moreover, the substantiality test is not dispositive: an attachment is subject to additional review based on complaint, or based on an assessment of

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(2012). The distinction between towers and other support structures is a common distinction. The Commission's recent report on competition in the mobile-service marketplace refers to the attachment of "equipment to pre-existing towers and other structures (e.g., rooftops, water tanks, power lines, and utility poles)." *In re Annual Report & Analysis of Competitive Mkt. Conditions*, Sixteenth Report, 28 FCC Rcd 3700, 3765 ¶76 (2013) ("Sixteenth Report").

[17] *Order*, ¶3 (JA-___).

[18] *Order*, ¶¶3, 195. (JA-___).

[19] Collocation Agreement, V.

actual impact after construction, thus allowing any placement to be reviewed in context.[20]

2. *Base Station Definitions.*

The term "base station" does not appear in the Programmatic Agreements, but it does appear in FCC decisions and rules, and in approximately 120 different sections in Title 47 of the Code of Federal Regulations. "Base station" is used to refer to the antennas and electronic equipment associated with the antenna, but not the structure to which an antenna might be attached. Thus, for example, at 47 C.F.R. §95.25(e), the Commission distinguishes between a "base station" and the "building or tree" on which the base station is mounted. 47 C.F.R. §2.1 defines a "base station" as a "land station," and a station as "[o]ne or more transmitters or receivers or a combination of transmitters and receivers, including the accessory equipment, necessary at one location for carrying on a radio communication service… ." The Commission has explained that wireless facilities:

> …are comprised largely of cellular *base stations and towers or other structures on which the base stations are situated*. 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 … *other structure*.[21]

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[20] Collocation Agreement, III.A.4, IV.A.4.

[21] *In re Annual Report & Analysis of Competitive Mkt. Conditions,* Fifteenth Report, 26 FCC Rcd 9664 ¶308 (2011) (*emphasis added*).

A base station has been similarly defined by industry as "a network element in radio access network responsible for radio transmission and reception in one or more cells to or from the user equipment."[22] Neither the Commission, nor any party identified a common definition of base station that included, for example, the utility pole or a building to which an antenna might be attached.

C. The Statute and Legislative History

Nothing in the legislative history suggests that Congress intended the terms in Section 6409 to have anything other than their common meaning. Indeed, to the extent that Congress spoke at all, it indicated that Section 6409 was addressing "…requests for modification of cell towers"[23] – the sort of "enormous" facilities and associated base stations that had been a focus of the Collocation Agreement.

Notably, Congress chose not to use the term "change in size" used in the Programmatic Agreements, but instead chose to reach only those modifications that did not substantially change a tower or base station's "physical dimensions."[24]

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[22] *ETSI Technical Report, Digital cellular telecommunications system (Phase 2+); Universal Mobile Telecommunications System (UMTS); LTE; Vocabulary for 3GPP Specifications (2013)*, http://www.etsi.org/deliver/etsi_tr/121900_121999/121905/11.03.00_60/tr_121905v110300p.pdf.

[23] H.R. Rep. No. 112-399, at 133 (2012) (Conf. Rep.) (*emphasis added*).

[24] 47 U.S.C. §1455(a)(1).

D. The Changing Wireless Landscape

While Congress was focusing on cell towers, the wireless industry was beginning to develop technologies that do not require placement on large towers. Of particular focus in the rulemaking were "distributed antenna systems" or DAS, and "small cell" technologies.

As the FCC explained, "small cells are low-powered wireless base stations that function like cells in a mobile wireless network, typically covering targeted indoor or localized outdoor areas…."[25] Wireless service providers often use small cells to provide connectivity to their subscribers in areas that present capacity and coverage challenges to traditional cellular networks.[26] Small cells may be small indeed – as small as a deck of cards.[27] However, the record also showed that "small cells" can be relatively large and include equipment cabinets about the size

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[25] *Order*, ¶30-32. (JA-___).

[26] *See Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, GN Docket No. 12-354, Notice of Proposed Rulemaking and Order, 27 FCC Rcd 15594, 15596 ¶4, 15605 ¶30 (2012); Heterogeneous Networks-Increasing Cellular Capacity, Ericsson Review (2011), http://www.ericsson.com/res/thecompany/docs/publications/ericsson_review/2011/heterogeneous_networks.pdf; *Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, Comments of PCIA, GN Docket No. 12-354, at 3 n.6 (Feb. 20, 2013).

[27] Comments of Qualcomm Incorporated, WT Docket No. 13-238, at 2 (Feb. 3, 2014). (JA-___) ("Qualcomm Comments").

of a small refrigerator.[28] It may be possible to place small facilities almost anywhere – their very size conceals them. But the larger cabinet may be inappropriate at some locations (undergrounded utility districts, preservation districts or the like). For that reason, localities have encouraged small cell deployment subject to limitations that ensure what was intended as a small cell installation *remains* small.[29]

DAS also provides an alternative to deployment on towers.[30] As the FCC explained, a DAS network typically consists of: (1) a number of remote communications "nodes" with each including at least one antenna; (2) a high capacity signal transport medium (typically fiber optic cable) connecting each node to a central hub site; and (3) electronics at the hub site to process or control the communications signals transmitted and received.[31] The nodes are often attached to utility poles and to other non-tower structures.[32] While the *Order* repeatedly emphasizes that DAS installations are "small,"[33] the record shows that DAS installations can vary significantly. One installation required the placement of a 65

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[28] Comments of the City of Alexandria *et al*., WT Docket No. 13-238, Exh. B, pp. 5-9 (Feb. 3, 2014). (JA-__). ("Alexandria Comments").

[29] *Id*. Alexandria Comments at n.75. (JA-__).

[30] *Sixteenth Report*, 28 FCC Rcd at 3906 ¶321.

[31] *Order*, ¶31. (JA-___).

[32] *Id.* (JA-___).

[33] *Order*, ¶¶3, 4, 11, 13, 23, 24, 25, 28, 32, 33. (JA-___).

foot pole directly in front of a Montgomery County, Maryland house,[34] while another involved a large conglomeration of equipment mounted to a utility pole outside a school in Lafayette, California.[35] Localities have encouraged the deployment of DAS, but subject to conditions that ensure that the facilities remain unobtrusive.[36]

But, Section 6409 itself would have had limited application to small cell or DAS facilities if the Commission applied the terms of the statute consistent with their ordinary meaning, in part because those facilities are not located on "towers." This was of concern to the Commission since it estimated that as many as "37 million small cells will be deployed by 2017" and "16 million DAS nodes will be deployed by 2018—with the number of nodes doubling between 2013 and 2016."[37]

E. The Rulemaking

The FCC did not move immediately to implement Section 6409. However, in January 2013, a year after adoption of the provision, the FCC's Wireless Bureau issued a Public Notice providing guidance as to the interpretation of Section

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[34] Alexandria Comments at 16. (JA-___).

[35] *Id.* at 17. (JA-___).

[36] *Id.* at 35, n. 75. (JA-_____).

[37] *Order*, ¶34. (JA-___).

6409.[38] By and large, the *Guidance* incorporated standards from the Programmatic Agreements, but acknowledged that the term "base station" was not used in those agreements.[39] While recognizing that the Commission had described a "base station" as consisting of "radio transceivers, antennas, coaxial cable, a regular and backup power supply, and other associated electronics," the Wireless Bureau opined that in the context of Section 6409, "it is reasonable to interpret a 'base station' to include a structure that currently supports or houses an antenna … that constitutes part of a base station."[40]

The *Guidance* was criticized in several filings,[41] including one by the FCC's Intergovernmental Advisory Commission,[42] which on July 31, 2013 advised the FCC that the Bureau had imported concepts from the Programmatic Agreements that had little application outside their specific context.[43] The IAC particularly

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[38] *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, 1 (2013).

[39] *Id.* at 3.

[40] *Id.*

[41] The filings included a filing by the City of Lafayette that included a video of the equipment described *supra* at n.33. (JA-___).

[42] The IAC was created by the FCC in 1997 to provide guidance to the Commission on issues of importance to state, local and tribal governments. http://www.fcc.gov/encyclopedia/intergovernmental-advisory-committee.

[43] Intergovernmental Advisory Committee To The Federal Communications Commission, *Advisory Recommendation Number 2013 – 9 Response to Wireless Telecommunications Bureau's Guidance On Interpretation of Section 6409(a) Of*

criticized the Wireless Bureau for misapplying its own definitions to redefine "base station" to refer to a structure to which a base station might be attached.[44]

Shortly thereafter, in September, 2013, the Commission issued the *Notice of Proposed Rulemaking* that led to the rules that are before this Court.[45] The proposed rules by and large repeated the formulation of the *Guidance*, and hence of the Programmatic Agreements. The Commission received 207 timely filed comments and 42 timely reply comments,[46] most from local governments. The record confirmed that even without the rules proposed by the Commission, collocation would proceed reasonably: some commenting localities indicated that they had approved more than 90% of all collocation applications.[47] On the other side, however, the record showed that simple dimensional rules such as those

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The Middle Class Tax Relief and Job Creation Act of 2012, WC Docket No. 11-59 at 2 (Jul. 31, 2013). (JA-___).

[44] *Id.* at 2-3.

[45] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting, 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, 2012 Biennial Review of Telecommunications Regulations*, WT Docket Nos. 13-238, 13-32, Notice of Proposed Rulemaking, 28 FCC Rcd 14238, 14240 ¶3 (2013) ("*NPRM*").

[46] *Order*, at n. 18. (JA-__).

[47] Alexandria Comments at 6 (JA-___); Comments of Fairfax County, Virginia, WT Docket No. 13-238 at 6 (Feb. 3, 2014). (JA-___).

reflected in the *Programmatic Agreements*, and those in the *Guidance*, as well as the expansion of Section 6409 to reach all structures and not just towers, could endanger areas subject to historical preservation, and environmentally sensitive areas, and could dramatically alter the landscape in individual neighborhoods by changing unobtrusive installations into obtrusive installations.[48] Bellevue, Washington, like other communities, pointed out that it had authorized placement of carefully designed (but fairly large) DAS facilities in the right of way:

A rule that allowed any existing collocated facility to be enlarged, regardless of context, would defeat those efforts, with potentially significant consequences.[49]

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[48] *See*, for example, Alexandria Comments at 14-22 (JA-___); Comments of California Coastal Commission, WT Docket No. 13-238 at 2-3(filed Feb. 3, 2014). (JA-___); Comments of City of Portland Design Commission, WT Docket No. 13-238 at 2-3(Jan. 31, 2014). (JA-___).

[49] Alexandria Comments at 17. (JA-___).

Savannah, Georgia, which is crisscrossed by low-flying military and EMS helicopters, limits the height of antennas above buildings because antennas (which are less visible) present a hazard that the buildings themselves do not. Savannah showed that there are special safety concerns associated with wireless antennae which may not be addressed in laws of general applicability, like building codes.[50]

The industry, while nodding to the legitimacy of the concerns, urged the Commission to adopt a functional approach that would allow deployment without local approval. In an *ex parte* presentation to the Commission, PCIA – the Wireless Infrastructure Association advised the Commission that in order for industry to "best leverage non-tower structures …" the Commission should define "substantially change the physical dimensions" to mean: (1) the mounting of the proposed antenna will protrude more than six feet from either the building's façade or other structure's outer dimensions…and at a minimum allow a 10% or ten foot increase in the "overall height of the building."[51] Verizon had proposed the same test, and in a September 17, 2014 *ex parte*, explained that a ten or fifteen-foot minimum was necessary when the existing structure "is short"[52] (although logically

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[50] *Id.* at 16-17; Comments of Savannah, GA, WT Docket No. 13-238 at 4 (Apr. 8, 2014). (JA-___).

[51] PCIA *Ex Parte* Communication, WT Docket No. 13-238 at 2 (Oct. 14, 2014). (JA- ___). ("PCIA *Ex Parte*")

[52] Verizon *Ex Parte* Communication, WT Docket Nos. 13-238 (Oct. 10, 2014). (JA-__). ("Verizon *Ex Parte*")

functional needs have little to do with whether an addition to a "short" structure is substantial).[53] It also claimed that, to increase coverage, minimum heights were needed to clear rooftop structures "such as parapet walls…." [54](although that would increase antenna visibility). It emphasized that a six foot additional width was necessary not because six feet is an insignificant addition, but because typical Verizon facilities require five to six foot additions.[55]

F. The Rules Adopted.

1. *The NHPA and NEPA exemptions.*

In contrast to the Section 6409 rules – which largely adopt the functional approach urged by industry for purposes of its own NHPA responsibilities, the FCC recognized that relatively small changes in the size of DAS or small cells could be substantial in preservation areas. [56] The *Order* begins by recognizing that the exemptions in the Programmatic Agreements were aimed at large towers, and have limited application to deployments on the scale envisioned by DAS and small cell providers.[57] In addition to maintaining and relying on a complaint procedure

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[53] *Id.*

[54] *Id.*

[55] PCIA *Ex Parte* at 2 (JA-____); Verizon *Ex Parte* (JA-_).

[56] *Order*, ¶37. (JA-___). As to environmental impacts, the Commission assumed it could rely on local and state regulation, *Order*, ¶43. (JA-___), although the *Order* does not clearly allow review of 6409 applications for environmental effects.

[57] *Order*, ¶¶24, 27. (JA-___).

that permits investigation of specific installations, in deciding whether any exemption is appropriate, the *Order* takes into account the effect of a modification on the visibility of an antenna structure; whether the modification complies with all zoning and historical preservation conditions on existing installations in the area; and the volume of the proposed modification considered alone and in combination with existing structures.[58] Thus, for example, the addition of an antenna to a utility pole that added three cubic feet (a box 1.5' x 2'x 1' for example) could require an environmental assessment in a historical area. Larger additions, the FCC concluded, could "significantly affect the environment."[59]

2. *Rules Governing Localities - "Tower, Base Stations and Substantial Change in Physical Dimension."*

a. *Substantial Change in Physical Dimension.* Rather than adopt an approach similar to that it adopted with respect to the NHPA and NEPA, which allow "substantiality" to be assessed in context on complaint, and which also take into account the nature of surrounding properties in assessing impact, the Commission chose to define "substantiality" using absolutist tests that generally vary only depending on whether a facility is in the right of way or not.

A modification "substantially changes the physical dimensions of an eligible support structure" if:

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[58] *Order*, ¶100, 47 C.F.R. §1.1307. (JA-___).

[59] *Order*, ¶37. (JA-___).

(i) for towers other than towers in the public rights-of-way, it increases the height of the tower by the greater of "more than 10% or by the height of one additional antenna array… not to exceed twenty feet;" and for other "eligible support structures," it increases the height of the structure by more than 10% or more than ten feet, whichever is greater; or

(ii) for towers other than towers in the public rights-of-way, it involves adding an appurtenance to the tower protruding from the tower the greater of "twenty feet, or … the width of the structure at the level of the appurtenance"; and for other eligible support structures, it involves adding an appurtenance protruding from the edge of the structure by more than six feet.[60]

A substantial modification is also deemed to occur if modification of a facility not in the right of way "involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets."[61] The height, width and volume of the added structures is ignored. Volume is considered for facilities in the rights-of-way: there, a substantial modification is deemed to occur if any cabinets are added where none currently exist, or the modification "involves installation of ground cabinets that are more

[60] *Order*, ¶188. (JA-__). Because "eligible support structure" includes base station electronics and the enclosure housing them, this allows enclosures to also increase by 10 feet in height.

[61] The *Order* does not explain why such an addition is insubstantial in all settings.

than 10% larger in height or overall volume than any other ground cabinets associated with the structure."[62]

A substantial modification occurs if there is excavation or deployment outside the current site, but excavation on a site is considered insubstantial, even in historic or environmentally sensitive areas.[63]

The rules generally ignore the visual impact of a facility modification, except in one respect.[64] In some instances, localities require a wireless antenna to be disguised as something else – a tree, for example. A modification is substantial if "it would defeat the concealment elements of the eligible support structure."[65] The Commission does not explain what a concealment element is with any precision, and in contrast to the NHPA standards, does not allow a locality to impose concealment requirements if the modification makes a facility which was previously not visible, visible.

Finally, the Commission's rules provide that a modification is substantial if "it does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station

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[62] 47 C.F.R. §1.40001(b)(7)(iii).

[63] *Order*, ¶188. (JA-___).

[64] The *Order*, ¶200 (JA-___) recognizes visual impacts are usually a function of physical dimension.

[65] 47 C.F.R. §1.40001(b)(7)(v).

equipment"[66] – other than, importantly, conditions limiting the permissible dimensions of the wireless facility. Thus, if a local agency allowed a "small cell" to be installed on an historic structure precisely *because* it was small, and limited the expandability of that installation, an applicant could ignore those limits and demand local approval of a different facility up to ten additional feet in height, protruding six feet out from the structure, and of unlimited volume. The applicant could also demand local approval of four equipment cabinets at the base of the structure.[67] The Commission also preempted existing restrictions that applied to non-conforming uses – structures not in compliance with local zoning requirements, but allowed to remain in place subject to the condition that no further changes occur.[68]

b. *Towers and Base Stations*. Rather than limit the applicability of Section 6409 to towers and to base stations as traditionally defined by the Commission and industry, the FCC redefines "base stations" to include supporting structures other than towers, including the side of a building, water towers, light poles and utility poles. This change allows the Commission to extend Section 6409 to structures to which DAS and small cells may be attached, but requires the

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[66] 47 C.F.R. §1.40001(b)(7)(iv).

[67] The local and state interests would only be protected to the extent the FCC can protect them through the NHPA and NEPA, Order, ¶230 (JA-___).

[68] *Order*, ¶183. (JA- ____).

Commission to create a term, "eligible structures" that appears nowhere in Section 6409. As a result, the rules define as insubstantial a ten-foot increase in the height of the supporting wall of a house, building or any other structure to which an antenna is attached, regardless of location.[69]

c. *Scope of Rule.* The rule allows modifications to any existing wireless facility, not just cell towers. A Wi-Fi hotspot at a Starbucks (and the structure to which it is attached) are wireless facilities under the *Order*. Perhaps recognizing that Congress was unlikely to have intended to mandate approval of ten-foot additions to such facilities, the FCC states that under its rule "existing" towers and base stations are those that have been "reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process." The FCC then changes direction, stating that because it will "facilitate deployment" any "lawfully" installed tower, even if never approved, may be modified. [70]

The *Order* (but not the rules) provides that state and localities may continue to apply "non-discretionary" structural and safety codes of "general applicability,"

[69] 47 C.F.R. §1.40001(b)(1)(iii), (4), (7)(i).

[70] *Order*, ¶174. (JA-___).

but does not preserve codes or conditions aimed at wireless facilities or particular installations.[71]

d. *Remedies.* The FCC concluded that because Section 6409(a) states that a local government "may not deny, and shall approve" a qualifying request, approval of an application that meets the FCC's standards is "non-discretionary."[72] If a locality fails to act on an application within a 60-day period, the application is deemed granted by the local government.[73] Court review of a local action or a deemed grant is based solely on whether the application satisfies the FCC rules – not whether in context, the application would result in a "substantial change" in physical dimensions of a tower or base station.

The "deemed grant" rules and the rules governing action on an incomplete application remain under OMB review, but otherwise, the Section 6409 rules went into effect on April 8.

SUMMARY OF ARGUMENT

Section 6409 creates a limited exception to local and state authority to review the placement of wireless facilities for proposed changes to transmission

[71] *Order*, ¶202. (JA-___).

[72] *Order*, ¶227. (JA-___).

[73] *Order*, ¶222. (JA-___).

equipment that do not involve a "substantial change in the physical dimension" of an existing "tower or base station."

In devising its 6409 rules, the FCC fails to come to grips with statutory terms, and instead interprets the statute to give a functional goal – speeding wireless deployment. While localities support wireless deployment, the issue on review is not whether the rules speed deployment, but whether they properly interpret statutory terms. They do not. For example, to promote deployment, the FCC adopts definitions of "substantial change" and "physical dimension" that in some instances ignore dimensions altogether. The *Order*, by and large, ignores context in defining substantiality. Increases in size in residential, industrial, or commercial areas or in historically or environmentally sensitive areas are treated identically. This is in sharp contrast to the agency's approach when addressing exemptions under the NHPA, which takes volume and visual impacts into account, and allow any particular installation to be assessed in context.

In effect, the agency has made the same mistake it made in *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999). There, the Commission defined the term "impair" in a way designed to ensure companies could enter the market more easily to compete with incumbents by obtaining access to incumbent facilities. But the use of the term "impair" was meant to limit the circumstances under which a competitor could obtain access to incumbent facilities, and the Supreme Court

found it was the Commission's duty to define "impair" in accordance with its ordinary meaning, and not simply to do whatever the Commission felt would best promote statutory goals.

The Commission makes a related error in defining "tower" and "base station." The term "base station" does not ordinarily include the structures to which antennas are attached. There is no indication in the legislative history that Congress intended the term to be read expansively. Indeed, if the term "base station" was intended to include structures to which antennas are attached, then the term "tower" in Section 6409 is irrelevant. Moreover, it implies the Congress meant to require localities to approve increases in the physical dimensions of any structure – a house, a building, a water tower or a light standard – automatically. Such a dramatic change in basic federal-state relationships cannot be implied from the text of Section 6409.

A proper analysis would have begun by recognizing that "substantiality" in its ordinary meaning is relative. Assessing substantiality requires consideration of the physical dimensions of the thing being changed as well as the physical context in which the object is located. What is a substantial change in physical dimensions of facilities in a neighborhood of one-story single family homes may be insubstantial in an industrial area filled with factories. What is substantial in an historic area may be insubstantial in a residential area. The construction required

to install a facility above a certain size in an historical or environmentally sensitive area may have substantial impacts that simply do not apply elsewhere. The Commission claims that numerical rules were required to give certainty to the process of collocation but the statute does not say localities and states can be forced to approve substantial charges as a matter of convenience. And "certainty" cannot explain, among other things, the FCC's failure to adopt standards that take into account obvious elements of physical dimension (such as the size of equipment cabinets off the right of way) or the depth of antenna structures. Neither the Commission nor the *Order* explain why changes that are substantial for purposes of the NHPA analysis are insubstantial for an application submitted to a state or local government. Nor can the Commission justify forcing localities to approve alterations to "non-conforming" facilities, where any change may be substantial.

Under the rules, almost any non-stealth wireless installation is allowed to expand by no less than ten feet in height and six feet in width. As a result, the *Order*, which in part justifies its treatment of small cell and DAS facilities because they can be deployed unobtrusively, prohibits enforcement of size-based requirements that ensure that those facilities remain small. The effect of the FCC's *Order* is actually the reverse of what the agency desires: rather than develop

ordinances that will facilitate placement of small facilities, localities must now act on the assumption that any facility permitted could substantially expand in size.

A proper analysis would also have recognized that Section 6409 is limited in scope – applying only to modifications to towers and associated base stations that had already been approved by localities. A limited reading is particularly necessary under traditional constitutional doctrines. The plain language of Section 6409 is an order from the federal government to every state and every locality to "approve" an application. But it is not evident by what right the federal government could command that affirmative action and that is particularly so if one assumes that the issuance of the local or state approval creates state property rights enforceable against the state or local government.

It may be that the federal government could preempt regulation of cell towers, and issue authorizations itself, so long as Congress, or the FCC are prepared to accept the blame if particular placements present problems. It is beyond the authority of the Congress to require local and state approval in a manner that strikes to the heart of local and state authority.

ARGUMENT

I. THE FCC RULES IMPLEMENTING SECTION 6409 FAIL TO PROPERLY INTERPRET THE TERMS OF THE STATUTE

Courts must set aside agency actions that are "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' or not supported by

'substantial evidence.'" *NetworkIP, LLC v. FCC*, 548 F.3d 116, 121 (D.C. Cir. 2008). "An agency's decision is arbitrary and capricious if the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Defenders of Wildlife v. N.C. DOT*, 762 F.3d 374, 396 (4th Cir. 2014).

An agency must give effect to the intent of Congress, but in doing so, must focus on the terms of the statute. *See AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 390 (1999). An agency cannot justify rules simply by stating that the rules advance the goals of the statute. See *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2445 (2014). Relying on "advancing 'the purpose of the Act'" is the "last resort of extravagant interpretation," as "no law pursues its purpose at all costs, and that the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Rapanos v. United States*, 547 U.S. 715, 752 (2006).

A. Section 6409 Does Not Generally Preempt Local Land Use Authority

Congress has largely preserved local authority over the siting of wireless infrastructure. *Mobile Northeast v. Fairfax County Board of Supervisors*, 672 F.3d 259, 265 (4th Cir. 2012), *citing* 47 U.S.C. §332(c)(7). Section 6409 seeks to add

an additional limit on local authority, but that limit is narrow: a State or local government "may not deny, and shall approve," any "eligible facilities" request for modifying an existing wireless tower or base station that does not substantially change the tower or base station's physical dimensions. [74] Eligible facilities requests are requests for modification of towers or base stations that involve collocation of new transmission equipment; or removal or replacement of transmission equipment.[75] But by its terms, Section 6409 does not limit local authority to review any other request, including a modification that *does* substantially change physical dimensions of either a base station, or tower associated with a wireless facility.[76] While Congress might have spurred faster deployment by requiring approval of any application for installation of a wireless facility, it struck a different balance, and Section 6409 must be read narrowly consistent with that balance. Nothing in Section 6409 suggests that Congress

[74] § 6409 (a)(1), 47 U.S.C. §1455(a)(1).

[75] § 6409(a)(2), 47 U.S.C. §1455(a)(2).

[76] The FCC assumes that the statutory reference to "tower or base station" means that an alteration to any base station is permitted whether associated with a tower or not. However, in light of the Programmatic Agreements and the agency's own discussion of what constitutes a wireless facility, *supra* at pp.5-8, the more natural reading is that Congress was referring to a wireless facility composed of a tower and a base station, and making it clear that a substantial change in either would trigger local review.

intended to define substantiality based on the sort of modifications providers might desire to make to best forward their business plans.[77]

A broad reading is inconsistent with precepts of statutory construction. Statutes that pre-emptively intrude on core areas of local and state authority are construed narrowly. *Department of Revenue of Ore. v. ACF Indus.*, 510 U.S. 332, 345 (1994). "[L]and-use decisions are a core function of local government. Few other municipal functions have such an important and direct impact on the daily lives of those who live or work in a community." *Gardiner v. City of Baltimore*, 969 F.2d 63, 67 (4th Cir. 1992). Indeed, federal control over local zoning processes can raise issues of constitutional dimension. *Petersburg Cellular Pshp v. Board of Supervisors*, 205 F.3d 688, 700 (4th Cir. 2000) (Niemeyer, J. writing for himself in the opinion of the Court). Section 6409 raises constitutional issues bluntly, commanding that state and local officers "may not deny, and shall approve," a Section 6409 request. The provision, if it is to pass muster at all,[78] must be read narrowly to apply only in those cases where there has already been an approval of a tower and a base station, and where the additional changes sought are truly insubstantial in light of the facilities and their location. The statute cannot be

[77] Nor does anything prevent attachment of conditions to the approval of a request for modification, such as additional stealth requirements.

[78] See *Printz v. United States*, 521 U.S. 898, 932-933 (1997), and *infra* at 33.

read to impose an obligation that a locality must approve a proposed change if a federal agency determines it would advance federal goals.

But that is how the FCC has read it.

B. The FCC's Approach to the Phrase "Substantial Change in Physical Dimension" Ignores the Ordinary Meaning of Those Terms And Is Not Otherwise Justified.

1. *The Rules Are Not Consistent with the Ordinary Meaning of the Terms "Substantial Change" or Physical Dimension.*

The ordinary usage of terms is presumed unless Congress gives them a specified or technical meaning. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989). A court may consider dictionary definitions to determine if a regulation represents a reasonable interpretation of the statute. *Smiley v. Citibank*, N.A., 517 U.S. 735, 744-45 (1996). A "substantial" change is a change that is "important" or "considerable in amount," or "relating to the main part of something."[79]

Substantiality necessarily depends on context, and in law "substantially" is often measured in context. For example, in copyright law, courts do not determine whether works are "substantially similar" by asking only whether two works are quantitatively similar. They ask whether the works are similar in important respects. As a result, even if the material copied is "quantitatively small," if it is

[79] *Merriam-Webster Unabridged Dictionary Online, http://unabridged.merriam-webster.com/* (last visited April 23, 2015).

"qualitatively important," a fact-finder may find "substantial" similarity.[80] Consistent with this contextual approach, the Commission has recognized in other contexts that "[i]t is not possible to define what would constitute a substantial change so that it may be applied in every case."[81]

To be sure, if all towers and base stations were of a similar design and located in similar places, a "substantial change" might be defined by an absolute standard of the sort crafted by the FCC. But where towers and base stations vary dramatically in size and design, and where the location may affect a change's impact significantly, the sort of blunt, absolute standard adopted in the rules is not a reasonable standard, nor one that can be adopted consistent with the plain meaning of the law.

Here the *Order* recognizes that wireless facilities do vary dramatically in size, shape and impacts. They may be found virtually anywhere – on rooftops, lamp posts, in front of homes, in parks, and at schools. The facilities may be in environmentally sensitive areas or historically preserved areas.[82] While the Commission's rules make some nod to context – modifications in the rights of way and outside the rights of way are treated differently — the Commission offers no

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[80] David Nimmer; 4 Nimmer on Copyright § 13.03 (2015).

[81] *In re Amendment of Section IV of Broadcast Application Forms 301, 303, 314 and 315*, 5 FCC 2d 175, 177 (1966).

[82] *Order*, ¶¶1, 11. (JA-___).

meaningful explanation as to how it decided what was "substantial." Thus, for example, the Commission repeatedly notes the benefits of small cells because of their small size[83] but then authorizes an increase that would multiply the volume of some small cells almost 3000 times,[84] without considering whether such an increase would be "substantial." The absence of that explanation, and of any rational basis for the lines drawn, is fatal.

Similarly, while the term "physical dimension" can have slightly different meanings in physics, mathematics and in day-to-day parlance,[85] for a three-dimensional object, the "physical dimensions" include at least height, width and depth.[86] The FCC, however, defines substantial change in physical dimensions without actually taking those dimensions into consideration. The permissible number of equipment cabinets allowed in sites outside the right of way is defined by the number of cabinets and not their width, height or depth, collectively or

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[83] *Order*, ¶¶3, 4, 11, 13, 23, 24, 25, 28, 32, 33. (JA-___).

[84] Increasing the size of an small cell facility from the "deck of cards" size described by *Qualcomm*, Qualcomm Comments (JA - ___), to 10'x 6' x 1" would increase the volume of the installation by about 3000 times. The rules permit a provider to add facilities that are not themselves "small cells" to the small cell "base station." 47 C.F.R. §1.40001.

[85] Merriam-Webster Dictionary, *supra*.

[86] *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 318 (2002) (physical dimension "describes the size and shape of the property in question").

individually.[87] Likewise, in considering modifications permitted to an existing utility pole, the FCC defined "substantiality" looking at only two dimensions, each in isolation: a modification is insubstantial IF it only extends an existing structure ten feet up. A modification is insubstantial IF it extends only six feet out from an existing structure. Depth is ignored. [88] The *Order* treats as identically insubstantial an addition of a ten-foot whip antenna a few inches wide (comparable to the old radio antennas on a car), and the addition of a solid block of equipment extending up ten feet, out from a structure six feet, and of unlimited depth.

This approach to measurement does not meet the test prescribed by Congress. The primary defense offered by the Commission for adopting its definition of "substantially change" and "physical dimensions" are: first, that the definitions will allow broadband deployment; and second, that they are similar to the definitions in the Programmatic Agreements.

2. *The Commission cannot justify the rules based on generalized policy goals.*

The Commission claims its "substantiality" test is not based on the language of the statute, but in truth is based on the Commission's assessment of what modifications must be allowed to permit widespread and expedited deployment of facilities without local or state government review. Thus, the Commission

[87] 47 C.F.R. §1.40001(b)(7)(iii).

[88] 47 C.F.R. §1.40001.

concluded that a 10-foot increase in the size of any base station or tower should be permitted because providers told it that was the minimum increase they required.[89]

Defining "substantiality" in terms of what is convenient for the provider parallels the Commission's error in *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999). In *Iowa Utilities*, the Court was asked to determine if the Commission had been faithful to a Congressional directive on what constitutes "impair." The Communications Act requires that elements of a telephone network should be made available to competitors of local exchange carriers under certain circumstances, notably where the absence of access would "impair" the ability of a competitor to provide service. In *Iowa Utilities*, the Commission adopted a definition of "impair" that was designed to allow access whenever a competitor would do better with access, than without it – a result it justified in light of the goals of the statute. The Supreme Court found that the Commission's approach was fundamentally deficient, having failed to give adequate consideration of the ordinary and fair meaning of the statutory term when devising the rules.[90] The Court found that the mere fact that it might be more convenient for a competitor to

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[89] *Order*, ¶¶193-194 (JA-___); *see also Order*, ¶193. (JA-___). "… the adoption of a fixed minimum best serves the intention of Congress to advance broadband service by expediting the deployment of minor modifications of towers and base stations."

[90] *Iowa Utilities*, 525 U.S. at 387-88.

enter the market under the Commission's rules was not a sufficient justification for the approach taken.[91]

Here, the statutory test was designed to draw a line between installations that might require review to protect state and local interests and those that do not. As in *AT&T*, rather than focusing on the line drawn by the statute, the FCC defines the sort of changes necessary to serve the functional ends it desires; and it then concludes *ipsi dixit*, that the statute must be read to allow those changes. *Iowa Utilities*, 525 U.S. at 391-92. That approach was rejected in *Iowa Utilities* and reflects the sort of "circular reasoning" that courts have found is emblematic of arbitrary decisionmaking. *Public Citizen v. Federal Trade Commission*, 869 F.2d 1541 (D.C. Cir. 1989).

3. *The standards are not justified by the Programmatic Agreements.*

The Commission concludes that its approach to the "substantial change" in physical dimension should be "informed" by the approach in the Programmatic Agreements.[92] But, as discussed in the Statement of Facts, *supra*, pp. 5-8, the *Order* omits key contextual elements found in the Programmatic Agreements crucial to their operation (and to the operation of the new exemptions adopted in the *Order*). Furthermore, the *Order* ignores key differences between the facilities

[91] *Id*. at 409.

[92] *Order*, ¶193. (JA-___).

it purports to permit under its rules, and the types of facilities that were the focus of the Programmatic Agreements.

As the Commission itself recognizes, at the time the Programmatic Agreements were signed, industry deployment typically required placement of facilities on large towers, or similar structures. Now, deployment is occurring "in geographic areas, such as densely populated urban areas, where traditional towers are not feasible."[93] Moreover, the "collocation exclusions in our process for historic preservation review under Section 106 do not consider the scale of small wireless facility deployments."[94] Those differences led the Commission to limit and adjust the Programmatic Agreement standards for its own NHPA/NEPA review – in order to add, for example, tests based on volume and visibility.[95] But the Commission made no similar accommodation in the context of a Section 6409 review by states or localities, and barely acknowledges that "substantiality" applies in situations far different than were the focus of the Programmatic Agreements. Rather, the Commission appears to assume that it has satisfied whatever obligation it had to define "substantial change" by adopting a slightly different test for substantiality for small structures than the standard it adopted for large towers. It has not done so.

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[93] *Order*, ¶32. (JA-___).

[94] *Order*, ¶24. (JA-___).

[95] 47 C.F.R. §1.1307.

The average wooden utility pole extends about 35 feet above ground – some shorter, and some are taller.[96] The FCC allows as of right increase an height of almost 1/3 of the above-ground pole length, and a horizontal extensions that are equal to 200-300% of the width directly in front of a home, a small business, or a school where there is little distance between a member of the public and the facility. By contrast, on a typical 200 foot tower, the maximum increase in width is the greater of 20 foot, or the tower width at the level of the appurtenance, horizontally and ten percent or one antenna array (up to 20 feet) vertically. And this on a structure that is likely to be far removed from homes, business, schools and the public. Merely reducing the increase permitted under the Programmatic Agreements on large towers hardly explains or justifies the choices made with respect to other structures.

Second, the Collocation Agreement's "substantial increase in size" test served a modest purpose. It limited the circumstances under which an environmental assessment is automatically required. It requires Commission review in any event if "a member of the public, a SHPO, or the Council" reports "that the collocation has an adverse effect on one or more historic properties."[97] It

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[96] 47 C.F.R §1.1418 (FCC presumption that pole is 37.5' feet tall); Florida Public Utilities Commission, *What's on a Utility Pole*, http://www.psc.state.fl.us/consumers/utilitypole/en/allutilitypoleinfo.aspx.

[97] Collocation Agreement at III.A.4, IV.A.4.

did not prevent state and local review. The Commission explained that "perfection" was not its goal in crafting the Collocation Agreement standards, and it admitted that under the tests adopted, it was likely "that adverse effects will not be considered in some circumstances." *In the Matter of Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, FCC 04-222, WT Docket No. 03-128 ¶21 (2004). But because the Commission maintained a complaint procedure, the fact that the standards were inexact was of less significance. Here, neither states nor localities are provided an opportunity to show that a proposed modification is in fact "substantial." The gaps and the overbreadth of exemptions under the Programmatic Agreements do not justify gaps or the overbreadth of the rules here.

Third, the Collocation Agreement determines whether an environmental assessment is required based on whether a collocation involves a substantial change in the "size" of a tower. Section 6409 asks whether a proposed modification involves a substantial change in "physical dimensions." As already discussed, the phrase "change" in physical dimensions at least requires the Commission to consider the cumulative impacts of changes in the height, width and depth of a structure and it has not done so. The Commission cannot justify its

failure to do so by simply deciding to treat Section 6409 as if it had used the same terms as the Collocation Agreement.[98]

Overall, the Programmatic Agreements viewed in their entirety, establish a "substantiality" standard which is presumed to obviate the need for an environmental assessment, but which permits more detailed examination of particular installations either before or after a project is built. The main lesson from the Programmatic Agreements is that simple mathematical rules do not adequately measure substantiality, a lesson the Commission ignored in the *Order*.

4. *The Rules Cannot Be Justified By References To Laws Adopted By States.*

The Commission argues that its rules are also supported by the fact that its rules set a standard for "substantiality" "far less" than those proposed "by some commenters" and by some states.[99] The fact that some parties proposed extreme standards of course proves nothing about the reasonableness of the Commission's standards.

The Commission's reliance on state laws is particularly disingenuous. The *Order* does not mention that almost all of the laws it cites were adopted after the Wireless Bureau issued its *Guidance* describing the sorts of attachments it believed

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[98] *Dallas v. F.C.C.* 118 F.3d 393, 397 (1997).

[99] *Order*, ¶¶193-194. (JA-___).

were consistent with the requirements of Section 6409.[100] Thus, to a large degree, the Commission is simply bootstrapping this *Order* to state action in response to the FCC's own published *Guidance*. More telling is that the Commission ignores critical differences between some state laws and the rules it did adopt. In North Carolina, a local government may show that a proposed modification is "substantial" even if it meets the "substantiality" size standards adopted by the State. N.C. Gen. Stat. §160A-400.51(7a). In Michigan, a modification is "substantial" if it would violate size limits previously placed on a structure. Mich. Comp. Laws §125.3514.[101] The Commission's rules invalidate these provisions. The Commission only finds support by ignoring the critical, limiting conditions states adopted.

5. *The Commission's Test for Substantial Change Cannot be Justified Based on Agency Expertise or the Need for Certainty.*

A rule is arbitrary and capricious if it is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle*

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[100] Statement of Facts, *supra*, pp. 16-18.

[101] In Georgia, a proposed modification may not increase the size of an equipment compound "initially approved," and comply with all applicable conditions of the initial support structure. GA. Code Ann. §36-66B-4(b) (2014). Collocation statutes adopted prior to the Commission's *Guidance* also provided local governments latitude in defining what is substantial in context. In California, for example, a locality can be required to define the increases in height, width, depth and mass that will be permitted as of right as part of the initial approval of a wireless facility. Cal. Gov't. Code § 65850.6(b)(2).

Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The Commission's definition of "substantial change" in the physical dimensions of wireless facilities is implausible. As noted above, it leads the Commission to say that if a locality allows an installation as small (and as inconspicuous) as a deck of cards on Monday, on Tuesday, it must treat as insubstantial and approve a proposed modification that would increase the volume of the facility 3000 times. It is hard to understand why such a change would in fact be insubstantial. And the judgment cannot be attributed to Commission expertise, which is not related to issues which are the stuff of zoning decisions (dimensions, configuration, community preservation, safety and so on) or the "physical dimensions" test which is the subject of Section 6409. Ultimately, the "substantial size" test rests on the agency's assertion that it needed to adopt an empirical standard to avoid deployment delays.[102] But, even were one to assume that ease of application is important, "certainty" itself cannot justify the approach taken by the Commission. The Commission does not allow for localities to demonstrate substantiality in particular circumstances, although that right is included in state laws the Commission cites, and in the Commission's own NHPA/NEPA exemptions. The Commission does not claim those processes have resulted in significant

[102] *Order*, ¶¶1, 10, 15. (JA-___).

deployment delays.[103] Certainty may avoid some litigation costs, as the FCC suggests, but certainty does not allow the FCC to require approval of modifications that are in fact substantial. At the very least, due process and federalism concerns require that a rule designed to provide "certainty" must be tailored so it does not overly intrude on state and local interests. The FCC rules are not carefully tailored.

That absence of careful tailoring, and the impermissible scope of the intrusion, is underlined by tension among various portions of the *Order*. In crafting NEPA and NHPA exemptions, for example, the Commission relies upon the existence of local and state oversight to address problems which may arise.[104] But it then appears to preempt local and state requirements that might be applied on a site-specific basis based on actual impacts, restricting states and localities to enforcing "generally applicable" and "non-discretionary" codes.[105] The Commission does not appear to treat as substantial a change that has significant safety, environmental or other impacts unless those violate "non-discretionary codes." Moreover, the Commission requires "non-discretionary" action on a permit within a very short time frame that can only be extended by a provider, and not by a court, even if that prevents consideration of the cumulative effects of

[103] *Order*, ¶190 (JA-___).

[104] *Order*, ¶42-45, (JA-___).

[105] *Order*, ¶202. (JA-___)

changes in physical dimension of a single or series of facilities. (This problem, while less severe, is also reflected in revised rules for Section 332(c)(7), which may preclude effective investigation of problems created by an installation). The Commission cannot have it both ways: it cannot adopt exemptions assuming a robust state and local ability to address problems created by installations, and then adopt rules which fail to fully allow localities and states to address any environmental safety or other problems created by expansion of particular applications, unless the specific matter is addressed by a "non-discretionary code." That is, problems created by the lack of tailoring reflected in the Commission "substantiality" test is compounded by the decision to preclude imposition of the conditions on approval, like new concealment conditions, and to preclude enforcement of certain pre-existing conditions directly related to changes in the size of the underlying facility.

The Commission does not explain why its rules must ignore existing limitations on existing facilities that define how large a facility may grow without triggering an additional review – even when such limitations may provide a certain guide as to what changes are substantial and which are not. The Commission does not explain why it generally failed to adopt three-dimensional tests, even though its own NHPA rules contain volumetric limitations. These options were all before the

Commission,[106] and all were basically ignored in favor of a rule that may be simple, but in critical respects fails to define "substantial change in physical dimension" in a way that comports with the statutory terms.

C. The FCC Improperly Conflates the Terms "Base Station" and "Tower"

The impact of the rules adopted would be far less significant if the Commission had limited the application of the rules to the towers and associated base stations that are the textual focus of Section 6409. Instead, because the term "tower" as commonly used and as used in the Programmatic Agreement would exclude many structures used by DAS and small cell providers,[107] the Commission chose to define base station to include any structure to which an antenna may be attached – whether a building, a light standard, a utility pole, a flag pole, or any other structure.[108]

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[106] Alexandria Comments at 12-13 (JA-____); Collocation Agreement, I; Comment of Eugene, OR, WT 13-238, at 12 (Feb. 3, 2014) (JA-_____). See *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43, 52 (1983) (agency must articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made") (internal quotations omitted); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449 (3d Cir. 2011).

[107] Statement of Facts, *supra*, at pp. 5-8.

[108] *Order*, ¶¶5, 145. (JA-___).

1. *The Commission's Definition of "Base Station" is Not In Accord With the Ordinary and Fair Meaning of the Term*

Commission precedent, the NPRM, the record, and the Commission's own *Order* demonstrate that the term "base stations" does not capture support structures. As the Statement of Facts explains,[109] the Commission has recognized that the two primary components in wireless infrastructure are a support structure, and the electronic equipment that transmits or receives signals from the user equipment — the latter, and not the former being the "base station." *In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, 26 FCC Rcd 9664 ¶308 (2011).

A base station likewise does not include all the portions of a communications network to which it may be interconnected; the term typically refers to on-site equipment like transceivers and modulators, not the fiber optics that may carry a signal from the "base station" to another location. In the context of cellphones, "base stations" are the fixed electronics that communicate with mobile units.[110] In fact, the DAS industry has explained that its networks do not

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[109] Statement of Facts, *supra*, at pp. 9-11.

[110] Alexandria Comments, Ex. B at 20. (JA-___).

actually have a base station as that term is commonly understood.[111] However, in order to include DAS within its *Order*, the FCC adopts a sweeping "base station" definition that includes, *inter alia*, the utility poles to which a DAS may be attached.

2. *Conflating Base Station And Support Structures Requires Linguistic Leaps That Cannot Be Justified.*

The *Order* employs linguistic gymnastics to devise a novel definition of base station that includes the supporting structure. In the NPRM,[112] the FCC proposed to define "base station" to include a "structures that support or house . . . part of a base station, . . . [and that] were not built for the sole or primary purpose of providing such support."[113] The NPRM seemed to recognize that the proposed definition was both circular and rendered the term "wireless tower" superfluous, violating a cardinal rule of statutory interpretation.[114]

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[111] To the extent there is a "base station," the "base station" would be owned by the customers of the DAS, and remote from the DAS antennas. Alexandria Comments, Ex. B, at 20. (JA-___). NextG has stressed this point for the Commission. *See, e.g.*, NextG Networks of California, Inc., *In re Petition of NextG Networks of California, Inc. for a Declaratory Ruling that its Service is Not Commercial Mobile Radio Service*, Petition for Declaratory Ruling, WT Docket No. 12-37 at 3 (Dec. 21, 2011); NextG Reply Comments, WT Docket No. 12-37, at 3 (May 14, 2011).

[112] Statement of Facts, *supra*, pp. 9-11.

[113] NPRM ¶108. (JA-___).

[114] NPRM ¶108 n. 238 (*citing Miller v. Clinton*, 687 F.3d 1332, 1347 (D.C. Cir. 2012)). (JA-___).

In the final rules, the Commission seeks to avoid these obvious problems by setting out what at first glance is a definition of base station more in keeping with existing usage. 47 C.F.R. §1.40001(b)(1)(i)-(ii) (describing base station in terms of equipment). But in subsection (iii), the FCC adds to the definition, "structures" that support the equipment "described in the preceding sections," while expressly excluding towers. This may allow the Commission to avoid the self-evident circularity of the NPRM, but the result is exactly the same, and no more defensible. The base station is still defined by the equipment and not the structure; the *Order* itself distinguishes between the structure and "the first base station deployment that brings a structure" within Section 6409.[115]

The consequence of permitting the Commission to count every structure as a "base station" expands Commission jurisdiction beyond the breaking point, as the rules themselves illustrate. Any part of an eligible support structure can be increased in size under 47 C.F.R. §1.40001(b)(7)(i) by right – thus, if convenient, the wall of a two-story building could be raised by no less than 10 feet or 10% of the building's height. Signage could be extended, at minimum, six feet (and ten feet up) out over a street or sidewalk if the signage supported any wireless device. Enforcement of discretionary zoning rules that prohibited such extensions would be prohibited. 47 C.F.R. §1.40001(b)(7)(vi).

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[115] *Order*, ¶174. (JA-___).

But, absent a specific grant of authority, the Commission's jurisdiction extends to wire or radio communications, and not to facilities or structures that may be useful for wire and radio communications. Otherwise, "we might be called upon to regulate access and charges for use of public and private roads and right of ways essential for the laying of wire, or even access and rents for antenna sites."[116] It is hard to imagine that through use of a common technical term, Congress meant to expand FCC jurisdiction to every structure in the United States to which attachment of any radio device, including a basic Wi-Fi hotspot, has been authorized. But that is what the FCC has done, and its actions founder on the basic principle that Congress "does not, one might say, hide elephants in mouse holes."[117]

Indeed, the definition of "base station" *in toto* is so broad that it lacks any meaningful, confining principles. As noted above, a "base station" as normally defined includes the equipment at a single site – and the outer boundaries of the base station are the site itself. But here the Commission has included in the definition of base stations "radio transceivers, antennas, coaxial or fiber-optic

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[116] *In Re: California Water and Telephone Co.*, Tariff F.C.C. No. 1 and Tariff F.C.C. No. 2 Applicable to Channel Service for Use by Community Antenna Television Systems The Associated Bell System Companies, 64 F.C.C.2d 753, ¶¶15-17 (1977). Congress gave the FCC the authority it lacked regarding utility poles when it adopted what is now 47 U.S.C. §224.

[117] *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994).

cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration (including Distributed Antenna Systems and small-cell networks)."[118] While the antenna/remote node for a DAS may be at a site, the other elements of the network are not, and may be scattered over miles. Under the definition as formulated by the Commission, it is impossible to know: where a base station ends; where it begins; what it includes; and what it does not include. That lack of definition is itself reversible error.[119]

The textual justification the Commission offers for its definition of base station is that excluding the supporting structure from the definition of base station "conflicts with the full text of the provision, which plainly contemplates collocations on a base station as well as a tower….[C]ollocating on base stations, which the statute envisions, would be conceptually impossible unless the structure is part of the definition as well."[120] Section 6409 actually says and implies nothing about collocation of facilities "on" a base station. The statute allows modifications of towers or base stations that involve removal, replacement or collocation of

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[118] 47 C.F.R. § 1.40001(b)(1)(ii).

[119] Alexandria Comments at 34. (JA-___). *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (regulations must provide fair notice of conduct that is forbidden or required).

[120] *Order*, ¶169. (JA-___). The other justification the Commission offered was that "no commenters" presented evidence that the term base station did not normally include supporting structures. *Order*, ¶170. (JA-___). That is not the case. Alexandria Comments at ___. (JA-___).

transmission equipment.[121] A modification in the size of a base station to allow for new electronic equipment in additional equipment cabinets (something the Commission clearly recognizes could happen) would be a collocation.[122] Collocation would clearly be possible for a base station associated with a wireless tower. The impossibility claim is nonsense and cannot support the Commission's expansive reading of "base station."

The FCC's definition is particularly troubling since Congress specifically identified the structure to which Section 6409 applied. Given the normal use of the term base station, the Congress cannot be presumed to have included other structures, and would have had no reason to mention towers specifically if all structures were included within the term "base station."[123]

D. The Treatment of Non-Conforming Uses Is Unjustified.

To avoid due process and takings concerns, structures and uses that were lawful when constructed or commenced are generally entitled to continue if newly

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[121] §6409(a)(2); 47 U.S.C. §1455(a)(2).

[122] See *Order*, ¶26 (JA-___) clarifying that "collocation… includes equipment associated with the antennas (such as wiring, cabling, cabinets, and backup-power equipment)."

[123] The FCC tries to avoid the redundancy by arguing "towers" refers to a structure built to support wireless facilities, even if the structure does not have any attachments to it, while base station structures are only those structures to which an antenna is attached. Order, ¶169.(JA-____). Section 6409 refers to "additions" and "replacements" and "collocations" of transmission equipment on existing towers already approved. The notion that Congress was actually referring to empty towers is implausible.

adopted land use regulations prohibit or otherwise restrict the existing use. *See Major Media of Southeast, Inc. v. Raleigh*, 792 F.2d 1269, 1272 (4th Cir. 1986). But these "non-conforming" uses are typically permitted to continue only under certain specific conditions, so that the burden borne by the surrounding community is not increased, and the landowner does not gain financial or other advantages over neighbors who are not permitted to build similar structures or engage in similar activities.[124] Any rights deemed vested are limited. Most notably local governments can usually require non-conforming uses to remove the non-conforming structure and otherwise comply with the new regulations after a reasonable amortization period. *Id.* at 1272-73; *see also Naegele Outdoor Advertising v. Durham*, 844 F.2d 172, 175 (4th Cir. 1988), or if the structure or use is expanded. *See Patton v. City of Galax*, 269 Va. 219, 228 (2005); *Trip Assocs. v. Mayor & City Council*, 392 Md. 563, 583 (2006).

Modifications to non-conforming use sites are by definition substantial in the physical sense. Any such change increases an already existing burden that otherwise would not be permitted. "[T]he earnest and ultimate purpose of zoning was and is to reduce nonconformance to conformance as speedily as possible …" *Grant v. Baltimore*, 212 Md. 301, 307 (1957). Nonetheless, the *Order* mandates a

[124] See *Lathan v. Zoning Bd. of Adjustment of Union City*, 69 N.C. App. 686 (1984); *Bailey v. Rutledge*, 291 S.C. 512 (Ct.App.1987).

change to a non-conforming tower must be approved if the modification otherwise complies with the size standards in the Commission's rules.[125]

That holding underlines the problems created by the Commission's failure to confront the statutory phrase "substantial change" in a way that takes into account the context of the change. Federal courts have traditionally respected the well-established rules regarding non-conforming uses when applying the Telecommunications Act. In *Aegerter v. City of Delafield*, 174 F.3d 886, 88, 892 (7th Cir. 1999), the Seventh Circuit upheld a city's decision to deny permission to replace an existing telecommunications tower based in part on the fact that the existing tower was a legal non-conforming use. Even in situations where the courts have invalidated local decisions involving legal non-conforming communications facilities, they have done so with the appropriate respect for local authority. For example, in *Omnipoint Communs. MB Operations, LLC v. Town of Lincoln*, 107 F. Supp. 2d 108 (D. Mass. 2000), the court invalidated a local decision refusing to allow a wireless communications facility, in part as an extension of a legal non-conforming use, because the carrier had met its burden under the Telecommunications Act to establish a significant gap in coverage.

What the courts did not do is what the FCC did here: ignore that non-conforming uses present special issues such that what is substantial with respect to

[125] *Order*, ¶201. (JA-___).

those facilities may be far different than what is substantial with respect to the placement of a facility that has been authorized and conforms to zoning codes.

The treatment of certain non-conforming facilities is inconsistent with the FCC's determination that an existing facility is one whose installation has been affirmatively approved.[126] The FCC justifies the exception on the grounds that it will facilitate deployment, which is no justification at all. Further, that it is "unlikely to conflict with local land use policies," which, as shown above, reveals a fundamental misunderstanding of local land use policies.[127] More generally, the Commission accepted the argument of PCIA that there should not be exceptions for non-conforming uses, because "simple changes to local zoning codes could immediately turn existing structures into legal, nonconforming uses unavailable for collocation under the statute."[128] But that argument does not justify the Commission's decision to allow modifications of non-conforming uses that exist now. Indeed, the Collocation Agreement, 47 C.F.R. 1 App. B Sections III and IV, distinguishes between "Collocation of Antennas on Towers Constructed on or Before March 16, 2001" and "Collocation of Antennas on Towers Constructed After March 16, 2001." Ultimately, fears as to what *could* be done do not justify authorization of physical changes that are in fact substantial.

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[126] Statement of Facts, *supra*.

[127] *Order*, ¶174. (JA-___).

[128] *Order*, ¶201, *citing* PCIA Reply Comments at 18-19. (JA-___).

II. SECTION 6409 AND THE COMMISSION'S RULES VIOLATE THE TENTH AMENDMENT

A. The Section 6409 Statute's Requirement That the Local Government "May Not Deny, and Shall Grant" A Permit Violates the Tenth Amendment.

The U.S. Supreme Court has read the Tenth Amendment to mean that the federal government "may not compel the States to enact or administer a federal regulatory program." *Printz*, 521 U.S. at 918-19, 925-26, & 933 (1997) (*quoting New York v. United States*, 505 U.S. 144, 188 (1992)). Section 6409 may therefore neither commandeer local government officials to administer a federal "approval-granting" program, nor "deem" that they have done so. Read literally, Section 6409's language providing that a state and local government "shall approve" an application runs directly afoul of this provision. *Printz* suggests that if the federal government wishes to authorize the placement of intrusive and harmful facilities, it must do so itself—and take responsibility for those actions. *Printz*, 521 U.S. at 925.

Congress acting within the scope of its Commerce Clause power can encourage states and localities to participate in a federal program so long as it does not cross the line between "coercion" and cooperation. *New York v. U.S.*, 505 U. S. 144, 166 (1992). "Imposition of any federal standard on a state or local body's legislative process [...] without a meaningful opportunity for a state to opt out, compromises state and local sovereignty." *Petersburg Cellular Pshp. v. Board of*

Supervisors, 205 F.3d 688, 700 (4th Cir. 2000) (Niemeyer, J., writing for himself in the Opinion of the Court). A federal law will pass muster under the Tenth Amendment if a state or locality is given a genuine choice between (a) regulating in accordance with a federal statute, or (b) having its regulatory authority preempted altogether. *New York*, 505 U. S. at 167.

> For example, if Congress instructed state or local legislatures on the minimum qualifications of members voting on the siting of federally regulated facilities, or on the percentage of votes needed for approval or denial of such permits, or on the frequency with which the local body must meet to consider such requests, these instructions might be seen as a "preemption" of the legislature's operating rules. But it is also this type of "preemption" that would be unconstitutional because it would "commandeer the legislative process," by co-opting potentially unwilling state and local legislative bodies to achieve federal policy goals. *New York*, 505 U.S. at 176.

Petersburg, 205 F.3d at 702.

That is particularly so here, where the statute – at least as implemented by the FCC – purports to require approval whether the state chooses to act, or not act on a Section 6409 application, allowing federal officials to avoid accountability altogether. *Petersburg*, 205 F.3d at 700.

B. The Commission's Rules Compound the Tenth Amendment Issues.

While "the breadth of agency discretion is... at zenith when the action assailed relates primarily to the fashioning of remedies and sanctions," *American Telephone & Telegraph Co v. FCC*, 454 F.3d 329, 334 (D.C. Cir. 2006), this

breadth does not extend to remedies that violate the Tenth Amendment by commandeering local governments. "Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than […] by 'reducing [them] to puppets of a ventriloquist Congress.'" *Printz*, 521 U.S. at 928, *citing Brown v. EPA*, 521 F.2d 827, 839 (9th Cir. 1975). The Commission cannot deem a permit proposal granted unless it has some permitting authority itself—and none is granted by the statute.

1. *Deemed Grant As A Remedy*

The FCC states that the deemed grant is a "remedy" for the failure of the locality to act in accordance with the statute. But the FCC candidly admits the remedy is intended to coerce compliance.[129] This "coercion" crosses the line between what is constitutionally permissible, and what is not. It is direct regulation of the conduct of the locality's legislative power, which the Tenth Amendment prohibits. *FERC v. Mississippi*, 456 U.S. 742, 762-766 (1982). And, to the extent it purports to require local and state administration of a "non-discretionary" federal process, directly or through the deemed grant, it runs afoul of *Printz*.[130]

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[129] *Order*, ¶¶221, 227. (JA-___).

[130] There are three general types of actions localities can take in land use matters: legislative, adjudicative and ministerial, *Calvert v. County of Yuba*, 145

Compelling a grant has consequences beyond mere preemption. As suggested above, the authorization of a tower or facility may create vested state property rights that cannot easily be remedied even if the federal regulation or law changes. And "deeming" an application granted may have additional negative impacts, to the extent applications propose changes that should be denied – as where an application proposes changes to a structure that creates safety issues.[131] No meaningful way is provided for a community to opt out of the program.[132]

2. *Parallels to the Deemed Granted Remedy Are Limited and Do Not Justify the Remedy Adopted Here*

While there are a handful of regulations that have some parallel to the "deemed granted" rule adopted here, each is distinguishable. The Commission

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Cal.App.4th 613 (2006). The FCC is clear that it views 6409 as requiring a "non-discretionary" process. *Order*, ¶227. (JA-___).

[131] The installation of a DAS system on overloaded poles led to a Malibu Fire Canyon that destroyed historic properties, thousands of acres of land, and resulted in injuries to public safety officials. In an echo of a "deemed granted" scenario. the DAS provider had filed applications, assumed that it had the necessary authorizations and proceeded to install the facilities. *Decision conditionally Approving the NextG Settlement Agreement, Investigation on the Commission's Own Motion into the Operations and Practices of Southern California Edison Company, Cellco Partnership LLP d/b/a/ Verizon Wireless, Sprint Communications Company LP, NextG Networks of California, Inc. and Pacific Bell Telephone Company d/b/a/ AT&T California and AT&T Mobility LLC, Regarding the Utility Facilities and the Canyon Fire in Malibu of October 2007*, Investigation 09-01-018, at 10 (Sept. 19, 2013), *available at*: http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K059/77059441.PDF. Alexandria Comments at 15. (JA-___).

[132] The rules also effectively deprive affected property owners and the public of any ability to comment meaningfully on an application.

cited in the NRPM to the *Order* that a pole owner "must deny a request for access within 45 days of receiving such a request or it will otherwise be deemed granted." NPRM ¶137 n. 275, citing *Application of Bellsouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, 13 FCC Rcd 20599, 20708-09 ¶176 (1998). (JA-___). But the pole owner to whom the rule was applicable was not a state or local government, but a regulated private company.

Similarly, the Commission noted that it and other federal government entities are sometimes deemed by federal law to have approved certain actions. But federal rules applying to the federal government are not relevant to Tenth Amendment analysis.

The Commission finds within the regulations for the Centers for Medicare and Medicaid Services one provision stating that an application to disenroll from a Medicaid managed care plan shall be "considered approved" if not acted on by a state agency by the regulatory deadline. 42 C.F.R. §438.56(e)(2). But this rule is a requirement that only applies if a state chooses to administer in what is ultimately a federal program. As the Supreme Court has recently emphasized, the federal

government cannot coerce participation in the federal program.[133] This case clearly does not involve such a federal program.

The "deemed granted" remedy the Commission adopted in cable franchising (Section 621) is also not parallel, but is instructive.[134] In that instance, the Commission allows a cable operator to move forward temporarily with installation and operation of a cable system without a franchise (an action otherwise prohibited by federal law) on a "deemed granted" basis, but makes clear that any facilities and equipment would have to be removed if the local authority ultimately denied a franchise.[135] Here, the FCC reads the law to compel approval of an application for an eligible facility; and offers no practical remedy or recourse if the application for an eligible facility is "deemed granted."[136]

3. *The Rule Does Not Merely Preempt*

The Commission argues that a "deemed granted" rule would no more constitute a federal regulatory program imposed on the states than would a pure

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[133] *National Federation of Independent Business v. Sebelius*132 S.Ct. 2566 (2012).

[134] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5139 (2007) ("Cable Franchise R&O").

[135] *Id.* at 5205.

[136] A locality can challenge the "deemed grant" by filing a court action within 30 days of the grant. But the only issue on court review is whether the application met the Section 6409 standards. *Order*, ¶231-232. (JA-___).

preemption of state action.[137] However, an actual preemption of local authority requires the federal government to assume responsibility for placement of facilities. While the difference may be small in one sense, compelling the agency (and Congress) to take responsibility for their actions is what the Constitution compels. The creation of a deemed granted rule impermissibly requires local and state officials to abandon their own judgments, and to grant approvals even where there is a clear indication that an application proposes modifications that will have a significant and adverse effects. To be sure, most applications for towers and site modifications are granted and will continue to be granted;[138] localities support deployment. But that does not justify compelling local approval in all cases, which is what Section 6409 and the *Order* does with respect to eligible facilities requests. As Justice Alito recently observed in a case involving 47 U.S.C. §332(c)(7), when considering the remedy that may be imposed when a locality fails to comply with FCC regulations on tower siting, a court should recognize the important "federalism implications" of the statute. *T-Mobile, LLC v. City of Roswell*, 135 S.Ct. 808 (2015). Section 6409 as implemented by the FCC raises serious federalism concerns, both with respect to the breadth and vagueness of the rules adopted, and with respect to the constitutionality of the remedies imposed.

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[137] Order, ¶213, n. 593 (JA-____); Alexandria Comments at 6-7. (JA-___).

[138] Alexandria Comments at 6-7, 35, n. 75. (JA-___).

CONCLUSION

The Petition for Review should be granted, and the *Order* should be found to be arbitrary and capricious, and otherwise not in accordance with the law.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Petitioners and Intervenors in support of Petitioners respectfully request oral argument. This appeal involves review of a statute and implementing agency regulations significantly affecting local and state governments, and raising constitutional issues. Oral discussion of the facts and the applicable precedent would benefit the Court.

Respectfully submitted,

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STATUTORY APPENDIX TO BRIEF OF PETITIONERS AND SUPPORTING INTERVENORS

FEDERAL STATUTES

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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 (2013)

(A) the first date when the reverse auction under subsection (a)(1), the reassignments and reallocations (if any) under subsection (b)(1)(B), and the forward auction under subsection (c)(1) have been completed;

(B) the date of a determination by the Commission that the amount of the proceeds from the forward auction under subsection (c)(1) is not greater than the sum described in subsection (c)(2)(B); or

(C) September 30, 2022.

(h) Protest right inapplicable

The right of a licensee to protest a proposed order of modification of its license under section 316 of this title shall not apply in the case of a modification made under this section.

(i) Commission authority

Nothing in subsection (b) shall be construed to—

(1) expand or contract the authority of the Commission, except as otherwise expressly provided; or

(2) prevent the implementation of the Commission's ''White Spaces'' Second Report and Order and Memorandum Opinion and Order (FCC 08–260, adopted November 4, 2008) in the spectrum that remains allocated for broadcast television use after the reorganization required by such subsection.

(Pub. L. 112–96, title VI, § 6403, Feb. 22, 2012, 126 Stat. 225.)

§ 1453. Unlicensed use in the 5 GHZ band

(a) Modification of Commission regulations to allow certain unlicensed use

(1) In general

Subject to paragraph (2), not later than 1 year after February 22, 2012, the Commission shall begin a proceeding to modify part 15 of title 47, Code of Federal Regulations, to allow unlicensed U–NII devices to operate in the 5350–5470 MHz band.

(2) Required determinations

The Commission may make the modification described in paragraph (1) only if the Commission, in consultation with the Assistant Secretary, determines that—

(A) licensed users will be protected by technical solutions, including use of existing, modified, or new spectrum-sharing technologies and solutions, such as dynamic frequency selection; and

(B) the primary mission of Federal spectrum users in the 5350–5470 MHz band will not be compromised by the introduction of unlicensed devices.

(b) Study by NTIA

(1) In general

The Assistant Secretary, in consultation with the Department of Defense and other impacted agencies, shall conduct a study evaluating known and proposed spectrum-sharing technologies and the risk to Federal users if unlicensed U–NII devices were allowed to operate in the 5350–5470 MHz band and in the 5850–5925 MHz band.

(2) Submission

The Assistant Secretary shall submit to the Commission and the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate—

(A) not later than 8 months after February 22, 2012, a report on the portion of the study required by paragraph (1) with respect to the 5350–5470 MHz band; and

(B) not later than 18 months after February 22, 2012, a report on the portion of the study required by paragraph (1) with respect to the 5850–5925 MHz band.

(c) Definitions

In this section:

(1) 5350–5470 MHz band

The term ''5350–5470 MHz band'' means the portion of the electromagnetic spectrum between the frequencies from 5350 megahertz to 5470 megahertz.

(2) 5850–5925 MHz band

The term ''5850–5925 MHz band'' means the portion of the electromagnetic spectrum between the frequencies from 5850 megahertz to 5925 megahertz.

(Pub. L. 112–96, title VI, § 6406, Feb. 22, 2012, 126 Stat. 231.)

§ 1454. Guard bands and unlicensed use

(a) In general

Nothing in subparagraph (G) of section 309(j)(8) of this title or in section 1452 of this title shall be construed to prevent the Commission from using relinquished or other spectrum to implement band plans with guard bands.

(b) Size of guard bands

Such guard bands shall be no larger than is technically reasonable to prevent harmful interference between licensed services outside the guard bands.

(c) Unlicensed use in guard bands

The Commission may permit the use of such guard bands for unlicensed use.

(d) Database

Unlicensed use shall rely on a database or subsequent methodology as determined by the Commission.

(e) Protections against harmful interference

The Commission may not permit any use of a guard band that the Commission determines would cause harmful interference to licensed services.

(Pub. L. 112–96, title VI, § 6407, Feb. 22, 2012, 126 Stat. 231.)

§ 1455. Wireless facilities deployment

(a) Facility modifications

(1) In general

Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104–104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

(2) Eligible facilities request

For purposes of this subsection, the term ''eligible facilities request'' means any request for modification of an existing wireless tower or base station that involves—

(A) collocation of new transmission equipment;

(B) removal of transmission equipment; or

(C) replacement of transmission equipment.

(3) Applicability of environmental laws

Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969.

(b) Federal easements and rights-of-way

(1) Grant

If an executive agency, a State, a political subdivision or agency of a State, or a person, firm, or organization applies for the grant of an easement or right-of-way to, in, over, or on a building or other property owned by the Federal Government for the right to install, construct, and maintain wireless service antenna structures and equipment and backhaul transmission equipment, the executive agency having control of the building or other property may grant to the applicant, on behalf of the Federal Government, an easement or right-of-way to perform such installation, construction, and maintenance.

(2) Application

The Administrator of General Services shall develop a common form for applications for easements and rights-of-way under paragraph (1) for all executive agencies that shall be used by applicants with respect to the buildings or other property of each such agency.

(3) Fee

(A) In general

Notwithstanding any other provision of law, the Administrator of General Services shall establish a fee for the grant of an easement or right-of-way pursuant to paragraph (1) that is based on direct cost recovery.

(B) Exceptions

The Administrator of General Services may establish exceptions to the fee amount required under subparagraph (A)—

(i) in consideration of the public benefit provided by a grant of an easement or right-of-way; and

(ii) in the interest of expanding wireless and broadband coverage.

(4) Use of fees collected

Any fee amounts collected by an executive agency pursuant to paragraph (3) may be made available, as provided in appropriations Acts, to such agency to cover the costs of granting the easement or right-of-way.

(c) Master contracts for wireless facility sitings

(1) In general

Notwithstanding section 704 of the Telecommunications Act of 1996 or any other provision of law, and not later than 60 days after February 22, 2012, the Administrator of General Services shall—

(A) develop 1 or more master contracts that shall govern the placement of wireless service antenna structures on buildings and other property owned by the Federal Government; and

(B) in developing the master contract or contracts, standardize the treatment of the placement of wireless service antenna structures on building rooftops or facades, the placement of wireless service antenna equipment on rooftops or inside buildings, the technology used in connection with wireless service antenna structures or equipment placed on Federal buildings and other property, and any other key issues the Administrator of General Services considers appropriate.

(2) Applicability

The master contract or contracts developed by the Administrator of General Services under paragraph (1) shall apply to all publicly accessible buildings and other property owned by the Federal Government, unless the Administrator of General Services decides that issues with respect to the siting of a wireless service antenna structure on a specific building or other property warrant nonstandard treatment of such building or other property.

(3) Application

The Administrator of General Services shall develop a common form or set of forms for wireless service antenna structure siting applications under this subsection for all executive agencies that shall be used by applicants with respect to the buildings and other property of each such agency.

(d) Executive agency defined

In this section, the term ''executive agency'' has the meaning given such term in section 102 of title 40.

(Pub. L. 112–96, title VI, § 6409, Feb. 22, 2012, 126 Stat. 232.)

REFERENCES IN TEXT

Section 704 of the Telecommunications Act of 1996, referred to in subsecs. (a)(1) and (c)(1), is section 704 of Pub. L. 104–104, title VII, Feb. 8, 1996, 110 Stat. 151. Subsec. (a) of section 704 of Pub. L. 104–104 amended section 332 of this title. Subsec. (b) of section 704 of Pub. L. 104–104 is not classified to the Code. Subsec. (c) of section 704 of Pub. L. 104–104 is set out as a note under section 332 of this title.

The National Historic Preservation Act, referred to in subsec. (a)(3), is Pub. L. 89–665, Oct. 15, 1966, 80 Stat. 915, which is classified generally to subchapter II (§ 470 et seq.) of chapter 1A of Title 16, Conservation. For complete classification of this Act to the Code, see section 470(a) of Title 16 and Tables.

The National Environmental Policy Act of 1969, referred to in subsec. (a)(3), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, which is classified generally to chapter 55 (§ 4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

§ 1456. System certification

Not later than 6 months after February 22, 2012, the Director of the Office of Management

47 C.F.R. §1.40001

§ 1.40001 Wireless Facility Modifications. [Effective Apr. 8, 2015.]

(a) Purpose. These rules implement section 6409 of the Spectrum Act (codified at 47 U.S.C. 1455), which requires a State or local government to approve any eligible facilities request for a modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station.

(b) Definitions. Terms used in this section have the following meanings.

(1) Base station. A structure or equipment at a fixed location that enables Commission-licensed or authorized wireless communications between user equipment and a communications network. The term does not encompass a tower as defined in this subpart or any equipment associated with a tower.

(i) The term includes, but is not limited to, equipment associated with wireless communications services such as private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.

(ii) The term includes, but is not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration (including Distributed Antenna Systems and small-cell networks).

(iii) The term includes any structure other than a tower that, at the time the relevant application is filed with the State or local government under this section, supports or houses equipment described in paragraphs (b)(1)(i) through (ii) of this section that has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, even if the structure was not built for the sole or primary purpose of providing such support.

(iv) The term does not include any structure that, at the time the relevant application is filed with the State or local government under this section, does not support or house equipment described in paragraphs (b)(1)(i)-(ii) of this section.

(2) Collocation. The mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.

(3) Eligible facilities request. Any request for modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station, involving:

(i) Collocation of new transmission equipment;

(ii) Removal of transmission equipment; or

(iii) Replacement of transmission equipment.

(4) Eligible support structure. Any tower or base station as defined in this section, provided that it is existing at the time the relevant application is filed with the State or local government under this section.

(5) Existing. A constructed tower or base station is existing for purposes of this section if it has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, provided that a tower that has not been reviewed and approved because it was not in a zoned area when it was built, but was lawfully constructed, is existing for purposes of this definition.

(6) Site. For towers other than towers in the public rights-of-way, the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site, and, for other eligible support structures, further restricted to that area in proximity to the structure and to other transmission equipment already deployed on the ground.

(7) Substantial change. A modification substantially changes the physical dimensions of an eligible support structure if it meets any of the following criteria:

(i) For towers other than towers in the public rights-of-way, it increases the height of the tower by more than 10% or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater; for other eligible support structures, it increases the height of the structure by more than 10% or more than ten feet, whichever is greater;

(A) Changes in height should be measured from the original support structure in cases where deployments are or will be separated horizontally, such as on buildings' rooftops; in other circumstances, changes in height should be measured from the dimensions of the tower or base station, inclusive of originally approved appurtenances and any modifications that were approved prior to the passage of the Spectrum Act.

(ii) For towers other than towers in the public rights-of-way, it involves adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater; for other eligible support structures, it involves adding an appurtenance to the body of the structure that would protrude from the edge of the structure by more than six feet;

(iii) For any eligible support structure, it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets; or, for towers in the public rights-of-way and base stations, it involves installation of any new equipment cabinets on the ground if there are no pre-existing ground cabinets associated with the

structure, or else involves installation of ground cabinets that are more than 10% larger in height or overall volume than any other ground cabinets associated with the structure;

(iv) It entails any excavation or deployment outside the current site;

(v) It would defeat the concealment elements of the eligible support structure; or

(vi) It does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment, provided however that this limitation does not apply to any modification that is non-compliant only in a manner that would not exceed the thresholds identified in § 1.40001(b)(7)(i) through (iv).

(8) Transmission equipment. Equipment that facilitates transmission for any Commission-licensed or authorized wireless communication service, including, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply. The term includes equipment associated with wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.

(9) Tower. Any structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities, including structures that are constructed for wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul, and the associated site.

(c) Review of applications. A State or local government may not deny and shall approve any eligible facilities request for modification of an eligible support structure that does not substantially change the physical dimensions of such structure.

(1) Documentation requirement for review. When an applicant asserts in writing that a request for modification is covered by this section, a State or local government may require the applicant to provide documentation or information only to the extent reasonably related to determining whether the request meets the requirements of this section. A State or local government may not require an applicant to submit any other documentation, including but not limited to documentation intended to illustrate the need for such wireless facilities or to justify the business decision to modify such wireless facilities.

(2) Timeframe for review. Within 60 days of the date on which an applicant submits a request seeking approval under this section, the State or local government shall approve the application unless it determines that the application is not covered by this section.

(3) Tolling of the timeframe for review. The 60-day period begins to run when the application is filed, and may be tolled only by mutual agreement or in cases where the reviewing State or local government determines that the application is incomplete. The timeframe for review is not tolled by a moratorium on the review of applications.

(i) To toll the timeframe for incompleteness, the reviewing State or local government must provide written notice to the applicant within 30 days of receipt of the application, clearly and specifically delineating all missing documents or information. Such delineated information is limited to documents or information meeting the standard under paragraph (c)(1) of this section.

(ii) The timeframe for review begins running again when the applicant makes a supplemental submission in response to the State or local government's notice of incompleteness.

(iii) Following a supplemental submission, the State or local government will have 10 days to notify the applicant that the supplemental submission did not provide the information identified in the original notice delineating missing information. The timeframe is tolled in the case of second or subsequent notices pursuant to the procedures identified in this paragraph (c)(3). Second or subsequent notices of incompleteness may not specify missing documents or information that were not delineated in the original notice of incompleteness.

(4) Failure to act. In the event the reviewing State or local government fails to approve or deny a request seeking approval under this section within the timeframe for review (accounting for any tolling), the request shall be deemed granted. The deemed grant does not become effective until the applicant notifies the applicable reviewing authority in writing after the review period has expired (accounting for any tolling) that the application has been deemed granted.

(5) Remedies. Applicants and reviewing authorities may bring claims related to Section 6409(a) to any court of competent jurisdiction.

shall make appointments only from commissions of the States interested in the particular proceeding in which the committee is to serve. He shall exercise his best judgment to select cooperating commissioners who are especially qualified to serve upon cooperating committees by reason of their ability and fitness; and in no case shall he appoint a commissioner upon a cooperating committee until he shall have been advised by such commissioner that it will be practicable for him to attend the hearings in the proceeding in which the committee is to serve, including the arguments therein, and the cooperative conferences, which may be held following the submission of the proceeding, to an extent that will reasonably enable him to be informed upon the issues in the proceeding and to form a reasonable judgment in the matters to be determined.

TENURE OF COOPERATORS

(a) No State commissioner shall sit in a cooperative proceeding under this plan except a commissioner who has been selected by his commission to represent it in a proceeding involving eight States or less, or has been selected by the president of the association to sit in a case involving more than eight States, in the manner hereinbefore provided.

(b) A commissioner who has been selected, as hereinbefore provided, to serve as a member of a cooperating committee in any proceeding, shall without further appointment, and without regard to the duration of time involved, continue to serve in said proceeding until the final disposition thereof, including hearings and conferences after any order or reopening, provided that he shall continue to be a State commissioner.

(c) No member of a cooperating committee shall have any right or authority to designate another commissioner to serve in his place at any hearing or conference in any proceeding in which he has been appointed to serve.

(d) Should a vacancy occur upon any cooperating committee, in a proceeding involving more than eight States, by reason of the death of any cooperating commissioner, or of his ceasing to be a State commissioner, or of other inability to serve, it shall be the duty of the president of the association to fill the vacancy by appointment, if, after communication with the chairman of the cooperating committee, it be deemed necessary to fill such vacancy.

(e) In the event of any such vacancy occurring upon a cooperating committee involving not more than eight States, the vacancy shall be filled by the commission from which the vacancy occurs.

COOPERATING COMMITTEE TO DETERMINE RESPECTING ANY REPORT OF STATEMENT OF ITS ATTITUDE

(a) Whenever a cooperating committee shall have concluded its work, or shall deem such course advisable, the committee shall consider whether it is necessary and desirable to make a report to the interested State commissions, and, if it shall determine to make a report, it shall cause the same to be distributed through the secretary of the association, or through the general solicitor to all interested commissions.

(b) If a report of the Federal Commission will accompany any order to be made in said proceeding, the Federal Commission will state therein the concurrence or nonconcurrence of said cooperating committee in the decision or order of said Federal Commission.

CONSTRUCTION HEREOF IN CERTAIN RESPECTS EXPRESSLY PROVIDED

It is understood and provided that no State or States shall be deprived of the right of participation and cooperation as hereinbefore provided because of nonmembership in the association. With respect to any such State or States, all negotiations herein specified to be carried on between the Federal Commission and any officer of such association shall be conducted by the Federal Commission directly with the chairman of the commission of such State or States.

[28 FR 12462, Nov. 22, 1963, as amended at 29 FR 4801, Apr. 4, 1964]

APPENDIX B TO PART 1—NATIONWIDE PROGRAMMATIC AGREEMENT FOR THE COLLOCATION OF WIRELESS ANTENNAS

NATIONWIDE PROGRAMMATIC AGREEMENT FOR THE COLLOCATION OF WIRELESS ANTENNAS

EXECUTED BY THE FEDERAL COMMUNICATIONS COMMISSION, THE NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION

Whereas, the Federal Communications Commission (FCC) establishes rules and procedures for the licensing of wireless communications facilities in the United States and its Possessions and Territories; and,

Whereas, the FCC has largely deregulated the review of applications for the construction of individual wireless communications facilities and, under this framework, applicants are required to prepare an Environmental Assessment (EA) in cases where the applicant determines that the proposed facility falls within one of certain environmental categories described in the FCC's rules (47 CFR 1.1307), including situations which may

affect historical sites listed or eligible for listing in the National Register of Historic Places (''National Register''); and,

Whereas, Section 106 of the National Historic Preservation Act (16 U.S.C. 470 *et seq.*) (''the Act'') requires federal agencies to take into account the effects of their undertakings on historic properties and to afford the Advisory Council on Historic Preservation (Council) a reasonable opportunity to comment; and,

Whereas, Section 800.14(b) of the Council's regulations, ''Protection of Historic Properties'' (36 CFR 800.14(b)), allows for programmatic agreements to streamline and tailor the Section 106 review process to particular federal programs; and,

Whereas, in August 2000, the Council established a Telecommunications Working Group to provide a forum for the FCC, Industry representatives, State Historic Preservation Officers (SHPOs) and Tribal Historic Preservation Officers (THPOs), and the Council to discuss improved coordination of Section 106 compliance regarding wireless communications projects affecting historic properties; and,

Whereas, the FCC, the Council and the Working Group have developed this Collocation Programmatic Agreement in accordance with 36 CFR 800.14(b) to address the Section 106 review process as it applies to the collocation of antennas (collocation being defined in Stipulation I.A below); and,

Whereas, the FCC encourages collocation of antennas where technically and economically feasible, in order to reduce the need for new tower construction; and,

Whereas, the parties hereto agree that the effects on historic properties of collocations of antennas on towers, buildings and structures are likely to be minimal and not adverse, and that in the cases where an adverse effect might occur, the procedures provided and referred to herein are proper and sufficient, consistent with Section 106, to assure that the FCC will take such effects into account; and

Whereas, the execution of this Nationwide Collocation Programmatic Agreement will streamline the Section 106 review of collocation proposals and thereby reduce the need for the construction of new towers, thereby reducing potential effects on historic properties that would otherwise result from the construction of those unnecessary new towers; and,

Whereas, the FCC and the Council have agreed that these measures should be incorporated into a Nationwide Programmatic Agreement to better manage the Section 106 consultation process and streamline reviews for collocation of antennas; and,

Whereas, since collocations reduce both the need for new tower construction and the potential for adverse effects on historic properties, the parties hereto agree that the terms of this Agreement should be interpreted and implemented wherever possible in ways that encourage collocation; and

Whereas, the parties hereto agree that the procedures described in this Agreement are, with regard to collocations as defined herein, a proper substitute for the FCC's compliance with the Council's rules, in accordance and consistent with Section 106 of the National Historic Preservation Act and its implementing regulations found at 36 CFR part 800; and

Whereas, the FCC has consulted with the National Conference of State Historic Preservation Officers (NCSHPO) and requested the President of NCSHPO to sign this Nationwide Collocation Programmatic Agreement in accordance with 36 CFR Section 800.14(b)(2)(iii); and,

Whereas, the FCC sought comment from Indian tribes and Native Hawaiian Organizations regarding the terms of this Nationwide Programmatic Agreement by letters of January 11, 2001 and February 8, 2001; and,

Whereas, the terms of this Programmatic Agreement do not apply on ''tribal lands'' as defined under Section 800.16(x) of the Council's regulations, 36 CFR 800.16(x) (''Tribal lands means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.''); and,

Whereas, the terms of this Programmatic Agreement do not preclude Indian tribes or Native Hawaiian Organizations from consulting directly with the FCC or its licensees, tower companies and applicants for antenna licenses when collocation activities off tribal lands may affect historic properties of religious and cultural significance to Indian tribes or Native Hawaiian organizations; and,

Whereas, the execution and implementation of this Nationwide Collocation Programmatic Agreement will not preclude members of the public from filing complaints with the FCC or the Council regarding adverse effects on historic properties from any existing tower or any activity covered under the terms of this Programmatic Agreement.

Now therefore, the FCC, the Council, and NCSHPO agree that the FCC will meet its Section 106 compliance responsibilities for the collocation of antennas as follows.

STIPULATIONS

The FCC, in coordination with licensees, tower companies and applicants for antenna licenses, will ensure that the following measures are carried out.

I. DEFINITIONS

For purposes of this Nationwide Programmatic Agreement, the following definitions apply.

A. ''Collocation'' means the mounting or installation of an antenna on an existing

tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.

B. ''Tower'' is any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities.

C.''Substantial increase in the size of the tower'' means:

(1) The mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or

(2) The mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or

(3) The mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or

(4) The mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site.

II. Applicability

A. This Nationwide Collocation Programmatic Agreement applies only to the collocation of antennas as defined in Stipulation I.A, above.

B. This Nationwide Collocation Programmatic Agreement does not cover any Section 106 responsibilities that federal agencies other than the FCC may have with regard to the collocation of antennas.

III. Collocation of Antennas on Towers Constructed on or Before March 16, 2001

A. An antenna may be mounted on an existing tower constructed on or before March 16, 2001 without such collocation being reviewed under the consultation process set forth under Subpart B of 36 CFR Part 800, unless:

1. The mounting of the antenna will result in a substantial increase in the size of the tower as defined in Stipulation I.C, above; or

2. The tower has been determined by the FCC to have an effect on one or more historic properties, unless such effect has been found to be not adverse through a no adverse effect finding, or if found to be adverse or potentially adverse, has been resolved, such as through a conditional no adverse effect determination, a Memorandum of Agreement, a programmatic agreement, or otherwise in compliance with Section 106 and Subpart B of 36 CFR Part 800; or

3. The tower is the subject of a pending environmental review or related proceeding before the FCC involving compliance with Section 106 of the National Historic Preservation Act; or

4. The collocation licensee or the owner of the tower has received written or electronic notification that the FCC is in receipt of a complaint from a member of the public, a SHPO or the Council, that the collocation has an adverse effect on one or more historic properties. Any such complaint must be in writing and supported by substantial evidence describing how the effect from the collocation is adverse to the attributes that qualify any affected historic property for eligibility or potential eligibility for the National Register.

IV. Collocation of Antennas on Towers Constructed After March 16, 2001

A. An antenna may be mounted on an existing tower constructed after March 16, 2001 without such collocation being reviewed under the consultation process set forth under Subpart B of 36 CFR Part 800, unless:

1. The Section 106 review process for the tower set forth in 36 CFR Part 800 and any associated environmental reviews required by the FCC have not been completed; or

2. The mounting of the new antenna will result in a substantial increase in the size of the tower as defined in Stipulation I.C, above; or

3. The tower as built or proposed has been determined by the FCC to have an effect on one or more historic properties, unless such effect has been found to be not adverse through a no adverse effect finding, or if found to be adverse or potentially adverse, has been resolved, such as through a conditional no adverse effect determination, a Memorandum of Agreement, a programmatic agreement, or otherwise in compliance with Section 106 and Subpart B of 36 CFR Part 800; or

4. The collocation licensee or the owner of the tower has received written or electronic notification that the FCC is in receipt of a complaint from a member of the public, a SHPO or the Council, that the collocation has an adverse effect on one or more historic properties. Any such complaint must be in

writing and supported by substantial evidence describing how the effect from the collocation is adverse to the attributes that qualify any affected historic property for eligibility or potential eligibility for the National Register.

V. COLLOCATION OF ANTENNAS ON BUILDINGS AND NON-TOWER STRUCTURES OUTSIDE OF HISTORIC DISTRICTS

A. An antenna may be mounted on a building or non-tower structure without such collocation being reviewed under the consultation process set forth under Subpart B of 36 CFR Part 800, unless:

1. The building or structure is over 45 years old;[1] or

2. The building or structure is inside the boundary of a historic district, or if the antenna is visible from the ground level of the historic district, the building or structure is within 250 feet of the boundary of the historic district; or

3. The building or non-tower structure is a designated National Historic Landmark, or listed in or eligible for listing in the National Register of Historic Places based upon the review of the licensee, tower company or applicant for an antenna license; or

4. The collocation licensee or the owner of the tower has received written or electronic notification that the FCC is in receipt of a complaint from a member of the public, a SHPO or the Council, that the collocation has an adverse effect on one or more historic properties. Any such complaint must be in writing and supported by substantial evidence describing how the effect from the collocation is adverse to the attributes that qualify any affected historic property for eligibility or potential eligibility for the National Register.

B. Subsequent to the collocation of an antenna, should the SHPO/THPO or Council determine that the collocation of the antenna or its associated equipment installed under the terms of Stipulation V has resulted in an adverse effect on historic properties, the SHPO/THPO or Council may notify the FCC accordingly. The FCC shall comply with the requirements of Section 106 and 36 CFR Part 800 for this particular collocation.

VI. RESERVATION OF RIGHTS

Neither execution of this Agreement, nor implementation of or compliance with any term herein shall operate in any way as a waiver by any party hereto, or by any person or entity complying herewith or affected hereby, of a right to assert in any court of law any claim, argument or defense regarding the validity or interpretation of any provision of the National Historic Preservation Act (16 U.S.C. 470 *et seq.*) or its implementing regulations contained in 36 CFR Part 800.

VII. MONITORING

A. FCC licensees shall retain records of the placement of all licensed antennas, including collocations subject to this Nationwide Programmatic Agreement, consistent with FCC rules and procedures.

B. The Council will forward to the FCC and the relevant SHPO any written objections it receives from members of the public regarding a collocation activity or general compliance with the provisions of this Nationwide Programmatic Agreement within thirty (30) days following receipt of the written objection. The FCC will forward a copy of the written objection to the appropriate licensee or tower owner.

VIII. AMENDMENTS

If any signatory to this Nationwide Collocation Programmatic Agreement believes that this Agreement should be amended, that signatory may at any time propose amendments, whereupon the signatories will consult to consider the amendments. This agreement may be amended only upon the written concurrence of the signatories.

IX. TERMINATION

A. If the FCC determines that it cannot implement the terms of this Nationwide Collocation Programmatic Agreement, or if the FCC, NCSHPO or the Council determines that the Programmatic Agreement is not being properly implemented by the parties to this Programmatic Agreement, the FCC, NCSHPO or the Council may propose to the other signatories that the Programmatic Agreement be terminated.

B. The party proposing to terminate the Programmatic Agreement shall notify the other signatories in writing, explaining the reasons for the proposed termination and the particulars of the asserted improper implementation. Such party also shall afford the other signatories a reasonable period of time of no less than thirty (30) days to consult and remedy the problems resulting in improper implementation. Upon receipt of such notice, the parties shall consult with each other and notify and consult with other entities that are either involved in such implementation or that would be substantially affected by termination of this Agreement, and seek alternatives to termination. Should the consultation fail to produce within the original remedy period or any extension, a reasonable alternative to termination, a resolution of the stated problems, or convincing evidence

[1] Suitable methods for determining the age of a building include, but are not limited to: (1) obtaining the opinon of a consultant who meets the Secretary of Interior's Professional Qualifications Standards (36 CFR Part 61) or (2) consulting public records.

of substantial implementation of this Agreement in accordance with its terms , this Programmatic Agreement shall be terminated thirty days after notice of termination is served on all parties and published in the FEDERAL REGISTER.

C. In the event that the Programmatic Agreement is terminated, the FCC shall advise its licensees and tower construction companies of the termination and of the need to comply with any applicable Section 106 requirements on a case-by-case basis for collocation activities.

X. ANNUAL MEETING OF THE SIGNATORIES

The signatories to this Nationwide Collocation Programmatic Agreement will meet on or about September 10, 2001, and on or about September 10 in each subsequent year, to discuss the effectiveness of this Agreement, including any issues related to improper implementation, and to discuss any potential amendments that would improve the effectiveness of this Agreement.

XI. DURATION OF THE PROGRAMMATIC AGREEMENT

This Programmatic Agreement for collocation shall remain in force unless the Programmatic Agreement is terminated or superseded by a comprehensive Programmatic Agreement for wireless communications antennas.

Execution of this Nationwide Programmatic Agreement by the FCC, NCSHPO and the Council, and implementation of its terms, evidence that the FCC has afforded the Council an opportunity to comment on the collocation as described herein of antennas covered under the FCC's rules, and that the FCC has taken into account the effects of these collocations on historic properties in accordance with Section 106 of the National Historic Preservation Act and its implementing regulations, 36 CFR Part 800.

Federal Communications Commission

_____

Date: _____

Advisory Council on Historic Preservation

_____

Date: _____

National Conference of State Historic Preservation Officers

_____

Date: _____

[70 FR 578, Jan. 4, 2005]

APPENDIX C TO PART 1—NATIONWIDE PROGRAMMATIC AGREEMENT REGARDING THE SECTION 106 NATIONAL HISTORIC PRESERVATION ACT REVIEW PROCESS

NATIONWIDE PROGRAMMATIC AGREEMENT FOR REVIEW OF EFFECTS ON HISTORIC PROPERTIES FOR CERTAIN UNDERTAKINGS APPROVED BY THE FEDERAL COMMUNICATIONS COMMISSION

EXECUTED BY THE FEDERAL COMMUNICATIONS COMMISSION, THE NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION

September 2004

Introduction

Whereas, Section 106 of the National Historic Preservation Act of 1966, as amended (''NHPA'') (codified at 16 U.S.C. 470f), requires federal agencies to take into account the effects of certain of their Undertakings on Historic Properties (see Section II, below), included in or eligible for inclusion in the National Register of Historic Places (''National Register''), and to afford the Advisory Council on Historic Preservation (''Council'') a reasonable opportunity to comment with regard to such Undertakings; and

Whereas, under the authority granted by Congress in the Communications Act of 1934, as amended (47 U.S.C. 151 *et seq.*), the Federal Communications Commission (''Commission'') establishes rules and procedures for the licensing of non-federal government communications services, and the registration of certain antenna structures in the United States and its Possessions and Territories; and

Whereas, Congress and the Commission have deregulated or streamlined the application process regarding the construction of individual Facilities in many of the Commission's licensed services; and

Whereas, under the framework established in the Commission's environmental rules, 47 CFR 1.1301–1.1319, Commission licensees and applicants for authorizations and antenna structure registrations are required to prepare, and the Commission is required to independently review and approve, a pre-construction Environmental Assessment (''EA'') in cases where a proposed tower or antenna may significantly affect the environment, including situations where a proposed tower or antenna may affect Historic Properties that are either listed in or eligible for listing in the National Register, including properties of religious and cultural importance to an Indian tribe or Native Hawaiian organization (''NHO'') that meet the National Register criteria; and

of substantial implementation of this Agreement in accordance with its terms , this Programmatic Agreement shall be terminated thirty days after notice of termination is served on all parties and published in the FEDERAL REGISTER.

C. In the event that the Programmatic Agreement is terminated, the FCC shall advise its licensees and tower construction companies of the termination and of the need to comply with any applicable Section 106 requirements on a case-by-case basis for collocation activities.

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September 2004

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Whereas, under the framework established in the Commission's environmental rules, 47 CFR 1.1301–1.1319, Commission licensees and applicants for authorizations and antenna structure registrations are required to prepare, and the Commission is required to independently review and approve, a pre-construction Environmental Assessment (''EA'') in cases where a proposed tower or antenna may significantly affect the environment, including situations where a proposed tower or antenna may affect Historic Properties that are either listed in or eligible for listing in the National Register, including properties of religious and cultural importance to an Indian tribe or Native Hawaiian organization (''NHO'') that meet the National Register criteria; and

Whereas, the Council has adopted rules implementing Section 106 of the NHPA (codified at 36 CFR Part 800) and setting forth the process, called the ''Section 106 process,'' for complying with the NHPA; and

Whereas, pursuant to the Commission's rules and the terms of this Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (''Nationwide Agreement''), Applicants (*see* Section II.A.2) have been authorized, consistent with the terms of the memorandum from the Council to the Commission, titled ''Delegation of Authority for the Section 106 Review of Telecommunications Projects,'' dated September 21, 2000, to initiate, coordinate, and assist the Commission with compliance with many aspects of the Section 106 review process for their Facilities; and

Whereas, in August 2000, the Council established a Telecommunications Working Group (the ''Working Group'') to provide a forum for the Commission, the Council, the National Conference of State Historic Preservation Officers (''Conference''), individual State Historic Preservation Officers (''SHPOs''), Tribal Historic Preservation Officers (''THPOs''), other tribal representatives, communications industry representatives, and other interested members of the public to discuss improved Section 106 compliance and to develop methods of streamlining the Section 106 review process; and

Whereas, Section 214 of the NHPA (16 U.S.C. 470v) authorizes the Council to promulgate regulations implementing exclusions from Section 106 review, and Section 800.14(b) of the Council's regulations (36 CFR 800.14(b)) allows for programmatic agreements to streamline and tailor the Section 106 review process to particular federal programs, if they are consistent with the Council's regulations; and

Whereas, the Commission, the Council, and the Conference executed on March 16, 2001, the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (the ''Collocation Agreement''), in order to streamline review for the collocation of antennas on existing towers and other structures and thereby reduce the need for the construction of new towers (Attachment 1 to this Nationwide Agreement); and

Whereas, the Council, the Conference, and the Commission now agree it is desirable to further streamline and tailor the Section 106 review process for Facilities that are not excluded from Section 106 review under the Collocation Agreement while protecting Historic Properties that are either listed in or eligible for listing in the National Register; and

Whereas, the Working Group agrees that a nationwide programmatic agreement is a desirable and effective way to further streamline and tailor the Section 106 review process as it applies to Facilities; and

Whereas, this Nationwide Agreement will, upon its execution by the Council, the Conference, and the Commission, constitute a substitute for the Council's rules with respect to certain Commission Undertakings; and

Whereas, the Commission sought public comment on a draft of this Nationwide Agreement through a Notice of Proposed Rulemaking released on June 9, 2003;

Whereas, the Commission has actively sought and received participation and comment from Indian tribes and NHOs regarding this Nationwide Agreement; and

Whereas, the Commission has consulted with federally recognized Indian tribes regarding this Nationwide Agreement (*see* Report and Order, FCC 04–222, at ¶ 31); and

Whereas, this Nationwide Agreement provides for appropriate public notification and participation in connection with the Section 106 process; and

Whereas, Section 101(d)(6) of the NHPA provides that federal agencies ''shall consult with any Indian tribe or Native Hawaiian organization'' that attaches religious and cultural significance to properties of traditional religious and cultural importance that may be determined to be eligible for inclusion in the National Register and that might be affected by a federal undertaking (16 U.S.C. 470a(d)(6)); and

Whereas, the Commission has adopted a ''Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes'' dated June 23, 2000, pursuant to which the Commission: recognizes the unique legal relationship that exists between the federal government and Indian tribal governments, as reflected in the Constitution of the United States, treaties, federal statutes, Executive orders, and numerous court decisions; affirms the federal trust relationship with Indian tribes, and recognizes that this historic trust relationship requires the federal government to adhere to certain fiduciary standards in its dealings with Indian tribes; commits to working with Indian tribes on a government-to-government basis consistent with the principles of tribal self-governance; commits, in accordance with the federal government's trust responsibility, and to the extent practicable, to consult with tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect tribal governments, their land and resources; strives to develop working relationships with tribal governments, and will endeavor to identify innovative mechanisms to facilitate tribal consultations in the Commission's regulatory processes; and endeavors to streamline its administrative process and procedures to remove undue burdens that its decisions and actions place on Indian tribes; and

Whereas, the Commission does not delegate under this Programmatic Agreement any portion of its responsibilities to Indian tribes and NHOs, including its obligation to consult under Section 101(d)(6) of the NHPA; and

Whereas, the terms of this Nationwide Agreement are consistent with and do not attempt to abrogate the rights of Indian tribes or NHOs to consult directly with the Commission regarding the construction of Facilities; and

Whereas, the execution and implementation of this Nationwide Agreement will not preclude Indian tribes or NHOs, SHPO/THPOs, local governments, or members of the public from filing complaints with the Commission or the Council regarding effects on Historic Properties from any Facility or any activity covered under the terms of the Nationwide Agreement; and

Whereas, Indian tribes and NHOs may request Council involvement in Section 106 cases that present issues of concern to Indian tribes or NHOs (*see* 36 CFR Part 800, Appendix A, Section (c)(4)); and

Whereas, the Commission, after consulting with federally recognized Indian tribes, has developed an electronic Tower Construction Notification System through which Indian tribes and NHOs may voluntarily identify the geographic areas in which Historic Properties to which they attach religious and cultural significance may be located, Applicants may ascertain which participating Indian tribes and NHOs have identified such an interest in the geographic area in which they propose to construct Facilities, and Applicants may voluntarily provide electronic notification of proposed Facilities construction for the Commission to forward to participating Indian tribes, NHOs, and SHPOs/THPOs; and

Whereas, the Council, the Conference and the Commission recognize that Applicants' use of qualified professionals experienced with the NHPA and Section 106 can streamline the review process and minimize potential delays; and

Whereas, the Commission has created a position and hired a cultural resources professional to assist with the Section 106 process; and

Whereas, upon execution of this Nationwide Agreement, the Council may still provide advisory comments to the Commission regarding the coordination of Section 106 reviews; notify the Commission of concerns raised by consulting parties and the public regarding an Undertaking; and participate in the resolution of adverse effects for complex, controversial, or other non-routine projects;

Now Therefore, in consideration of the above provisions and of the covenants and agreements contained herein, the Council, the Conference and the Commission (the ''Parties'') agree as follows:

I. APPLICABILITY AND SCOPE OF THIS NATIONWIDE AGREEMENT

A. This Nationwide Agreement (1) Excludes from Section 106 review certain Undertakings involving the construction and modification of Facilities, and (2) streamlines and tailors the Section 106 review process for other Undertakings involving the construction and modification of Facilities. An illustrative list of Commission activities in relation to which Undertakings covered by this Agreement may occur is provided as Attachment 2 to this Agreement.

B. This Nationwide Agreement applies only to federal Undertakings as determined by the Commission (''Undertakings''). The Commission has sole authority to determine what activities undertaken by the Commission or its Applicants constitute Undertakings within the meaning of the NHPA. Nothing in this Agreement shall preclude the Commission from revisiting or affect the existing ability of any person to challenge any prior determination of what does or does not constitute an Undertaking. Maintenance and servicing of Towers, Antennas, and associated equipment are not deemed to be Undertakings subject to Section 106 review.

C. This Agreement does not apply to Antenna Collocations that are exempt from Section 106 review under the Collocation Agreement (*see* Attachment 1). Pursuant to the terms of the Collocation Agreement, such Collocations shall not be subject to the Section 106 review process and shall not be submitted to the SHPO/THPO for review. This Agreement does apply to collocations that are not exempt from Section 106 review under the Collocation Agreement.

D. This Agreement does not apply on ''tribal lands'' as defined under Section 800.16(x) of the Council's regulations, 36 CFR § 800.16(x) (''Tribal lands means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.''). This Nationwide Agreement, however, will apply on tribal lands should a tribe, pursuant to appropriate tribal procedures and upon reasonable notice to the Council, Commission, and appropriate SHPO/THPO, elect to adopt the provisions of this Nationwide Agreement. Where a tribe that has assumed SHPO functions pursuant to Section 101(d)(2) of the NHPA (16 U.S.C. 470(d)(2)) has agreed to application of this Nationwide Agreement on tribal lands, the term SHPO/THPO denotes the Tribal Historic Preservation Officer with respect to review of proposed Undertakings on those tribal lands. Where a tribe that has not assumed SHPO functions has agreed to application of this Nationwide Agreement on tribal lands, the tribe may notify the Commission of the tribe's intention to perform the duties of a SHPO/THPO, as defined in this Nationwide Agreement, for proposed Undertakings on its

tribal lands, and in such instances the term SHPO/THPO denotes both the State Historic Preservation Officer and the tribe's authorized representative. In all other instances, the term SHPO/THPO denotes the State Historic Preservation Officer.

E. This Nationwide Agreement governs only review of Undertakings under Section 106 of the NHPA. Applicants completing the Section 106 review process under the terms of this Nationwide Agreement may not initiate construction without completing any environmental review that is otherwise required for effects other than historic preservation under the Commission's rules (*See* 47 CFR 1.1301–1.1319). Completion of the Section 106 review process under this Nationwide Agreement satisfies an Applicant's obligations under the Commission's rules with respect to Historic Properties, except for Undertakings that have been determined to have an adverse effect on Historic Properties and that therefore require preparation and filing of an Environmental Assessment (*See* 47 CFR 1.1307(a)(4)).

F. This Nationwide Agreement does not govern any Section 106 responsibilities that agencies other than the Commission may have with respect to those agencies' federal Undertakings.

II. Definitions

A. The following terms are used in this Nationwide Agreement as defined below:

1. Antenna. An apparatus designed for the purpose of emitting radio frequency (''RF'') radiation, to be operated or operating from a fixed location pursuant to Commission authorization, for the transmission of writing, signs, signals, data, images, pictures, and sounds of all kinds, including the transmitting device and any on-site equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with that antenna and added to a Tower, structure, or building as part of the original installation of the antenna. For most services, an Antenna will be mounted on or in, and is distinct from, a supporting structure such as a Tower, structure or building. However, in the case of AM broadcast stations, the entire Tower or group of Towers constitutes the Antenna for that station. For purposes of this Nationwide Agreement, the term Antenna does not include unintentional radiators, mobile stations, or devices authorized under Part 15 of the Commission's rules.

2. Applicant. A Commission licensee, permittee, or registration holder, or an applicant or prospective applicant for a wireless or broadcast license, authorization or antenna structure registration, and the duly authorized agents, employees, and contractors of any such person or entity.

3. Area of Potential Effects (''APE''). The geographic area or areas within which an Undertaking may directly or indirectly cause alterations in the character or use of Historic Properties, if any such properties exist.

4. Collocation. The mounting or installation of an Antenna on an existing Tower, building, or structure for the purpose of transmitting radio frequency signals for telecommunications or broadcast purposes.

5. Effect. An alteration to the characteristics of a Historic Property qualifying it for inclusion in or eligibility for the National Register.

6. Experimental Authorization. An authorization issued to conduct experimentation utilizing radio waves for gathering scientific or technical operation data directed toward the improvement or extension of an established service and not intended for reception and use by the general public. ''Experimental Authorization'' does not include an ''Experimental Broadcast Station'' authorized under Part 74 of the Commission's rules.

7. Facility. A Tower or an Antenna. The term Facility may also refer to a Tower and its associated Antenna(s).

8. Field Survey. A research strategy that utilizes one or more visits to the area where construction is proposed as a means of identifying Historic Properties.

9. Historic Property. Any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or NHO that meet the National Register criteria.

10. National Register. The National Register of Historic Places, maintained by the Secretary of the Interior's office of the Keeper of the National Register.

11. SHPO/THPO Inventory. A set of records of previously gathered information, authorized by state or tribal law, on the absence, presence and significance of historic and archaeological resources within the state or tribal land.

12. Special Temporary Authorization. Authorization granted to a permittee or licensee to allow the operation of a station for a limited period at a specified variance from the terms of the station's permanent authorization or requirements of the Commission's rules applicable to the particular class or type of station.

13. Submission Packet. The document to be submitted initially to the SHPO/THPO to facilitate review of the Applicant's findings and any determinations with regard to the potential impact of the proposed Undertaking on Historic Properties in the APE. There are two Submission Packets: (a) The New Tower Submission Packet (FCC Form

620) (*See* Attachment 3) and (b) The Collocation Submission Packet (FCC Form 621) (*See* Attachment 4). Any documents required to be submitted along with a Form are part of the Submission Packet.

14. Tower. Any structure built for the sole or primary purpose of supporting Commission-licensed or authorized Antennas, including the on-site fencing, equipment, switches, wiring, cabling, power sources, shelters, or cabinets associated with that Tower but not installed as part of an Antenna as defined herein.

B. All other terms not defined above or elsewhere in this Nationwide Agreement shall have the same meaning as set forth in the Council's rules section on Definitions (36 CFR 800.16) or the Commission's rules (47 CFR Chapter I).

C. For the calculation of time periods under this Agreement, ''days'' mean ''calendar days.'' Any time period specified in the Agreement that ends on a weekend or a Federal or State holiday is extended until the close of the following business day.

D. Written communications include communications by e-mail or facsimile.

III. Undertakings Excluded From Section 106 Review

Undertakings that fall within the provisions listed in the following sections III.A. through III.F. are excluded from Section 106 review by the SHPO/THPO, the Commission, and the Council, and, accordingly, shall not be submitted to the SHPO/THPO for review. The determination that an exclusion applies to an Undertaking should be made by an authorized individual within the Applicant's organization, and Applicants should retain documentation of their determination that an exclusion applies. Concerns regarding the application of these exclusions from Section 106 review may be presented to and considered by the Commission pursuant to Section XI.

A. Enhancement of a tower and any associated excavation that does not involve a collocation and does not substantially increase the size of the existing tower, as defined in the Collocation Agreement. For towers constructed after March 16, 2001, this exclusion applies only if the tower has completed the Section 106 review process and any associated environmental reviews required by the Commission.

B. Construction of a replacement for an existing communications tower and any associated excavation that does not substantially increase the size of the existing tower under elements 1–3 of the definition as defined in the Collocation Agreement (*see* Attachment 1 to this Agreement, Stipulation 1.c.1–3) and that does not expand the boundaries of the leased or owned property surrounding the tower by more than 30 feet in any direction or involve excavation outside these expanded boundaries or outside any existing access or utility easement related to the site. For towers constructed after March 16, 2001, this exclusion applies only if the tower has completed the Section 106 review process and any associated environmental reviews required by the Commission's rules.

C. Construction of any temporary communications Tower, Antenna structure, or related Facility that involves no excavation or where all areas to be excavated will be located in areas described in Section VI.D.2.c.i below, including but not limited to the following:

1. A Tower or Antenna authorized by the Commission for a temporary period, such as any Facility authorized by a Commission grant of Special Temporary Authority (''STA'') or emergency authorization;

2. A cell on wheels (COW) transmission Facility;

3. A broadcast auxiliary services truck, TV pickup station, remote pickup broadcast station (e.g., electronic newsgathering vehicle) authorized under Part 74 or temporary fixed or transportable earth station in the fixed satellite service (e.g., satellite newsgathering vehicle) authorized under Part 25;

4. A temporary ballast mount Tower;

5. Any Facility authorized by a Commission grant of an experimental authorization.

For purposes of this Section III.C, the term ''temporary'' means ''for no more than twenty-four months duration except in the case of those Facilities associated with national security.''

D. Construction of a Facility less than 200 feet in overall height above ground level in an existing industrial park,[1] commercial strip mall,[2] or shopping center[3] that occupies a total land area of 100,000 square feet or more, provided that the industrial park, strip mall, or shopping center is not located within the boundaries of or within 500 feet of

[1] A tract of land that is planned, developed, and operated as an integrated facility for a number of individual industrial uses, with consideration to transportation facilities, circulation, parking, utility needs, aesthetics and compatibility.

[2] A structure or grouping of structures, housing retail business, set back far enough from the street to permit parking spaces to be placed between the building entrances and the public right of way.

[3] A group of commercial establishments planned, constructed, and managed as a total entity, with customer and employee parking provided on-site, provision for goods delivery separated from customer access, aesthetic considerations and protection from the elements, and landscaping and signage in accordance with an approved plan.

a Historic Property, as identified by the Applicant after a preliminary search of relevant records. Proposed Facilities within this exclusion must complete the process of participation of Indian tribes and NHOs pursuant to Section IV of this Agreement. If as a result of this process the Applicant or the Commission identifies a Historic Property that may be affected, the Applicant must complete the Section 106 review process pursuant to this Agreement notwithstanding the exclusion.

E. Construction of a Facility in or within 50 feet of the outer boundary of a right-of-way designated by a Federal, State, local, or Tribal government for the location of communications Towers or above-ground utility transmission or distribution lines and associated structures and equipment and in active use for such purposes, provided:

1. The proposed Facility would not constitute a substantial increase in size, under elements 1–3 of the definition in the Collocation Agreement, over existing structures located in the right-of-way within the vicinity of the proposed Facility, and;

2. The proposed Facility would not be located within the boundaries of a Historic Property, as identified by the Applicant after a preliminary search of relevant records.

Proposed Facilities within this exclusion must complete the process of participation of Indian tribes and NHOs pursuant to Section IV of this Agreement. If as a result of this process the Applicant or the Commission identifies a Historic Property that may be affected, the Applicant must complete the Section 106 review process pursuant to this Agreement notwithstanding the exclusion.

F. Construction of a Facility in any area previously designated by the SHPO/THPO at its discretion, following consultation with appropriate Indian tribes and NHOs, as having limited potential to affect Historic Properties. Such designation shall be documented by the SHPO/THPO and made available for public review.

IV. Participation of Indian Tribes and Native Hawaiian Organizations in Undertakings Off Tribal Lands

A. The Commission recognizes its responsibility to carry out consultation with any Indian tribe or NHO that attaches religious and cultural significance to a Historic Property if the property may be affected by a Commission undertaking. This responsibility is founded in Sections 101(d)(6)(a-b) and 106 of the NHPA (16 U.S.C. 470a(d)(6)(a-b) and 470f), the regulations of the Council (36 CFR Part 800), the Commission's environmental regulations (47 CFR 1.1301–1.1319), and the unique legal relationship that exists between the federal government and Indian Tribal governments, as reflected in the Constitution of the United States, treaties, federal statutes, Executive orders, and numerous court decisions. This historic trust relationship requires the federal government to adhere to certain fiduciary standards in its dealings with Indian Tribes. (Commission Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes).

B. As an initial step to enable the Commission to fulfill its duty of consultation, Applicants shall use reasonable and good faith efforts to identify any Indian tribe or NHO that may attach religious and cultural significance to Historic Properties that may be affected by an Undertaking. Applicants should be aware that frequently, Historic Properties of religious and cultural significance to Indian tribes and NHOs are located on ancestral, aboriginal, or ceded lands of such tribes and organizations and Applicants should take this into account when complying with their responsibilities. Where an Indian tribe or NHO has voluntarily provided information to the Commission's Tower Construction Notification System regarding the geographic areas in which Historic Properties of religious and cultural significance to that Indian tribe or NHO may be located, reference to the Tower Construction Notification System shall constitute a reasonable and good faith effort at identification with respect to that Indian tribe or NHO. In addition, such reasonable and good faith efforts may include, but are not limited to, seeking relevant information from the relevant SHPO/THPO, Indian tribes, state agencies, the U.S. Bureau of Indian Affairs (''BIA''), or, where applicable, any federal agency with land holdings within the state (e.g., the U.S. Bureau of Land Management). Although these agencies can provide useful information in identifying potentially affected Indian tribes, contacting BIA, the SHPO or other federal and state agencies is not a substitute for seeking information directly from Indian tribes that may attach religious and cultural significance to a potentially affected Historic Property, as described below.

C. After the Applicant has identified Indian tribes and NHOs that may attach religious and cultural significance to potentially affected Historic Properties, the Commission has the responsibility, and the Commission imposes on the Applicant the obligation, to ensure that contact is made at an early stage in the planning process with such Indian tribes and NHOs in order to begin the process of ascertaining whether such Historic Properties may be affected. This initial contact shall be made by the Commission or the Applicant, in accordance with the wishes of the Indian tribe or NHO. This contact shall constitute only an initial effort to contact the Indian tribe or NHO, and does not in itself fully satisfy the Applicant's obligations or substitute for government-to-government consultation unless the Indian tribe

or NHO affirmatively disclaims further interest or the Indian tribe or NHO has otherwise agreed that such contact is sufficient. Depending on the preference of the Indian tribe or NHO, the means of initial contact may include, without limitation:

1. Electronic notification through the Commission's Tower Construction Notification System;

2. Written communication from the Commission at the request of the Applicant;

3. Written, e-mail, or telephonic notification directly from the Applicant to the Indian tribe or NHO;

4. Any other means that the Indian Tribe or NHO has informed the Commission are acceptable, including through the adoption of best practices pursuant to Section IV.J, below; or

5. Any other means to which an Indian tribe or NHO and an Applicant have agreed pursuant to Section IV.K, below.

D. The Commission will use its best efforts to ascertain the preferences of each Indian tribe and NHO for initial contact, and to make these preferences available to Applicants in a readily accessible format. In addition, the Commission will use its best efforts to ascertain, and to make available to Applicants, any locations or types of construction projects, within the broad geographic areas in which Historic Properties of religious and cultural significance to an Indian tribe or NHO may be located, for which the Indian tribe or NHO does not expect notification. To the extent they are comfortable doing so, the Commission encourages Indian tribes and NHOs to accept the Tower Construction Notification System as an efficient and thorough means of making initial contact.

E. In the absence of any contrary indication of an Indian tribe's or NHO's preference, where an Applicant does not have a pre-existing relationship with an Indian tribe or NHO, initial contact with the Indian tribe or NHO shall be made through the Commission. Unless the Indian tribe or NHO has indicated otherwise, the Commission may make this initial contact through the Tower Construction Notification System. An Applicant that has a pre-existing relationship with an Indian tribe or NHO shall make initial contact in the manner that is customary to that relationship or in such other manner as may be accepted by the Indian tribe or NHO. An Applicant shall copy the Commission on any initial written or electronic direct contact with an Indian tribe or NHO, unless the Indian tribe or NHO has agreed through a best practices agreement or otherwise that such copying is not necessary.

F. Applicants' direct contacts with Indian tribes and NHOs, where accepted by the Indian tribe or NHO, shall be made in a sensitive manner that is consistent with the reasonable wishes of the Indian tribe or NHO, where such wishes are known or can be reasonably ascertained. In general, unless an Indian tribe or NHO has provided guidance to the contrary, Applicants shall follow the following guidelines:

1. All communications with Indian tribes shall be respectful of tribal sovereignty;

2. Communications shall be directed to the appropriate representative designated or identified by the tribal government or other governing body;

3. Applicants shall provide all information reasonably necessary for the Indian tribe or NHO to evaluate whether Historic Properties of religious and cultural significance may be affected. The parties recognize that it may be neither feasible nor desirable to provide complete information about the project at the time of initial contact, particularly when initial contact is made early in the process. Unless the Indian tribe or NHO affirmatively disclaims interest, however, it shall be provided with complete information within the earliest reasonable time frame;

4. The Applicant must ensure that Indian tribes and NHOs have a reasonable opportunity to respond to all communications. Ordinarily, 30 days from the time the relevant tribal or NHO representative may reasonably be expected to have received an inquiry shall be considered a reasonable time. Should a tribe or NHO request additional time to respond, the Applicant shall afford additional time as reasonable under the circumstances. However, where initial contact is made automatically through the Tower Construction Notification System, and where an Indian tribe or NHO has stated that it is not interested in reviewing proposed construction of certain types or in certain locations, the Applicant need not await a response to contact regarding proposed construction meeting that description;

5. Applicants should not assume that failure to respond to a single communication establishes that an Indian tribe or NHO is not interested in participating, but should make a reasonable effort to follow up.

G. The purposes of communications between the Applicant and Indian tribes or NHOs are: (1) To ascertain whether Historic Properties of religious and cultural significance to the Indian tribe or NHO may be affected by the undertaking and consultation is therefore necessary, and (2) where possible, with the concurrence of the Indian tribe or NHO, to reach an agreement on the presence or absence of effects that may obviate the need for consultation. Accordingly, the Applicant shall promptly refer to the Commission any request from a federally recognized Indian tribe for government-to-government consultation. The Commission will then carry out government-to-government consultation with the Indian tribe. Applicants shall also seek guidance from the Commission in the event of any substantive or procedural disagreement with an Indian

tribe or NHO, or if the Indian tribe or NHO does not respond to the Applicant's inquiries. Applicants are strongly advised to seek guidance from the Commission in cases of doubt.

H. If an Indian tribe or NHO indicates that a Historic Property of religious and cultural significance to it may be affected, the Applicant shall invite the commenting tribe or organization to become a consulting party. If the Indian tribe or NHO agrees to become a consulting party, it shall be afforded that status and shall be provided with all of the information, copies of submissions, and other prerogatives of a consulting party as provided for in 36 CFR 800.2.

I. Information regarding Historic Properties to which Indian tribes or NHOs attach religious and cultural significance may be highly confidential, private, and sensitive. If an Indian tribe or NHO requests confidentiality from the Applicant, the Applicant shall honor this request and shall, in turn, request confidential treatment of such materials or information in accordance with the Commission's rules and Section 304 of the NHPA (16 U.S.C. 470w–3(a)) in the event they are submitted to the Commission. The Commission shall provide such confidential treatment consistent with its rules and applicable federal laws. Although the Commission will strive to protect the privacy interests of all parties, the Commission cannot guarantee its own ability or the ability of Applicants to protect confidential, private, and sensitive information from disclosure under all circumstances.

J. In order to promote efficiency, minimize misunderstandings, and ensure that communications among the parties are made in accordance with each Indian tribe or NHO's reasonable preferences, the Commission will use its best efforts to arrive at agreements regarding best practices with Indian tribes and NHOs and their representatives. Such best practices may include means of making initial contacts with Indian tribes and NHOs as well as guidelines for subsequent discussions between Applicants and Indian tribes or NHOs in fulfillment of the requirements of the Section 106 process. To the extent possible, the Commission will strive to achieve consistency among best practice agreements with Indian tribes and NHOs. Where best practices exist, the Commission encourages Applicants to follow those best practices.

K. Nothing in this Section shall be construed to prohibit or limit Applicants and Indian tribes or NHOs from entering into or continuing pre-existing arrangements or agreements governing their contacts, provided such arrangements or agreements are otherwise consistent with federal law and no modification is made in the roles of other parties to the process under this Nationwide Agreement without their consent. Documentation of such alternative arrangements or agreements should be filed with the Commission.

V. Public Participation and Consulting Parties

A. On or before the date an Applicant submits the appropriate Submission Packet to the SHPO/THPO, as prescribed by Section VII, below, the Applicant shall provide the local government that has primary land use jurisdiction over the site of the planned Undertaking with written notification of the planned Undertaking.

B. On or before the date an Applicant submits the appropriate Submission Packet to the SHPO/THPO, as prescribed by Section VII, below, the Applicant shall provide written notice to the public of the planned Undertaking. Such notice may be accomplished (1) through the public notification provisions of the relevant local zoning or local historic preservation process for the proposed Facility; or (2) by publication in a local newspaper of general circulation. In the alternative, an Applicant may use other appropriate means of providing public notice, including seeking the assistance of the local government.

C. The written notice to the local government and to the public shall include: (1) The location of the proposed Facility including its street address; (2) a description of the proposed Facility including its height and type of structure; (3) instruction on how to submit comments regarding potential effects on Historic Properties; and (4) the name, address, and telephone number of a contact person.

D. A SHPO/THPO may make available lists of other groups, including Indian tribes, NHOs and organizations of Indian tribes or NHOs, which should be provided notice for Undertakings to be located in particular areas.

E. If the Applicant receives a comment regarding potentially affected Historic Properties, the Applicant shall consider the comment and either include it in the initial submission to the SHPO/THPO, or, if the initial submission has already been made, immediately forward the comment to the SHPO/THPO for review. An Applicant need not submit to the SHPO/THPO any comment that does not substantially relate to potentially affected Historic Properties.

F. The relevant SHPO/THPO, Indian tribes and NHOs that attach religious and cultural significance to Historic Properties that may be affected, and the local government are entitled to be consulting parties in the Section 106 review of an Undertaking. The Council may enter the Section 106 process for a given Undertaking, on Commission invitation or on its own decision, in accordance with 36 CFR Part 800, Appendix A. An Applicant shall consider all written requests of other individuals and organizations to participate as consulting parties and determine which

should be consulting parties. An Applicant is encouraged to grant such status to individuals or organizations with a demonstrated legal or economic interest in the Undertaking, or demonstrated expertise or standing as a representative of local or public interest in historic or cultural resources preservation. Any such individual or organization denied consulting party status may petition the Commission for review of such denial. Applicants may seek assistance from the Commission in identifying and involving consulting parties. All entities granted consulting party status shall be identified to the SHPO/THPO as part of the Submission Packet.

G. Consulting parties are entitled to: (1) Receive notices, copies of submission packets, correspondence and other documents provided to the SHPO/THPO in a Section 106 review; and (2) be provided an opportunity to have their views expressed and taken into account by the Applicant, the SHPO/THPO and, where appropriate, by the Commission.

VI. IDENTIFICATION, EVALUATION, AND ASSESSMENT OF EFFECTS

A. In preparing the Submission Packet for the SHPO/THPO and consulting parties pursuant to Section VII of this Nationwide Agreement and Attachments 3 and 4, the Applicant shall: (1) Define the area of potential effects (APE); (2) identify Historic Properties within the APE; (3) evaluate the historic significance of identified properties as appropriate; and (4) assess the effects of the Undertaking on Historic Properties. The standards and procedures described below shall be applied by the Applicant in preparing the Submission Packet, by the SHPO/THPO in reviewing the Submission Packet, and where appropriate, by the Commission in making findings.

B. Exclusion of Specific Geographic Areas from Review.

The SHPO/THPO, consistent with relevant State or tribal procedures, may specify geographic areas in which no review is required for direct effects on archeological resources or no review is required for visual effects.

C. Area of Potential Effects.

1. The term ''Area of Potential Effects'' is defined in Section II.A.3 of this Nationwide Agreement. For purposes of this Nationwide Agreement, the APE for direct effects and the APE for visual effects are further defined and are to be established as described below.

2. The APE for direct effects is limited to the area of potential ground disturbance and any property, or any portion thereof, that will be physically altered or destroyed by the Undertaking.

3. The APE for visual effects is the geographic area in which the Undertaking has the potential to introduce visual elements that diminish or alter the setting, including the landscape, where the setting is a character-defining feature of a Historic Property that makes it eligible for listing on the National Register.

4. Unless otherwise established through consultation with the SHPO/THPO, the presumed APE for visual effects for construction of new Facilities is the area from which the Tower will be visible:

a. Within a half mile from the tower site if the proposed Tower is 200 feet or less in overall height;

b. Within ¾ of a mile from the tower site if the proposed Tower is more than 200 but no more than 400 feet in overall height; or

c. Wthin 1 ½ miles from the proposed tower site if the proposed Tower is more than 400 feet in overall height.

5. In the event the Applicant determines, or the SHPO/THPO recommends, that an alternative APE for visual effects is necessary, the Applicant and the SHPO/THPO may mutually agree to an alternative APE.

6. If the Applicant and the SHPO/THPO, after using good faith efforts, cannot reach an agreement on the use of an alternative APE, either the Applicant or the SHPO/THPO may submit the issue to the Commission for resolution. The Commission shall make its determination concerning an alternative APE within a reasonable time.

D. Identification and Evaluation of Historic Properties.

1. Identification and Evaluation of Historic Properties Within the APE for Visual Effects.

a. Except to identify Historic Properties of religious and cultural significance to Indian tribes and NHOs, Applicants shall identify Historic Properties within the APE for visual effects by reviewing the following records. Applicants are required to review such records only to the extent they are available at the offices of the SHPO/THPO or can be found in publicly available sources identified by the SHPO/THPO. With respect to these properties, Applicants are not required to undertake a Field Survey or other measures other than reviewing these records in order to identify Historic Properties:

i. Properties listed in the National Register;

ii. Properties formally determined eligible for listing by the Keeper of the National Register;

iii. Properties that the SHPO/THPO certifies are in the process of being nominated to the National Register;

iv. Properties previously determined eligible as part of a consensus determination of eligibility between the SHPO/THPO and a Federal Agency or local government representing the Department of Housing and Urban Development (HUD); and

v. Properties listed in the SHPO/THPO Inventory that the SHPO/THPO has previously evaluated and found to meet the National

Register criteria, and that are identified accordingly in the SHPO/THPO Inventory.

b. At an early stage in the planning process and in accordance with Section IV of this Nationwide Agreement, the Commission or the Applicant, as appropriate, shall gather information from Indian tribes or NHOs identified pursuant to Section IV.B to assist in identifying Historic Properties of religious and cultural significance to them within the APE for visual effects. Such information gathering may include a Field Survey where appropriate.

c. Based on the sources listed above and public comment received pursuant to Section V of this Nationwide Agreement, the Applicant shall include in its Submission Packet a list of properties it has identified as apparent Historic Properties within the APE for visual effects.

i. During the review period described in Section VII.A, the SHPO/THPO may identify additional properties included in the SHPO/THPO Inventory and located within the APE that the SHPO/THPO considers eligible for listing on the National Register, and notify the Applicant pursuant to Section VII.A.4.

ii. The SHPO/THPO may also advise the Applicant that previously identified properties on the list no longer qualify for inclusion in the National Register.

d. Applicants are encouraged at their discretion to use the services of professionals who meet the Secretary of the Interior's Professional Qualification Standards when identifying Historic Properties within the APE for visual effects.

e. Applicants are not required to evaluate the historic significance of properties identified pursuant to Section VI.D.1.a., but may rely on the previous evaluation of these properties. Applicants may, at their discretion, evaluate whether such properties are no longer eligible for inclusion in the National Register and recommend to the SHPO/THPO their removal from consideration. Any such evaluation shall be performed by a professional who meets the Secretary of the Interior's Professional Qualification Standards.

2. Identification and Evaluation of Historic Properties Within the APE for Direct Effects.

a. In addition to the properties identified pursuant to Section VI.D.1, Applicants shall make a reasonable good faith effort to identify other above ground and archeological Historic Properties, including buildings, structures, and historic districts, that lie within the APE for direct effects. Such reasonable and good faith efforts may include a Field Survey where appropriate.

b. Identification and evaluation of Historic Properties within the APE for direct effects, including any finding that an archeological Field Survey is not required, shall be undertaken by a professional who meets the Secretary of the Interior's Professional Qualification Standards. Identification and evaluation relating to archeological resources shall be performed by a professional who meets the Secretary of the Interior's Professional Qualification Standards in archeology.

c. Except as provided below, the Applicant need not undertake a Field Survey for archeological resources where:

i. the depth of previous disturbance exceeds the proposed construction depth (excluding footings and other anchoring mechanisms) by at least 2 feet as documented in the Applicant's siting analysis; or

ii. geomorphological evidence indicates that cultural resource-bearing soils do not occur within the project area or may occur but at depths that exceed 2 feet below the proposed construction depth.

d. At an early stage in the planning process and in accordance with Section IV of this Nationwide Agreement, the Commission or the Applicant, as appropriate, shall gather information from Indian tribes or NHOs identified pursuant to Section IV.B to assist in identifying archeological Historic Properties of religious and cultural significance to them within the APE for direct effects. If an Indian tribe or NHO provides evidence that supports a high probability of the presence of intact archeological Historic Properties within the APE for direct effects, the Applicant shall conduct an archeological Field Survey notwithstanding Section VI.D.2.c.

e. Where the Applicant pursuant to Sections VI.D.2.c and VI.D.2.d finds that no archeological Field Survey is necessary, it shall include in its Submission Packet a report substantiating this finding. During the review period described in Section VII.A, the SHPO/THPO may, based on evidence that supports a high probability of the presence of intact archeological Historic Properties within the APE for direct effects, notify the Applicant that the Submission Packet is inadequate without an archeological Field Survey pursuant to Section VII.A.4.

f. The Applicant shall conduct an archeological Field Survey within the APE for direct effects if neither of the conditions in Section VI.D.2.c applies, or if required pursuant to Section VI.D.2.d or e. The Field Survey shall be conducted in consul-tation with the SHPO/THPO and consulting Indian tribes or NHOs.

g. The Applicant, in consultation with the SHPO/THPO and appropriate Indian tribes or NHOs, shall apply the National Register criteria (36 CFR Part 63) to properties identified within the APE for direct effects that have not previously been evaluated for National Register eligibility, with the exception of those identified pursuant to Section VI.D.1.a.

3. Dispute Resolution. Where there is a disagreement regarding the identification or eligibility of a property, and after attempting in good faith to resolve the issue the Applicant and the SHPO/THPO continue to disagree, the Applicant or the SHPO/THPO may submit the issue to the Commission. The Commission shall handle such submissions in accordance with 36 CFR 800.4(c)(2).

E. Assessment of Effects

1. Applicants shall assess effects of the Undertaking on Historic Properties using the Criteria of Adverse Effect (36 CFR 800.5(a)(1)).

2. In determining whether Historic Properties in the APE may be adversely affected by the Undertaking, the Applicant should consider factors such as the topography, vegetation, known presence of Historic Properties, and existing land use.

3. An Undertaking will have a visual adverse effect on a Historic Property if the visual effect from the Facility will noticeably diminish the integrity of one or more of the characteristics qualifying the property for inclusion in or eligibility for the National Register. Construction of a Facility will not cause a visual adverse effect except where visual setting or visual elements are character-defining features of eligibility of a Historic Property located within the APE.

4. For collocations not excluded from review by the Collocation Agreement or this Agreement, the assessment of effects will consider only effects from the newly added or modified Facilities and not effects from the existing Tower or Antenna.

5. Assessment pursuant to this Agreement shall be performed by professionals who meet the Secretary of the Interior's Professional Qualification Standards.

VII. Procedures

A. Use of the Submission Packet

1. For each Undertaking within the scope of this Nationwide Agreement, the Applicant shall initially determine whether there are no Historic Properties affected, no adverse effect on Historic Properties, or an adverse effect on Historic Properties. The Applicant shall prepare a Submission Packet and submit it to the SHPO/THPO and to all consulting parties, including any Indian tribe or NHO that is participating as a consulting party.

2. The SHPO/THPO shall have 30 days from receipt of the requisite documentation to review the Submission Packet.

3. If the SHPO/THPO receives a comment or objection, in accordance with Section V.E, more than 25 but less than 31 days following its receipt of the initial submission, the SHPO/THPO shall have five calendar days to consider such comment or objection before the Section 106 process is complete or the matter may be submitted to the Commission.

4. If the SHPO/THPO determines the Applicant's Submission Packet is inadequate, or if the SHPO/THPO identifies additional Historic Properties within the APE, the SHPO/THPO will immediately notify the Applicant and describe any deficiencies. The SHPO/THPO may close its file without prejudice if the Applicant does not resubmit an amended Submission Packet within 60 days following the Applicant's receipt of the returned Submission Packet. Resubmission of the Submission Packet to the SHPO/THPO commences a new 30 day period for review.

B. Determinations of No Historic Properties Affected

1. If the SHPO/THPO concurs in writing with the Applicant's determination of no Historic Properties affected, it is deemed that no Historic Properties exist within the APE or the Undertaking will have no effect on any Historic Properties located within the APE. The Section 106 process is then complete, and the Applicant may proceed with the project, unless further processing for reasons other than Section 106 is required.

2. If the SHPO/THPO does not provide written notice to the Applicant that it agrees or disagrees with the Applicant's determination of no Historic Properties affected within 30 days following receipt of a complete Submission Packet, it is deemed that no Historic Properties exist within the APE or the Undertaking will have no effect on Historic Properties. The Section 106 process is then complete and the Applicant may proceed with the project, unless further processing for reasons other than Section 106 is required.

3. If the SHPO/THPO provides written notice within 30 days following receipt of the Submission Packet that it disagrees with the Applicant's determination of no Historic Properties affected, it should provide a short and concise explanation of exactly how the criteria of eligibility and/or criteria of Adverse Effect would apply. The Applicant and the SHPO/THPO should engage in further discussions and make a reasonable and good faith effort to resolve their disagreement.

4. If the SHPO/THPO and Applicant do not resolve their disagreement, the Applicant may at any time choose to submit the matter, together with all relevant documents, to the Commission, advising the SHPO/THPO accordingly.

C. Determinations of No Adverse Effect

1. If the SHPO/THPO concurs in writing with the Applicant's determination of no adverse effect, the Facility is deemed to have no adverse effect on Historic Properties. The Section 106 process is then complete and the

Applicant may proceed with the project, unless further processing for reasons other than Section 106 is required.

2. If the SHPO/THPO does not provide written notice to the Applicant that it agrees or disagrees with the Applicant's determination of no adverse effect within thirty days following its receipt of a complete Submission Packet, the SHPO/THPO is presumed to have concurred with the Applicant's determination. The Applicant shall, pursuant to procedures to be promulgated by the Commission, forward a copy of its Submission Packet to the Commission, together with all correspondence with the SHPO/THPO and any comments or objections received from the public, and advise the SHPO/THPO accordingly. The Section 106 process shall then be complete unless the Commission notifies the Applicant otherwise within 15 days after the Commission receives the Submission Packet and accompanying material electronically or 25 days after the Commission receives this material by other means.

3. If the SHPO/THPO provides written notice within 30 days following receipt of the Submission Packet that it disagrees with the Applicant's determination of no adverse effect, it should provide a short and concise explanation of the Historic Properties it believes to be affected and exactly how the criteria of Adverse Effect would apply. The Applicant and the SHPO/THPO should engage in further discussions and make a reasonable and good faith effort to resolve their disagreement.

4. If the SHPO/THPO and Applicant do not resolve their dispute, the Applicant may at any time choose to submit the matter, together with all relevant documents, to the Commission, advising the SHPO/THPO accordingly.

5. Whenever the Applicant or the Commission concludes, or a SHPO/THPO advises, that a proposed project will have an adverse effect on a Historic Property, after applying the criteria of Adverse Effect, the Applicant and the SHPO/THPO are encouraged to investigate measures that would avoid the adverse effect and permit a conditional ''No Adverse Effect'' determination.

6. If the Applicant and SHPO/THPO mutually agree upon conditions that will result in no adverse effect, the Applicant shall advise the SHPO/THPO in writing that it will comply with the conditions. The Applicant can then make a determination of no adverse effect subject to its implementation of the conditions. The Undertaking is then deemed conditionally to have no adverse effect on Historic Properties, and the Applicant may proceed with the project subject to compliance with those conditions. Where the Commission has previously been involved in the matter, the Applicant shall notify the Commission of this resolution.

D. Determinations of Adverse Effect

1. If the Applicant determines at any stage in the process that an Undertaking would have an adverse effect on Historic Properties within the APE(s), or if the Commission so finds, the Applicant shall submit to the SHPO/THPO a plan designed to avoid, minimize, or mitigate the adverse effect.

2. The Applicant shall forward a copy of its submission with its mitigation plan and the entire record to the Council and the Commission. Within fifteen days following receipt of the Applicant's submission, the Council shall indicate whether it intends to participate in the negotiation of a Memorandum of Agreement by notifying both the Applicant and the Commission.

3. Where the Undertaking would have an adverse effect on a National Historic Landmark, the Commission shall request the Council to participate in consultation and shall invite participation by the Secretary of the Interior.

4. The Applicant, SHPO/THPO, and consulting parties shall negotiate a Memorandum of Agreement that shall be sent to the Commission for review and execution.

5. If the parties are unable to agree upon mitigation measures, they shall submit the matter to the Commission, which shall coordinate additional actions in accordance with the Council's rules, including 36 CFR 800.6(b)(1)(v) and 800.7.

E. Retention of Information

The SHPO/THPO shall, subject to applicable state or tribal laws and regulations, and in accordance with its rules and procedures governing historic property records, retain the information in the Submission Packet pertaining to the location and National Register eligibility of Historic Properties and make such information available to Federal agencies and Applicants in other Section 106 reviews, where disclosure is not prevented by the confidentiality standards in 36 CFR 800.11(c).

F. Removal of Obsolete Towers

Applicants that construct new Towers under the terms of this Nationwide Agreement adjacent to or within the boundaries of a Historic Property are encouraged to disassemble such Towers should they become obsolete or remain vacant for a year or more.

VIII. EMERGENCY SITUATIONS

Unless the Commission deems it necessary to issue an emergency authorization in accordance with its rules, or the Undertaking is otherwise excluded from Section 106 review pursuant to the Collocation Agreement or Section III of this Agreement, the procedures in this Agreement shall apply.

IX. INADVERTENT OR POST-REVIEW DISCOVERIES

A. In the event that an Applicant discovers a previously unidentified site within the APE that may be a Historic Property that would be affected by an Undertaking, the Applicant shall promptly notify the Commission, the SHPO/THPO and any potentially affected Indian tribe or NHO, and within a reasonable time shall submit to the Commission, the SHPO/THPO and any potentially affected Indian tribe or NHO, a written report evaluating the property's eligibility for inclusion in the National Register. The Applicant shall seek the input of any potentially affected Indian tribe or NHO in preparing this report. If found during construction, construction must cease until evaluation has been completed.

B. If the Applicant and SHPO/THPO concur that the discovered resource is eligible for listing in the National Register, the Applicant will consult with the SHPO/THPO, and Indian tribes or NHOs as appropriate, to evaluate measures that will avoid, minimize, or mitigate adverse effects. Upon agreement regarding such measures, the Applicant shall implement them and notify the Commission of its action.

C. If the Applicant and SHPO/THPO cannot reach agreement regarding the eligibility of a property, the matter will be referred to the Commission for review in accordance with Section VI.D.3. If the Applicant and the SHPO/THPO cannot reach agreement on measures to avoid, minimize, or mitigate adverse effects, the matter shall be referred to the Commission for appropriate action.

D. If the Applicant discovers any human or burial remains during implementation of an Undertaking, the Applicant shall cease work immediately, notify the SHPO/THPO and Commission, and adhere to applicable State and Federal laws regarding the treatment of human or burial remains.

X. CONSTRUCTION PRIOR TO COMPLIANCE WITH SECTION 106

A. The terms of Section 110(k) of the National Historic Preservation Act (16 U.S.C. 470h–2(k)) (''Section 110(k)'') apply to Undertakings covered by this Agreement. Any SHPO/THPO, potentially affected Indian tribe or NHO, the Council, or a member of the public may submit a complaint to the Commission alleging that a facility has been constructed or partially constructed after the effective date of this Agreement in violation of Section 110(k). Any such complaint must be in writing and supported by substantial evidence specifically describing how Section 110(k) has been violated. Upon receipt of such complaint the Commission will assume responsibility for investigating the applicability of Section 110(k) in accordance with the provisions herein.

B. If upon its initial review, the Commission concludes that a complaint on its face demonstrates a probable violation of Section 110(k), the Commission will immediately notify and provide the relevant Applicant with copies of the Complaint and order that all construction of a new tower or installation of any new collocations immediately cease and remain suspended pending the Commission's resolution of the complaint.

C. Within 15 days of receipt, the Commission will review the complaint and take appropriate action, which the Commission may determine, and which may include the following:

1. Dismiss the complaint without further action if the complaint does not establish a probable violation of Section 110(k) even if the allegations are taken as true;

2. Provide the Applicant with a copy of the complaint and request a written response within a reasonable time;

3. Request from the Applicant a background report which documents the history and chronology of the planning and construction of the Facility;

4. Request from the Applicant a summary of the steps taken to comply with the requirements of Section 106 as set forth in this Nationwide Agreement, particularly the application of the Criteria of Adverse Effect;

5. Request from the Applicant copies of any documents regarding the planning or construction of the Facility, including correspondence, memoranda, and agreements;

6. If the Facility was constructed prior to full compliance with the requirements of Section 106, request from the Applicant an explanation for such failure, and possible measures that can be taken to mitigate any resulting adverse effects on Historic Properties.

D. If the Commission concludes that there is a probable violation of Section 110(k) (*i.e.*, that ''with intent to avoid the requirements of Section 106, [an Applicant] has intentionally significantly adversely affected a Historic Property''), the Commission shall notify the Applicant and forward a copy of the documentation set forth in Section X.C. to the Council and, as appropriate, the SHPO/THPO and other consulting parties, along with the Commission's opinion regarding the probable violation of Section 110(k). The Commission will consider the views of the consulting parties in determining a resolution, which may include negotiating a Memorandum of Agreement (MOA) that will resolve any adverse effects. The Commission, SHPO/THPO, Council, and Applicant shall sign the MOA to evidence acceptance of the mitigation plan and conclusion of the Section 106 review process.

E. Nothing in Section X or any other provision of this Agreement shall preclude the Commission from continuing or instituting

enforcement proceedings under the Communications Act and its rules against an Applicant that has constructed a Facility prior to completing required review under this Agreement. Sanctions for violations of the Commission's rules may include any sanctions allowed under the Communications Act and the Commission's rules.

F. The Commission shall provide copies of all concluding reports or orders for all Section 110(k) investigations conducted by the Commission to the original complainant, the Applicant, the relevant local government, and other consulting parties.

G. Facilities that are excluded from Section 106 review pursuant to the Collocation Agreement or Section III of this Agreement are not subject to review under this provision. Any parties who allege that such Facilities have violated Section 110(k) should notify the Commission in accordance with the provisions of Section XI, Public Comments and Objections.

XI. PUBLIC COMMENTS AND OBJECTIONS

Any member of the public may notify the Commission of concerns it has regarding the application of this Nationwide Agreement within a State or with regard to the review of individual Undertakings covered or excluded under the terms of this Agreement. Comments related to telecommunications activities shall be directed to the Wireless Telecommunications Bureau and those related to broadcast facilities to the Media Bureau. The Commission will consider public comments and following consultation with the SHPO/THPO, potentially affected Indian tribes and NHOs, or Council, where appropriate, take appropriate actions. The Commission shall notify the objector of the outcome of its actions.

XII. AMENDMENTS

The signatories may propose modifications or other amendments to this Nationwide Agreement. Any amendment to this Agreement shall be subject to appropriate public notice and comment and shall be signed by the Commission, the Council, and the Conference.

XIII. TERMINATION

A. Any signatory to this Nationwide Agreement may request termination by written notice to the other parties. Within sixty (60) days following receipt of a written request for termination from a signatory, all other signatories shall discuss the basis for the termination request and seek agreement on amendments or other actions that would avoid termination.

B. In the event that this Agreement is terminated, the Commission and all Applicants shall comply with the requirements of 36 CFR Part 800.

XIV. ANNUAL REVIEW

The signatories to this Nationwide Agreement will meet annually on or about the anniversary of the effective date of the Agreement to discuss the effectiveness of this Agreement, including any issues related to improper implementation, and to discuss any potential amendments that would improve the effectiveness of this Agreement.

XV. RESERVATION OF RIGHTS

Neither execution of this Agreement, nor implementation of or compliance with any term herein, shall operate in any way as a waiver by any party hereto, or by any person or entity complying herewith or affected hereby, of a right to assert in any court of law any claim, argument or defense regarding the validity or interpretation of any provision of the NHPA or its implementing regulations contained in 36 CFR Part 800.

XVI. SEVERABILITY

If any section, subsection, paragraph, sentence, clause or phrase in this Agreement is, for any reason, held to be unconstitutional or invalid or ineffective, such decision shall not affect the validity or effectiveness of the remaining portions of this Agreement.

In witness whereof, the Parties have caused this Agreement to be executed by their respective authorized officers as of the day and year first written above.

Federal Communications Commission

_____

Chairman

Date _____

Advisory Council on Historic Preservation

_____

Chairman

Date _____

National Conference of State Historic Preservation Officers

_____

Date _____

[70 FR 580, Jan. 4, 2005]

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

Subpart A—Terminology

Subpart B—Allocation, Assignment, and Use of Radio Frequencies

WIRELESS TELECOMMUNICATIONS BUREAU OFFERS GUIDANCE ON INTERPRETATION OF SECTION 6409(a) OF THE MIDDLE CLASS TAX RELIEF AND JOB CREATION ACT OF 2012

[NO NUMBER IN ORIGINAL]

RELEASE-NUMBER: DA 12-2047

FEDERAL COMMUNICATIONS COMMISSION

28 FCC Rcd 1; 2013 FCC LEXIS 265

January 25, 2013, Released

ACTION:
[**1] **PUBLIC NOTICE**

OPINION:

[*1] On February 22, 2012, the Middle Class Tax Relief and Job Creation Act of 2012 (Tax Act) n1 became law. Section 6409(a) of the Tax Act provides that a state or local government "may not deny, and shall approve" any request for collocation, removal, or replacement of transmission equipment on an existing wireless tower or base station, provided this action does not substantially change the physical dimensions of the tower or base station. n2 The full text of Section 6409(a) is reproduced in the Appendix to this Public Notice.

n1 Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, H.R. 3630, *126 Stat. 156* (enacted Feb. 22, 2012) (Tax Act).
n2 *Id.*, § 6409(a).

To date, the Commission has not received any formal petition to interpret or apply the provisions of Section 6409(a). We also are unaware of any judicial precedent interpreting or applying its terms. The Wireless Telecommunications Bureau has, however, received informal inquiries from service [**2] providers, facilities owners, and state and local governments seeking guidance as to how Section 6409(a) should be applied. In order to assist interested parties, this Public Notice summarizes the Bureau's understanding of Section 6409(a) in response to several of the most frequently asked questions. n3

n3 Although we offer this interpretive guidance to assist parties in understanding their obligations under Section

6409(a), *see, e.g., Truckers United for Safety v. Federal Highway Administration, 139 F.3d 934 (D.C.Cir. 1998),* the Commission remains free to exercise its discretion to interpret Section 6409(a) either by exercising its rulemaking authority or through adjudication. With two exceptions not relevant here, the Tax Act expressly grants the Commission authority to "implement and enforce" this and other provisions of Title VI of that Act "as if this title is a part of the Communications Act of 1934 *(47 U.S.C. 151* et seq.)." Tax Act § 6003.

What does it mean [**3] **to "substantially change the physical dimensions" of a tower or base station?**

Section 6409(a) does not define what constitutes a "substantial[] change" in the dimensions of a tower or base station. In a similar context, under the *Nationwide Collocation Agreement* with the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers, the Commission has applied a four-prong test to determine whether a collocation will effect a "substantial increase in the size of [a] tower." n4 A proposed collocation that does not involve a substantial increase in [*2] size is ordinarily excluded from the Commission's required historic preservation review under Section 106 of the National Historic Preservation Act (NHPA). n5 The Commission later adopted the same definition in the *2009 Declaratory Ruling* to determine whether an application will be treated as a collocation when applying Section 332(c)(7) of the Communications Act of 1934. n6 The Commission has also applied a similar definition to determine whether a modification of an existing registered tower requires public notice for purposes of environmental review. n7

n4 47 C.F.R. Part 1, App. B, Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, § I.C (*Nationwide Collocation Agreement*).

[**4]

n5 *See 16 U.S.C. § 470f, see also* 47 C.F.R. § 1.1307(a)(4) (requiring applicants to determine whether proposed facilities may affect properties that are listed, or are eligible for listing, in the National Register of Historic Places).

n6 *See* Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Declaratory Ruling, 24 FCC Rcd. 13994, 14012, para. 46 & n.146 (2009)* (*2009 Declaratory Ruling*), *recon. denied, 25 FCC Rcd. 11157 (2010), pet. for review denied sub nom. City of Arlington, Texas v. FCC, 668 F.3d 229* (5th Cir.), *cert. granted, 113 S.Ct. 524 (2012); 47 U.S.C. § 332*(c)(7).

n7 *See* 47 C.F.R. § 17.4(c)(1)(B); National Environmental Policy Act Compliance for Proposed Tower Registrations, WT Docket No. 08-61, *Order on Remand, 26 FCC Rcd. 16700, 16720-21, para. 53 (2011).*

[**5]

Under Section I.C of the *Nationwide Collocation Agreement*, a "substantial increase in the size of the tower" occurs if:

1) [t]he mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or

2) [t]he mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or

3) [t]he mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to [**6] shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or

4) [t]he mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site.

Although Congress did not adopt the Commission's terminology of "substantial increase in size" in Section 6409(a), we believe that the policy reasons for excluding from Section 6409(a) collocations that substantially change the physical dimensions of a structure are closely analogous to those that animated the Commission in the *Nationwide Collocation Agreement* and subsequent proceedings. In light of the Commission's prior findings, the Bureau believes it is appropriate to look to the existing definition of "substantial increase in size" to determine whether the collocation, removal, or replacement of equipment [*3] on a wireless tower or base station substantially changes the physical dimensions of the underlying structure within the meaning of Section 6409(a).

What is a "wireless tower or base station"?

A "tower" is [**7] defined in the *Nationwide Collocation Agreement* as "any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities." n8 The Commission has described a "base station" as consisting of "radio transceivers, antennas, coaxial cable, a regular and backup power supply, and other associated electronics." n9 Section 6409(a) applies to the collocation, removal, or replacement of equipment on a wireless tower or base station. In this context, we believe it is reasonable to interpret a "base station" to include a structure that currently supports or houses an antenna, transceiver, or other associated equipment that constitutes part of a base station. n10 Moreover, given the absence of any limiting statutory language, we believe a "base station" encompasses such equipment in any technological configuration, including distributed antenna systems and small cells.

n8 *See Nationwide Collocation Agreement*, § I.B.
n9 *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, WT Docket No. 10-133, *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fifteenth Report, 26 FCC Rcd. 9664, 9481, para. 308 (2011).*

[**8]

n10 *See also* 47 C.F.R. Part 1, App. C, Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, § II.A.14 (defining "tower" to include "the on-site fencing, equipment, switches, wiring, cabling, power sources, shelters, or cabinets associated with that Tower but not installed as part of an Antenna as defined herein").

Section 6409(a) by its terms applies to any "wireless" tower or base station. By contrast, the scope of Section 332(c)(7) extends only to facilities used for "personal wireless services" as defined in that section. n11 Given Congress's decision

not to use the pre-existing definition from another statutory provision relating to wireless siting, we believe the scope of a "wireless" tower or base station under Section 6409(a) is not intended to be limited to facilities that support "personal wireless services" under Section 332(c)(7).

n11 *47 U.S.C. § 332*(c)(7)(A). "Personal wireless services" is in turn defined to mean "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services." *Id.* § 332(c)(7)(C)(1).

[**9]

May a state or local government require an application for an action covered under Section 6409(a)?

Section 6409(a) states that a state or local government "may not deny, and shall approve, any eligible facilities request . . . ." It does not say that a state or local government may not require an application to be filed. The provision that a state or local government must approve and may not deny a request to take a covered action, in the Bureau's view, implies that the relevant government entity may require the filing of an application for administrative approval.

[*4] **Is there a time limit within which an application must be approved?**

Section 6409(a) does not specify any period of time for approving an application. However, the statute clearly contemplates an administrative process that invariably ends in approval of a covered application. We believe the time period for processing these applications should be commensurate with the nature of the review.

In the *2009 Declaratory Ruling*, the Commission found that 90 days is a presumptively reasonable period of time to process collocation applications. n12 In light of the requirement of Section 6409(a) that [**10] the reviewing authority "may not deny, and shall approve" a covered request, we believe that 90 days should be the maximum presumptively reasonable period of time for reviewing such applications, whether for "personal wireless services" or other wireless facilities.

n12 *See 2009 Declaratory Ruling, 24 FCC Rcd. at 14012-13,* paras. 46-47.

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APPENDIX:

[*5] **APPENDIX**

SEC. 6409. WIRELESS FACILITIES DEPLOYMENT.

(a) FACILITY MODIFICATIONS.

(1) IN GENERAL. Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104-104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

(2) ELIGIBLE FACILITIES REQUEST. For purposes of this subsection, [**11] the term "eligible facilities request"

means any request for modification of an existing wireless tower or base station that involves -

(A) collocation of new transmission equipment;
(B) removal of transmission equipment; or
(C) replacement of transmission equipment.

(3) APPLICABILITY OF ENVIRONMENTAL LAWS. Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969.

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawFederal ActsGeneral OverviewCommunications LawTelephone ServicesMobile Communications ServicesCommunications LawU.S. Federal Communications CommissionAuthority

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(E) OR 32(A)

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No. 15-1240 **Caption: Montgomery County, MD et al. v. U.S. and FCC**

1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

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CERTIFICATE OF SERVICE

I certify that on April 24, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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