No. 15-1240 (Consolidated with No. 15-1284)

In The
United States Court of Appeals
For The Fourth Circuit

MONTGOMERY COUNTY, MARYLAND,

Petitioner,

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

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

JOINT BRIEF OF CTIA – THE WIRELESS ASSOCIATION® AND PERSONAL COMMUNICATIONS INDUSTRY ASS'N, LTD., D/B/A PCIA – THE WIRELESS INFRASTRUCTURE ASSOCIATION

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Dated: June 9, 2015

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CORPORATE DISCLOSURE STATEMENT OF CTIA

Pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1, intervenor CTIA – The Wireless Association® ("CTIA") makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?

   [ ] YES [X] NO

2. Does party/amicus have any parent corporations? If yes, identify all parent corporations, including grandparent and great-grandparent corporations.

   [ ] YES [X] NO

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? If yes, identify all such owners.

   [ ] YES [X] NO

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 [X] NO

5. Is party a trade association? (*amici curiae* do not complete this question). 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:

[X] YES [ ] NO

There is no such member.

6. Does this case arise out of a bankruptcy proceeding?

[ ] YES [X] NO

Dated: June 9, 2015

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CORPORATE DISCLOSURE STATEMENT OF PCIA

Pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1, intervenor Personal Communications Industry Association, Ltd., d/b/a PCIA – The Wireless Infrastructure Association ("PCIA") makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?

   [ ] YES [X] NO

2. Does party/amicus have any parent corporations? If yes, identify all parent corporations, including grandparent and great-grandparent corporations.

   [ ] YES [X] NO

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? If yes, identify all such owners.

   [ ] YES [X] NO

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 [X] NO

5. Is party a trade association? (*amici curiae* do not complete this question). 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:

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1) to review final orders of the Federal Communications Commission ("FCC" or "Commission"). On October 21, 2014, the Commission released a final order, *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 F.C.C.R. 12865 (2014) ("*Infrastructure Order*"), interpreting Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 156, 232-33 (2012) (codified at 47 U.S.C. § 1455(a)) ("TRA" or "Section 6409"). A summary of the *Infrastructure Order* appeared in the Federal Register on January 8, 2015. 80 Fed. Reg. 1237. Petitioners timely appealed.

STATEMENT OF THE ISSUES

1. Whether the Commission's interpretation of Section 6409(a) is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

2. Whether Section 6409(a) and the *Infrastructure Order* are constitutional exercises of federal power.

SUMMARY OF THE ARGUMENT

In the quickly evolving world of wireless service, providers must frequently upgrade their facilities to increase network capacity, expand coverage, and make

new communications technologies available to consumers. Yet even small changes to wireless facilities are routinely used by some State and local governments as an excuse to delay the deployment of new wireless technologies. These delays are an inconvenience to consumers and expensive for providers, but most importantly, they are costly to our national economy: the economic literature confirms a robust link between the availability and quality of wireless service and GDP and job growth. *See, e.g.*, Executive Office of the President, *Community-Based Broadband Solutions* 5-6 (Jan. 2015) (summarizing studies) *available at* http://www.whitehouse.gov/; Letter from Jonathan S. Adelstein, PCIA, to Tom Wheeler, Chairman, FCC, WT Docket 13-238 (Mar. 14, 2014) (citing report predicting infrastructure investments over five-year period will create 1.3 million jobs, grow GDP by 2.2 percent, and stimulate up to $1.2 trillion in economic development).

For the past 20 years, Congress and the FCC have taken a variety of actions designed to reconcile local concerns over the placement and siting of wireless facilities with the critical national need to ensure that wireless networks can be widely deployed and upgraded as technology advances. Most recently, in 2012, Congress took targeted action to reduce delays pertaining to facilities modifications by enacting Section 6409(a) of the TRA. Section 6409(a) provides that "a State or local government may not deny, and shall approve, any eligible

facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." 47 U.S.C. § 1455(a)(1). The Commission subsequently promulgated rules interpreting key terms in the statute—including "substantially change" and "base station"—and established timeframes after which facilities applications that had not been acted upon would be "deemed granted." *Infrastructure Order* ¶¶ 166-68, 188-89, 212.

Petitioners urge the Court to set the FCC's actions aside. Ignoring the national policy goals evident from the plain text of Section 6409(a), Petitioners argue that the Commission's interpretations of "substantially change" and "base station" are inconsistent with the statute. Pet. Br. 31, 46. Next, Petitioners assert that both Section 6409(a) and the *Infrastructure Order* violate the Tenth Amendment to the U.S. Constitution. Pet. Br. 55. Petitioners' Amici echo these arguments. *See* Amicus Br. 5, 14, 20.

These arguments are without merit. First, the *Infrastructure Order* is critical to achieving the national policy goals established by Congress in Section 6409(a). The Commission's authoritative interpretations of undefined statutory terms provide certainty, and the "deemed granted" remedy ensures that reluctant State and local jurisdictions cannot thwart federal law through endless delay.

Second, the Commission's interpretation of Section 6409(a) is entitled to deference under the familiar *Chevron* framework. The Commission's efforts "illuminate the meaning of the term[s]" left undefined in the statute, *United States v. Bridges*, 741 F.3d 464, 468 (4th Cir. 2014), and reflect a careful resolution of the "competing policy interests" at play in this proceeding, *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1873 (2013). These actions were not dictated by "what[ever] is convenient for the provider," Pet. Br. 35; to the contrary, the Order rejected many proposals advanced by industry, *Infrastructure Order* ¶¶ 168, 173, 180-81, 197, 199, 216. Although Petitioners are quick to assert definitions they wish the Commission had adopted, they offer no compelling argument demonstrating that the Commission's interpretations are unreasonable or foreclosed by the statute—and, indeed, they fail to even cite *Chevron* in their brief.

Third, Section 6409(a) and the *Infrastructure Order* are plainly constitutional. Section 6409(a) offers State and local governments a constitutionally valid choice between "regulating [wireless facilities modifications] according to federal standards or having state law pre-empted by federal regulation." *New York v. United States*, 505 U.S. 144, 167 (1992). The *Infrastructure Order's* "deemed granted" remedy supports that choice because it gives effect to Section 6409(a) in a manner that does not require action on the part of State or local governments. State or local officials are not "required to approve

or prohibit anything." *Cellular Phone Taskforce v. F.C.C.*, 205 F.3d 82, 96 (2d Cir. 2000).

The *Infrastructure Order* should be upheld.

ARGUMENT

I. THE *INFRASTRUCTURE ORDER* IS CRITICAL TO ACHIEVING THE NATIONAL POLICY GOALS EMBODIED IN SECTION 6409(A).

A. Congress Has Repeatedly Tried To Combat A Long History Of State And Local Obstruction Of Wireless Infrastructure Deployment.

The federal government has long recognized the paramount importance of "mak[ing] available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." 47 U.S.C. § 151. In the Communications Act of 1934, Congress established the FCC and gave it jurisdiction over wire and radio transmissions, to create "a unified and comprehensive regulatory system for the industry." *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 214 (1943).

In 1993 and 1996, Congress took major steps to address cellular telephone technology and growing demand for wireless service. In the Omnibus Budget Reconciliation Act of 1993 ("OBRA"), Pub. L. No. 103-66, § 6002, 107 Stat. 312 (1993) (codified at 47 U.S.C. § 332), Congress "dramatically revise[d] the regulation of the wireless telecommunications industry." *Cellnet Commc'ns, Inc.*

v. F.C.C., 149 F.3d 429, 433 (6th Cir. 1998). Among other things, OBRA "preempt[ed] states from regulating market entry and rates charged" by wireless providers. *GTE Mobilnet of Ohio v. Johnson*, 111 F.3d 469, 477 (6th Cir. 1997).

Congress passed Section 704 of the Telecommunications Act of 1996 ("TCA"), Pub. L. No. 104-104, § 704, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 332(c)(7)), to "encourage the rapid deployment of new telecommunications technologies" by "reduc[ing] the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers." *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 115 (2005). The TCA "generally preserves the traditional authority of state and local governments to regulate the location, construction, and modification of wireless communications facilities like cell phone towers, but imposes specific limitations on that authority." *T-Mobile S., LLC v. City of Roswell, Ga.*, 135 S. Ct. 808, 814 (2015) (quotations omitted).

Despite this, for years after these enactments, many localities subjected wireless carriers and infrastructure companies to tactics that stymied facilities deployment. The opposition displayed by some localities took many forms, and has been well documented before the FCC and in the courts. For example: A city in Massachusetts required applicants to submit materials to 11 different city departments, each with the power to deny the application. Comments of AT&T at

16 n.23, WC Docket No. 11-59 (July 18, 2011) ("AT&T Comments"). Local authorities in the Washington D.C. area required applicants to affirmatively disprove the suitability of a lengthy list of alternative sites—even though some were clearly unavailable. *Id.* at 15 n.21. Two western jurisdictions resorted to "inventing a criterion" with which to deny applications when their existing rules proved insufficient. *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte Cnty., Kansas City, Kan.*, 546 F.3d 1299, 1308 (10th Cir. 2008). A town in New York demanded unnecessary environmental review "merely to delay the permitting process in contravention of the Federal statute." *Bell Atl. Mobile of Rochester L.P. v. Town of Irondequoit, N.Y.*, 848 F. Supp. 2d 391, 401 (W.D.N.Y. 2012). Another enacted a local law "interfer[ing] with Congress's goal of facilitating . . . the growth of wireless telephone service" by establishing discriminatory procedures disfavoring certain facilities. *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 106 (2d Cir. 2010).

These examples illustrate that local authorities have often given in to what the First Circuit has dubbed "the 'not in my backyard' ('NIMBY') problem: property owners resist new facilities in populated areas because they find wireless facilities unsightly and worry facilities lower property values; yet as cell phone consumers these same people want quality service where they are most." *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 51 n.9 (1st Cir. 2009).

The "NIMBY problem" has created "numerous pockets of resistance for wireless carriers." *Id.* This resistance has been aided by a cottage industry of consultants that sprang up to advise municipalities on how to avoid the limitations imposed by the TCA, and ensure that new facilities are "built only as a last, worst case scenario." AT&T Comments at 17 (quoting consultant literature). Not surprisingly, courts across the country were regularly called upon to hear resulting disputes. *See, e.g., T-Mobile Ne. LLC v. City Council of City of Newport News, Va.*, 674 F.3d 380, 384 (4th Cir. 2012) (finding denial of application not based on substantial evidence); *PrimeCo Pers. Commc'ns, Ltd. P'ship v. City of Mequon*, 352 F.3d 1147, 1151 (7th Cir. 2003) (same). The Supreme Court described the history thus: "In theory, § 332(c)(7)(B)(ii) requires state and local zoning authorities to take prompt action . . . . [b]ut in practice, wireless providers often faced long delays." *Arlington*, 133 S. Ct. at 1867.

These circumstances led the FCC in 2009 to conclude that "unreasonable delays in the personal wireless service facility siting applications process have obstructed the provision of wireless services." *Petition for Declaratory Ruling to Clarify Provisions of Section 332(7)(B)*, 24 F.C.C.R. 13994, 14006 (2009) ("*Shot Clock Order*") (interpreting Section 332(c)(7)(B)(ii) and establishing presumptively reasonable timeframes for action on wireless facilities siting

requests).[1] However, some localities remained committed to fighting federal law, *see Irondequoit*, 848 F. Supp. 2d at 403, (holding town "willfully disregarded the law"), and challenging the FCC's modest efforts, *see Arlington*, 133 S. Ct. at 1863 (rejecting APA and constitutional challenge to *Shot Clock Order*).

B. Section 6409(a) Provides A Targeted Remedy Designed To Facilitate Technological Upgrades And Other Facilities Modifications.

While litigation over the *Shot Clock Order* was pending, delay and obstruction continued. Meanwhile, continuing innovation in mobile broadband and other new technologies—for example, the development of the "Long Term Evolution" or "LTE" high-speed data transmission standard—created a need to upgrade equipment in areas where facilities had already been built. So in 2012 Congress took further action to reduce delays pertaining to certain facilities modifications, and enacted Section 6409(a). Congress was addressing a critical problem: even minor changes to wireless facilities are routinely used as excuses by some local governments to cause more delay.

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[1] The FCC relied on evidence showing, for example, that by 2008 nearly a quarter of all wireless siting applications nationwide had been pending for more than one year, and nearly a quarter of those more than three years. *See City of Arlington, Tex. v. F.C.C.*, 668 F.3d 229, 260-61 (5th Cir. 2012) *aff'd*, 133 S. Ct. 1863 (2013) (citing CTIA data).

Examples of such obstruction abound in the record. Albany, California, delayed a Verizon LTE upgrade for more than two years, even though "the 4 existing antennas would simply be replaced by 4 like for like antennas." Comments of California Wireless Association at 9, WC Docket No. 11-59 (Sept. 30, 2011). Livermore, California, took 168 days to approve a proposal to add three like-sized camouflaged antennas on an existing tree pole. Comments of Verizon at 31, WT Docket No. 13-238 (Feb. 3, 2014) ("Verizon Comments"). Leonia, New Jersey, delayed for more than four years a collocation application involving antennas smaller than those already deployed at the site. Reply Comments of T-Mobile, Attachment A at 4, WT Docket No. 13-238 (Mar. 5, 2014) ("T-Mobile Reply"). Two Missouri localities imposed fees amounting to more than $150 per lineal foot in exchange for approval to replace 140 feet of copper wire with fiber optic cable. *Id.* An Illinois town delayed for nearly one year the replacement of nine antennas with smaller antennas. *Id.* at 3. And two cities in Silicon Valley, California, have taken the position that AT&T cannot place Distributed Antenna Systems ("DAS") on pole-top extensions extending a few feet above existing utility poles, even though there is no zoning-height restriction for the public rights of way. AT&T Comments at 17.

Because Congress was rightly concerned by such "pockets of resistance," *Omnipoint Holdings*, 586 F.3d at 51 n.9, Section 6409(a) "streamlines the process

for siting of wireless facilities by preempting the ability of State and local authorities to delay collocation of, removal of, and replacement of wireless transmission equipment," 158 Cong. Rec. E237, E239 (daily ed. Feb. 24, 2012) (statement of Rep. Upton). It accomplishes this by establishing, in essence, a national modification-by-right principle. The statute provides that "a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." 47 U.S.C. § 1455(a)(1). An "eligible facilities request" is "any request for modification of an existing wireless tower or base station that involves" the "collocation . . . removal . . . or replacement of transmission equipment." *Id.* § 1455(a)(2).

Moreover, unlike the TCA, Section 6409(a) does not "generally preserve" local authority. Rather, in the narrow field in which it operates, Section 6409(a) preempts local authority by its plain terms, "[n]otwithstanding section 704 of the [TCA] or any other provision of law." *Id.* § 1455(a). "Section 6409 is [thus] further evidence of a clear congressional policy demanding the prompt removal of locally imposed, unreasonably discriminatory obstacles to modifications of existing facilities that would further the rapid deployment of wireless technology."

New Cingular Wireless PCS, LLC v. City of W. Haven, No. 3:11cv1967, 2013 WL 3458069 at *8 (D. Conn. July 9, 2013).

C. The *Infrastructure Order* Is Designed To Address Continued Local Obstruction And Resolve Uncertainty.

Despite the clear intent of Congress to "advance wireless broadband service" by enacting Section 6409(a), H.R. Rep. 112-399, at 136 (2012), *reprinted in* 2012 U.S.C.C.A.N. 186, 220, the delay tactics used by many State and local governments have continued. Indeed, the record shows that some localities intend to use Section 6409(a) itself to *justify* delay. Some of Petitioners' Amici expressed the view below that "Section 6409(a) requires additional [review] time because it requires the permit authority to perform new factual inquiries not previously part of the permit review process." Comments of the California Local Governments at 22, WT Docket No. 13-238 (Feb. 3, 2014). Other localities have proffered extremely narrow interpretations of Section 6409(a) that cause uncertainty as to its application. *See* Verizon Comments at 26-27 (collecting examples). Two cities in California, for example, took the position that Section 6409(a) applies only to "tower[s]," effectively reading "base station" out of the statute. T-Mobile Reply, Attachment B at 4.

The FCC concluded that it was necessary to provide guidance on the meaning of the statute, because "Section 6409(a) includes a number of undefined terms . . . that bear directly on how the provision applies to infrastructure

deployments." *Infrastructure Order* ¶ 15. In early 2013, the Wireline Telecommunications Bureau issued a Public Notice offering "interpretive guidance to assist parties in understanding their obligations under Section 6409(a)." *Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief & Job Creation Act of 2012*, Public Notice, 28 F.C.C. Rcd. 1, 1 n.3 (2013). Yet parties remained divided over the meaning of the statute's terms. Worse, some jurisdictions demonstrated that they intended to abuse any ambiguity: for example, just six months after the Bureau issued its Public Notice, Williston Park, New York, barred T-Mobile from replacing three antennas because the new antennas were five inches longer than the old ones. *See* T-Mobile Reply, Attachment A at 2. If five inches "substantially changes the physical dimensions" of a tower, then the statute has no meaning. Confronted with these and similar facts, the Commission reasoned that an authoritative rulemaking would "advance Congress's goal" and "serve the public interest." *Infrastructure Order* ¶ 15.

In addition to defining key terms, the *Infrastructure Order* provides that "an application covered by Section 6409(a) [that] has not been approved by a State or local government within 60 days from the date of filing . . . will be deemed granted." *Infrastructure Order* ¶ 212. The need for this limitation is driven by the statutory language "may not deny, and shall approve." 47 U.S.C. § 1455(a). "With no such limitation, a State or local government could evade its statutory

obligation to approve covered applications by simply failing to act on them." *Infrastructure Order* ¶ 212. The *Infrastructure Order* is thus critical to achieving the national policy goals Congress enacted in Section 6409(a).

The *Infrastructure Order* has already begun to have positive effects. Since its release, a number of localities and their national associations have partnered with CTIA and PCIA to develop tools to aid compliance with Section 6409(a). Earlier this year, CTIA and PCIA jointly released with the National Association of Counties, the National League of Cities, and the National Association of Telecommunications Officers and Advisors, a checklist for streamlining the local review process, and a model ordinance chapter that comports with federal law. Letter from D. Zachary Champ, PCIA, to Marlene H. Dortch, Secretary, FCC, WT Docket 13-238 (Mar. 6, 2015). CTIA and PCIA continue to work with these national associations to conduct "in-person outreach on these materials." *Id.* at 2; *see also Infrastructure Order* ¶ 141.

But progress is not uniform. Despite the fact that many State and local governments are now operating within the framework established by Section 6409(a) and the *Infrastructure Order*, certain "pockets of resistance" continue to oppose reasonable efforts to implement federal law. Indeed, some States are even now debating policies that purport to place moratoria and other obstacles in the way of modifications to wireless facilities. *See Wireless Telecommunications*

Towers: Hearing on H.B. 727 Before the H. Comm. on Ways & Means, 2015 Reg. Sess. (Md. 2015) (testimony of Bethanne Cooley, CTIA); *Public Information Meetings Regarding Telecommunications Towers:* Hearing on S.B. 568 Before the Joint Comm. on Energy & Tech., 2015 Jan. Sess. (Conn. 2015) (testimony of Bethanne Cooley, CTIA). Because the *Infrastructure Order* is critical to achieving the national policy goals embodied in Section 6409(a), it should be upheld.

II. THE COMMISSION'S INTERPRETATION OF SECTION 6409(A) IS ENTITLED TO DEFERENCE.

"When a court reviews an agency's construction of the statute that it administers, it employs the deferential standard of review articulated in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)." *E.E.O.C. v. Seafarers Int'l Union*, 394 F.3d 197, 200 (4th Cir. 2005).[2] Under *Chevron*, a reviewing court "is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

Petitioners and Amici ignore the *Chevron* framework entirely and urge this Court to set aside the Commission's interpretation of Section 6409(a) as unsupported by "substantial evidence" and as "arbitrary and capricious" under the

[2] There is no question that the FCC "administers" the TRA. The statute instructs the Commission to "implement and enforce" its provisions "as if [they were] a part of the Communications Act." 47 U.S.C. § 1403(a).

Administrative Procedure Act ("APA"). Pet. Br. 27-28; Amicus Br. 6, 12. "Substantial evidence" is the standard for reviewing agency decision making in formal administrative proceedings, and has no application in review of notice-and-comment proceedings such as this one. *See* 5 U.S.C. § 706(2)(E); *GTE S., Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999). The APA's arbitrary and capricious standard is likewise concerned with ensuring reasoned decision making and accurate fact finding. *See, e.g., Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Neither standard is the appropriate framework for statutory interpretation.[3] *Chevron* is the proper framework.

A. Congress Has Not Directly Spoken To The Meaning Of "Substantially Change" Or "Base Station."

Under *Chevron* step one, the court must first ask "whether Congress has directly spoken to the precise question at issue." *Arlington*, 133 S. Ct. at 1868. Here, it is clear that Congress has not. The TRA does not define either "substantially change" or "base station"—the two terms Petitioners and Amici insist the Commission misinterpreted. 47 U.S.C. § 1455. Moreover, the record

[3] If Petitioners instead intend to suggest that the Commission's interpretation is "arbitrary or capricious in substance," that standard is synonymous with the *Chevron* "step two" rubric, and Petitioners therefore concede that "reasonableness" is the appropriate standard here. *See, e.g., Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011).

confirms there is no commonly accepted definition of these terms; indeed, there is wide variance even among State and local governments as to how to interpret them. *Infrastructure Order* ¶¶ 138-39, 143. When "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Arlington*, 133 S. Ct. at 868.

B. Under *Chevron* Step Two, The Commission's Interpretation Of "Substantially Change" Is Reasonable.

The accelerated approval process contemplated by Section 6409(a) applies to requests "for a modification . . . that does not substantially change the physical dimensions of [the] tower or base station." 47 U.S.C. § 1455(a). To fill the gap "implicitly left" by Congress's decision to leave "substantially change" undefined, *Bridges*, 741 F.3d at 468 n.5, the Commission adopted a multi-part test "defined by specific, objective factors," *Infrastructure Order* ¶ 189. This test is "within the limits of [Congress's] delegation" because it does not conflict with the text or purpose of the statute, and is a reasonable "resol[ution of] the struggle between competing views of the public interest." *Chevron*, 467 U.S. at 865-66.

The Commission's interpretation of "substantially change" is consistent with the statutory text because the factors which comprise its test measure change to the "physical dimensions" of towers and base stations. 47 U.S.C. § 1455(a). Petitioners nevertheless complain that "simple mathematical rules do not

adequately measure substantiality" because they form a "blunt, absolute standard" that conflicts with the "ordinary meaning" of "substantial" by ignoring "context." Pet. Br. 31-32, 40; *see also* Amicus Br. 16 ("context matters"). In a parade of imagined horribles, Petitioners assert that facilities modifications could swell "3000 times" and extend to "unlimited depth[s]." Pet. Br. 33, 34.

To reach these absurd conclusions, Petitioners misread the *Infrastructure Order*. The rules adopted by the Commission do take "context" into account: they differentiate between towers and base stations; they distinguish between facilities that are in the public rights of way and those that are not; they recognize different thresholds for what size increases constitute a substantial change, depending on the type of structure and where it is located; and they require compliance with existing "concealment elements" and other "conditions associated with the siting approval." 47 C.F.R. § 1.40001(b)(7).

Failing to credit these limitations, Petitioners imagine that the rules permit modifications consisting of "solid block[s] of equipment extending . . . [to] unlimited depth[s]" because "[a] modification is insubstantial IF it extends only six feet out from an existing structure. Depth is ignored." Pet. Br. 34. But this is nonsense. "Depth is ignored" only by Petitioners, who overlook that an object can "protrude from the edge of [a] structure," 47 C.F.R. § 1.40001(b)(7)(ii), in more than one direction—including along the third axis in three dimensional space.

Petitioners also claim that the six, 10, and 20 foot thresholds contemplated in various instances will swell facilities "3000 times." Pet. Br. 33, 42. To generate this figure, Petitioners posit facilities modifications attaching equipment to "deck of cards size" small cells. *See* Pet. Br. 33 n.84. But such comparisons elide the rules' text, which applies these thresholds to different types of "eligible support *structures*," such as commercial towers or buildings. 47 C.F.R. § 1.40001(b)(7) (emphasis added). Petitioners' calculation, by contrast, necessarily supposes "deck of cards size" small cells detached from any structure. Their calculation is therefore wrong by several orders of magnitude. "To put it simply, 'context matters.'" Amicus Br. 16 (citation omitted). In any event, even if Petitioners' worry were not put to rest by the plain text of the rules, it defies reality: expanding structures to "3000 times" original size is in most cases an engineering impossibility.

Petitioners further contend that the Commission's test violates the statutory text in the case of "non-conforming use sites" because any change to these sites "increases an already existing burden that otherwise would not be permitted." Pet. Br. 52. According to Petitioners, this is evidenced by an "appropriate respect for local authority" shown by the federal courts under the TCA. Pet. Br. 53. But Petitioners misunderstand the source of the solicitude the courts have shown. It arises from the text of the TCA itself, which "generally preserves the traditional

authority of State and local governments . . . but imposes specific limitations on that authority." *Roswell*, 135 S. Ct. at 814 (quotations omitted). Section 6409(a) is critically different. It does not "generally preserve" local authority: rather, in the narrow field in which it operates, it expressly preempts local authority "[n]otwithstanding section 704 of the [TCA] or any other provision of law." 47 U.S.C. § 1455(a). The Commission (and the courts) thus should treat local authority differently under Section 6409(a) than under the TCA—that is what the text expressly requires.

In addition to consistency with the text of Section 6409(a), the test adopted by the *Infrastructure Order* is consistent with the statute's purpose. Indeed, as the Commission recognized, the "entirely subjective standard" advocated by some local jurisdictions would "conflict with Congress's intent." *Id.* ¶ 189. Petitioners complain that this is an improper justification, asserting that "[t]he Commission cannot justify the rules based on generalized policy goals," "agency expertise," and statutory "purpose." Pet. Br. 28, 34, 41. This is wrong. "[C]ourts often apply a statute's highly general language in light of the statute's basic purposes." *Am. Broad. Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2511 (2014). And within the *Chevron* context, the need for agency expertise and policy guidance is in fact the justification that supports deference. *Arlington*, 133 S. Ct. at 1873; *Chevron*, 467 U.S. at 863-65. To be sure, an agency cannot advert to generalized policy

goals or statutory purpose to rewrite unambiguous, plain text. But where, as here, the agency is interpreting terms pursuant to a delegation from Congress, considerations of policy and purpose, informed by agency expertise, are precisely what *Chevron* requires.

Petitioners object that the Commission's interpretation cannot properly be considered a product of agency expertise because it creates "tension among various portions of the *Order*," including with a purported "right" of localities "to demonstrate substantiality" in the environmental and historical review processes established by the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* ("NEPA"), and Section 106 of the National Historic Preservation Act of 1966, 16 U.S.C. § 470f ("NHPA"). Pet. Br. 42-43. But there is no tension, because the Commission expressly recognized that eligible facilities requests must comply with NEPA and NHPA. *Infrastructure Order* ¶ 203.[4] In any event, the supposed "tension" has no bearing on whether the Commission properly engaged its expertise.

[4] In their non-binding docketing statement, Petitioners indicated intent to challenge the Commission's revision of certain exclusions associated with NEPA and NHPA. D.E. 18 at 3. Because Petitioners have abandoned this issue, Pet. Br. 3, it is waived, *Robinson v. Comm'r, Soc. Sec.*, 583 F. App'x 68, 69 (4th Cir. 2014).

Finally, the objective test adopted by the *Infrastructure Order* strikes "an appropriate balance between municipal flexibility and the rapid deployment of covered facilities." *Infrastructure Order* ¶ 189. Indeed, contrary to Petitioners' charge that the Order "[d]efin[es] substantiality in terms of what is convenient for the provider," Pet. Br. 35, the Commission expressly rejected interpretations urged by industry. For example, the Commission did not agree with industry proposals to measure changes in tower height from the last approval, reasoning that a series of small changes "would provide no cumulative limit at all." *Infrastructure Order* ¶ 197. And the agency rejected proposals that would have allowed for additional excavation at modified facilities. *Id.* ¶ 199.

In sum, Petitioners cannot plausibly argue that Commission's interpretation of "substantially change" is unreasonable. Petitioners' true objection appears to be that they do not agree with the policy balance the Commission has struck. But, "[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail." *Chevron*, 467 U.S. at 866.

C. The Commission's Interpretation Of "Base Station" Is Also Reasonable Under *Chevron* Step Two.

The Commission also determined "that the term 'existing . . . base station' includes a structure that, at the time of the application, supports or houses an

antenna, transceiver, or other associated equipment that constitutes part of a 'base station' as defined above, even if the structure was not built for the sole or primary purpose of providing such support." *Infrastructure Order* ¶ 168. In doing so, it rejected the view of many local governments—also expressed by Petitioners and Amici here—that the term "refers only to the equipment compound associated with a tower and the equipment located on it" and not the supporting structure. *Id.* ¶ 170; *see* Pet. Br. 48; Amicus Br. at 6. It similarly rejected proposals advanced by industry to include structures "capable of supporting wireless transmission equipment" (but not already doing so), such as water tanks and utility poles. *Infrastructure Order* ¶ 168, 173.

The Commission's decision to include some supporting structures within its definition of "base station" is eminently reasonable. First, it accords with the text of Section 6409(a) by affording "base station" and "tower" independent meaning: if "base station" were given the narrow construction urged by Petitioners, it would be completely subsumed and rendered superfluous by the Commission's longstanding interpretation of "tower," which "treats equipment compounds as part of the associated towers for purposes of collocations." *Infrastructure Order* ¶ 170.

Second, the Commission's decision to include some structures within its definition of base station comports with Section 6409(a)'s purpose by bringing greater efficiency to the process of collocations. *See* Comments of PCIA at 31-33,

WT Docket No. 13-238 (Feb. 3, 2014). A narrow interpretation would have the effect of prejudicing collocations on structures already supporting wireless facilities, which would be perverse given that nearly everyone—including local jurisdictions—has long sought to encourage collocations. *See Implementation of the National Environmental Policy Act of 1969*, Report and Order, 49 F.C.C.2d 1313, 1324 (1974) (finding collocation "has no significant aesthetic effect and is environmentally preferable to the construction of a new tower").

Third, the Commission's limitation of the term to structures that host wireless facilities at the time of application preserves local authority: local jurisdictions remain empowered to decide in the first instance which non-tower structures will be subject to Section 6409(a). *Infrastructure Order* ¶¶ 173, 179. The *Infrastructure Order* also seeks to avoid any unintended consequences that might arise from the statute's broad language by holding that structural enhancements are permitted under Section 6409(a) only "so long as the modification of the underlying support structure is performed in connection with and is necessary to support a collocation, removal, or replacement of transmission equipment," and "does not include replacement of the underlying structure." *Id.* ¶ 180.

Finally, the Commission's interpretation is reasonable because it is sufficiently flexible to encompass new and emerging technologies. The record

demonstrates that many local jurisdictions attempt to use the advent of new technologies as an excuse to carve out dubious exceptions from rules established by the Commission. For example, some local governments urged in this proceeding that the *Shot Clock Order* did not apply to DAS and small cell deployments. *See, e.g.*, Comments of Fairfax County at 27-28, WT Docket No. 13-238 (Feb. 3, 2014). It was reasonable for the Commission to anticipate that some local jurisdictions might act on similar "antipathy to Section 6409(a)" and thereby discourage innovation. Reply Comments of CTIA at 12, WT Docket No. 13-238 (Mar. 5, 2014) ("CTIA Reply").

Petitioners nevertheless assert that the Commission's definition of "base station" is inconsistent with the "ordinary and fair meaning" of the term. Pet. Br. 46. Amici press more sharply, arguing that Congress borrowed "a term of art from a specific technical field," and "presumably knew and adopted the same definition." Amicus Br. 6. These arguments are inapplicable here because they presuppose a term of art where in fact there is none. As the Commission recognized, "no commenters presented evidence that 'base station' is more commonly understood to mean an equipment compound as opposed to the broader definition . . . [which includes] supporting structures." *Infrastructure Order* ¶ 170. Petitioners concede as much: "Neither the Commission, nor any party identified a common definition of base station . . . ." Pet. Br. 9. Even in this litigation,

Petitioners and Amici offer no evidence of consensus. Pet. Br. 46-47; Amicus Br. 6-8. The single FCC report they cite in their arguments does not purport to interpret "base station," Pet. Br. 46; Amicus Br. 7, and even if it did, the agency would have a duty to reexamine that interpretation "on a continuing basis," *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

Moreover, the collection of rules Petitioners allude to in their "Statement of Case" [sic], Pet. Br. 8-9, and that Amici relegate to a footnote, Amicus Br. 7 n.4, are relevant only insofar as they show that the Commission has interpreted "base" and "station" differently in different contexts and when used in various combinations with other terms.[5] By Petitioners' count, there are approximately 120 such references scattered across the Code of Federal Regulations. Pet. Br. 8. But these varying definitions do nothing to demonstrate the existence of a consistent term of art. To the contrary, the variety of uses and meanings identified

[5] *See, e.g.*, 47 C.F.R. § 2.1 ("Base Station. A land station in the land mobile service. . . . Land Station. A station in the mobile service not intended to be used while in motion."); 47 C.F.R. § 90.25 ("Base station. A station at a specified site authorized to communicate with mobile stations."); 47 C.F.R. § 95.25 ("A small base station . . . [h]as an antenna no more than 6.1 meters (20 feet) above the ground or above the building or tree on which it is mounted"); 47 C.F.R. § 22.99 (defining "base transmitter"); 47 C.F.R. § 1.907 (defining "radio station").

by the Petitioners demonstrates that there is no fixed definition to which Congress was referring.

Petitioners next attempt to show that the Commission's definition "conflates the terms 'base station' and 'tower'" thus "expand[ing] Commission jurisdiction beyond the breaking point." Pet. Br. 45, 47-51. The "specious, but scary-sounding, 'jurisdictional'-'nonjurisdictional' line" that purportedly exists between communications equipment and existing support structures is of course "an empty distraction." *Arlington*, 133 S. Ct. at 1870, 1873. "[T]he *Chevron* framework applies." *Id.* at 1870.

In short, Petitioners and their Amici fail to identify anything in the text of the statute that unambiguously forecloses the FCC's reasonable and expert interpretation of the term "base station." This Court should "not usurp [the] agency's interpretive authority by supplanting its construction." *Philip Morris USA, Inc. v. Vilsack*, 736 F.3d 284, 290 (4th Cir. 2013) (quotation omitted).

III. SECTION 6409(A) AND THE *INFRASTRUCTURE ORDER* ARE PLAINLY CONSTITUTIONAL.

The Tenth Amendment provides, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. "[W]here Congress has the authority to regulate private activity under the Commerce Clause" it also has "power to offer States the choice of regulating that activity according to federal

standards or having state law pre-empted by federal regulation." *New York*, 505 U.S. at 167. "This arrangement, which has been termed 'a program of cooperative federalism,' is replicated in numerous federal statutory schemes" that have been upheld by the courts. *Id.* (citation omitted). Congress's decision to impose a cooperative scheme does not exceed the Commerce Clause, nor offend the Tenth Amendment, unless it "compels States to regulate," *id.* at 168, or "conscript[s] the State's officers directly," *Printz v. United States*, 521 U.S. 898, 935 (1997). Both Section 6409(a) and the *Infrastructure Order* are fully consistent with this teaching. *Accord T-Mobile West Corp. v. City & Cnty. of San Francisco*, No. GC-11-510703, slip op. at 11 (Cal. Super. Ct. Nov. 26, 2014) *available at* http://www.sfsuperiorcourt.org/ ("Section 6409(a) does not, on its face, violate the Tenth Amendment.").[6]

A. Section 6409(a) And The *Infrastructure Order* Are A Valid Exercise Of Federal Power To Regulate The Wireless Industry.

The Commerce Clause provides that Congress "shall have the power . . . [t]o regulate Commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3. Because "the power to regulate and promote interstate wireless communications falls well within Congress' commerce power," *Petersburg Cellular Partnership v.*

[6] To date, this is the only court opinion of which Intervenors are aware that has considered a Tenth Amendment challenge or defense to Section 6409.

Bd. of Sup'rs of Nottoway Cnty., 205 F.3d 688, 705 (4th Cir. 2000) (opinion of Niemeyer, J.),[7] the courts routinely enforce federal statutes and regulations designed to "encourage the rapid deployment of new telecommunications technologies," *City of Rancho Palos Verdes*, 544 U.S. at 115.

Just this Term, the Supreme Court enforced a provision of the TCA requiring local authorities to provide written reasons when they deny an application to construct a wireless communications facility. *Roswell*, 135 S. Ct. at 814. And it recently upheld the FCC's authority to promulgate rules under a provision "requiring zoning authorities to render a decision 'within a reasonable period of time.'" *Arlington*, 133 S. Ct. at 1873 (citation omitted). Similarly, this Court has enforced the TCA's requirement that denials of wireless applications be supported by "substantial evidence." *See, e.g.*, *Newport News*, 674 F.3d at 382 (holding permit denial "is not supported by substantial evidence").

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[7] *Petersburg Cellular* vacated a writ of mandamus directing a local zoning authority to issue a conditional use permit, with the three-judge panel producing a per curiam opinion and each judge writing separately. 205 F.3d at 691-92 (per curiam). Although none of the judges raised doubts about Congress's power under the Commerce Clause to regulate interstate telecommunications, *see id.* at 705 (opinion of Niemeyer, J.); *id.* at 710 (Widener, J., concurring in judgment); *id.* at 711 (King, J., dissenting), one judge expressed concern that the "substantial evidence" requirement contained at 47 U.S.C. 332(c)(7)(B)(iii) violated the Tenth Amendment, *id.* at 705 (opinion of Niemeyer, J.). This concern has since been put to rest. *Roswell*, 135 S. Ct. at 811 (enforcing Section 332(c)(7)(B)(iii)); *Newport News*, 674 F.3d at 391 (same); *see also Arlington*, 133 S. Ct. at 1873 (labeling challenge to Section 332(c)(7)(B)(ii) "faux federalism").

Section 6409(a)—and by extension the *Infrastructure Order*—impose limitations on State and local authority similar to those that courts have routinely upheld. Section 6409(a) provides that "a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station." 47 U.S.C. § 1455(a). The *Infrastructure Order* ensures this command is not rendered nugatory through endless delay. *Id.* ¶¶ 212-13. Thus, like the provision of the TCA "requiring zoning authorities to render a decision 'within a reasonable period of time,'" Section 6409(a) and the Order "explicitly supplant[] state authority by requiring zoning authorities to render a decision." *Arlington*, 133 S. Ct. at 1873. The scheme is undoubtedly "well within Congress' commerce power." *Petersburg Cellular*, 205 F.3d at 705 (opinion of Niemeyer, J.).

B. Section 6409(a) Offers Local Governments A Constitutionally Valid Choice Between Regulating According To Federal Standards And Preemption.

Petitioners do not directly challenge Congress's well-established authority to offer a choice between compliance with federal standards and preemption. Rather, their objection appears to be two-fold. First, they claim that the statute does not offer *any* choice: "Read literally, Section 6409's language providing that a state and [sic] local government 'shall approve' an application runs directly afoul of [the Tenth Amendment]." Pet. Br. 55; *see also* Amici Br. 22 (asserting "compliance is

not optional"). Second, that to the extent the statute offers a choice, Petitioners assert it is not "genuine" or "meaningful" choice. Pet. Br. 55-56; *see also* Amicus Br. at 21-22.

Both of these arguments are without merit. First, Section 6409(a) "do[es] not require State or local authorities to review wireless facilities siting applications." *Infrastructure Order* ¶ 213 n.593. This is evident on the face of the statute. Section 6409(a) provides that "a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." 47 U.S.C. § 1455(a). There is no requirement that State or local governments receive "facilities request[s]." A State or local government may—as some in fact do—eschew the review of wireless facilities requests altogether. *See* Andrew Erber, *The Effective Prohibition Preemption in Modern Wireless Tower Siting*, 66 Fed. Comm. L.J. 357, 359-60 n.5 (2014). Section 6409(a)'s command applies only to governments that *elect* to exercise control in this area. Thus, Section 6409(a) offers State and local authorities a choice: regulate wireless facilities requests according to federal standards, or face preemption.

Second, the choice offered by Section 6409(a) is "meaningful" because it is well within Constitutional limits. In *New York*, the Supreme Court upheld a

federal scheme that offered States a choice between "regulat[ing] the disposal of radioactive waste according to federal standards," or refusing to participate, thereby leaving "residents who produce radioactive waste . . . subject to federal regulation." 505 U.S. at 174. The Court explained that this "set of incentives" was a valid "conditional exercise of Congress' commerce power" because the alternative to regulating in accord with federal standards was non-participation in the federal scheme, resulting in preemption. *See id.* at 174. By contrast, the Court struck down a provision where the alternative to regulating in accord with federal standards was to "take title" to the nuclear waste. *Id.* at 176. The Court explained that because the "take title" provision, "standing alone," was "beyond the authority of Congress" to impose, "it follows that Congress lacks the power to offer the States a choice between the two." *Id.* at 175-76. *See also Verizon Maryland, Inc. v. Global NAPS, Inc.*, 377 F.3d 355, 368 (4th Cir. 2004) (rejecting Tenth Amendment challenge to TCA provision requiring states to "undertake [interconnection] responsibilities or relinquish the authority to regulate to the FCC"); *Cellular Phone Taskforce*, 205 F.3d at 96 (rejecting Tenth Amendment challenge because "State and local governments are not required to approve or prohibit anything").

Section 6409(a) is like the "set of incentives" upheld in *New York*. "[T]he power to regulate and promote interstate wireless communications falls well within

Congress' commerce power," and thus there is no doubt that Congress has authority to preempt. *Petersburg Cellular*, 205 F.3d at 705 (opinion of Niemeyer, J.); *id.* at 711 (King, J., dissenting) ("[T]he siting of telecommunications towers substantially affects interstate commerce."). Indeed, "[u]nder its commerce power, Congress could have completely preempted State regulation of local telecommunications participation." *Verizon Maryland*, 377 F.3d at 381 (Niemeyer, J., concurring in part and dissenting in part). But because Section 6409(a) instead applies only to governments that elect to receive facilities requests, the exercise of Congress's authority is conditional: "if local residents do not view such expenditures or participation as worthwhile," then their governments "need not expend any funds, or participate in any federal program." *New York*, 505 U.S. at 174. "A meaningful chance to opt out exists [because] local governments can abandon the regulatory subject matter without further participation." Amicus Br. 21 (citing *FERC v. Mississippi*, 456 U.S. 742, 764 (1982)); *see also* Pet. Br. 57.

In short, if State and local governments choose to regulate in the area of wireless infrastructure, they must do so in accord with federal standards—including Section 6409(a)—or face preemption. If these jurisdictions decide not to regulate, wireless providers will be "subject [only] to federal regulation"—just like the nuclear waste producers in *New York*. Section 6409(a) thus offers State and local governments a constitutionally valid choice between cooperation and

declining to regulate. "The choice . . . may be (somewhat) unsavory to the states, yet it remains a real choice." *Verizon Maryland*, 377 F.3d at 368 (opinion of the court) (brackets omitted).

C. The *Infrastructure Order's* "Deemed Granted" Remedy Supports The Choice Offered By Section 6409(a).

Petitioners next argue that even if Section 6409(a) is constitutional, the *Infrastructure Order* is not because the "deemed granted" remedy "purports to require approval whether the state chooses to act, or not act on a Section 6409 application." Pet. Br. 56. Petitioners also object that "[t]he Commission cannot deem a permit proposal granted unless it has some permitting authority itself"; that the supposed coercive effect of the deemed granted remedy amounts to "direct regulation of the conduct of the locality's legislative power"; that a deemed grant may create "property rights"; and that the deemed granted remedy allows the federal government to avoid "responsibility." Pet. Br. 57, 58, 61. Amici urge this last contention more pointedly, asserting that the deemed granted remedy "forces State and local governments to facilitate, approve, and ultimately take the blame for, a federal wireless infrastructure deployment program." Amicus Br. 22 (quotations omitted).

All of these arguments are without merit. First, the assertion that the "deemed granted" remedy compels local action is a fundamental misreading of the word "deem." To "deem" something is "[t]o treat (something) as if . . . it were

really something else." Black's Law Dictionary (9th ed. 2009). It "has been traditionally considered to be a useful word when it is necessary to establish a legal fiction." *Id.* (quotation omitted). Deeming an action to have taken place is thus an explicit recognition that the action has not, in fact, taken place, and the courts treat it as such. For example, when under the forbearance regime codified at 47 U.S.C. § 160, a forbearance petition is "deemed granted" due to FCC delay, the deemed grant is not judicially reviewable because the grant does not "constitute agency action." *Sprint Nextel Corp. v. F.C.C.*, 508 F.3d 1129, 1131 (D.C. Cir. 2007). Because there is likewise no action on the part of local officials when an eligible facilities request is "deemed granted" under the *Infrastructure Order*, it simply cannot be that the federal government has somehow compelled them to enact or administer a federal regulatory program.

It is not surprising then Petitioners cannot point to any example of a "deemed granted" remedy that has been struck down due to federalism concerns. This is in spite of the fact that, as Petitioners acknowledge, numerous federal regimes employ such a remedy. Pet. Br. 58-60. In the cable franchising context, for example, if a local franchising authority fails to act on an application within the time frame prescribed by the FCC, the applicant's proposal is deemed granted on an interim basis. *Alliance for Cmty. Media v. F.C.C.*, 529 F.3d 763, 771 (6th Cir. 2008) (upholding remedy). Similarly, federal Medicaid regulations provide that if

a "State agency . . . fails to make a disenrollment determination" within a specified timeframe, "the disenrollment is considered approved." 42 C.F.R. § 438.56(d)(3)(ii). Although Petitioners offer, without citation to any authority, various theories for attempting to distinguish these and other examples, they miss the fundamental point: because no State or local action has taken place, none has been compelled. *See Sprint Nextel*, 508 F.3d at 1131.

Second, Petitioners are wrong in asserting that "[t]he Commission cannot deem a permit proposal granted unless it has some permitting authority itself." Pet. Br. 57. This argument necessarily rests on the assumption that facilities modifications can never occur without a permit. But zoning regulations exist only as an affirmative exercise the state's police power. *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). Some jurisdictions elect not to exercise this power at all. Erber, 66 Fed. Comm. L.J. at 359-60 n.5. The choice offered by the *Infrastructure Order* is between "regulating . . . according to federal standards or having state law pre-empted." *New York*, 505 U.S. at 173-74. Thus, if Petitioners elect not to regulate in accord with federal standards, any exercise of state authority frustrating the federal policy—including local zoning laws—will be preempted, leaving the wireless providers "subject [only] to federal regulation." *Id.* at 174. With the local requirement swept away, no permit is required.

Third, it makes no difference that a jurisdiction electing to review facilities requests in a manner that complies with Section 6409(a) and the *Infrastructure Order* might be required to engage their "legislative process." Pet. Br. 56, 57. The Supreme Court has rejected similar arguments: "Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *Reno v. Condon*, 528 U.S. 141, 150-51 (2000) (rejecting Tenth Amendment challenge to federal regulation that required South Carolina to amend its laws). If Section 6409(a) and the *Infrastructure Order* offer State and local governments a constitutionally valid choice—and they do—then it simply does not matter that a jurisdiction "opting in" to the area of federal control may be required to comply legislatively.

Fourth, Petitioners worry that a deemed grant "may create vested state property rights" or create unspecified "safety issues." Pet. Br. 58. This is nothing more than an attempt to dress-up a dislike of federal preemption in another guise. Petitioners' exercise in labeling—which is unaccompanied by citation to authority—cannot change the legal reality: if there is a conflict between the *Infrastructure Order* and local zoning authority, it is local authority that must yield. *See, e.g.*, *City of New York v. F.C.C.*, 486 U.S. 57, 64 (1988) ("The

statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof."). In any event, the *Infrastructure Order* does not grant "vested state property rights" to anyone. At most it removes restrictions on property rights imposed by Petitioners through use of their zoning authority.

Last, there is no merit to the argument that the "deemed granted" remedy allows the federal government to somehow avoid "tak[ing] responsibility for [its] actions." Pet. Br. 61; *see also* Amicus Br. at 22-23. If State and local officials elect not to receive "facilities request[s]," they are not required to comply with any federal command. 47 U.S.C. § 1455(a). Any wireless facilities modifications that follow from a deemed grant result solely from the operation of federal law. Thus, the federal government remains accountable. "[T]he States are not forced to absorb the costs of implementing a federal program," nor are they "put in the position of taking the blame for its burdensomeness and for its defects." *Printz*, 521 U.S. at 930.

In sum, the *Infrastructure Order's* "deemed granted" remedy does not violate the Tenth Amendment. It instead supports the constitutionally valid choice offered by Section 6409(a) by clarifying for all involved what is required for participation in the federal scheme. Indeed, without this limitation, a state or local government allegedly choosing to regulate in accord with federal standards "could

evade its statutory obligation[s]." *Infrastructure Order* ¶ 212. The deemed grant mitigates this risk. Because this remedy does not negatively affect the choice offered by Section 6409(a), it is plainly constitutional.

CONCLUSION

For the foregoing reasons, the Court should uphold the *Infrastructure Order*.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, Circuit Rule 32(b), and the Court's order granting CTIA and PCIA leave to file a separate brief of up to 8,750 words, *see* D.E. 34, because this brief contains 8,750 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2010 version of Microsoft Word in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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