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

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

JOINT REPLY COMMENTS FILED BY THE LEAGUE OF CALIFORNIA CITIES, THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND SCAN NATOA

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Patrick Whitnell, Esq.
General Counsel
League of California Cities
1400 K Street, 4th Floor
Sacramento, CA 95814
pwhitnell@cacities.org
www.cacities.org
Direct: (916) 658-8281
Fax: (916) 658-8240

Jennifer Bacon Henning, Esq.
Litigation Counsel
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814
jhenning@coconet.org
Direct: (916) 327-7535

Christy Marie Lopez, Esq.
President of SCAN NATOA
Aleshire & Wynder, LLP
18881 Von Karman Avenue, Suite 1700
Irvine, CA 92612
clopez@awattorneys.com
Tel: (949) 223-1170
Fax: (949) 223-1180

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SUMMARY

The League of California Cities ("League"), the California State Association of Counties ("CSAC"), and the States of California and Nevada Chapter of National Association of Telecommunications Officers and Advisors ("SCAN NATOA") (collectively, "California Local Governments") offer these comments in response to the comments filed on February 5, 2014 in the Federal Communications Commission's (the "Commission") Notice of Proposed Rulemaking ("NPRM") adopted and released on September 26, 2013.[1] California Local Governments appreciate the opportunity to participate in this important matter.

California Local Governments support the thorough and thoughtful comments filed by many municipal commenters, and specifically the comments from the City of Alexandria, Virginia; the City of Eugene, Oregon; the City of Mesa, Arizona; the Colorado Communications and Utility Alliance *et al.*; Fairfax County, Virginia; the National Association of Telecommunications Officers and Advisors ("NATOA") *et al.*; City of San Antonio, Texas; and the Town of Hillsborough, California.[2] In contrast, California Local Governments generally oppose the comments from AT&T; Crown Castle; CTIA; PCIA; Sprint Corporation; Towerstream Corporation; and Verizon.[3]

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

[2] *See* JOINT COMMENTS OF THE CITY OF ALEXANDRIA, VA. *ET AL.*, *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014); COMMENTS OF THE CITY OF EUGENE, OR., *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014); REPLY COMMENTS OF THE CITY OF MESA ARIZ., *Reply Comment*, WT Docket No. 13-238 (filed Feb. 26, 2014); COMMENTS OF THE COLO. COMMS. AND UTIL. ALLIANCE *ET AL.*, *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014); COMMENTS OF FAIRFAX CNTY., VA., *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014) [hereinafter "FAIRFAX CNTY. COMMENTS"]; JOINT COMMENTS OF THE NAT'L ASS'N OF TELECOMS. OFFICERS & ADVISORS *ET AL.*, *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014) [hereinafter "NATOA COMMENTS"]; COMMENTS OF THE CITY OF SAN ANTONIO, TEX., *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014) [hereinafter "SAN ANTONIO COMMENTS"]; COMMENTS OF THE TOWN OF HILLSBOROUGH, CAL., *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014).

[3] *See* COMMENTS OF AT&T, *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014) [hereinafter "AT&T COMMENTS"]; COMMENTS OF CROWN CASTLE, *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014) [hereinafter "CROWN CASTLE COMMENTS"]; COMMENTS OF CTIA—THE WIRELESS ASS'N, *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014); COMMENTS OF PCIA—THE WIRELESS INFRASTRUCTURE ASS'N & THE HETNET FORUM,

These reply comments address only selected issues—namely, the proposed (1) new rules to interpret Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 (codified as 47 U.S.C. § 1455(a) (2013)); (2) PCIA definition of a distributed antenna system ("DAS") or small cell; and (3) revised rules to interpret Section 332(c)(7)(B) of the Telecommunications Act of 1996 ("Telecom Act").

* * *

No Demonstrated Need for New or Revised Rules. The Commission should not now revise current rules or adopt new ones because no factual record exists to show a national problem for the Commission to redress. The initial comments generally show that the current rules work well, and that State and local governments implemented Section 6409(a) without much controversy.[4] Appendix A, attached to these comments, provides more detailed responses to the anecdotal (and often misleading) assertions provided in some wireless industry comments.

Any Potential Rules Must Be Narrow. Should the Commission adopt new rules, it should recognize and reject the unworkable scheme proposed in the NPRM. Under the proposed rules, Section 6409(a) would require State and local governments to approve virtually all new wireless facilities within 45 days regardless of whether a bona fide inquiries exists about its status as an "eligible facilities request" or whether it will "substantially change" the host structure.[5] Moreover, the proposed rules would improperly substitute the Commission for the courts as the proper venue to resolve such inquiries.

Comment, WT Docket No. 13-238 (filed Feb. 3, 2014) [hereinafter "PCIA COMMENTS"]; COMMENTS OF SPRINT CORP., *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014) [hereinafter "SPRINT COMMENTS"]; COMMENTS OF TOWERSTREAM CORP., *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014) [hereinafter "TOWERSTREAM COMMENTS"]; COMMENTS OF VERIZON AND VERIZON WIRELESS, *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014) [hereinafter "VERIZON COMMENTS"].

[4] *See infra*, notes 12–14, and accompanying text.

[5] *See infra*, Part I.C.

In the event that the Commission feels compelled to act now, it should adopt only the very most narrowly tailored possible. In particular, California Local Governments emphasize that:

- A "***wireless tower***" means a structure solely or primarily built to support wireless transmission equipment. This standard comports with the limited Congressional intent evidenced in the statutory scheme that includes Section 6409(a), current Commission rules, common usage among both wireless providers and local governments, and common sense.[6]
- Whether a proposal to install new wireless facilities constitutes a "***collocation***" must depend on whether a legally established wireless use already exists on the structure at the time the applicant submits the request. This standard provides a verifiable bright-line test that generally follows the logic in the *2009 Declaratory Ruling*.[7]
- The broad phrase "***substantially change the physical dimensions***" includes all physical changes—increases, decreases, and other aesthetic transformations. Any eligible facilities request that does not mimic and extend the camouflage on the existing wireless tower or base station causes a *per se* substantial change.[8]
- The phrases "***or any other provision of law***" and "***may not deny, and shall approve***" does not exempt wireless applicants from generally applicable laws. Nothing in Section 6409(a) supports such a proposed rule.[9]

PCIA-Proposed DAS & Small Cell Standards. The Commission should reject the illusory standard that PCIA proposes for a distributed antenna system ("DAS") or small cell

[6] *See infra*, notes 25–31, and accompanying text.
[7] *See infra*, notes 32–34, and accompanying text.
[8] *See infra*, notes 35–43, and accompanying text.
[9] *See infra*, notes 47–59, and accompanying text.

because it would allow wireless providers to fill public spaces with an unlimited number of wireless equipment enclosures.[10]

Deemed-Granted Remedy. The Commission should not impose an extraordinary and constitutionally questionable deemed-granted remedy on local governments that require additional time to review a permit request or find that a permit should not be issued. No factual record exists to justify a rule with such magnitude, and that would summarily reverse the entire wireless permit process.[11]

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[10] *See infra*, Part II.
[11] *See infra*, Part III.E.

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I. THE COMMISSION SHOULD DECLINE TO ADOPT THE WIRELESS INDUSTRY'S UNNECESSARY, UNWORKABLE, & IRRATIONALLY DANGEROUS RULES

In response to the NPRM, comments from the wireless industry (1) offer little to no actual evidence of any national problem for the Commission to redress; (2) propose a series of rules that dismantles local land use authority piece by piece; and (3) urge the Commission to disregard generally applicable laws designed to protect people and property from overbuilt or poorly constructed facilities.

A. No Factual Record Demonstrates a Present Need for New Rules

The Commission should not adopt new rules without a clear and fully developed factual record that shows a pervasive problem the Commission can redress.[12] This basic principal rings even more true when the Commission proposes rules that preempt local power over areas of traditionally local control, such as land use. With no factual record that demonstrates a national problem at this time, the Commission should not adopt any new rules at this time.

Although the industry comments provide a few anecdotal examples with limited (if any) factual context, the Commission could not infer a nationwide problem from a few isolated disputes. Indeed, the Commission should ignore anecdotal examples when the comments do not name the alleged bad actor, as when Verizon that asserted various unnamed communities in Georgia impose onerous permit requirements, because basic due process requires adequate notice and an opportunity to respond.[13]

In an attempt to drum up a record where none exists, several industry commenters offer the same factual record from the *2009 Declaratory Ruling* as evidence that the Commission

[12] *See* COMMENTS OF THE DISTRICT OF COLUMBIA at 5, *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014); FAIRFAX CNTY. COMMENTS, *supra* note 2, at 4; NATOA COMMENTS, *supra* note 2, at 7.
[13] *See* VERIZON COMMENTS, *supra* note 3, at 27.

should adopt more restrictive rules now.[14] The Commission should not consider such old evidence from the *2009 Declaratory Ruling*, which supported the current presumptively reasonable time, to now justify a materially shorter time under the same facts. Instead, the Commission should consider only the facts in the current record (or lack thereof) in the present NPRM.

B. In the Event the Commission Decides to Adopt New Rules, It Should Adopt Narrow Rules that Comport with Congressional Intent, Common Sense, and Federalism Principles

In the event that the Commission decides to define certain terms in Section 6409(a) or revisit the *2009 Declaratory Ruling*, notwithstanding the absence of a reliable factual record that demonstrates any need, then the Commission should narrowly define the terms to comport with Congressional intent, common use, and common sense. California Local Governments, like many other municipal commenters, expansively discussed these issues in its initial comments and reiterate them now.[15]

The Commission should specifically decline to adopt preemptive rules that divest authority from local governments and channel local fact-intensive inquiries away from currently available venues, such as local administrative bodies and the courts best suited to address these questions. Such proposed rules flaunt bedrock federalism principals and would transform the Commission and its staff into the very "national zoning board" that it seeks to avoid.[16]

C. The Proposed Rules Eviscerate Reasonable Local Control and Foster a Race to the Bottom Rather than Rational Wireless Policies

The industry commenters endorse a series of individual rules that, when strung together, would eviscerate local control over a vast number of wireless facilities. For example, the

[14] *See, e.g.*, AT&T COMMENTS, *supra* note 3, at 29; CTIA COMMENTS, *supra* note 3, at 18 n.64.
[15] *See* JOINT COMMENTS FILED BY THE LEAGUE OF CAL. CITIES *ET AL.* at 1–11, *Comment*, WT Docket No. 13-238 (filed Feb. 238) [hereinafter "CAL. LOCAL GOV'TS COMMENTS"]; NATOA COMMENTS, *supra* note 2, at 6–7.
[16] *See* NPRM, *supra* note 1, at ¶ 99.

proposed industry rules would classify *any* proposal to place wireless transmission facilities on *any* structure as a collocation subject to a 45-day shot clock and deemed-granted remedy. Under this industry scheme, virtually all wireless facilities on existing structures (new builds as well as collocations) would escape any discretionary review so long as the service provider did not substantially increase the height of that support structure.[17]

The proposed rules conflict with the basic policies inherent in both the Telecom Act and current Commission rules.[18] The scheme in these proposed rules (1) ignores the necessary balance between the public interest in wireless infrastructure and the public interest in safe and rational land uses, (2) encourages bad actors in the wireless industry to game the system, and (3) eliminates opportunities for cooperative solutions between industry and local government.

Wireless towers and base stations do not exist in some invisible abstract; these facilities operate in the shared space where we all live and work. Just as wireless facilities share space with other uses, these facilities must follow the same rules. The Commission may find some narrow "rules of the road" necessary to further these sometimes-conflicted public interests, but the Commission should not allow policies intended to accelerate wireless services to devolve into a race to the bottom, in which wireless providers attempt to preempt as many local laws as possible under the guise of Section 6409(a).

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[17] *See, e.g.*, AT&T COMMENTS, *supra* note 3, at 22, 24, 26; CTIA COMMENTS, *supra* note 3, at 12–13, 16–18; PCIA COMMENTS, *supra* note 3, at 31–32, 34–36, 48, 50; SPRINT COMMENTS, *supra* note 3, at 8–11; VERIZON COMMENTS, *supra* note 3, at 28, 31–32.

[18] *See* 47 U.S.C. § 332(c)(7) (2011) (preserving general local authority while preempting limited specific local prerogatives); In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance, *Declaratory Ruling*, 24 FCC Rcd. 13994, 140013 ¶ 49 (rel. Nov. 18, 2009) (finding a strong public interest in cooperation and consensual resolutions between industry and communities) [hereinafter "*2009 Declaratory Ruling*"].

II. THE COMMISSION SHOULD REJECT PCIA'S ILLUSORY STANDARD FOR DAS & SMALL CELLS BECAUSE THE EXPANSIVE & UNLIMITED NUMBER OF EQUIPMENT BOXES WILL LIKELY CAUSE A SIGNIFICANT ENVIRONMENTAL IMPACT

PCIA and several other industry commenters urge the Commission to adopt an inappropriately expansive standard to define a distributed antenna system ("DAS") node or small cell.[19] Specifically, PCIA proposes to define a DAS or small cell via reference to its volumetric size as follows:

> **(1) Equipment Volume.** An equipment enclosure shall be no larger than seventeen (17) cubic feet in volume.
>
> **(2) Antenna Volume.** Each antenna associated with the installation shall be in an antenna enclosure of no more than three (3) cubic feet in volume. Each antenna that has exposed elements shall fit within an imaginary enclosure of no more than three (3) cubic feet.
>
> **(3) Infrastructure Volume.** Associated electric meter, concealment, telecom demarcation box, ground-based enclosures, battery back-up power systems, grounding equipment, power transfer switch, and cut-off switch may be located outside the primary equipment enclosure(s), and are not included in the calculation of Equipment Volume.
>
> Volume is a measure of the exterior displacement, not the interior volume of the enclosures. Any equipment that is concealed from public view in or behind an otherwise approved structure or concealment, is not included in the volume calculations.[20]

These definitions do not clearly describe the PCIA proposal. To help the Commission evaluate the proposed standard, California Local Governments provides Figure 1, which depicts a few various possible examples that would qualify as a DAS node or small cell.

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[19] *See* PCIA COMMENTS, *supra* note 3, at 7–8; *see also* AT&T COMMENTS, *supra* note 3, at 14; SPRINT COMMENTS, *supra* note 3, at 6; CROWN CASTLE COMMENTS, *supra* note 3, at 5.
[20] *See* PCIA COMMENTS, *supra* note 3, at 7.

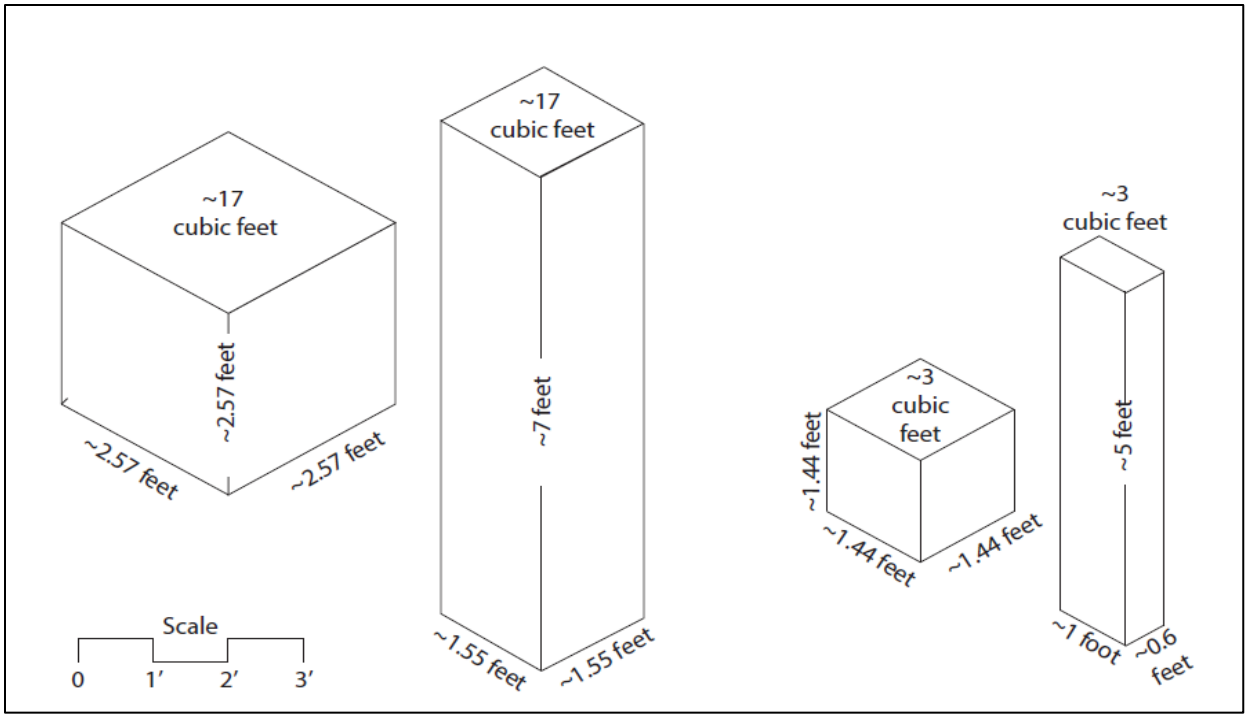

FIGURE 1: Isometric examples of various equipment and antenna configurations under the PCIA proposed standard for DAS and small cell facilities. (Source: Telecom Law Firm, P.C.)

The Commission should not adopt the proposed PCIA standard for DAS nodes and small cells because it comes riddled with carve-outs for large and intrusive equipment that completely eviscerate any actual limit on the permitted size. The Commission may categorically exclude certain projects only when it finds that the project will not likely cause a substantial impact on the environment. However, the Commission cannot determine the likelihood of a substantial environmental impact when it cannot determine the scope of the project itself.

PCIA not only proposes a rather large pole-mounted equipment volume at seventeen cubic feet, but also proposes to *exclude* "[a]ssociated electric meter, concealment, telecom demarcation box, ground-based enclosures, battery back-up power systems, grounding equipment, power transfer switch, and cut-off switch may be located outside the primary equipment enclosure(s)."[21] Under this proposal, a DAS or small cell operator could install an

[21] *See* PCIA COMMENTS, *supra* note 3, at 7.

unlimited number of ground-mounted equipment cabinets *in addition to* a pole-mounted equipment box larger than the average person.

The proposed standard similarly does not limit the number of three-cubic-foot antennas at each DAS node or small cell. Although PCIA deleted language from the second prong that expressly permitted an unlimited number of antennas, this change does not affirmatively limit the number of antenna enclosures associated with each DAS node or small cell.[22] The proposed standard still permits an unlimited number of antennas.

Moreover, the proposed standard exempts all equipment from the volumetric limits when concealed from public view, and excludes "concealment" from the basic infrastructure volume equation.[23] In other words, PCIA asks the Commission to exempt all equipment that the public cannot see and all the structures installed to prevent the public from seeing the equipment. This circular and overreaching carve-out should eliminate any doubt that the proposed standard would allow a limitless number of equipment elements at the DAS node or small cell site.

The Commission should reject this proposed standard as illusory because it does not actually limit the scope of a DAS node or small cell, and thus the Commission cannot actually determine whether such projects will likely cause a significant environmental impact.

III. SECTION 6409(a) ISSUES

As many commenters discussed, Congress could not and did not intend Section 6409(a) to preempt all local land use control or to guarantee approval for every eligible facilities

[22] *Compare* NPRM, *supra* note 1, at ¶ 49 n.99 (including the words "[t]here is no limit to the number of antennas that can be installed by-right as part of a DAS or Small Cell installation"), *with* PCIA COMMENTS, *supra* note 3, at 7 (omitting the same).
[23] *See* PCIA COMMENTS, *supra* note 3, at 7.

request.[24] Although the Commission need not interpret Section 6409(a) at this time, any rules it might adopt should recognize the limits in the statute and not just its mandate to approve certain alleged *de minimis* wireless infrastructure changes.

A. The Proposed Definition of an "Existing Wireless Tower or Base Station" Would Artificially Transform All New Wireless Facilities into Collocations

The Commission should reject the proposal from industry commenters to define "existing wireless tower or base station" to include structures that do not presently support any wireless equipment.[25] As explained in Part I.C above, this rule would artificially transform all new wireless facilities into collocations that a government "may not deny, and shall approve" because the applicant could technically request a permit to "collocate" wireless transmission equipment on an "existing wireless tower or base station." Section 6409(a) would then require local governments to approve all *new sites* that do not result in a substantial change.

In support of the proposed rule, CTIA attempts to argue that a *post hoc* written statement from Representative Fred Upton somehow shows Congress intended to streamline collocation of wireless transmission equipment in general rather than only those structures that currently support wireless facilities.[26] The Commission should reject this line of argument because (1) the comments appeared after Congress enacted the statute and (2) the statutory scheme in the Spectrum Act proves otherwise.[27]

First, one congressperson's after-the-fact statement, not offered for debate, does not shed any light on Congressional intent. To evidence Congressional intent, comments in the legislative

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[24] *See, e.g.*, CAL. LOCAL GOV'TS COMMENTS, *supra* note 15, at 18; INTERGOVERNMENTAL ADVISORY COMM., ADVISORY RECOMMENDATION NO. 2013-13, RESPONSE TO NOTICE OF PROPOSED RULEMAKING ADOPTED AND RELEASED SEPTEMBER 26, 2013 at 4 (2013).
[25] *See, e.g.*, AT&T COMMENTS, *supra* note 3, at 22; CTIA COMMENTS, *supra* note 3, at 12; PCIA COMMENTS, *supra* note 3, at 32; SPRINT COMMENTS, *supra* note 3, at 9; VERIZON COMMENTS, *supra* note 3, at 28.
[26] *See* CTIA COMMENTS, *supra* note 3, at 11–12 (citing 158 CONG. REC. at E239 [(Feb. 17, 2012)] (Statement of Rep. Upton)) California Local Governments inserted the date that CTIA omitted.
[27] *See* 158 CONG. REC. E237, E239 (Feb. 17, 2012) (Statement of Rep. Upton).

history must at least appear before Congress votes.[28] The comment CTIA cites appear in the "Extension of Remarks" and thus Congress never actually considered them before it voted on the Middle Class Tax Relief and Job Creation Act of 2012. Although these remarks may represent the intent of one member Congress, the Commission should not consider them persuasive as to the intent of Congress as a whole.

Second, Congress intended a "wireless tower" to narrowly refer to a structure specifically built to support wireless antennas because it chose a more specific statutory term in Section 6409(a) than it adopted in Section 6206(c)(3) of the same act.[29] Section 6206(c)(3) directs FirstNet to leverage "existing . . . commercial or other communications infrastructure . . . and . . . Federal, State, tribal, or local infrastructure" for public safety networks whereas Section 6409(a) authorizes generally commercial carriers to collocate, remove, or replace wireless transmission equipment on "existing wireless tower or base station."[30] The difference between these statutes follows sound public policy because Congress would naturally intend to provide greater access to a governmental first-responder network like FirstNet than it would to private commercial entities like AT&T and Verizon.

Congress specifically chose the term "existing wireless towers" and no evidence on the face of the statute or in the utterly silent legislative history indicates that it intended that phrase to mean "structures similar to wireless . . . towers." Moreover, the words in the proposed rule do not actually provide any limit to the kind of structures covered under Section 6409(a) because many structures could hold wireless facilities and no principled means exists to distinguish

[28] *See Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 170 (2001) (quoting *Hagan v. Utah*, 510 U.S. 399, 420 (1994), for the proposition that "subsequent history is less illuminating than the contemporaneous evidence").
[29] *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6206(c)(3), 126 Stat. 156 (codified as 47 U.S.C. § 1426(c)(3) (2013)); *see also* CAL. LOCAL GOV'TS COMMENTS, *supra* note 15, at 4–5.
[30] *See* 47 U.S.C. § 1426(c)(3) (2013).

structures that "typically hold wireless facilities" from other structures. The Commission should therefore reject Verizon's proposal to define "existing wireless tower or base station" as "structures similar to wireless antenna towers that typically hold wireless facilities" because it conflicts with the plain words and manifest intent in Section 6409(a) and Section 6206(c)(3).[31]

At bottom, the words "existing wireless tower or base station" effectively limits the places where Section 6409(a) applies, so any rule that expanded those places would run counter to manifest Congressional intent. Congress purposely chose the phrase "existing wireless tower or base station" even though it would not include as many structures as the industry commenters would like, and the Commission should faithfully implement that choice.

B. Whether a Permit Request Constitutes a "Collocation" Should Depend on Whether a Legally Established Wireless Use Already Exists on the Structure

Some industry commenters erroneously urge the Commission to follow the *2009 Declaratory Ruling* and define a "collocation" as a request that does not result in substantial increase in size of a tower.[32] This proposal presents the hopelessly circular scenario in which (1) local governments must approve every collocation request that does not substantially change the physical dimensions of the existing wireless tower or base station but (2) a collocation necessarily means a request that does not substantially change the physical dimensions of the existing wireless tower or base station. The Commission suggested that definition years before Congress enacted Section 6409(a); it could not know that it would create this conundrum, and therefore should not define a "collocation" in under Section 6409(a) the same way it defines that term in the *2009 Declaratory Ruling*.

[31] *See* VERIZON COMMENTS, *supra* note 3, at 28.
[32] *See, e.g.*, AT&T COMMENTS, *supra* note 3, at 28.

Instead, the key to whether a proposal to install wireless transmission equipment constitutes a "collocation" depends on whether a legally established wireless use already exists on the structure at the time the applicant submits the request.[33] This criterion provides a verifiable bright-line rule to distinguish collocations from new sites—validly permitted wireless facilities either exist on the structure or they do not. This approach also generally follows the logic in the *2009 Declaratory Ruling*, which found that collocations do not implicate the same local effects as new builds.[34] The Commission should not adopt the collocation standard from the *2009 Declaratory Ruling* because the key to whether a permit request constitutes a collocation depends on the existence of a legally established wireless use on the structure.

C. The Commission Should Not Define Substantial Change and Should Reject the Inappropriately Rigid Four-Part Collocation Agreement Test

California Local Governments emphasizes that the Commission should not attempt to define what constitutes a substantial change under Section 6409(a).[35] Congress intended the flexible "substantially change" standard to allow State and local governments the opportunity to accelerate infrastructure deployment consistent with their local values. The Commission should not take away that flexibility.

In the event that the Commission decides to define a substantial change, it should not adopt the inappropriately rigid four-part test from the Collocation Agreement ("Collocation Agreement Test").[36] Any final rule should (1) recognize that the phrase "substantially change" applies to all physical aspects—not just increases in size—and (2) allow communities to strike

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[33] *See, e.g.*, 53 PA. STAT. ANN. § 11702.2 (West 2012) (defining "collocation" as "[t]he placement or installation of new wireless telecommunications facilities on previously approved and constructed wireless support structures . . ."); *see also* CROWN CASTLE COMMENTS, *supra* note 3, at 10.
[34] *See 2009 Declaratory Ruling*, *supra* note 18, at 14012 ¶ 46.
[35] *See* CAL. LOCAL GOV'TS COMMENTS, *supra* note 15, at 11–12.
[36] *See* NPRM, *supra* note 1, at ¶ 119; *see also* Wireless Telecommunications Bureau Offers Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, *Public Notice*, 28 FCC Rcd. 1, at 3 (rel. Jan. 25, 2013).

the right balance between the public interest in wireless infrastructure and the equally important public interests in well-planned and aesthetically consistent communities.

1. *The Phrase "Substantially Change" Encompasses All Articulable Measures*

Despite the broadly generic phrase "substantially change the physical dimensions" in Section 6409(a), the industry comments urge the Commission to adopt the Collocation Agreement Test, which narrowly and rigidly analyzes each eligible facilities request through only empirically measurable increases in only a limited few physical dimensions.[37] The Commission should reject the Collocation Agreement Test because the phrase "substantial change" encompasses all articulable measures. The plain term "change" in Section 6409(a) indicates that State and local governments retain discretionary power over substantial increases, decreases, and other physical differences not necessarily related to size.[38]

The other terms in Section 6409(a) do not limit the general term "change" to the more specific "increase" because the terms "remove" and "replace" in Section 6409(a)(2)(B) explicitly contemplates decreases in size and other changes not necessarily related to size.[39] On rare occasions, a court may invoke the canon *ejusdem generis* to "elucidate [Congress's] words and effectuate its intent," but not when it would "obscure or defeat [its] intent and purpose."[40] Congress included equipment removals and replacements within the term "eligible facilities request," and expressly subjected all eligible facilities requests to the substantial-change analysis. The Commission would therefore "obscure and defeat" Congressional intent if it attempted to limit the general term "change" to merely "increases."

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[37] *Compare* 47 U.S.C. § 1455(a) (2013) (adopting the broadly generic term "change"), *with* CTIA COMMENTS, *supra* note 3, at 14 (interpreting the broadly generic term "change" as the narrowly specific term "increase").
[38] *See* MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/change (last visited on Feb. 17, 2014).
[39] *See* 47 U.S.C. § 1455(a)(2)(B).
[40] *See United States v. Alpers*, 338 U.S. 680, 682 (1950).

2. *The Commission Should Reject Proposals to Define Excavation Outside the Wireless Premises as an "Insubstantial" Change*

In the event that the Commission adopts the Collocation Agreement Test, it should reject the PCIA and Sprint proposal to expand the fourth prong to allow applicants to excavate outside the leased or licensed premises.[41] Many eligible facilities requests that involve excavation outside the premises will result in a substantial change, and States that do not consider it a substantial change may freely adopt a different rule.

The industry comments themselves demonstrate that communities that do not consider expanded ground space as a substantial change will reflect that value in its local laws. For example, the Carolinas Wireless Association points out that the North Carolina General Assembly found that an expanded 2,500 square feet did not constitute a substantial change whereas the California Wireless Association points out that the California State Senate considered but rejected a bill that would not cover such expanded premises.[42] Moreover, the Pennsylvania Wireless Association asks the Commission to adopt rules akin to Pennsylvania's Wireless Broadband Collocation Act, which does not require local approval when the proposal would expand the ground space boundaries.[43] The differences among these State laws demonstrate that whether a proposal will cause a substantial change depends in large part on the specific circumstances where the change occurs. The Commission should reject proposals to

[41] *See* PCIA COMMENTS, *supra* note 3, at 38; SPRINT COMMENTS, *supra* note 3, at 10.
[42] *Compare* COMMENTS OF THE CAL. WIRELESS ASS'N at 3, *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014) (citing 2006 Cal. Legis. Serv. Ch. 676 (S.B. 1627) (West)), *with* COMMENTS OF THE CAROLINAS WIRELESS ASS'N at 3 (citing N.C. GEN. STAT. §§ 160A-400.50(b), 153A349.50(b) (2013)).
[43] *See generally* COMMENTS OF THE PA. WIRELESS ASS'N, *Comment*, WT Docket No. 13-238 (filed Feb. 3, 2014); *see also* N.C. GEN. STAT. §§ 160A-400.53(a1); PA. STAT. ANN. § 11702.4(c)(2).

define excavation outside the wireless premises as an insubstantial change as a misguided lowest common denominator, one size-fits-all approach.

3. *The Commission Should Clarify That Eligible Facilities Requests That Do Not Mimic Existing Camouflage Constitutes a* Per Se *Substantial Change*

The Commission should reject the Collocation Agreement Test because it would permit a wireless upgrade or collocation to undo all the creative and collaborative efforts in the permit review and approval process to camouflage wireless sites. Local governments spend considerable time and resources to find camouflaged solutions, and reasonably expect such sites to remain camouflaged throughout its lifespan. The Commission should not interpret Section 6409(a) to frustrate those efforts or reasonable expectations.

For example, AT&T urges the Commission to find that a request to completely replace a support structure does not cause a substantial change.[44] Section 6409(a) could potentially require a local government to approve a proposal to replace a camouflaged site with an uncamouflaged monopole on the grounds that the replacement pole does not increase the height more than ten percent (10%) or the width more than twenty feet. Figure 2 and Figure 3, below, illustrate this example and its logical outcome under AT&T's proposed view of Section 6409(a).

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[44] *See* AT&T COMMENTS, *supra* note 3, at 24.

FIGURE 2: Camouflaged site in Denver, Colorado. (Source: Telecom Law Firm, P.C.)

FIGURE 3: A logical mandatory outcome under Section 6409(a) that destroys the approved camouflage. (Source: Telecom Law Firm, P.C.)

PCIA proposes to add a gloss to the Collocation Agreement Test that purports to resolve this issue, but the Commission should see that this proposal comments provide a case-in-point example of how the wireless industry attempts to dismantle local authority piece-by-piece.[45] PCIA concedes that a local government should consider whether a change that undermines elements designed to conceal an existing wireless facility rises to the level of a substantial change, but only to the extent that the change would remove such elements rather than whether the increases frustrate those elements.[46] PCIA also asserts that State and local governments may not deny an eligible facilities request on the ground that it does not comply with a prior condition of approval, as more fully discussed in Part III.D.1 below. Taken together, these proposed rules

[45] *See* PCIA COMMENTS, *supra* note 3, at 39.
[46] *See id.*

hardly preserve any aesthetics at all because the applicant does not need to replicate the camouflage for the new equipment so long as it does not diminish the current camouflage. The images in Figure 4 and Figure 5 depict this concept and logical outcome

FIGURE 4: Actual photograph of an unmanned camouflaged wireless site in Yucca Valley, California. (Source: Telecom Law Firm, P.C.)

FIGURE 5: Photo simulation that shows a permitted modification under the PCIA formulation. The original site completely concealed all the equipment within the faux-house, whereas the hypothetical collocation does not "remove" the camouflage. (Source: Telecom Law Firm, P.C.)

PCIA's proposed rule would require a local government to approve the collocated tower in Figure 5 because it maintains—but does not mimic—the existing camouflage on the collocated element(s). The Commission can see that this proposed formulation of the rule could cause a substantial change and lead to ridiculous results. Accordingly, the Commission should find that an eligible facilities request must at least effectively mimic the existing camouflage or else constitutes a substantial change *per se* to prevent haphazard, mismatched, and aesthetically disagreeable facilities like the one depicted above.

D. The Commission Should Affirm that Wireless Facilities Must Comply with All Generally Applicable Laws and Conditions of Approval Because Section 6409(a) Does Not Authorize Wireless Providers to Choose Laws With Which It Wants to Comply

Industry comments that claim Section 6409(a) requires local approval regardless of whether the eligible facilities request would violate any generally applicable law wildly overstate its preemptive effect.[47] Section 6409(a) does not provide wireless carriers the unprecedented benefit to pick-and-choose which laws it would like to comply with. The Commission should affirm that (1) Section 6409(a) does not exempt applicants from generally applicable laws and (2) State and local governments retain their power to conditionally approve eligible facilities requests to ensure the projects comply with such laws.

1. *The Commission Should Reject the Unreasonably Dangerous Proposal to Exempt Wireless Facilities from Generally Applicable Zoning and Structural Laws*

Section 6409(a) does not mandate local approval when an otherwise eligible facilities request would "substantially change the physical dimensions of the existing wireless tower or

[47] *See, e.g.*, CTIA COMMENTS, *supra* note 3, at 15 (arguing that a State or local government may not deny an eligible facilities request merely because it allegedly violates a local law); TOWERSTREAM COMMENTS, *supra* note 3, at 23 (asserting that State and local governments must approve *every* eligible facilities request).

base station."[48] Although some industry comments recognize that Section 6409(a) does not exempt wireless facilities from generally applicable zoning and structural laws, other industry commenters argue that the Commission should preempt some—or even all—such laws.[49] The Commission should reject this proposed rule. Any change in physical dimensions that would cause the structure to violate a generally applicable law must constitute a "substantial" change because these laws (1) protect lives and property, and (2) do not effectively prohibit or unreasonably discriminate against personal wireless services. Even industry-friendly State laws do not exempt eligible facilities requests from generally applicable zoning and structural laws. Any other result would compromise public safety only to financially benefit the wireless industry.

First and foremost, Congress did not intend Section 6409(a) to exempt wireless facilities from local oversight needed to prevent serious harm to people and property. As California Local Governments noted in its initial comments, overbuilt wireless facilities like the ones that caused the 2007 Malibu Canyon Fire seriously threaten public health and safety.[50] Recent tower fires and collapses underscore the need for local oversight.[51] Although PCIA asserts that such

[48] *See* 47 U.S.C. § 1455(a).
[49] *See, e.g.*, CTIA COMMENTS, *supra* note 3, at 15; PCIA COMMENTS, *supra* note 3, at 41 (arguing that Section 6409(a) preempts discretionary zoning laws, but not ministerial structural codes); SPRINT COMMENTS at 11 (arguing that only objective, ministerial, and nondiscretionary structural codes should apply); TOWERSTREAM COMMENTS, *supra* note 3, at 23.
[50] *See* CAL. LOCAL GOV'TS COMMENTS, *supra* note 15, at 14 (citing Melissa Caskey, *CPUC Approves $51.5-Million Malibu Canyon Fire Settlement*, MALIBU TIMES (Sep. 23, 2013), *available at* http://www.malibutimes.com/news/article_3d62067a-2175-11e3-86b6-001a4bcf887a.html).
[51] *See, e.g.*, Brad Doherty, *Spark Ignites Cell Tower Fire*, BROWNSVILLE HERALD (Jan. 6, 2014), http://www.brownsvilleherald.com/news/local/article_dfc15d14-7754-11e3-b856-0019bb30f31a.html; Kathi Belich, *Cellphone Tower Catches Fire in Sanford*, WFTV (Aug. 21, 2013), http://www.wftv.com/news/news/local/cell-phone-tower-catches-fire-seminole-co/nZX69/; Karen Araiza, *Welding Sparked Cell Phone Tower Fire: Officials Figured Out What Caused a Fire that Left a Cell Phone Tower Leaning, Ready to Collapse*, NBC PHILADELPHIA (July 8, 2013), http://www.nbcphiladelphia.com/news/local/Cell-Phone-Tower-on-Fire-in-Bucks-County-212489511.html.

"[c]atastrophic failures" rarely occur, they do occur and the Commission should not preempt laws designed to preserve public safety and prevent such structural failures.[52]

Contrary to some industry comments, State and local governments do not generally enact or revise zoning and structural laws—such as fall zones, setbacks, and limits on expansions to legal nonconforming uses—to thwart wireless infrastructure deployment.[53] From time to time, State and local governments must revise zoning ordinances to reflect natural community changes such as density and new development. In the rare case that a local government improperly exercises its authority, Congress granted the Commission the power to preempt such action "to the extent necessary to correct such violation or inconsistency."[54] The Commission should reject all proposals to preempt fall zones, setbacks, and limits on expansions to legal nonconforming uses because it would preempt far beyond "the extent necessary" as Congress required.[55]

Furthermore, the State laws touted in the industry comments do not exempt eligible facilities requests from generally applicable laws. For example, North Carolina explicitly permits the local government to review whether the proposed changes violate "[a]pplicable public safety, land use, or zoning issues addressed in its adopted regulations, including aesthetics, landscaping, land-use based location priorities, structural design, setbacks, and fall zones."[56] Moreover, the Pennsylvania Wireless Broadband Collocation Act explicitly requires all eligible facilities requests to comply with all prior conditions of approval.[57] For these reasons, the Commission should reject the unreasonably dangerous proposal to exempt wireless facilities from generally applicable zoning and structural laws.

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[52] *See* PCIA COMMENTS, *supra* note 3, at 45.
[53] *See, e.g.*, CTIA COMMENTS, *supra* note 3, at 15; PCIA COMMENTS, *supra* note 3, at 45.
[54] *See* 47 U.S.C. § 253(d) (2011).
[55] *See id.*
[56] *See* N.C. GEN. STAT. §§ 160A-400.52(c)(1).
[57] *See* PA. STAT. ANN. § 11702.4(c)(4).

2. *The Commission Should Affirm the Local Government Power to Conditionally Approve Eligible Facilities Requests*

Some industry comments incorrectly equate a conditional approval with an outright denial, and urge the Commission to effectively preempt the power to conditionally approve permit applications.[58] State and local government must retain their traditional police power to conditionally approve permits as a mechanism to enforce generally applicable laws. Like any other exercise of local power, the Telecom Act already provides an "expedited" remedy for prohibitory or unreasonably discriminatory permit conditions.[59]

Moreover, conditional approvals may even salvage some wireless facilities proposals that, for example, a local government might otherwise deny on the ground that it does not comply with the zoning code. For these reasons, the Commission should affirm the local government power to conditionally approve eligible facilities requests.

E. The Commission Should Not Craft any New Section 6409(a) Remedies

Like many other commenters, California Local Governments explained how a deemed-granted remedy for an alleged failure for a government to act within the presumptively reasonable time violates the Tenth Amendment and federalism principles.[60] California Local Governments find nothing in the industry comments that shows otherwise. Moreover, California Local Governments reiterate its initial comments that Congress already established the appropriate judicial procedures to resolve Section 6409(a) disputes.[61]

The industry comments overstate Commission authority to adopt a deemed-granted remedy because: (1) the fact that a few State statutes provide a deemed-granted remedy merely

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[58] *See* AT&T COMMENTS, *supra* note 3, at 26; PCIA COMMENTS, *supra* note 3, at 42–43.
[59] *See* 47 U.S.C. § 332(c)(7)(B)(v).
[60] *See* CAL. LOCAL GOV'TS COMMENTS, *supra* note 15, at 25–26; *see also* FAIRFAX CNTY. COMMENTS, *supra* note 2, at 18.
[61] *See* CAL. LOCAL GOV'TS COMMENTS, *supra* note 15, at 24–25.

reflects the unique power of the State over its instrumentalities and does not evidence the Commission's power to do the same; (2) a self-executing deemed-granted remedy would be inappropriate because Section 6409(a) does not guarantee approval for every eligible facilities request; and (3) Congress intended the local courts, not the Commission in distant Washington D.C., to determine whether to order an approval.

1. *Industry Comments Overstate Commission Authority to "Accelerate Broadband Deployment" Through a Deemed-Granted Remedy*

PCIA overstates the Commission authority to adopt a deemed-granted remedy because Congress did not authorize the Commission to bluntly preempt the vast majority of State and local land use laws as a means to accelerate broadband deployment. Section 706 of the Telecom Act authorizes the Commission to accelerate broadband deployment when it finds that deployment does not occur on reasonable and timely basis.[62] Although this authority appears broad, whether an adopted rule may stand depends on whether the agency acted reasonably—a standard that narrows as the impact of the rule broadens.

The Commission should carefully note that judicial deference to a legislative rule often depends on the nature of the issue and the impact of the rule.[63] In *FDA v. Brown & Williamson Tobacco Corp.*, the Supreme Court held that the FDA could not regulate tobacco as drugs even through the statutory term for "drug" appeared broad enough to encompass such products.[64] The Court reasoned that common sense dictates that Congress would not likely "delegate a policy decision of such economic and political magnitude to a political agency."[65] Similarly, in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, the Court held that the

[62] *See* 47 U.S.C. § 1302 (2013).
[63] *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *MCI Telecoms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994).
[64] *See Brown & Williamson*, 529 U.S. at 133.
[65] *See id.*

statutory power in Section 303(r) to "modify any requirement" under the Communications Act of 1932 did not allow the FCC to regulate long-distance telephone rates because Congress would not so subtly permit the Commission to regulate the rates of an entire industry.[66] Thus, the scope of reasonableness grows narrower as the social and economic impact of the rule grows broader.

Here, a court will likely interpret the scope of Commission authority as narrowly as possible because the proposed rules would massively and disruptively impact land-use policies nationwide. Congress preserved local discretion over eligible facilities requests that cause a substantial change, and as in *Brown & Williamson* and *MCI Telecoms*, common sense dictates that Congress would not delegate the power to completely eliminate local discretion in a subject matter of "such economic and political magnitude."[67] Moreover, even though the Commission might interpret the preemptive language of Section 6409(a) to include such power, Congress would not so cavalierly permit the Commission to preempt virtually every State and local zoning law across the nation on the threadbare basis of the 149 words in Section 6409(a), and lacking any real legislative record.[68] Thus, the Commission should note that its authority to promulgate rules to "accelerate broadband deployment" very likely does not permit all the rules proposed in the NPRM.

2. *States May Impose Deemed-Granted Remedies that the Federal Government May Not Because a State Bears a Unique Relationship to Its Political Instrumentalities*

Several industry commenters urge the Commission to follow those few State legislatures that adopted deemed-granted remedies similar to the one proposed in the NPRM.[69] However, the

[66] *See MCI Telecoms.*, 512 U.S. at 225.
[67] *See Brown & Williamson*, 529 U.S. at 133.
[68] *See MCI Telecoms.*, 512 U.S. at 225.
[69] *See, e.g.*, CAL. WIRELESS ASS'N COMMENTS, *supra* note 42, at 3–4; CAROLINAS WIRELESS ASS'N COMMENTS, *supra* note 42, at 2; PA. WIRELESS ASS'N COMMENTS, *supra* note 43, at 1–2.

Commission should not consider these few statutes as evidence that the federal government may (or should) impose such remedies because the States and federal government bear fundamentally different relationships with local governments.

Just because a few individual States decided to enact a law does not automatically mean the federal government may enact the same law and impose it on all other States. State legislatures may exercise plenary authority over local governments because "[m]unicipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them."[70] In contrast, the Tenth Amendment limits the federal power to those specifically enumerated in the Constitution.[71] The Commission should not view deemed-granted remedies under individual State law as evidence of federal power to impose the same.

3. *The Commission Should Not Adopt a Self-Executing Deemed-Granted Remedy Because Section 6409(a) Does Not Guarantee Approval for Every Eligible Facilities Request*

CTIA and other industry commenters rely on a false premise when it asserts that the Commission must adopt a deemed granted remedy because a judicial cause of action does not *guarantee* an approval.[72] Section 6409(a) does not guarantee that a local government will approve *every* eligible facilities request.[73] Even when the applicant submits an eligible facilities request, it still bears the burden to prove that its specific proposal will not create a substantial change.[74]

[70] *See Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907).
[71] U.S. CONST. Amend. X.
[72] *See* CTIA COMMENTS, *supra* note 3, at 18.
[73] *See* 47 U.S.C. § 1455(a).
[74] *See id.*

Nevertheless, many industry commenters urge the Commission to adopt a rule that would *automatically* deem granted any eligible facilities request after a mere forty-five days without independent review.[75] Congress already implicitly rejected this oppressive approach because the statute does not guarantee approval for every eligible facilities request through its explicit limit on substantial changes. Moreover, the Commission already implicitly rejected this approach when it proposed to find that an eligible facilities request presupposes the traditional permit application process. Indeed, what purpose would a permit application serve when it becomes "deemed granted" regardless of how the local government responds? The Commission should not impose a deemed-granted remedy.

4. *The Commission Should Not Substitute Itself for the Courts as the Appropriate Venue to Resolve Section 6409(a) Disputes*

The Commission should reject the industry comments that urge the Commission to adjudicate wireless land-use disputes. Congress recognized that local courts, with more expertise in land-use matters, greater resources, and with local access to the facts in the matter, should serve as the neutral factfinder when it specified the remedies in the Telecom Act.[76] Congress did not indicate any intent to revisit its earlier choice, and the Commission should not unilaterally substitute itself for the courts.

IV. THE COMMISSION SHOULD DECLINE TO IMPOSE RULES GUIDING FACT-INTENSIVE INQUIRIES ABOUT MUNICIPAL PROPERTY PREFERENCES

California Local Governments join the comments of the City of San Antonio, Texas, and urge the Commission to decline to adopt rules relating to local ordinances establishing a

[75] *See, e.g.*, AT&T COMMENTS, *supra* note 3, at 26; CTIA COMMENTS, *supra* note 3, at 18; PCIA COMMENTS, *supra* note 3, at 50; SPRINT COMMENTS, *supra* note 3, at 11; VERIZON COMMENTS, *supra* note 3, at 32–33.
[76] *See* 47 U.S.C. § 332(c)(7)(B)(v).

municipal property preference.[77] Local courts are best suited to resolve such disputes, assuming Section 332 even applies. For example, Section 332 does not apply at all when a government acts as a landowner because cities that exercise "property rights as a landowner . . . fall outside the [Telecom Act's] preemptive scope . . . ."[78]

The Commission should decline CTIA's request to establish a *per se* unreasonably discriminatory finding for "preferential [zoning] treatment for applicants utilizing municipal land or facilities."[79] Such a rule would be contrary to the requirement of *unreasonable* discrimination because it would block a municipality's opportunity to rebut that finding. The courts are best suited to resolve concerns, such as CTIA's, where a municipality delays or denies a permit for a "non-municipal site or facility solely to bestow an economic benefit upon a local jurisdiction . . . ."[80]

First, municipalities should have the opportunity, in court, to present facts demonstrating that, if some discrimination exists, why that discrimination is reasonable. Courts' analysis of Equal Protection claims under the Fourteenth Amendment presumes differential treatment to be valid "if the classification drawn by the statute is rationally related to a legitimate state interest."[81] Even under the Equal Protection Clause, which only requires discrimination (not *unreasonable* discrimination), after a plaintiff has established a prima facie case of discrimination, "the burden of proof shifts to the State to rebut the presumption of

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[77] *See* SAN ANTONIO COMMENTS, *supra* note 2, at 25–28.
[78] *Omnipoint Com., Inc. v. City of Huntington Beach*, 738 F.3d 192, 201 (9th Cir. 2013) (holding city's decision that it could not license city-owned park "without voter approval is not the type of zoning and land use decision covered by § 332(c)(7)"); *Sprint Spectrum, L.P. v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002) (concluding the Telecommunications Act of 1996 "does not preempt nonregulatory decisions of a local government entity or instrumentality acting in its proprietary capacity").
[79] CTIA COMMENTS, *supra* note 3, at 20.
[80] CTIA COMMENTS, *supra* note 3, at 21.
[81] *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

unconstitutional action . . . ."[82] Under CTIA's proposed rule, there would no presumption of validity, and no burden-shifting—contrary to how the courts have approached discrimination claims under the Equal Protection Clause. Municipalities should be afforded the opportunity to explain the application of their ordinances, for example, why they may require antennas on a police or fire station in a single-family residential area. There may be perfectly legitimate reasons for such a requirement, like encouraging the provision of wireless coverage in a residential area, yet simultaneously preventing the blight of antennas emerging from residential homes.

Second, municipalities should have the opportunity, in a neutral local court, to present facts explaining how they are not unreasonably discriminating against a particular service provider. In order to prevail on an unreasonable discrimination claim, the plain text of Section 332(c)(7)(B)(i)(I) requires a carrier to show the municipality unreasonably discriminated "among providers of functionally equivalent services." No discrimination exists when all carriers have the same opportunities to place facilities. Congress set forth the legal standard in the statute, and provided for judicial remedies. The Commission is not well-suited to set rules over these local, fact-intensive inquiries from its distant location in Washington D.C., and should avoid rulemaking in this area.

V. CONCLUSION

The scant record before the Commission does not show an actual and present need for disruptive federal intervention. Rather, in the limited time since Congress enacted Section 6409(a) and the Commission promulgated the *2009 Declaratory Ruling*, local governments generally tailored their local policies to facilitate the federal objectives. The Commission should

[82] *See Washington v. Davis*, 426 U.S. 229, 241 (1976).

confirm the primary role of local governments to facilitate wireless deployment through rational policies that reflect local circumstances and values, just as Congress intended.

Respectfully submitted,

/s/ Patrick Whitnell

Patrick Whitnell, Esq.
General Counsel
League of California Cities
1400 K Street, 4th Floor
Sacramento, CA 95814
pwhitnell@cacities.org
Direct: (916) 658-8281
Fax: (916) 658-8240

/s/ Jennifer Bacon Henning

Jennifer Bacon Henning, Esq.
Litigation Counsel
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814
jhenning@coconet.org
Direct: (916) 327-7535

/s/ Christy Marie Lopez

Christy Marie Lopez, Esq.
President of SCAN NATOA
Aleshire & Wynder, LLP
18881 Von Karman Avenue, Suite 1700
Irvine, CA 92612
clopez@awattorneys.com
Tel: (949) 223-1170
Fax: (949) 223-1180

APPENDIX A

Several wireless industry commenters provided anecdotal examples that allegedly supports new or revised rules. This Appendix provides factual rebuttals to demonstrate why the Commission should not base any new or revised rules on the limited and misleading facts presented in some wireless industry comments.

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City of Albany, California

Verizon complains that Albany deliberated for 90 days to determine whether a proposal qualified as an "eligible facilities request" under Section 6409(a), but fails to mention that it submitted its request *before* Congress enacted Section 6409(a).[83] The "eligible facilities request" concept therefore did not exist at the outset of this permit request.

Verizon omitted the material facts that show how Albany acted reasonably under the circumstances and within the presumptively reasonable timeframes. In 2011, Verizon proposed to add new equipment to a 65-foot-tall wooden monopole (in a zone with a maximum 45-foot height limit) that also supported MetroPCS equipment. Albany initially sought to bring this legal nonconforming use into compliance, but encountered substantial delays from Verizon when it requested Verizon produced a structural analysis to show the wooden pole could support all the current and planned equipment loads. In 2012, after Congress enacted Section 6409(a), Albany reassessed the facts, found that Verizon submitted an eligible facilities request, and approved the permit.

[83] *See* VERIZON COMMENTS, *supra* note 3, at 31.

City of Campbell, California

Both CTIA and Verizon vaguely allege that a request to upgrade Verizon antennas at an undisclosed site had been pending at the City of Campbell, California, for more than 130 days.[84] However, the Commission should ignore this anecdote because neither commenters actually identify the request nor can Campbell find any record of any permit request that matches that description. The Commission should not afford any weight to such suspiciously incomplete claims masqueraded as settled facts.

Moreover, PCIA misstates the facts when it alleges that Campbell required a wireless provider to seek a conditional use permit for a permit to upgrade "like-for-like antennas" at an existing site.[85] Campbell required a conditional use permit because (1) the Sprint monopole, originally built in an unincorporated area, violated zone height limit after Campbell annexed the land; and (2) Sprint proposed to add new equipment and larger antennas.[86]

First, Campbell did not retroactively apply its zone height ordinance to purposely deny Sprint's request to substantially upgrade its monopole because it never initially approved the monopole in the first place.[87] In 2004, Santa Clara County originally approved the Sprint permit to build this 70-foot-tall monopole in an unincorporated area near Campbell. Two years later, in 2006, Campbell annexed the land under the monopole. The monopole became a legal nonconforming use under the Campbell municipal code because it far exceeded the 45-foot zone

[84] *See* CTIA COMMENTS, *supra* note 3, at 15; VERIZON COMMENTS, *supra* note 3, at 31.
[85] *See* PCIA COMMENTS, *supra* note 3, at 44.
[86] *See* CONDITIONAL USE PERMIT TO ALLOW THE CONTINUED OPERATION AND MODIFICATION OF AN EXISTING SPRINT WIRELESS TELECOMMUNICATIONS MONOPOLE, at 3 (Mar. 26, 2013), *available at* http://www.ci.campbell.ca.us/Archive/ViewFile/Item/158 [hereinafter "CAMPBELL MEMORANDUM"].
[87] *Cf.* PCIA COMMENTS at 45 (warning the Commission that local governments retroactively apply fall zones and setbacks to deny eligible facilities requests).

height limit.[88] Thus, Campbell merely required Sprint to obtain the necessary permit to continue to operate the monopole.

Second, Campbell approved the conditional use permit with only small changes to the proposed equipment. Campbell staff advised the Site and Architectural Review Committee that Section 6409(a) required permit approval but recommended that Sprint install the smallest equipment possible mounted as close to the pole as possible to mitigate the visual impact of the substantially larger equipment.[89]

Town of Hillsborough, California

CTIA presented a legally incorrect and factually incomplete anecdote about the moratorium in the Town of Hillsborough, California, when it claimed Hillsborough could extend its moratorium *ad infinitum*.[90] However, Hillsborough could not possibly extend its moratorium an additional year, much less *ad infinitum* as CTIA claims because California state law limits a moratorium to no more than twenty-four months.[91] Moreover, California law ensures checks and balances through a procedure that requires a jurisdiction to approve three separate legal ordinances at a public hearing and extended to the maximum term.

Moreover, CTIA did not disclose that Hillsborough enacted the moratorium specifically to allow time to draft a new ordinance in response to certain acts from various wireless applicants. For example, in this small town with only 11,000 residents, one DAS applicant literally tossed multiple incomplete permit applications with nearly $80,000 in checks on the City's public counter and then exited the building as an effort to trigger the time limits in the

[88] *See* CAMPBELL MEMORANDUM, *supra* note 86, at 2.
[89] *See* CAMPBELL MEMORANDUM, *supra* note 86, at 3.
[90] *See* CTIA COMMENTS, *supra* note 3, at 19.
[91] *See* CAL. GOV'T CODE § 65858 (West 2013).

2009 Declaratory Ruling. Hillsborough returned those abandoned and incomplete permit applications to the applicant. Hillsborough also plans to introduce a revised ordinance this month, with an expected end the moratorium within the next 30 to 60 days.

City of Livermore, California

Verizon complains that the City of Livermore, California, approved its permit request to upgrade some antennas after 168 days, but omitted to mention that it submitted its application eight days before Congress enacted Section 6409(a).[92] Just like its example in Albany, Verizon showcased a permit request in a false light because the application required the local government to adjust its policies and procedures to Section 6409(a) mid-review.

On February 14, 2012, Verizon submitted an incomplete permit request, and received a notice of incompleteness 19 days later. On April 26, 2012, Verizon asserted its rights under Section 6409(a) for the first time and Livermore staff met with Verizon fifteen days later to discuss how to proceed. Livermore administratively approved the permit request 57 days after it met with Verizon to discuss Section 6409(a). Although the entire process lasted 168 days, Livermore responded within the presumptively reasonable time after it conferred with Verizon to determine the local impact of the radically new federal law. These more complete facts show that Livermore acted reasonably and cooperatively under the highly uncertain regulatory circumstances.

* * *

[92] *See* VERIZON COMMENTS, *supra* note 3, at 31.