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

NOTICE OF PROPOSED RULEMAKING

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By the Commission: Acting Chairwoman Clyburn, Commissioner Rosenworcel and Commissioner Pai issuing separate statements.

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In this Notice of Proposed Rulemaking, we explore opportunities to promote the deployment of infrastructure that is necessary to provide the public with advanced wireless broadband services, consistent with governing law and the public interest. In the Telecommunications Act of 1996, Congress directed the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by working to "remove barriers to infrastructure investment" in a manner consistent with the public interest, convenience, and necessity.[1] We have made significant progress in recent years in expanding high-speed Internet access and promoting broadband availability, but we must continue to examine and address impediments to broadband investment, including impediments that may be presented by unnecessary or unclear regulatory requirements and processes. This Notice of Proposed Rulemaking addresses potential measures to expedite the environmental and historic preservation review of new wireless facilities, as well as rules to implement statutory provisions governing State and local review of wireless siting proposals.

2. America's demand for and reliance on wireless broadband services has been growing dramatically and will almost certainly continue to do so in the years ahead. The ability of wireless providers to meet this demand will depend not only on access to spectrum, but also on the extent to which they can deploy new or improved wireless facilities or cell sites. The impact of broadband demand on the number of cell sites is reflected in data showing a twelve percent increase in the number of cell sites in 2011 alone.[2] The growth in new site deployment is likely to accelerate as providers increasingly deploy

[1] 47 U.S.C. § 1302(a).

[2] According to CTIA—The Wireless Association ("CTIA"), the total number of cell sites in use by CTIA's members was 283,385 as of year-end 2011. *See* CTIA, *2011 Semi-Annual Wireless Industry Survey Results*, at 163 (2012). This represents an increase of 12 percent since December 31, 2010, of 15 percent since December 31, 2009, of 54 percent since December 31, 2005, and of 61 percent since December 31, 2004. *Id.*

small cells and Distributed Antenna Systems ("DAS") that expand capacity or coverage in a local area through small, low-mounted antennas. These new technologies supplement the capacity of the "macrocell" network, filling in gaps or providing additional capacity in a localized outdoor or indoor area where adding a traditional macrocell would be impractical or inefficient. Because individual DAS antennas and small cells cover very small areas, it is necessary to deploy a large number to achieve the seamless coverage that would be provided by a single macrocell. Further, even where cell sites have been deployed, providers may be required to add to or replace existing facilities to enable support for newer so-called "4G" wireless technologies that provide greater connection speeds to consumers.

3. Parties seeking to deploy wireless infrastructure often face processes they must complete prior to construction that can take long periods of time and impose significant expense. Apart from any private arrangements they must enter into to gain access to the land or structure on which the wireless facilities will be deployed, parties must typically obtain siting approval from the governing local municipality with jurisdiction over the area. They must also comply with the Commission's rules for environmental review, which implement our obligations under Federal statutes including the National Environmental Policy Act of 1969 and the National Historic Preservation Act of 1966, and are designed to protect wetlands, Native American religious sites, and historic properties, *inter alia*.[3] These regulatory processes serve important interests, ensuring that infrastructure is deployed in a manner that appropriately protects the Nation's environmental and historic resources, and that is consistent with local community needs, interests, and values. Because these processes can delay the deployment of infrastructure for new or improved wireless services, however, eliminating any steps associated with these processes that may not be needed to achieve their policy goals and fulfill existing statutory mandates is also an important public goal and provides a significant benefit to America's communities.

4. In the last few years, the Commission has taken a number of significant steps to reduce barriers to wireless infrastructure investment. In 2009, the Commission released a Declaratory Ruling establishing presumptive timeframes for State and local processing of wireless tower and antenna siting requests ("*2009 Declaratory Ruling*").[4] In 2011, the Commission adopted an order that ensures timely and rationally priced access to utility poles ("*Pole Attachment Order*").[5] The Commission also released at the same time a Notice of Inquiry on Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting ("*NOI*").[6] In the *NOI*, the Commission sought to develop a record on the nature and scope of both wireline and wireless broadband deployment issues, including best practices that have promoted deployment as well as practices that have resulted in delays, and further sought comment on "specific steps that could be taken to identify and reduce unnecessary obstacles to obtaining access to rights-of-way and siting wireless facilities."[7]

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[3] *See* 42 U.S.C. § 4321 *et seq.*; 16 U.S.C. § 470f.

[4] *See* Petition for Declaratory Ruling To Clarify Provisions of Section 332(C)(7)(B) To Ensure Timely Siting Review and To Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Declaratory Ruling*, 24 FCC Rcd 13994 (2009), *recon. denied*, 25 FCC Rcd 11157 (2010), *aff'd sub nom. City of Arlington, Texas v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S.Ct. 1863 (2013).

[5] Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, WC Docket No. 07-245, GN Docket No. 09-51, *Report and Order and Order on Reconsideration*, 26 FCC Rcd 5240 (2011), *aff'd sub nom. American Elec. Power Service Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *pet. for cert. filed*, 81 USLW 3673 (May 24, 2013).

[6] Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting, WC Docket No. 11-59, *Notice of Inquiry*, 26 FCC Rcd 5384 (2011) ("*NOI*").

[7] *NOI*, 26 FCC Rcd at 5389 para. 10.

5. Earlier this year, the Commission released the Signal Boosters R&O, establishing rules for signal boosters that will promote the deployment of such devices to expand wireless coverage.[8] In addition, we continue to assist the interagency Working Group established by Executive Order 13616 to facilitate broadband deployment on Federal buildings and rights-of-way.[9] We are also separately considering options to facilitate collocation on older towers that did not complete historic preservation review, while protecting Native American sacred sites, sites of Tribal cultural importance, and archeological sites.[10] We will continue working on these fronts as we consider the issues in the immediate rulemaking proceeding.

6. With this Notice of Proposed Rulemaking, we now address four major issues regarding the regulation of wireless facility siting and construction, including issues raised by commenters in the *NOI* proceeding, with the goal of reducing, where appropriate, the cost and delay associated with the deployment of such infrastructure. First, we seek comment on expediting our environmental review process, including review for effects on historic properties, in connection with proposed deployments of small cells, DAS, and other small-scale wireless technologies that may have minimal effects on the environment. While cellular service has traditionally been provided by antennas on large communications towers, these newer technologies can be deployed on utility poles, street lamps, water towers, or rooftops. Through these deployments, providers can enhance the wireless capacity available to mobile users for advanced broadband applications or fill in coverage gaps in areas where it is not possible or economically justifiable to put in additional large towers. They can also deploy these cells inside buildings to enhance indoor signal strength.

7. Deployment of such technologies is therefore becoming increasingly common as one measure to meet growing consumer demand, and we find it may be appropriate to update our environmental review requirements to reflect this development. These requirements are intended to ensure that we consider the environmental effects of new wireless infrastructure deployments, including effects on historic properties. While the Commission has acted in the past to tailor our environmental review for the deployment of wireless infrastructure, those processes were largely developed long before small cell technologies became prevalent, and for the most part reflect the scale and level of environmental concern presented by traditional deployments on tall structures. Accordingly, we seek comment on whether to expedite or tailor our environmental review process for technologies such as DAS and small cells.

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[8] Amendment of Parts 1, 2, 22, 24, 27, 90 and 95 of the Commission's Rules to Improve Wireless Coverage Through the Use of Signal Boosters, WT Docket No. 10-4, *Report and Order*, 28 FCC Rcd 1663 (2013) ("*Signal Boosters R&O*").

[9] Accelerating Broadband Infrastructure Deployment, Executive Order 13616, 77 Fed. Reg. 36903 (June 14, 2012). Finding that "decisions on access to Federal property and [rights-of-way] can be essential to the deployment of both wired and wireless broadband infrastructure," Executive Order 13616 created a "Broadband Deployment on Federal Property Working Group" to develop "a coordinated and consistent approach in implementing agency procedures, requirements, and policies related to access to Federal lands, buildings, and [rights-of-way], federally assisted highways, and tribal lands to advance broadband deployment." *Id.* The Working Group is composed of representatives from seven Federal agencies that each have significant ownership of or responsibility for managing Federal lands, buildings, and rights-of-way, federally assisted highways, or Tribal lands, and also includes representatives from four other agencies, including the Commission, that "provide advice and assistance[.]" *Id.*

[10] *See*, *e.g.*, Federal Communications Commission Office of Native Affairs and Policy, 2012 Annual Report, at 6 (stating that in 2013, the Commission's Office of Native Affairs and Policy and other Commission staff will "host and initiate consultations with Tribal Nations and inter-Tribal government associations regarding options and strategies for analyzing and addressing the status of various classes of towers that never went through historic preservation review under Section 106 of the National Historic Preservation Act."), *available at* http://transition.fcc.gov/cgb/onap/ONAP-AnnualReport03-19-2013.pdf.

8. Second, in response to a petition filed by CTIA—The Wireless Association ("CTIA"), and based on the associated record, we propose to adopt a narrow exemption from the Commission's pre-construction environmental notification requirements for certain temporary towers.[11] Under the current notification requirements, before a party can register with the Commission a proposed communications tower that requires registration under Part 17 of our rules,[12] and thus begin to construct or deploy the tower in question, it must complete a process of local and national notice, which helps to facilitate public involvement in our consideration of the proposed deployment's potential to create significant environmental effects. Temporary towers are often needed with very little advance warning, however, making the notification process impracticable. Under our proposed exemption, eligible towers must meet specified criteria, including very short duration, height limits, minimal or no associated excavation, and absence of lighting, which should ensure a minimal potential for significant environmental effects. We therefore tentatively find that the proposed exemption will serve the public interest by enabling providers to deploy these temporary facilities on a timely basis in response to unanticipated short term needs without undermining the purposes of the notification process.

9. Third, we seek comment on rules to clarify and implement the requirements of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act").[13] Under Section 6409(a), "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."[14] Eligible facilities requests include collocation requests, as well as requests for removal or replacement of existing equipment. Collocation, which involves placing wireless equipment on pre-existing structures rather than constructing new support structures, is often the most efficient, rapid, and economical means of expanding wireless coverage and capacity, and also reduces the environmental and other impacts of new wireless facilities deployment. By requiring timely approval of eligible collocations, Section 6409(a) will help providers meet the Nation's growing demand for wireless broadband service and may be critical to the deployment of the nationwide public safety broadband network mandated by the Spectrum Act. Because most of the terms of the provision are undefined, however, we are concerned that disputes over its interpretation may significantly delay these benefits. We therefore propose to adopt rules clarifying the provision's meaning to assist all parties in implementing its requirements. We also seek comment on how to encourage efforts to develop best practices for applying Section 6409(a) and what role they might play in interpreting or implementing the provision.

10. Finally, we seek comment on whether we should address certain disputes or questions that have arisen about how to apply our *2009 Declaratory Ruling* in four specific circumstances. We also seek comment on one additional issue of interpretation arising under Section 332(c)(7)(B)(i)(I), a provision of Section 332(c)(7) that was not addressed by the *2009 Declaratory Ruling*. We note that the presumptive timeframes the Commission established under Section 332(c)(7) in the *2009 Declaratory Ruling* govern many wireless facilities siting applications that are not covered by Section 6409(a).

[11] We have previously waived the notification requirements for these temporary towers pending the completion of this rulemaking proceeding. *See* Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers; 2012 Biennial Review of Telecommunications Regulations, RM-11688, WT Docket No. 13-32, *Order*, 28 FCC Rcd 7758 (2013) ("*Waiver Order*").

[12] 47 C.F.R. Part 17.

[13] *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 156 (2012) (codified at 47 U.S.C. § 1455(a)).

[14] 47 U.S.C. § 1455(a)(1).

II. EXPEDITING ENVIRONMENTAL COMPLIANCE FOR DISTRIBUTED ANTENNA SYSTEMS AND SMALL CELLS

11. In this section, we seek comment on measures to expedite our environmental review processes under NEPA and Section 106 of the NHPA in connection with new wireless technologies that may, because of their intrinsic characteristics, have minimal effects on the environment. When our current policies and rules for the environmental review of proposed communications facilities were established, most wireless service was provided through antennas mounted on communications towers at a height of 100 to 200 feet or more and supported by radio equipment in large cabinets or shelters. In recent years, due in part to the need for greater capacity to satisfy the public's growing demand for broadband services, providers have increasingly met that demand through technologies that use large numbers of smaller antennas deployed at much lower heights and supported by compact radio equipment. These technologies, including distributed antenna systems ("DAS"), small cells, and others, can be deployed on utility poles, street lamps, water towers, or rooftops, as well as inside buildings, to enhance capacity or fill in coverage gaps.

12. While DAS and small cell equipment have generally been well received in urban areas and in historic districts, they have also posed new challenges to achieving compliance with our environmental review requirements, particularly Section 106 requirements for historic preservation review. Although the current process already excludes from environmental review many placements of antennas on existing structures, the contours and limits of the exclusions were not designed in recognition of the typical scale of DAS and small cell equipment or the shorter support structures typically used by that equipment. Furthermore, the review process is not well suited to technologies that may require the deployment of dozens or hundreds of small cells or antennas in an area in order to achieve the ubiquitous coverage that would previously have been provided by the deployment of a single large cell site. As DAS and small cell systems become more popular and widespread, providers and environmental regulators have requested clarification of the existing NEPA and NHPA rules and processes, and adoption of better tailored rules and processes with respect to deployment of these facilities. Accordingly, we seek comment on a number of proposals to expedite or tailor our review under NEPA and Section 106 for these technologies.

13. Measures tailoring Section 106 review may require the agreement of the Advisory Council on Historic Preservation ("ACHP") and coordination with the National Conference of State Historic Preservation Officers ("NCSHPO") as well as consultation with federally recognized Tribal Nations.[15] Further, revisions to our NEPA rules require consultation with the Council for Environmental Quality ("CEQ").[16] We have begun this process[17] and will continue to undertake such coordination and consultation as we move through this rulemaking proceeding. As discussed in detail below, in parallel with this rulemaking, we are exploring with the ACHP options for tailoring our historic preservation review through one or more of the mechanisms provided under the ACHP's rules for adopting alternative procedures to implement Section 106 (referred to as "program alternatives").

[15] As discussed below, we must comply with the rules of the Advisory Council on Historic Preservation, which specify the process under which Federal agencies shall perform their historic preservation reviews. 36 C.F.R §§ 800.2, 800.3. These rules provide that, in performing Section 106 reviews, a Federal agency must, among other things, consult with the appropriate State Historic Preservation Officer ("SHPO") or Tribal Historic Preservation Officer ("THPO"). 36 C.F.R § 800.4(a). As further discussed below, we have entered into two programmatic agreements with the NCSHPO and ACHP concerning the procedures for these reviews.

[16] 40 C.F.R § 1507.3(a) ("Each agency shall consult with [CEQ] while developing its procedures and before publishing them in the Federal Register for comment. … The procedures shall be adopted only after an opportunity for public review and after review by [CEQ] for conformity with [NEPA] and [CEQ's] regulations.").

[17] For example, initial consultations with CEQ staff took place during August, 2013. *See also infra*, nn. 104, 105 (describing outreach to Tribal Nations).

A. Background

1. DAS and Small Cells

14. The increasing demand for advanced wireless services and greater wireless bandwidth is driving a need for additional infrastructure deployment and new infrastructure technologies.[18] To meet localized needs for coverage or increased capacity in outdoor and indoor environments, many wireless providers are turning in part to small cell technologies and DAS.[19]

15. Small cells are low-powered wireless base stations that function like cells in a mobile wireless network and are intended to cover targeted indoor or localized outdoor areas ranging in size from homes and offices to stadiums, shopping malls, hospitals, and metropolitan outdoor spaces.[20] Typically, they are used by wireless service providers to provide wireless connectivity to their subscribers in areas that present capacity and coverage challenges to traditional wide-area macrocell networks.[21] Because these cells are significantly smaller in coverage area than traditional macrocells, networks that incorporate small cell technology can take advantage of greater reuse of scarce wireless frequencies, thus greatly increasing spectral efficiency and data capacity within the network footprint.[22] For example, deploying ten small cells in a coverage area that can be served by a single macrocell could result in a tenfold increase in capacity over the macrocell use case, using the same quantity of spectrum.[23] Small cells can also be used to help fill in coverage gaps created by buildings, tower siting difficulties, and/or challenging terrain.[24]

16. Another alternative to the use of macrocells mounted on tall antenna structures is distributed antenna systems ("DAS").[25] A DAS network is used to distribute RF signals from a central

[18] *See* CTIA Comments, WC Docket No. 11-59, at 6-9.

[19] Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, *Sixteenth Report*, WT Docket No. 11-186, 28 FCC Rcd 3700, 3933 para. 373 (2013) ("*Sixteenth Competition Report*"). *See* J. Sharpe Smith, aglmagazine, "Towers Will Handle Most Mobile Data Growth in Next Five Years," Mar. 11, 2013, *available at* http://agl-mag.com/towers-will-handle-most-mobile-data-growth-in-next-five-years/ (noting projection by Cisco that 25 percent of wireless data growth through 2017 will be carried by DAS, picocells and Wi-Fi); Tammy Parker, FierceBroadbandWireless, "Active DAS equipment market growing 20% annually in North America," Aug. 18, 2012, *available at* http://www.fiercebroadbandwireless.com/story/active-das-equipment-market-growing-20-annually-north-america/2012-08-18.

[20] *Sixteenth Competition Report*, 28 FCC Rcd at 3937-38 para. 384; http://www.smallcellforum.org/aboutsmallcells-small-cells-what-is-a-small-cell. While the industry has not always been consistent in the terms it uses for different types of small cell technology, generally speaking, femtocells, picocells, metrocells, and microcells refer to types of small cell technologies with coverage areas of increasing size.

[21] Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band, GN Docket No. 12-354, *Notice of Proposed Rulemaking and Order*, 27 FCC Rcd 15594, 15596 para. 4, 15605 para. 30 (2012) ("*3.5 GHz Service Rules NPRM*"). Networks using a mix of both macrocells and small cell technologies are sometimes referred to as "heterogenous networks" or "HetNets." *See*, *e.g.*, http://ieeexplore.ieee.org/xpls/abs_all.jsp?arnumber=5483516&tag=1; PCIA Comments, GN Docket No. 12-354, at 3 n.6.

[22] *See 3.5 GHz Service Rules NPRM*, 27 FCC Rcd at 15596 para. 4.

[23] *Id.*

[24] *Id.*; *see also* http://www.thedasforum.org/resources/das-and-small-cell-technologies-distinguished/.

[25] *Sixteenth Competition Report*, 28 FCC Rcd at 3906 para. 321.

hub to a specific area with poor coverage or inadequate capacity.[26] A DAS network consists of (i) a number of remote communications nodes deployed throughout the desired coverage area, each including at least one antenna for the transmission and reception of a wireless service provider's RF signals, (ii) a high capacity signal transport medium (typically fiber optic cable) connecting each node to a central communications hub site, and (iii) radio transceivers located at the hub site (rather than at each individual node as is the case for small cells) to process or control the communications signals transmitted and received through the antennas.[27] DAS deployments may cover entire neighborhoods and involve hundreds of nodes connected to a single hub.[28] Further, whereas small cells are usually operator-managed and support use by a single wireless service provider, DAS networks can often accommodate multiple wireless providers using different frequencies and/or wireless air interfaces.[29] Economics as well as coverage and capacity needs may dictate different solutions in different scenarios, so use of DAS and small cells continues to evolve.[30] In addition, other wireless technologies are also being developed and deployed that are similarly capable of being placed indoors or on top of short structures like utility poles.

17. Small-scale wireless technologies like DAS and small cells have a number of advantages over traditional macrocells. Because the facilities deployed at each node are physically much smaller than macrocell antenna and base station equipment, they can be placed on a variety of short structures or on rooftops. Thus, providers can deploy the technology in geographic areas where constructing towers is not feasible or localized wireless traffic demands are too great to be met with large cells alone.[31] In addition, because these technologies utilize small equipment and transmit at signal power levels much lower than macrocells, they can be deployed in indoor as well as outdoor environments. Further, as the deployments on poles and rooftops are less visible than macrocells on tower structures, they may be particularly desirable for addressing capacity or coverage needs in areas with stringent siting regulations, such as historic districts. Because individual DAS nodes and small cells cover small areas, however, it is

[26] *See* http://www.thedasforum.org/wp-content/uploads/2013/02/DAS-And-Small-Cell-Technologies-Distinguished-2_4_13.pdf at 5.

[27] *Id. See also* https://www.torontohydro.com/sites/electricsystem/Documents/Wireless/Expert%20Evidence%20of%20Charles%20L.%20Jackson%20June%2011,%202013.pdf (noting that while "each small cell is a separate base station, . . . a cell with a distributed antenna system is built by connecting several antennas to a single base station.").

[28] *See*, *e.g.*, http://wireless4paloalto.att.com/das/ (noting proposal for DAS deployment "throughout downtown Palo Alto"); http://www.thedasforum.org/wp-content/uploads/2013/02/DAS-And-Small-Cell-Technologies-Distinguished-2_4_13.pdf, at 3, 4 (DAS network can range from two to hundreds of nodes, covering areas ranging from several blocks to entire cities); http://www.att.com/Common/about_us/files/pdf/das_football.pdf (indicating DAS deployment in a stadium typically includes hundreds of antennas).

[29] *See*, *e.g.*, http://www.smallcellforum.org/aboutsmallcells-small-cells-what-is-a-small-cell (noting that small cells are "operator-managed"); http://www.thedasforum.org/wp-content/uploads/2013/02/DAS-And-Small-Cell-Technologies-Distinguished-2_4_13.pdf at 3 (noting that in contrast to DAS, "small cell solutions are typically deployed piecemeal to provide coverage or enhance capacity in much smaller areas with a single wireless communications technology for a single wireless carrier.").

[30] *See*, *e.g.*, Tammy Parker, FierceBroadbandWireless, "DAS facing heady competition from small cells," *available at* http://www.fiercebroadbandwireless.com/story/das-facing-heady-competition-small-cells/2012-08-26; J. Sharpe Smith, aglmagazine, "Verizon, AT&T Roll Out Small Cells," June 21, 2013, *available at* http://agl-mag.com/verizon-att-roll-out-small-cells/; J. Sharpe Smith, aglmagazine, "In-Building DAS Will Share the Stage with Small Cells: ABI Research," Sept. 4, 2012, *available at* http://agl-mag.com/in-building-das-will-share-the-stage-with-small-cells-abi-research/.

[31] *See* PCIA – The Wireless Infrastructure Association and the DAS Forum (A Membership Section of PCIA) Comments, WC Docket No. 11-59 ("PCIA and DAS Forum Comments"), at 27; http://www.thedasforum.org/wp-content/uploads/2013/02/DAS-And-Small-Cell-Technologies-Distinguished-2_4_13.pdf.

necessary to deploy a number of such nodes to achieve the seamless coverage that would be provided by a single macrocell.[32]

2. Environmental Review under NEPA

18. The National Environmental Policy Act of 1969 ("NEPA")[33] requires agencies of the Federal Government to identify and evaluate the environmental effects of proposed "major Federal actions significantly affecting the quality of the human environment. . . ."[34] Although NEPA does not impose substantive requirements upon agency decision-making, Title I requires Federal agencies to take a "hard look" at major Federal actions that may have significant environmental consequences and to disseminate relevant information to the public.[35] A major Federal action includes projects or programs that are entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies.[36]

19. Under Section 204 of NEPA, the Council on Environmental Quality ("CEQ") is entrusted with oversight responsibility regarding the NEPA activities of Federal agencies.[37] CEQ's regulations direct agencies to identify their major Federal actions as falling into one of three categories.[38] The first such category encompasses those actions that normally have a significant environmental impact. These actions require an Environmental Impact Statement ("EIS").[39] A second category of agency actions includes those actions that ordinarily may have a significant environmental impact.[40] For actions in this category, an agency may conduct an EA in lieu of an EIS.[41] An EA is briefer than an EIS, and its purpose is to determine whether an EIS is required.[42] If an EA shows that a proposed action will have no

[32] For further information regarding DAS and small cells, *see* http://www.fcc.gov/events/augmenting-mobile-broadband-your-community-overview-distributed-antenna-systems-and-small-cel (workshop hosted on Feb. 1, 2012, by the Wireless Bureau, in cooperation with the National Association of Telecommunications Officers and Advisors ("NATOA"), to provide "an overview of [DAS] and small cell technologies that augment mobile broadband and wireless services.").

[33] 42 U.S.C. § 4321 *et seq.*

[34] 42 U.S.C. § 4332(2)(C); National Environmental Policy Act Compliance for Proposed Tower Registrations, Effects of Communications Towers on Migratory Birds, WT Docket Nos. 08-61, 03-187, *Order on Remand*, 26 FCC Rcd 16700, 16702-03 (2011) ("*Order on Remand*") (*citing Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989)).

[35] *Robertson,* 490 U.S. at 349-50.

[36] 40 C.F.R. § 1508.18(a).

[37] 42 U.S.C. § 4344.

[38] *See* 40 C.F.R. § 1507.3(b)(2).

[39] 40 C.F.R. § 1501.4. An EIS is a detailed statement by the responsible Federal official on: "(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1508.11.

[40] 40 C.F.R. §§ 1501.4(b), 1507.3(b)(2)(iii) (agency procedures shall identify those typical classes of action that normally require environmental assessments but not necessarily environmental impact statements).

[41] 40 C.F.R. §§ 1501.4(b), 1507.3(b)(2)(iii).

[42] Pursuant to CEQ's regulations, an environmental assessment is a document that: (1) discusses the need for a proposed action, the alternatives, and the environmental impacts of the proposed action and alternatives; (2) lists the agencies and persons consulted; and (3) provides evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact. 40 C.F.R. § 1508.9. *See also* 40 C.F.R. § 1501.4(b).

significant environmental impact, then the agency issues a Finding Of No Significant Impact ("FONSI"),[43] and the proposed action can proceed. However, if an EA indicates that the action will have a significant environmental impact, the agency must proceed with the EIS process.

20. The third category of actions – "categorical exclusions" – are those actions agencies have identified "which do not individually or cumulatively have a significant effect on the human environment … and for which … neither an environmental assessment nor an environmental impact statement is required."[44] CEQ regulations require that an agency that chooses to establish categorical exclusions must also provide for "extraordinary circumstances"[45] under which a normally excluded action may have a significant effect.

21. The Commission has generally found that its grant or approval of an application that will result in construction of a wireless communications facility qualifies as a major Federal action, thereby subjecting the constructed facility to NEPA procedures. The Commission has, for example, found that major Federal actions include the processing of antenna structure registration applications,[46] the processing of site-specific licensing applications,[47] and service authorizations that will result in facilities construction at unspecified locations, such as geographic-area licenses.[48]

22. Consistent with CEQ regulations, Sections 1.1307(a) and (b) of the Commission's rules identify the types of communications facilities whose approval by the Commission would fall into CEQ's second category, actions that may significantly affect the environment.[49] Thus, for these proposed facilities, applicants must prepare an EA that the Commission will use to determine if the proposed facilities will have a significant environmental impact. Section 1.1307(a) includes, for example, facilities to be located in a flood plain.[50] Section 1.1307(b) requires an Environmental Assessment if exposure to

[43] *See* 40 C.F.R. § 1508.13.

[44] *See* 40 C.F.R. §§ 1508.4, 1507.3(b)(2)(ii).

[45] *See* 40 C.F.R. § 1508.4.

[46] *See* Streamlining the Commission's Antenna Structure Clearance Procedure; Revision of Part 17 of the Commission's Rules Concerning Construction, Marking, and Lighting of Antenna Structures, WT Docket No. 95-5, *Report and Order*, 11 FCC Rcd 4272, 4289 para. 41 (1995) (finding that the registration of an antenna structure constitutes a major Federal action subject to NEPA) ("*Antenna Structure Clearance R&O*"). *Accord*, Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, WT Docket No. 03-128, *Report and Order*, 20 FCC Rcd 1073, 1084 para. 27 (2004) ("*NPA Report and Order*"), *aff'd sub nom*. *CTIA-The Wireless Ass'n v. FCC*, 466 F.3d 105 (D.C. Cir. 2006) (explaining that the Commission's treatment of tower registrations as Federal undertakings within the meaning of Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, is a permissible interpretation in light of the preconstruction approval process that it has implemented to assure that communications towers are not a risk to air safety under Section 303(q) of the Communications Act).

[47] *See* Biennial Regulatory Review; Amendment of Parts 0, 1, 13, 22, 24 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, WT Docket No. 98-20, *Notice of Proposed Rulemaking*, 13 FCC Rcd 9672, 9703 para. 77 (1998); *see also* 47 C.F.R. § 1.923(e).

[48] *See* Amendment of Environmental Rules, GN Docket No. 88-387, *First Report and Order*, 5 FCC Rcd 2942 (1990) (requiring licensees and applicants to ascertain prior to construction whether proposed facilities in connection with a geographic area license may have a significant environmental effect); 47 C.F.R. § 1.1312(b).

[49] 47 C.F.R. § 1.1307(a), (b).

[50] Section 1.1307(a) requires environmental review of facilities that are to be located in an officially designated wilderness area, an officially designated wildlife preserve, or a flood plain; that may affect listed threatened or endangered species or their critical habitats, or are likely to jeopardize proposed threatened or endangered species or destroy or adversely modify proposed critical habitats; that may affect districts, sites, buildings, structures or objects (continued….)

Radiofrequency ("RF") emissions will exceed specified levels.[51]

23. Section 1.1306 of the Commission's rules specifies those actions that fall into the third category, actions that are categorically excluded from environmental processing.[52] Under Section 1.1306, an action is categorically excluded unless (1) it falls under one of the categories of environmental concern specified in Sections 1.1307(a) and (b), or (2) the Bureau responsible for reviewing the action determines, on its own motion or in response to public petition, that the action, although not falling within the categories of Sections 1.1307(a) or (b), may nevertheless have a significant environmental impact.[53]

24. Because antenna collocations on existing buildings or towers are unlikely to have significant environmental effects, Note 1 to Section 1.1306 (Note 1) provides that "the mounting of antenna(s) on an existing building or antenna tower" is excluded from review for environmental effects except for effects on historic properties and exposure to RF emissions.[54] The second sentence of Note 1 further excludes from environmental processing, including review for historic preservation effects and exposure to RF emissions, installation of wire or cable in existing underground or aerial corridors.[55]

3. Historic Preservation Review under the NHPA

25. Section 106 of the National Historic Preservation Act ("NHPA") requires Federal agencies to take into account the effects of their "undertaking[s]" on historic properties included or eligible for inclusion in the National Register of Historic Places ("National Register").[56] Similar to NEPA, the NHPA does not require the Commission to engage in any particular preservation activities or

(Continued from previous page)
that are listed, or eligible for listing, in the National Register of Historic Places; that may affect Native American religious sites; that will involve significant change in surface features (*e.g.*, deforestation); or that will be located in residential neighborhoods and will be equipped with high intensity white lights. 47 C.F.R. § 1.1307(a).

[51] 47 C.F.R. § 1.1307(b). The Commission recently issued a First Report and Order, Further Notice of Proposed Rule Making, and Notice of Inquiry that addressed several issues regarding compliance with current RF exposure criteria, and sought comment on whether to reassess the current limits. *See* Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies; Proposed Changes in the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields, ET Docket Nos. 13-84, 03-137, *First Report and Order, Further Notice of Proposed Rulemaking, and Notice of Inquiry*, 28 FCC Rcd 3498 (2013).

[52] 47 C.F.R. § 1.1306.

[53] 47 C.F.R. § 1.1306(a). Thus, even with respect to the categorical exclusions in section 1.1306, the Bureau will require environmental processing for an individual facility, either on its own motion or in response to a complaint from the public, where the Bureau determines that a particular action may cause significant environmental effects. *See* 47 C.F.R. § 1.1307(c), (d).

[54] 47 C.F.R. § 1.1306 Note 1. *See* Amendment of the Commission's Environmental Rules, *Order*, 3 FCC Rcd 4986, 4986 para. 7 (1988) ("the Commission has long held that the mounting of antennas on existing buildings or antenna towers generally is environmentally preferable to the construction of a new facility, a preference which is reflected in note 1"); Implementation of the National Environmental Policy Act of 1969, Docket No. 19555**,** *Report and Order*, 49 FCC 2d 1313, 1324 para. 27 (1974) (mounting an antenna on an existing building or tower "obviously has no significant aesthetic effect and is environmentally preferable to the construction of a new tower, provided there is compliance with radiation safety standards….").

[55] *See* 47 C.F.R. § 1.1306 Note 1 ("The provisions of § 1.1307(a) and (b) of this part do not encompass the installation of aerial wire or cable over existing aerial corridors of prior or permitted use or the underground installation of wire or cable along existing underground corridors of prior or permitted use, established by the applicant or others."). *See also* Amendment of Environmental Rules; Amendment of Part 63 of the Commission's Rules Relating to Common Carriers, GN Docket No. 88-387, *Second Report and Order*, 6 FCC Rcd 1716 (1991) ("*Second Environmental Report and Order*").

[56] 16 U.S.C. § 470f.

prescribe any substantive outcomes; rather, Section 106 requires only that the Commission consult the State Historic Preservation Officer ("SHPO") or Tribal Historic Preservation Officer ("THPO") and the Advisory Council on Historic Preservation ("ACHP") and consider the impacts of its proposed undertakings.[57] Similar to a "major Federal action," an "undertaking" includes, among other things, projects, activities, or programs that "requir[e] a Federal permit, license, or approval[.]"[58] The Commission has generally interpreted the scope of its Federal undertakings under the NHPA as coextensive with its major Federal actions under NEPA.[59]

26. The ACHP is statutorily charged with promulgating rules to govern the Section 106 process.[60] The ACHP's rules generally specify the process under which Federal agencies shall perform their historic preservation reviews.[61] Section 800.14 of the ACHP's rules also provides, however, for several types of "program alternatives" that allow Federal agencies to tailor the Section 106 process to their particular programs and undertakings.[62] As one of these program alternatives, an agency, the ACHP, and the relevant SHPO/THPO or, if nationwide, the National Conference of State Historic Preservation Officers ("NCSHPO") may "negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings."[63] Compliance with the procedures set forth in an approved programmatic agreement satisfies the Federal agency's Section 106 responsibilities for individual undertakings covered by the program.[64]

27. To fulfill its responsibilities under Section 106, the Commission has incorporated the requirements of the NHPA into its environmental rules.[65] Specifically, if a proposed facility may affect properties listed or eligible for listing in the National Register as determined under Section 1.1307(a)(4), the Commission's rules require submission of an Environmental Assessment ("EA") prior to construction.[66] Section 1.1307(a)(4) directs licensees and applicants, when determining whether a proposed action may affect historic properties, to follow the procedures in the ACHP's rules as modified by two programmatic agreements established in 2001 and 2004, respectively.[67]

28. The first agreement, the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas ("Collocation Agreement"), addresses historic preservation review for collocations on

[57] *Davis v. Latschar*, 202 F.3d 359, 370 (D.C. Cir. 2000).

[58] 16 U.S.C. § 470w(7).

[59] *See*, *e.g.*, *NPA Report and Order*, 20 FCC Rcd at 1083-84 paras. 25-28. Courts also generally treat similarly "major Federal actions" under NEPA and "Federal undertakings" under the NHPA. *See*, *e.g.*, *Karst Environmental Educ. and Protection, Inc. v. Environmental Protection Agency*, 475 F.3d 1291, 1295-96 (D.C. Cir. 2007); *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1263 (10th Cir. 2001).

[60] 16 U.S.C. § 470s ("The Council is authorized to promulgate such rules and regulations as it deems necessary to govern the implementation of section 106 of this Act in its entirety.").

[61] *See* 36 C.F.R. §§ 800.2, 800.3.

[62] 36 C.F.R. § 800.14; *see also* Program Alternatives, http://www.achp.gov/progalt/.

[63] 36 C.F.R. § 800.14(b).

[64] 36 C.F.R. § 800.14(b)(2)(iii).

[65] *See* 47 C.F.R. § 1.1307(a)(4).

[66] 47 C.F.R. § 1.1307(a)(4). For a full discussion of our historic preservation rules and processes, *see* http://wireless.fcc.gov/siting/npa/npa.html.

[67] *See* 47 C.F.R. § 1.1307(a)(4).

existing towers, buildings, and other non-tower structures.[68] Under the Collocation Agreement, most collocations are excluded from routine historic preservation review, with a few defined exceptions to address potentially problematic situations. Collocations on towers are generally excluded from review unless either the mounting of the antenna will result in a substantial increase in the size of the tower,[69] a relevant environmental review proceeding or complaint is pending regarding the tower, or the tower is the subject of an unresolved finding of adverse or potentially adverse effect on historic properties.[70] For towers constructed after March 16, 2001, a collocation also requires Section 106 review if the Section 106 review process for the tower and any associated environmental reviews have not been completed.[71] The Collocation Agreement excludes collocations on a building or other non-tower structure from routine Section 106 review unless, among other things, the building or structure is over 45 years old; the building or structure is inside the boundary of a historic district; the building or structure is within 250 feet outside the boundary of a historic district and the antenna is visible from ground level anywhere within the historic district; or the building or structure is a designated National Historic Landmark or is listed in or eligible for listing in the National Register.[72]

29. The second agreement, the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process ("NPA"), establishes review procedures for Commission undertakings that are better tailored to communications towers than the procedures prescribed in the ACHP's rules.[73] In particular, the NPA establishes a process for consultation and initial review by the relevant SHPO or THPO and, if necessary, subsequent Commission review of the proposed tower construction.[74] The NPA also outlines procedures for public participation, identifying and evaluating historic properties within the area of potential effects, and assessing effects on historic properties.

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[68] 47 C.F.R. Part 1, App. B, Nationwide Programmatic Agreement for the Collocation of Wireless Antennas ("Collocation Agreement"); *see* Wireless Telecommunications Bureau Announces Execution of Programmatic Agreement with Respect to Collocating Wireless Antennas on Existing Structures, *Public Notice*, 16 FCC Rcd 5574 (WTB 2001).

[69] For purposes of the Collocation Agreement, a substantial increase in size occurs if any of the following conditions is true: (1) the mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10 percent or the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed these size limits if necessary to avoid interference with existing antennas; (2) the mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; (3) the mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed these size limits if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or (4) the mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site. *See* Collocation Agreement, § I.C.

[70] Collocation Agreement, §§ III, IV.

[71] Collocation Agreement, § IV.

[72] Collocation Agreement, § V.

[73] 47 C.F.R. Part 1, App. C, Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process ("NPA"); *see NPA Report and Order*, 20 FCC Rcd at 1079 para. 15, 1081 para. 19. For an overview of the history of and processes established by the NPA, *see* http://wireless.fcc.gov/siting/npa/intro.html.

[74] *NPA Report and Order*, 20 FCC Rcd at 1127-30 paras. 149-57.

30. In addition to qualifying collocations that are excluded under the Collocation Agreement, the NPA delineates additional exclusions from routine Section 106 review. These exclusions encompass categories of construction that are deemed unlikely to adversely affect historic properties.[75] Among these exclusions from routine Section 106 review, the NPA provides a limited exclusion for construction of a facility in or within 50 feet of the outer boundary of a right-of-way that has been designated by a Federal, State, or Tribal government for the location of either communications towers or above-ground utility transmission or distribution lines and is in active use for such purposes.[76] The exclusion covers construction of new antenna structures as well as collocations, but does not apply if the proposed deployment would constitute a substantial increase in size over existing structures located in the right-of-way within the vicinity of the proposed facility, or if it would be located within the boundaries of a historic property.[77] Further, proposed facilities that fall within this exclusion are still required to complete the process of participation of Tribal Nations and Native Hawaiian Organizations ("NHO") pursuant to the terms of the NPA.[78] If, through this process, the applicant or the Commission identifies a historic property that may be affected, the applicant is required to complete the Section 106 process notwithstanding the exclusion.[79]

4. Proposals to Tailor DAS/Small Cell Environmental Processing

31. In the last year, the Commission has received requests to expedite the environmental review process for DAS and small cells. In an *ex parte* filing submitted in the *NOI* proceeding, PCIA—The Wireless Infrastructure Association and the DAS Forum[80] (hereinafter, in this section, "PCIA"), among others, propose that many DAS and small cell deployments should be categorically excluded from all environmental processing, including both NEPA and Section 106 processing, with the exception of compliance with RF emission exposure limits.[81] PCIA argues that the financial and regulatory costs involved in environmental and Section 106 processing are not warranted due to the minimal environmental effects of small cells and DAS facilities.[82] Specifically, PCIA proposes that the Commission add a sentence to Note 1 of Section 1.1306, stating: "The provisions of § 1.1307(a) do not encompass distributed antenna systems or small cell installations where they are deployed in or on

[75] NPA, § III. These exclusions include: tower enhancements that do not involve collocations and that do not constitute a substantial increase in size; certain replacement towers that do not involve a substantial increase in size; certain temporary towers as defined by the NPA; certain facilities under 200 feet in height located in industrial parks or commercial malls or shopping centers; facilities in locations previously designated by the SHPO or THPO as having limited potential to affect historic properties; and certain facilities in designated communications or utility rights-of-way.

[76] *See NPA Report and Order*, 20 FCC Rcd at 1098 para. 63; NPA, § III.E.

[77] *See NPA Report and Order*, 20 FCC Rcd at 1098 paras. 63-64; NPA, § III.E. In this context, a facility would cause a substantial increase in size if the facility meets one of the first three elements of the substantial increase definition in the Collocation Agreement. *See* NPA § III.E.1.

[78] *See NPA Report and Order*, 20 FCC Rcd at 1098 para. 64; NPA, § III.E; *see also* NPA, § IV.

[79] *See* NPA, § III.E.

[80] On April 22, 2013, the DAS Forum renamed itself the HetNet Forum to reflect its increasingly diverse membership and its focus on advancing the variety of small cell solutions—DAS, microcells, picocells, Wi-Fi, and remote radio units—that use licensed and unlicensed spectrum to link to the macrocellular network. *See* http://www.pcia.com/pcia-press-releases/571-the-das-forum-renamed-hetnet-forum.

[81] Letter from D. Zachary Champ, PCIA-The Wireless Infrastructure Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-59, GN Docket No. 12-354, at 1, 2-5 (filed Mar. 19, 2013) ("PCIA Mar. 19, 2013 *Ex Parte*").

[82] PCIA and DAS Forum Comments, WC Docket No. 11-59, at 50-51.

existing buildings, towers or other structures or along or within existing aerial or underground corridors."[83]

32. As an alternative means of excluding DAS and small cells from Section 106 review, PCIA proposes that the Commission ask the ACHP to invoke the "exempted category" provision of the ACHP's rules. This provision allows for exclusions from Section 106 review when "[t]he potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse."[84] PCIA notes that such a procedure is both more time-consuming and more complex than its preferred categorical exclusion alternative since it entails a separate protocol prescribed by the ACHP rules, including the review and approval of the ACHP after public notice and consultation—and a rulemaking would still be needed to incorporate the final exclusion into the FCC's rules.[85]

33. As a third option, PCIA asks the Commission to exclude DAS and small cell solutions from the definition of Section 106 undertakings under the NPA. PCIA argues that the Commission has "sole authority to determine what activities undertaken by the Commission or its Applicants constitute Undertakings within the meaning of the NHPA"[86] and that, given the lack of Federal involvement with DAS and small cell installations, the Commission should conclude they are not "undertaking[s]" and thus fall outside the scope of the NHPA.[87]

34. Verizon supports the proposals of PCIA as potential mechanisms to exclude collocations of small cells on existing structures from historic preservation review.[88] Verizon further proposes that the Commission should facilitate small cell deployment by clarifying that the collocation exclusion under the first sentence of Note 1 to Section 1.1306 applies not only to collocations on existing antenna towers and buildings but also to facilities mounted on structures such as utility poles, water tanks, light poles, and road signs, thus excluding them from environmental review except for historic preservation and RF emissions exposure compliance.[89]

B. Discussion

35. As described above, many wireless technologies now connect to mobile users using small antennas that are placed on short structures such as poles or inside buildings and that, individually, provide coverage over a much smaller area than a traditional cell. Our environmental rules were largely written prior to these developments, however, and primarily reflect the environmental concerns presented by traditional macrocell deployments on tall structures. Further, because DAS and small cell deployments often require a large number of antennas or base stations to provide coverage to an area comparable to a single macrocell, they may implicate dramatically greater environmental compliance costs under the existing site-by-site review process. Given these factors, and the increasing reliance on these new technologies to meet ever increasing demand for wireless services, including broadband, we find that we should consider whether further tailoring of our environmental rules is appropriate for technologies such as DAS and small cells, and, if so, how such tailoring can be accomplished.

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[83] PCIA Mar. 19, 2013 *Ex Parte*, at 2-5.

[84] 36 C.F.R. § 800.14(c)(ii).

[85] PCIA Mar. 19, 2013 *Ex Parte*, at 5-6 (*citing* 36 C.F.R. § 800.14(c)(2)-(5)).

[86] *Id.* at 6 (*citing* NPA, § I.B).

[87] PCIA Mar. 19, 2013 *Ex Parte*, at 6-7.

[88] *See* Letter from Tamara Preiss, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-59, at 2 (filed Feb. 28, 2013) ("Verizon Feb. 28, 2013 *Ex Parte*").

[89] *See id.*

1. NEPA Review

36. We first address whether and how we should expedite our NEPA compliance process for DAS and small cells, and in particular whether to adopt a categorical exclusion to relieve all or some subset of such deployments from routine NEPA review. We address a possible exclusion for historic preservation review under Section 106 of the NHPA separately below.

37. *Updating the NEPA Exclusion for Collocations in Note 1.* We first seek comment on whether to adopt Verizon's proposal that we amend the first sentence in Note 1 to Section 1.1306, which currently excludes collocations on an "existing building or antenna tower" from environmental review except for review for RF emissions exposure and effects on historic properties. Verizon proposes that the exclusion should also apply to collocations on other structures, including structures such as utility poles, water tanks, light poles, and road signs. For the reasons discussed below, we propose a rule change to implement this suggestion and seek comment.

38. As noted above, the exclusion under the first part of Note 1 already applies to the mounting of antennas on existing towers and buildings, reflecting a determination that such collocations individually and cumulatively are unlikely to have significant environmental effects.[90] We tentatively conclude that the same determination applies with regard to collocations on structures like water towers and poles. In addition, the Commission has previously recognized that the ability to use structures such as utility poles is vitally important to the deployment of wireless and wireline services, including broadband.[91] In particular, DAS and small cell facilities, which are critical to satisfying demand for ubiquitous mobile voice and broadband services, often use such structures.[92] Accordingly, to expedite environmental processing for DAS and small cell deployments and to update our environmental rules to reflect current industry practices and technologies, we propose to amend Note 1 to provide that the categorical exclusion in the first sentence also applies to antennas mounted on existing structures other than buildings and "antenna tower[s]," including structures on which equipment associated with emerging technologies such as DAS facilities is sited. To accomplish such a change, we propose to modify sentence 1 of the note to change the phrase "existing building or antenna tower" to "existing building, antenna tower, or other structure."

39. We seek comment on this proposal and on whether the proposed language requires any further definition or qualification. For example, the Collocation Agreement and the NPA do not distinguish between buildings and other non-tower structures in applying exclusions from Section 106 review. We believe this supports our tentative view that there is no basis to subject collocations on structures such as utility poles to greater environmental review than collocations on buildings.[93] We seek comment on this analysis. Are collocations on structures other than towers and buildings any more likely to have significant environmental effects than collocations on towers and buildings? Are there certain types of existing structures for which this is true and, if so, which types, and what effects? We further

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[90] *See* 47 C.F.R. § 1.1306(a) & Note 1; *Order on Remand*, 26 FCC Rcd at 16708 para. 19. *See also* Implementation of the National Environmental Policy Act of 1969, Docket No. 19555**,** *Report and Order*, 49 FCC 2d 1313, 1324 para. 27 (1974) (finding that mounting an antenna on an existing building or tower "has no significant aesthetic effect and is environmentally preferable to the construction of a new tower, provided there is compliance with radiation safety standards….").

[91] Implementation of Section 224 of the Act,; A National Broadband Plan For Our Future, WC Docket No. 07-245, GN Docket No. 09-51, *Report and Order and Order on Reconsideration*, 26 FCC Rcd 5240, 5241-42 (2011).

[92] *See* Letter from Tamara Preiss, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-59, filed May 14, 2013; Letter from Colleen Thompson, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-59, filed June 17, 2013 ("AT&T June 17, 2013 *Ex Parte*"); Verizon Feb. 28, 2013 *Ex Parte*, at 2.

[93] *See*, *e.g.*, Collocation Agreement, § V (Collocation of Antennas on Buildings and Non-Tower Structures Outside of Historic Districts).

seek comment on whether, and how, we should define, specify, or limit what constitutes a "structure" in any rule that we adopt. Are there any technical or other limitations that we should reference in a definition of the term "structure" such that Note 1 would not extend to types of existing structures, if any, for which collocations are likely to have significant environmental effects? Those that advocate a different level of environmental review for collocations on any types of existing structures, or that advocate any other limitations on an expanded exclusion, should identify those attributes of such structures that they believe warrant heightened scrutiny and describe with specificity any limitations they consider appropriate.

40. We seek comment on whether any further action is needed to adequately and appropriately tailor NEPA review for collocations of DAS and small cell facilities or other collocations. For example, the first sentence of Note 1 specifically excludes "the mounting of antennas" on existing structures from NEPA review. Our understanding, however, is that the typical deployment of a DAS or small cell "node" on a pole or other structure includes not only antennas but also associated equipment such as power supplies, converters, and transceivers. Should we further amend the categorical exclusion for collocations so that it expressly covers not only the mounting of antennas but also the associated equipment? Does such associated equipment raise particular environmental concerns that the antennas do not? Do we need to clarify or define what constitutes associated equipment for purposes of this exclusion? If so, how should associated equipment be defined? Are there physical, technical, or other technologically neutral characteristics of associated equipment by which we should limit the exclusion so that there will be no significant environmental effects?

41. We also seek comment on whether we should further amend the first sentence of Note 1 to clarify that the collocation exclusion applies to installations in the interior of buildings. Similarly, is any amendment needed to clarify that the first part of the Note 1 exclusion applies not only to rooftops but also to the sides of buildings? Given that either such clarification would not exclude facilities from Section 106 review or review for exposure to RF emissions, are there any other special environmental concerns that might arise from collocations inside or on the side of buildings as opposed to collocations on rooftops? If either of these clarifications to the collocation exclusion in Note 1 is appropriate, how should the language be amended to reflect the clarification?

42. We note that while the proposed amendment to Note 1 would continue to exclude only facilities that are collocated on existing structures, we are also seeking comment below on whether to adopt a new categorical exclusion that would broadly exclude DAS and small cell deployments, either collocated or deployed on new poles, from our routine NEPA review procedures (other than for compliance with RF exposure limits). We propose the above amendment to the Note 1 collocation exclusion independent of whether we also adopt a separate categorical exclusion applicable to smaller facilities generally. Regardless of whether we also adopt a broader NEPA exclusion for small facilities generally, we anticipate that the proposed expansion of the Note 1 collocation exclusion to cover all structures will continue to provide independent benefits, because it will apply to all collocations on any non-tower structure, not merely collocations involving DAS and small cell facilities. For example, such a clarification would also cover collocation of a macrocell on a water tank.

43. *Adopting A New Categorical Exclusion for DAS/Small Cell Deployments.* The Commission's existing categorical exclusions are designed to capture and exclude from environmental processing those categories of facilities that are unlikely to have significant environmental effects.[94] Such exclusions facilitate rapid deployment of services to the public consistent with our obligation under NEPA to consider environmental effects, and also preserve the resources of the Commission and applicants for situations that may involve greater potential for significant environmental effects. We therefore seek comment on whether DAS and small cell deployments are unlikely to have significant environmental effects and whether we should adopt a categorical exclusion for some or all of the

[94] *See supra*, Section II.A.2.

components involved in DAS and small cell deployments from NEPA review other than for compliance with RF exposure limits.

44. As discussed above, a typical DAS deployment includes a number of communications "nodes," each typically consisting of an antenna or antennas either collocated on an existing support structure or deployed on a new structure, along with a cabinet containing associated equipment. In addition to the nodes, the DAS system includes a central hub site and fiber or other cabling connecting the nodes to the hub.[95] Other small cell solutions may also include some or all of these components. If we adopt the proposal discussed above to amend the first sentence of Note 1, we believe that it would effectively exclude the collocation of nodes for DAS, small cells, and other comparable wireless technologies from NEPA review, other than historic preservation review and review for compliance with our RF exposure limits. We seek comment on this analysis. Should we adopt a special collocation exclusion for the communications nodes of DAS, small cell, and other small wireless technologies, either in addition to or instead of the proposed revisions to the existing categorical exclusion for collocations generally? If so, we seek comment on how to define the scope of the exclusion. We explore this definitional question in greater detail below.

45. Assuming we adopt a broadened collocation exclusion, either in general or specifically for small communications nodes, such an exclusion would not cover all construction that may be necessary to deploy DAS, small cells, and other small facilities. In particular, it would not cover new support structures, such as new poles, that are constructed to support communications nodes as part of a DAS or small cell deployment. We seek comment on whether some or all such construction should also be excluded from NEPA review. We invite comment on the potential environmental effects of the construction or deployment of such new supporting structures and equipment, on whether we may conclude that such facilities are unlikely to have significant environmental effects, and, if so, under what circumstances (*e.g.*, categories or locations).

46. If we adopt a specific NEPA exclusion for DAS and other small wireless facilities, either for collocated facilities or for facilities deployed on new structures, how should we define the scope or application of such an exclusion? PCIA initially proposed that we define the scope of the exclusion by reference to "distributed antenna systems or small cell installations."[96] We are concerned, however, that defining an exclusion by reference to a specific wireless technology such as "DAS" may be both over-inclusive and under-inclusive. It may be over-inclusive because some facilities associated with the named technology could be larger and more obtrusive than contemplated in the general case and therefore have a greater potential for significant environmental effects. For example, future DAS deployments over different spectrum bands may require larger or higher antennas. A definition that relies exclusively on reference to a particular technology may also be under-inclusive in that other technologies that involve comparably unobtrusive wireless facilities may be developed that equally warrant an exclusion. For example, commercial uses of signal boosters (such as repeaters) may have characteristics similar to DAS and small cells such that they should be similarly eligible for any exclusion developed for DAS and small cell deployments.[97] We therefore believe that framing any exclusion based on objective physical factors

[95] For an indoor DAS network, remote antennas are placed throughout a building and are connected with fiber to a single hub containing the wireless service provider's equipment. An outdoor DAS network consists of a central hub location which links, via fiber, a system of antenna locations (or nodes). *See* www.crowncastle.com/das/.

[96] *See* PCIA Mar. 19, 2013 *Ex Parte* at 5. Subsequently, PCIA and the HetNet Forum submitted "an industry-consensus definition for visually unobtrusive wireless facility installations" that, they proposed, should be granted a categorical exclusion. *See* Letter from D. Zachary Champ, PCIA-The Wireless Infrastructure Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-59, GN Docket No. 12-354, filed July 22, 2013 ("PCIA July 22, 2013 *Ex Parte*"). We discuss this definitional proposal below.

such as height, size, or location could be a better approach than referencing a specific technology such as DAS. We seek comment on this analysis, and on how to craft an exclusion based on the dimensions and other objective characteristics of facilities, including all aspects of any such definition.

47. Specifically, we seek comment on how we can define the covered facilities to ensure that deployments eligible for the categorical exclusion have no more than *de minimis* effects on the environment and that changes to technology do not expand the exclusion beyond its intent. Should we define any such categorical exclusion with reference to the height of the supporting structure, the size of the antenna, and the dimensions of the equipment cabinets or other ancillary equipment? If so, what dimensions should we adopt as a definition? To the extent that we adopt a new categorical exclusion that extends to new support structures, we seek comment on how to define the structures that are eligible, the locations where the exclusion should apply, and any other conditions or criteria for eligibility that are necessary to ensure that such deployments do not have a significant effect on the environment.

48. We note that the size and architecture of antennas, supporting structures, and other equipment may depend in part on the characteristics of the service being provided, such as the spectrum used. Should we strive to define any exclusion in a manner that is technologically neutral in effect as well as in form? If so, what definitions would best achieve this end? In order to assure that consumers can continue to benefit from technological development, should any size or other criteria we apply attempt to anticipate potential future technological and industry developments?

49. We also note that PCIA and the HetNet Forum have recently submitted a new proposal for the definition of facilities that should be categorically exempt.[98] This definition relies on defining the maximum cubic volume of the relevant facilities rather than on specific technological labels.[99] PCIA and the HetNet Forum assert that their proposed definition "has widespread industry support" and both "accommodates current DAS and small cell deployments and anticipates foreseeable technological development."[100] We seek comment on the proposed definition.

50. We also seek comment on whether any proposed exclusion should be defined in part by the location of facilities. For example, the NPA establishes an exclusion from routine Section 106 review for deployments of wireless facilities, including deployments on new structures, located in utility or telecommunications rights-of-way. Specifically, deployments are not subject to Section 106 review if (1) such facilities are located in or within 50 feet of a right-of-way designated for communications tower or

(Continued from previous page)

[97] *See*, *e.g.*, AT&T Inc. ("AT&T") Comments, WC Docket No. 11-59, at 22-23 (requesting "further streamlining of the Section 106 process" for DAS and repeaters). *See also* Amendment of Parts 1, 2, 22, 24, 27, 90 and 95 of the Commission's Rules to Improve Wireless Coverage Through the Use of Signal Boosters, WT Docket No. 10-4, *Report and Order*, 28 FCC Rcd 1663 (2013).

[98] PCIA July 22, 2013 *Ex Parte.*

[99] Specifically, they propose that an installation conforming to the following parameters should be exempt:

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.

PCIA July 22, 2013 *Ex Parte* at 2-3.

[100] *Id.* at 3.

above-ground utility transmission or distribution lines, (2) the facility would not constitute a substantial increase in size over existing structures in the right-of-way in the vicinity of the proposed construction, (3) the facility would not be located within the boundaries of a historic property, and (4) the applicant has successfully completed the process established in the NPA for Tribal and Native Hawaiian Organization participation.[101] We seek comment on whether we should adopt a categorical exclusion from routine NEPA review for DAS and small cells in rights-of-way designated for utilities or telecommunications similar to the one in the NPA that applies to Section 106 review. If so, should we apply any of the NPA conditions for this categorical exclusion such as the one requiring that the facilities not constitute a substantial increase in size over existing nearby structures in the right-of-way? Would a rights-of-way categorical exclusion appropriately and effectively tailor NEPA review for DAS and small cells?

51. As another example of a location-based exclusion, Note 1 to Section 1.1306 currently includes a categorical exclusion from all environmental review for "the installation of aerial wire or cable over existing aerial corridors of prior or permitted use or the underground installation of wire or cable along existing underground corridors of prior or permitted use . . . ."[102] PCIA proposes that we similarly exclude DAS and small cell deployments, including deployments on new structures, that are placed "along or within existing aerial or underground corridors."[103] We seek comment on whether we should extend the wire and cable exclusion to cover components of DAS or small cell deployments in such corridors, including new support structures. Is there a basis for the Commission to conclude that DAS and small cell deployments (whether on new or existing structures) do not individually or cumulatively have a significant effect on the quality of the human environment so as to qualify for a categorical exclusion from NEPA review under 40 C.F.R. § 1508.4? To the extent that these deployments require the deployment of fiber optic cable, is any amendment to the existing exclusion necessary, or does the existing exclusion for aerial or underground cables deployed in existing corridors adequately cover such components? With regard to other components including new structures, to what extent can such components be placed "in or along" aerial or underground corridors?

52. Finally, we seek comment on whether any categorical exclusion outside of existing aerial or underground corridors should include specific provisions for DAS and small cell components other than the nodes. For example, should the exclusion cover fiber that is not already excluded under the existing Note 1 exclusion for cable in existing aerial or underground corridors? If so, how should we frame such an exclusion? Should the hub station also be included, and if so, in what circumstances? What additional revisions to the exclusion for existing aerial or underground corridors would expedite DAS and small cell deployment without risking significant environmental impact?

2. Historic Preservation Review

53. We next seek preliminary comment on whether and how we should tailor Section 106 review for effects on historic properties in the context of DAS, small cells, and similar facilities. As one option, we seek comment on whether we can and should adopt an exclusion from Section 106 review for such facilities. We note that whether to adopt such an exclusion raises many of the same questions of definition and scope discussed above in connection with a possible exclusion from NEPA review, and we invite commenters to consider the same questions in addressing whether we should adopt an exclusion from Section 106 review. Further, in the discussion below, we refer back as appropriate to the issues raised by a possible NEPA exclusion. We seek comment, however, on whether and to what extent a Section 106 exclusion raises different legal or policy issues. We explore these and other issues that relate specifically to Section 106 review below.

[101] NPA § III.E. *See NPA Report and Order*, 20 FCC Rcd at 1098 paras. 63-64.

[102] 47 C.F.R. § 1.1306 Note 1.

[103] PCIA Mar. 19, 2013 *Ex Parte*, at 2-5.

54. We also recognize that changes to our Section 106 processing rules may require coordination with the ACHP and NCSHPO and consultation with federally recognized Tribal Nations, and we intend to undertake such coordination and consultation. Commission staff has written separately to Tribal leaders and to THPOs and Cultural Preservation Officials, informing them of Section 106 priorities and issues for Tribal consultation, and inviting them to share their values and initial thoughts regarding tailoring of Section 106 review for DAS and small cells.[104] In an effort to prepare Tribal Nations for consultations, Commission staff has also discussed this matter at meetings of inter-Tribal government organizations.[105]

55. *Options for Tailoring Historic Preservation Review.* As discussed above, PCIA identifies three possible avenues to tailor historic preservation review for DAS and small cell facilities: (1) categorical exclusion; (2) program alternative; or (3) finding that DAS and small cell deployments are not "undertakings" under Section 106. PCIA favors the categorical exclusion approach as the most expeditious means to streamline the deployment of DAS and small cells and to facilitate wireless broadband deployment while maintaining historic preservation goals.[106] According to PCIA, a rulemaking to add DAS and small cell solutions to the list of facilities that are categorically excluded from non-RF-related environmental processing under Section 1.1306 (Note 1) would satisfy the Commission's responsibilities under the NHPA and the ACHP's Section 106 regulations. In particular, PCIA relies on Section 800.3(a)(1) of the ACHP's rules, which provides that an agency has no further Section 106 obligations "[i]f the undertaking is a type of activity that does not have the potential to cause effects on historic properties assuming such historic properties were present."[107] According to PCIA, "this rule provides a 'categorical exclusion from the consultation process' where 'there is no potential adverse effect' or the environmental effects are 'de minimis.'"[108] PCIA asserts that adopting a categorical exclusion through a notice-and-comment rulemaking would "involve all interested parties, including the ACHP," but that, unlike the more elaborate program alternative processes authorized by Section 800.14 of the ACHP's rules, it would require only a single proceeding, thus "saving time and resources for all concerned . . . ."[109] PCIA observes that the third option, finding DAS and small cell deployments not to be undertakings, may "be more vulnerable to protracted procedural and substantive challenges."[110]

[104] *See* Letter from Geoffrey Blackwell, Chief, Office of Native Affairs and Policy, Consumer and Governmental Affairs Bureau, to Tribal Leaders, dated June 25, 2013 (filed in WT Docket No. 13-238 on September 25, 2013); Letter from Geoffrey Blackwell, Office of Native Affairs and Policy, Consumer and Governmental Affairs Bureau, and Jeffrey Steinberg, Deputy Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, to Tribal Historic Preservation Officers and Cultural Preservation Officials, dated June 25, 2013 (filed in WT Docket No. 13-238 on September 25, 2013).

[105] Meetings attended include the United South and Eastern Tribes Washington Impact Week, Committee Meetings, February 7, 2013, Arlington, Virginia; To Bridge A Gap Conference, Panel Session, March 12, 2013, Norman, Oklahoma (via teleconference); United South and Eastern Tribes Semi-Annual Meeting, Board of Directors and Committee Meetings, May 15-17, 2013, Oneida, New York; National Congress of American Indians, 2013 Mid-Year Conference, Committee Meetings, June 25-26, 2013, Reno, Nevada; and National Association of Tribal Historic Preservation Officers, Annual Meeting, August 20-22, 2013, Billings, Montana.

[106] *See* PCIA Mar. 19, 2013 *Ex Parte*, at 5-6.

[107] 36 C.F.R. § 800.3(a)(1); PCIA Mar. 19, 2013 *Ex Parte*, at 5.

[108] *Id.* (citing *Save Our Heritage, Inc. v. FAA*, 269 F.3d 49, 58, 62-63 (1st Cir. 2001)).

[109] *Id.* at 6.

[110] *Id.* at 7.

56. We seek comment on the alternatives of an exclusion in our rules or a program alternative under the ACHP rules, and the relative costs and benefits of each.[111] We invite commenters to discuss the potential effects of DAS and small cell systems on historic properties, as such an assessment is a key component in selecting an appropriate procedural mechanism to depart from the ordinary process for historic preservation review of a Federal undertaking.[112] Does Section 800.3(a)(1) of the ACHP's rules support an exclusion in circumstances where the potential for adverse effects is *de minimis*, as PCIA suggests, or only where there is no potential for any effects on historic properties? Commenters should also address the extent to which any revision of Section 1.1306 (Note 1) to exclude DAS and small cell systems from Section 106 historic preservation review would require that the Commission consult the ACHP, SHPOs, Tribal Nations and NHOs, or others. Given that either a Commission exclusion or an ACHP-approved program alternative would necessarily involve and revisit matters addressed in the NPA, what, if any, revision to the NPA would either option require? Does the very existence of the NPA favor or militate against adopting an exclusion in a rulemaking? Would a program alternative, providing the agency an opportunity to tailor a process for DAS and small cell systems in coordination with ACHP, offer greater flexibility or more significant benefits than a Commission exclusion? If we were to pursue a program alternative, which of the various program alternatives authorized by Section 800.14 of the ACHP's rules[113] is most appropriate, considering their relative costs and benefits, consultative obligations, eligibility standards, and the time required to implement each alternative? Are there are other procedural mechanisms by which the Commission, either acting unilaterally or in coordination with the ACHP or others, could streamline any required historic preservation review of DAS or small cell systems?

57. We note that, while we proceed with this rulemaking, we intend to work with ACHP and NCSHPO to explore the option of a program alternative to further tailor Section 106 review for DAS, small cell, and similar facilities. Those efforts will also inform any steps we take as a result of this Notice of Proposed Rulemaking.

58. *Defining the Scope of the Exclusion.* Assuming we exclude small wireless facilities from historic preservation review either through adoption of an exclusion or through one of ACHP's program alternatives, we seek comment on how to define the scope of the exclusion. In particular, as with the possible exclusion from NEPA review discussed above, we seek comment on how to define the facilities that would not be subject to review under these approaches. If we do adopt an exclusion for small facilities that covers both Section 106 and NEPA review, should we define the facilities excluded from Section 106 review the same way we do the facilities excluded from NEPA review? While there may be administrative advantages to adopting the same definition, there may also be circumstances where a facility that meets criteria for an exclusion under NEPA does not meet the criteria for an exclusion under

[111] We seek comment below on the extent to which DAS and small cell deployments constitute a Federal undertaking under the NHPA and a major Federal action under NEPA. *See infra*, Section II.B.3.

[112] *Compare* 36 C.F.R. § 800.3 (providing that "[i]f the undertaking is a type of activity that does not have the potential to cause effects on historic properties . . . the agency official has no further obligations under section 106"); *Save Our Heritage, Inc. v. FAA*, 269 F.3d at 58, 62-63 (finding no obligation to consult ACHP or to prepare an EA for an otherwise categorically excluded action, where the FAA made a reasoned determination of *de minimis* effects) *with* 36 C.F.R. §§ 800.14 (generally authorizing the development of alternate Section 106 procedures upon approval by the ACHP after public participation and consultation with the SHPOs and potentially affected Indian tribes and Native Hawaiian Organizations), 800.14(c) (Exempted Categories) (the agency official may propose a category of undertakings exempted from review under the Subpart B rules if "the potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse), 800.14(e) (Program Comments**)** (the agency official shall identify the category of undertakings, specify the likely effects on historic properties, specify the steps the agency official will take to ensure that the effects are taken into account, identify the time period for which the comment is requested and summarize any views submitted by the public).

[113] 36 C.F.R. § 800.14.

Section 106 and vice versa. For example, Note 1 to Section 1.1306, which provides a categorical exclusion for collocations on an existing building or antenna tower for most purposes under NEPA, does not extend to review under Section 106.[114]

59. In order to define the scope of an exclusion or program alternative, we seek comment on whether and under what circumstances DAS and small cell facilities, individually and cumulatively, are unlikely to cause an adverse effect on historic properties.[115] Are there some circumstances, such as placement of facilities in historic districts or collocations near or on historic buildings, where there is a potential for significant effects on historic properties? If so, what conditions, criteria, or definitions should we use to identify situations in which routine Section 106 review may be appropriate while maintaining an exclusion in the ordinary case? In the alternative, is it sufficient to rely on Section 1.1307(c) and (d) of the Commission's rules, which direct the reviewing Bureau to require an EA for an otherwise categorically excluded deployment where, on its own motion or in response to public petition, the Bureau finds that the deployment may have a significant environmental impact?[116]

60. While the general provisions of the Collocation Agreement and the NPA already exclude many DAS and small cell facilities from some or all of the Section 106 review process, PCIA notes two provisions that limit the applicability of the exclusions in this context. First, the Collocation Agreement, while excluding most collocations from Section 106 review, provides that collocations on existing buildings or other non-tower structures that are over 45 years old are not excluded.[117] PCIA asserts that the percentage of utility poles that are 45 years or older is significant and growing and that, as a consequence, collocations of small wireless facilities on such existing poles will increasingly not be excluded from review.[118] Second, as described above, the NPA provides a partial exclusion for deployments (including new poles) in or near utility rights-of-way, but with certain limitations.[119] Critically, this exclusion does not apply if the deployment would be located within the boundaries of a historic property.[120] PCIA asserts that "corridors" including utility and highway rights-of-way are

[114] 47 C.F.R. § 1.1306 Note 1.

[115] The ACHP's rules state that "[a]n adverse affect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." 36 C.F.R. § 800.5(a)(1). The ACHP further explains that "[a]n agency must look at the nature of the undertaking when judging whether it has the potential to affect historic properties, and not at whether the specific undertaking has effects on specific historic properties. The presence of historic properties must be assumed at this stage." *See* http://www.achp.gov/106q&a.html#800.3. *See also NPA Report and Order*, 20 FCC Rcd at 1124 paras. 140-42 (discussing clarification of "adverse effect" standard adopted as part of the NPA).

[116] 47 C.F.R. § 1.1307(c), (d). *See also* NPA § XI (providing that the Commission will consider public comments raising concerns as to individual undertakings covered or excluded under the terms of the NPA, and, following consultation "with the SHPO/THPO, potentially affected Indian tribes and NHOs, or [ACHP], where appropriate, take appropriate actions.").

[117] Collocation Agreement § V.A.1.

[118] PCIA Mar. 19, 2013 *Ex Parte*, Attach. (Dr. Amos J. Loveday, DAS/SMALL CELLS & HISTORIC PRESERVATION: An Analysis of the Impact of Historic Preservation Rules on Distributed Antenna Systems and Small Cell Deployment, Feb. 27, 2013, at 3 ("Loveday Report")).

[119] NPA, § III.E. Under this provision, proposed facilities subject to the exclusion must complete the process of participation of Tribal Nations and NHOs pursuant to the NPA and, if as a result of this process the applicant or the Commission identifies a historic property that may be affected, the applicant must complete the Section 106 review process pursuant to the NPA notwithstanding the exclusion. *Id. See also NPA Report and Order*, 20 FCC Rcd at 1098 para. 64.

[120] NPA, § III.E.2.

increasingly being found eligible for the National Register, thus reducing the availability of this exclusion.[121]

61. We seek comment on whether, if we find that a comprehensive exclusion for DAS and small cells is not appropriate through either an exclusion or a program alternative, we should address one or both of these specific concerns or tailor review for any other categories of small facility deployments other than those that are currently excluded under the NPA or the Collocation Agreement. First, with respect to collocations on non-tower structures that are over 45 years old, we note that, because utility poles are being maintained for long periods of time, it is likely that most utility poles will eventually fall out of the NPA exclusion. Given that the NPA was adopted when use of structures such as utility poles for wireless communications facilities was extremely rare, we seek comment on whether review of collocations on older utility poles was intended, in what ways such structures might possess historic value, and to what extent collocation may result in adverse effects to that historic value. We seek comment on whether we can and should clarify or otherwise provide that the provision requiring review of collocations on buildings and other structures over 45 years old is not applicable to a utility pole that is over 45 years of age. If so, how should we define a utility pole for such purpose? Should we exclude other categories of non-tower structures, such as street lamps or water towers?[122]

62. With regard to the second issue, as noted above, according to PCIA, use of utility corridors for DAS and small cell deployment is becoming more difficult because such corridors are increasingly being considered historic properties or districts, and thus both new poles and collocations in such rights-of-way are becoming subject to routine Section 106 review under the Collocation Agreement and the NPA.[123] We seek comment on whether collocations and new pole deployments in utility or communications rights-of-way that otherwise fall within the exclusions in the Collocation Agreement or the NPA should be exempt from the Section 106 historic preservation review process regardless of whether such rights-of-way are considered historic properties. Would additional infrastructure potentially have significant effects on historic properties if located in utility corridors that are already lined with utility poles and other infrastructure of similar size?[124] Are there any particular circumstances that may suggest that a different result is appropriate, such as, for example, if utility poles are a contributing element towards making a corridor a Historic District?

63. We also note an additional issue that arises when a collocation requires an existing utility pole to be replaced with a new pole. The NPA currently provides that the construction of a new tower that replaces an existing tower is excluded from routine Section 106 review if it meets certain criteria.[125] The NPA does not, however, address replacements of utility poles or other non-tower structures. AT&T

[121] Loveday Report at 3.

[122] We note that such structures may be more likely to have historic value. For historic street lamps, *see*, *e.g.*, http://www.cityofalamedaca.org/About-Alameda/Street-Lights; http://thealamedan.org/news/alamedas-historic-streetlights-are-getting-makeover. For historic water tanks, *see*, *e.g.*, http://www.niobraracountylibrary.org/history/index.php?id=40.

[123] Loveday Report at 3. *See* Collocation Agreement, § V.A.2; NPA § III.E.2.

[124] *See, e.g., NPA Report and Order,* 20 FCC Rcd at 1098 para. 63 (finding that "the likelihood of an incremental adverse impact on historic properties is minimal … where such structures will be located near similar existing poles").

[125] NPA, § III.B. Specifically, the replacement is excluded if it does not substantially increase the size of the existing tower under the first three elements of the Collocation Agreement's substantial increase test, and does not expand the boundaries of the leased or owned property surrounding the tower by more than 30 feet in any direction or involve excavation outside these expanded boundaries or outside any existing access or utility easement related to the site. *Id.* For replacements of towers constructed after March 16, 2001, this exclusion applies only if the existing tower has completed Section 106 and NEPA review. *Id.*

has suggested that we extend the exclusion for replacement towers to cover replacements of non-tower structures.[126] We seek comment on this proposal, and in particular, whether we should provide, through an exclusion or a program alternative, for an exclusion from routine Section 106 review for replacement utility poles. If so, should we limit it to circumstances where the new pole is no larger than the existing pole or where there is not a substantial increase in size? Should the exclusion apply if the replacement is constructed with different materials?

64. Finally, we seek comment on whether, to the extent DAS, small cell, and other small facilities are not excluded from historic preservation review, we could still develop a process that would enable the review to proceed more efficiently. For example, we seek comment on whether and how to define circumstances in which individual communication nodes (*e.g.*, the separate antenna nodes of a single DAS deployment) can be grouped together and reviewed as a single undertaking for historic preservation review. We further seek comment on whether and to what extent such changes may be implemented as a matter of process by the Bureaus without any amendment of the NPA or the Commission's rules.[127]

3. Other Considerations

65. As noted above, in an *ex parte* submission in the *NOI* proceeding, PCIA suggests that the Commission could find that DAS and small cell deployments are not Federal undertakings under the NHPA pursuant to an NPA provision that grants it "sole authority to determine what activities undertaken by the Commission or its Applicants constitute Undertakings within the meaning of the NHPA."[128] In light of PCIA's suggestion, we seek comment on the extent to which deployments of DAS or small cell facilities qualify as Federal undertakings under the NHPA and major Federal actions under NEPA. We invite commenters to analyze this issue in terms of the extent to which the Commission provides, or has the authority to provide, Federal licensing, approval, or other assistance for such deployments, and also to consider the effects of such deployments on the environment and historic preservation.[129] In particular, Section 319 of the Communications Act generally confers on the Commission authority to regulate and require pre-construction approval for the construction of any facility for which a license is required, which in turn extends to any "apparatus for the transmission of energy, or communications, or signals by radio."[130] Further, while the Commission has generally waived the requirement of preconstruction approval for geographic-area licensees, as permitted by Section 319(d), the Commission has also retained a limited approval authority under Section 1.1312 of the Commission's rules to review the environmental effects of all "facilities."[131] The Commission has found, given these provisions, that macro site deployments are appropriately classified as Federal undertakings, a conclusion affirmed by the United

[126] *See* AT&T June 17, 2013 *Ex Parte*, at 1.

[127] 47 C.F.R. §§ 0.131, 0.331.

[128] *See* PCIA Mar. 19, 2013 *Ex Parte*, at 6-7 (*citing* NPA § I.B). *See also* 36 C.F.R. § 800.3(a).

[129] *See* 16 U.S.C. § 470w(7) (defining undertaking to mean projects, activities or programs that are funded in whole or in part under the jurisdiction of a Federal agency, including those requiring a Federal permit, license or approval); 40 C.F.R. § 1508.8 (defining "major Federal action" under NEPA to encompass actions by non-Federal actors with effects that may be major and that are potentially subject to Federal control, such as approval by permit or other regulatory action of specific projects). *See also CTIA—The Wireless Ass'n*, 466 F.3d at 114-15 ("Whatever else 'approval' may mean, we see no basis for CTIA's suggestion that the FCC's retention of authority to 'rule[] on,' 47 C.F.R. § 1.1312(b), a party's submission under NEPA cannot constitute 'approval' [under] 16 U.S.C. § 470w(7).").

[130] *See* 47 U.S.C. §§ 301, 319. We note that DAS nodes and small cells transmit the signals of Commission licensees in technically the same manner as traditional macrocells.

[131] 47 C.F.R. § 1.1312.

States Court of Appeals for the District of Columbia.[132] Is there a difference in how these provisions apply to DAS facilities and small cells as compared to macrocells and the towers on which they are mounted that would justify distinguishing the deployment of DAS and small cell facilities for purposes of classification as a Federal undertaking and major Federal action? Is the only distinguishing factor that the physical characteristics of DAS and small cells may make them less intrusive than traditional macro sites?[133] We invite commenters to describe any other differences that potentially warrant different treatment under the NHPA and NEPA, and to explain specifically how these differences affect the analysis of whether these deployments are Federal undertakings and major Federal actions.

66. Assuming DAS and small cell deployments are Federal undertakings within the meaning of the NHPA and major Federal actions under NEPA, we seek comment on how and by what mechanisms we might implement either of the options discussed above – categorical exclusion or program alternative. Under the Commission's existing rules and processes, where no site-by-site filing is otherwise required for a facility, a licensee is required to ensure compliance with the environmental rules before constructing a facility, but is not required to file any site-by-site certification.[134] In particular, such a licensee planning to construct a new facility must ascertain if a proposed facility may have a significant environmental impact.[135] If so, the licensee must submit the required documentation for an environmental assessment on which the Commission must complete environmental processing before construction may be initiated.[136] Is this process appropriate for the potential exemptions discussed above? Should the Commission consider developing documentation requirements for demonstrating eligibility for any of the exemptions under consideration in this Notice of Proposed Rulemaking? Would the costs of such documentation requirements outweigh the benefits? What mechanism might be appropriate to address cases in which eligibility for the exemption is unclear?

67. We emphasize that if we exclude any class of DAS and small cell deployments or other small facilities deployments from all routine environmental processing, including Section 106 historic preservation review, such deployments would still be subject to Section 1.1307(c) and (d) of the Commission's rules. Thus, the relevant processing Bureau would still require the filing of an EA if, either on its own motion or in response to a complaint from the public, the Bureau determines that a particular action may cause significant environmental effects.[137] In addition, deployments that are eligible for the exclusions discussed in this section would still be subject to any applicable notice requirements.[138]

III. ENVIRONMENTAL NOTIFICATION EXEMPTION FOR REGISTRATION OF TEMPORARY TOWERS

68. In this section, we propose to adopt a permanent exemption from the pre-construction environmental notification process for certain temporary towers that require antenna structure registration.

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[132] *See NPA Report and Order*, 20 FCC Rcd at 1083 para. 24 (finding that "our existing policies treating tower construction as an undertaking under the NHPA reflect a permissible interpretation of the Commission's authority under Section 319(d) of the Act to issue construction permits for radio towers"); *CTIA—The Wireless Ass'n*, 466 F.3d at 114-15.

[133] *See* PCIA Mar. 19, 2013 *Ex Parte*, at n.34 (*citing CTIA—The Wireless Ass'n* , 466 F.3d at 114-15); Loveday Report at 6.

[134] 47 C.F.R. § 1.1312.

[135] *See id.*

[136] *See id. See also* FCC Form 601, Schedule B, Instructions, at 1 (noting that "[i]n some circumstances, geographic area Licensees must apply for a site-specific authorization," including cases when a site may have a significant environmental effect as defined in Section 1.1307).

[137] 47 C.F.R. § 1.1307(c), (d).

[138] *See* 47 C.F.R. § 17.4(c); *Order on Remand*, 26 FCC Rcd at 16716-30.

We have previously granted an interim waiver of the notification process, pending completion of this rulemaking, for temporary towers that have characteristics (very short duration, height limits, minimal or no excavation, and no lighting) that minimize their potential to cause significant environmental effects. We now propose to incorporate this exemption permanently into our rules in order to remove an administrative obstacle to the availability of broadband and other wireless services during major events and unanticipated periods of localized high demand.

A. Background

1. Environmental Notification Process for Antenna Structure Registrations

69. The Commission's rules require that, if the owner of a proposed antenna structure must provide pre-construction notice to the Federal Aviation Administration ("FAA") under its rules, then the owner must also, prior to construction, register the antenna structure in the Commission's Antenna Structure Registration ("ASR") System.[139] The term "antenna structure" includes both "the radiating and/or receive system" and the supporting structure, such as a tower.[140] Notification to the FAA is generally required for any antenna structure that is taller than 200 feet above ground level or that may interfere with the flight path of a nearby airport.[141] To register such a structure in the ASR system, the antenna structure owner must submit to the Commission an application that includes a "No Hazard" determination from the FAA along with any associated lighting or painting specifications required by the FAA. The ASR program allows the Commission to fulfill its statutory responsibility under Section 303(q) of the Act to require painting and lighting of antenna structures that may pose a hazard to air navigation.[142]

70. The Commission has deemed the processing of an antenna structure registration application to be an action that triggers its environmental review responsibilities under NEPA and the NHPA.[143] One of these responsibilities is to facilitate public involvement in agency decisions that may affect the environment.[144] Accordingly, the Commission established the environmental notification process to facilitate public involvement in the NEPA review of ASR applications.[145] Under the environmental notification rules, prior to filing a completed ASR application for any new antenna structure or for certain categories of antenna structure modifications or replacements, the ASR applicant must provide local and national notice of the application so that members of the public have an

[139] 47 C.F.R. § 17.4.

[140] 47 C.F.R. § 17.2(a).

[141] *See* 47 C.F.R. § 17.7.

[142] *See* 47 U.S.C. § 303(q).

[143] *See supra*, n. 46.

[144] *See* 40 C.F.R. § 1506.6(a) (requiring agencies to make "diligent efforts to involve the public in preparing and implementing their NEPA procedures"); *see also* 40 C.F.R. § 1500.2(d) ("Federal agencies shall to the fullest extent possible … [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment.").

[145] *See*, *generally*, *Order on Remand*, 26 FCC Rcd 16700; The Wireless Telecommunications Bureau Provides Guidance on the Implementation of the Environmental Notification Process for the Registration of Antenna Structures, *Public Notice*, 27 FCC Rcd 5081 (WTB 2012) ("*ASR Guidance PN*"). The Commission adopted its environmental notification process in response to the decision of the Court of Appeals for the District of Columbia Circuit in *American Bird Conservancy v. FCC*, which held that the Commission's previous antenna structure registration procedures had impermissibly failed to offer members of the public a meaningful opportunity to request an EA for proposed towers that the Commission considers categorically excluded from review under NEPA. *American Bird Conservancy v. FCC*, 516 F.3d 1027, 1035 (D.C. Cir. 2008).

opportunity to comment on the environmental effects of the proposal.[146] Commission staff considers any timely filed comments and responsive pleadings in determining whether to require an EA for an otherwise categorically excluded construction under sections 1.1307(c) and (d) of our rules.[147]

71. In addition to other exceptions, the Commission has provided for case-by-case waiver or postponement of the notification requirement in emergency situations, such as where temporary towers need to be built quickly to restore lost communications.[148] As the Commission stated in the *Order on Remand*,

> [w]e recognize that cases may arise that involve emergency situations, such as where temporary towers need to be built quickly to restore lost communications. Such situations often require grants of special temporary authority (STAs). In such cases, upon an appropriate showing and at the request of the applicant, the processing Bureau may waive or postpone this notice requirement.[149]

The Commission further provided, however, that the Bureau shall ordinarily require in such cases that notice be provided within a short period after authorization or construction, unless the Bureau concludes in a particular case that provision of such notice would be impracticable or not in the public interest.[150]

2. CTIA Petition

72. On December 21, 2012, CTIA filed a Petition for Expedited Rulemaking asking the Commission to add an exception from the public notice requirements for temporary towers that (i) will be in use for 60 days or less, (ii) require the filing of a Form 7460-1 with the FAA, (iii) do not require marking or lighting pursuant to FAA regulations, and (iv) will be less than 200 feet in height ("Temporary Towers Petition").[151] CTIA also asked the Commission for an interim waiver of its environmental notification rules for the same class of temporary towers pending the outcome of the rulemaking.[152]

73. According to CTIA, although the Commission has provided for waivers of notice in emergency situations, as discussed above, many non-emergency situations arise in which carriers need temporary towers to address short-term capacity constraints but have insufficient advance notice to complete the public notice process.[153] CTIA claims that the notification requirements may interfere with addressing these situations expeditiously because the environmental notification process typically takes at least 60 days to complete. CTIA asserts that over the previous year there were multiple race events, state fairs, and air shows at which temporary facilities could not be deployed due to the ASR notice requirements.[154] CTIA states that the requested exemption from environmental notice would address the

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[146] For an overview of the environmental notification process, *see ASR Guidance PN*; *Order on Remand*, Appendix E. *See also* http://www.fcc.gov/help/environmental-notification-process-registration-antenna-structures-overview.

[147] 47 C.F.R. § 1.307(c), (d); *see*, *generally*, 47 C.F.R. § 17.4(c).

[148] *Order on Remand*, 26 FCC Rcd at 16717 n. 117.

[149] *Id.*

[150] *Id.*

[151] Petition of CTIA—The Wireless Association for Expedited Rulemaking and Blanket Waiver Regarding Public Notice Procedures for Temporary Towers, RM-11688, filed Dec. 21, 2012 ("Temporary Towers Petition").

[152] *Id.* at 11-12.

[153] *Id.* at 4-7.

[154] *Id.* at 6-7.

foregoing situations without undermining meaningful environmental or air safety review or significantly affecting avian mortality, and would therefore serve the public interest.[155]

74. CTIA states that, under its proposal, an ASR applicant would still be required to conduct its standard NEPA screening analysis for new towers and to certify on the Form 854 that the proposed tower would not have a significant environmental effect.[156] It states that the applicant would also have to obtain an FAA Determination of No Hazard where required under FAA rules.[157]

75. On January 25, 2013, the Wireless Telecommunications Bureau placed the Temporary Towers Petition on public notice.[158] AT&T, Verizon Wireless, NTCH, Inc. ("NTCH"), and PCIA—The Wireless Infrastructure Association ("PCIA") filed comments supporting both the Temporary Towers Petition and the request for an interim waiver.[159] CTIA and PCIA filed reply comments. No commenting party opposed either the Temporary Towers Petition or the interim waiver request.

76. Commenters argue that the requested exemption will enable wireless carriers to respond to non-emergency short-term spikes in demand (planned and unplanned), allow carriers to quickly deploy temporary towers when antennas must be unexpectedly removed from a permanent structure in non-emergency situations, and ensure service continuity, all without undermining environmental or air safety concerns or significantly affecting avian mortality.[160] According to commenters, a waiver process for such situations is inefficient and wastes carrier and FCC resources.[161] Commenters agree that current environmental notice requirements hinder wireless carriers' ability to address short-term network capacity and coverage issues, thereby necessitating an exemption for certain temporary towers.[162] By easing the notice requirements as CTIA proposes, they argue, the Commission can ensure that carriers and other temporary tower operators have the flexibility to site temporary towers when and where they are needed most.[163] Commenters also argue that post-construction notice, such as is routinely required for emergency tower waivers, needlessly consumes the resources of temporary tower owners and the

[155] *Id.* at 7-11.

[156] *Id.* at 9.

[157] *Id.*

[158] Wireless Telecommunications Bureau Seeks Comment on Petition of CTIA—The Wireless Association for Expedited Rulemaking and Blanket Waiver Regarding Public Notice Procedures for Temporary Towers, *Public Notice*, RM-11688, 28 FCC Rcd 210 (WTB 2013) ("*Temporary Towers Petition PN*").

[159] NTCH also filed its comments in the Biennial Review docket. *See* Commission Seeks Public Comment in 2012 Biennial Review of Telecommunications Regulations, *Public Notice*, CG Docket No. 13-29, EB Docket No. 13-35, IB Docket No. 13-30, ET Docket No. 13-36, PS Docket No. 13-31, WT Docket No. 13-32, WC Docket No. 13-33, 28 FCC Rcd 1556 (2013).

[160] AT&T Comments, RM-11688, at 3-4, 10-13; PCIA Comments, RM-11688, at 4-6; Verizon Wireless Comments, RM-11688, at 4-6.

[161] AT&T Comments, RM-11688, at 5, 7-8; PCIA Reply Comments, RM-11688, at 1-3.

[162] AT&T Comments, RM-11688, at 5-6, 8; Verizon Wireless Comments, RM-11688, at 3-4. Based on their experiences, commenters cite a number of examples where temporary tower deployments were inhibited due to ASR notice requirements. AT&T notes that, absent a waiver, the interim ASR notice requirements would have prevented the deployment of multiple cell sites on wheels for the 2013 Presidential inauguration. *See* AT&T Comments, RM-11688, at 7. PCIA notes 4 examples where its members were unable to deploy temporary towers as planned. *See* PCIA Comments, RM-11688, at 2-3. Verizon Wireless cites 8 examples. *See* Verizon Wireless Comments, RM-11688, at 3-4. *See also* CTIA Reply Comments, RM-11688, at 3.

[163] PCIA Reply Comments, RM-11688, at 2; CTIA Reply Comments, RM-11688, at 2-3.

Commission, because many temporary towers are removed before the notice period can be completed and because temporary towers do not have a significant impact on the environment.[164]

77. On May 15, 2013, we granted CTIA's request for an interim waiver of the environmental notification rules, with one modification.[165] Specifically, we granted an interim waiver of the notification requirements for temporary towers that: (1) will be in use for no more than 60 days; (2) require notice of construction to the FAA; (3) do not require marking or lighting under FAA regulations; (4) will be less than 200 feet in height; and (5) will either involve no excavation or involve excavation only where the depth of previous disturbance exceeds the proposed construction depth (excluding footings and other anchoring mechanisms) by at least two feet. The interim waiver will remain in effect pending completion of this rulemaking proceeding.[166]

B. Discussion

78. We now propose to adopt a limited exemption from the environmental notification requirements that is substantially similar to the exemption proposed by CTIA. Specifically, and consistent with the interim exemption granted in the *Waiver Order*, we propose an exemption from our ASR environmental notification requirements for temporary antenna structures that, because of their characteristics, do not have the potential for significant environmental effects.[167] We seek comment on how to define such an exemption, and whether the criteria set out in the *Waiver Order* are sufficient and appropriate for this purpose. Under these criteria, an antenna structure would be exempt from the notification requirements if it (i) will be in use for 60 days or less, (ii) requires notice of construction to the FAA, (iii) does not require marking or lighting pursuant to FAA regulations, (iv) will be less than 200 feet in height, and (v) will involve minimal or no excavation. We seek comment on our proposal and on alternative approaches to address the concerns raised in the CTIA petition.

79. In considering the proposed exemption, we recognize that one of our responsibilities under NEPA is to facilitate public involvement in agency decisions that may affect the environment. CEQ regulations direct that agencies shall "make diligent efforts to involve the public in preparing and implementing their NEPA procedures" and "solicit appropriate information from the public."[168] At the same time, an agency has "'wide discretion in fashioning its own procedures' to implement its environmental obligations,"[169] and "considerable discretion [under CEQ regulations] to decide the extent to which such public involvement is 'practicable.'"[170] Consistent with the discretion to identify particular circumstances in which inviting public involvement is impracticable or inappropriate, we propose to find

[164] AT&T Comments, RM-11688, at 8 n. 12.

[165] Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers; 2012 Biennial Review of Telecommunications Regulations, RM-11688, WT Docket No. 13-32, *Order*, 28 FCC Rcd 7758 (2013) ("*Waiver Order*").

[166] *Id.*

[167] In this section, we use the terms "antenna structures" and "towers" interchangeably.

[168] 40 C.F.R. § 1506.6(a), (d); *see also* 40 C.F.R. § 1500.2(d) ("Federal agencies shall to the fullest extent possible … [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment."); *American Bird Conservancy v. FCC*, 516 F.3d 1027, 1035 (D.C. Cir. 2008).

[169] *Order on Remand*, 26 FCC Rcd at 16717 para. 45 (quoting *American Bird Conservancy*, 516 F.3d at 1035).

[170] *Brodsky v. U.S. Nuclear Regulatory Com'n*, 704 F.3d 113, 121 (2d Cir. 2013) (noting that the reviewing court properly considers "whether the lack of public input prevented the agency from weighing all the factors essential to exercising its judgment [under NEPA] in a reasonable manner" if the issuance of a FONSI without public comment is challenged) (internal quotations omitted); *TOMAC, Taxpayers of Mich. Against Casinos v. Norton,* 433 F.3d 852, 861(D.C. Cir. 2006)*;* 40 C.F.R. § 1501.4(b).

that the environmental notice requirements will typically be impracticable for temporary towers that meet the criteria outlined above. We further propose to find that the risk that carriers will not be able to meet short-term capacity needs and the resulting detriment to the public if they are required to complete the notification process outweighs the small likelihood that the process will confer any benefit. We also note that parties filing comments in response to the *Temporary Towers Petition PN* uniformly supported an exemption for antenna structures meeting the criteria set out by CTIA. We therefore tentatively conclude that establishing the proposed exemption is consistent with our obligations under NEPA and CEQ regulations, and will serve the public interest.[171]

80. Commenters state that the environmental notification process is impracticable for antenna structures meeting the criteria set out by CTIA and will interfere with carriers' ability to respond to short-term capacity needs. The ASR notice process takes approximately 40 days,[172] as carriers must provide local and national public notice, allow 30 days for the filing of any requests for further environmental review, and wait for the Commission to clear the tower for a final certification. If a request for environmental review is filed, the deployment can be delayed longer even if the request lacks merit. According to commenters, situations frequently arise where there is insufficient time to complete this process before a temporary tower must be deployed to meet near-term demand, including (1) newsworthy events that occur without any prior notice and require immediate deployments, such as natural disasters; (2) other events that occur with less than 30 days advance notice, such as certain political events and parades for sports teams; (3) events for which the timing and general location are known in advance, but where the specific locations for temporary towers are unknown until days before the event, such as state fairs and major sporting events; and (4) situations in which unexpected difficulties with permanent structures require the deployment of temporary towers while permanent facilities are repaired.[173] The record, as well as our own experience in administering the environmental notice rule, shows that substantial numbers of such non-emergency temporary towers require registration. In particular, notice to the FAA (and therefore ASR registration) is necessary for towers under 200 feet in height if they may interfere with the flight path of a nearby airport.[174] Therefore, absent an exemption, application of the ASR notice process to these temporary towers will apparently prevent service providers from meeting important short term coverage and capacity needs. We seek comment on this analysis.

81. At the same time, the benefits of environmental notice appear to be limited in the case of most temporary towers. The environmental notice process is intended to effectuate the opportunity conferred by Section 1.1307(c) of our rules for interested persons to allege that an otherwise categorically excluded ASR application presents "circumstances necessitating environmental consideration in the decision-making process."[175] Thus, to the extent that significant environmental effects are highly unlikely

[171] *Cf.* Amendment of Environmental Rules in Response to New Regulations Issues by the Council on Environmental Quality, GEN Docket No. 79-163, *Report and Order*, 60 Rad. Reg. 2d (P&F) 13, para. 17 (1986) (finding that for "temporary proposals that are encompassed within § 1.1307," the Commission "may assess the environmental factors and grant the authorization without awaiting public comment if it finds no likelihood of a long-term, significant environmental impact").

[172] *See ASR Guidance PN*, 27 FCC Rcd at 5082.

[173] *See* Temporary Towers Petition at 5-6; AT&T Comments, RM-11688, at 5-6; NTCH Comments, RM-11688, at 1; PCIA Comments, RM-11688, at 2-4; Verizon Wireless Comments, RM-11688, at 3-4, 7-8; CTIA Reply Comments, RM-11688, at 3.

[174] *See* 47 C.F.R. §§ 17.4, 17.7. In many such cases, the FAA issues a Determination of No Hazard without requiring marking or lighting. *See*, *e.g.*, ASR Application A0842015, *available at* http://wireless2.fcc.gov/UlsApp/AsrSearch/asrApplication.jsp?applKey=4198052# (waiver request noting that FAA did not require marking or lighting). Nonetheless, the fact that FAA notice was required is enough to trigger the registration requirement under our rules. Thus, it is not uncommon that our rules require ASR registration for towers that are less than 200 feet in height and that do not require any marking or lighting.

[175] *See Order on Remand*, 26 FCC Rcd at 16719 para. 50; 47 C.F.R. § 1.1307(c).

for certain classes of temporary towers, there seems to be little reason to require environmental notification, particularly given the harm to the public from delaying the deployment of such towers. We seek comment on this analysis, and on whether the criteria proposed by CTIA in the Temporary Towers Petition, as modified in the Waiver Order, sufficiently insure against potential environmental impact or risk to air safety from such towers.

82. In particular, CTIA proposes that, to be exempt from notice, a temporary tower must be less than 200 feet in height and not subject to FAA marking or lighting requirements. We seek comment on these conditions. Evidence demonstrates that lighting and height are major factors influencing whether an antenna structure may cause significant environmental impacts, particularly on migratory birds.[176] Given this evidence, is it necessary that, in addition to the height and lighting restrictions, eligible temporary towers be limited to those that do not require marking? Is a requirement that eligible temporary towers be less than 200 feet in height a sufficient height limitation to protect against significant environmental impacts? Is it too strict?

83. In adopting an interim waiver, we added a condition that deployments covered by the waiver either must involve no excavation or the depth of previous disturbance must exceed the proposed construction depth (excluding footings and other anchoring mechanisms) by at least two feet.[177] That specific requirement was drawn from the NPA, which excludes towers from Section 106 historic preservation review if they are deployed for less than 24 months and also meet this condition.[178] As the Commission explained in adopting the NPA, "[s]o long as no excavation will occur on previously undisturbed ground, the risk of damage to archeological or other historic properties from a temporary facility is small."[179] We seek comment on whether to similarly require no or minimal excavation as a condition of the proposed temporary towers exemption from environmental notice. Is such a condition necessary to assure that such towers are unlikely to have significant environmental effects, and what are the costs of the condition? Are effects on historic properties the only concern with excavation, and, if so, is Section 106 review under the NPA, which includes a process for public participation,[180] sufficient to protect against such effects? Should we adopt any other structural or construction conditions in addition to or in lieu of those proposed in the *Waiver Order*?

84. Consistent with CTIA's proposal in its Petition, we propose to limit the temporary towers exemption from notice to towers that will be deployed for no more than 60 days. We seek comment on this time period. We note that the NPA excludes from review under Section 106 of the NHPA a broader category of temporary towers, generally defined as towers that will remain in place for up to 24

[176] Based on a review and analysis of available peer-reviewed literature, the Final Programmatic Environmental Assessment found that, all other factors being equal: taller towers result in higher levels of avian mortality than shorter towers; towers with guy wires result in higher levels of avian mortality than towers without guy wires; and steady-burning lights result in higher levels of avian mortality than flashing lights. *See* Final Programmatic Environmental Assessment for the Antenna Structure Registration Program, released March 13, 2012, at 7-1, *available at* http://www.fcc.gov/pea; *see also Order on Remand*, 26 FCC Rcd at 16722 para. 54 (finding that absence of lighting is the most preferred lighting style); *id.* at 16731-32 para. 80 (citing data indicating no evidence of large-scale bird mortality at towers less than approximately 450 feet in height).

[177] *See Waiver Order*, 28 FCC Rcd at para. 12.

[178] *See* 47 C.F.R. Pt. 1, App. C, Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process ("NPA"), §§ III.C., VI.D.2.c.i.

[179] Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, WT Docket No. 03-128, *Report and Order*, 20 FCC Rcd 1073, 1091 para. 49 (2004) ("*NPA Report and Order*"), *recon. denied*, 24 FCC Rcd 14841 (2009).

[180] NPA, § V.

months.[181] Further, NTCH proposes that the maximum period be three months instead of two.[182] Would exempting from notice temporary towers that are deployed for longer than 60 days be consistent with avoiding a potential for all significant environmental effects, not only those on historic properties? Is it reasonable to expect that parties deploying a tower for more than 60 days will ordinarily have sufficient advance notice to complete the environmental notice process, and therefore should either do so or obtain a case-specific waiver? Alternatively, is a period shorter than 60 days both reasonable and necessary to protect against significant environmental effects? We also note that the NPA permits temporary towers used for national security purposes to exceed 24 months and still be excluded from Section 106 review.[183] Should we adopt a similar exception to whatever time limit we apply to the notification exemption?

85. We propose to require no post-construction environmental notice for temporary towers that qualify for the exemption. While we ordinarily require that environmental notice be provided within a short period after construction when pre-construction notice is waived due to an emergency situation, the Commission recognized in the *Order on Remand* that in some circumstances, post-construction notice may be impractical or not in the public interest.[184] While towers subject to emergency waiver relief may be deployed for long periods or even indefinitely, thus warranting post-construction notice, we address here only towers deployed for short periods of time. Notice in this circumstance would seem to serve little purpose as the deployment would be over or nearly so by the time the notice period ended.[185] In addition, our own experience in administering the ASR public notice process is that temporary antenna structures rarely generate public comment regarding potentially significant environmental effects and rarely are determined to require further environmental processing.[186] We therefore propose to find that it would not be in the public interest to require post-construction notice for towers subject to the proposed exemption. We seek comment on our proposal and analysis, and on the costs and benefits of requiring post-construction notice of towers subject to the exemption. As an alternative to completely exempting such towers from environmental notification, would it be appropriate to establish a shorter post-construction environmental notice period or limit the notice requirement to national notice?

86. CTIA states in its Temporary Towers Petition that under its proposal, towers exempted from environmental notice would still be required to comply with the Commission's other NEPA rules, including the obligation to certify environmental compliance on a completed ASR application and to file an EA in appropriate cases.[187] We propose to retain these requirements. We note that, as part of the NEPA rules, even if a specific facility is categorically excluded from environmental processing under Section 1.1306,[188] the reviewing Bureau shall require the filing of an EA under Section 1.1307(c) and (d)

[181] *See* NPA § III.C ("the term 'temporary' means 'for no more than twenty-four months duration except in the case of those Facilities associated with national security'"). As stated in the *NPA Report and Order*, temporary towers meeting certain criteria were excluded from routine Section 106 review based on the conclusion that such towers do not have potential to cause significant effects on historic properties. *NPA Report and Order*, 20 FCC Rcd at 1091 para. 49.

[182] NTCH Comments, RM-11688, at 3; *see also* CTIA Reply Comments, RM-11688, at 4 (reiterating 60-day proposal but not objecting to extending the exemption to include towers deployed for up to 90 days).

[183] NPA, § III.C.

[184] *Order on Remand*, 26 FCC Rcd at 16717 n. 117.

[185] AT&T Comments, RM-11688, at 8 n. 12; NTCH Comments, RM-11688, at 2.

[186] *See* Verizon Wireless Comments, RM-11688, at 5 (asserting that Verizon Wireless has not received any opposition to its ASR applications for temporary towers since implementation of the notice requirements).

[187] Temporary Towers Petition at 9.

[188] 47 C.F.R. § 1.1306.

of the rules if the Bureau determines the deployment may have a significant environmental impact.[189] We also note that where an EA is filed for a registered tower, the Commission puts the EA on public notice for 30 days and also requires the applicant to provide local notice unless local notice was previously completed for that tower.[190] We propose that if an applicant determines that it needs to complete an EA for a temporary tower that would otherwise be exempt from environmental notice, or if the Bureau makes this determination under Section 1.1307(c) or (d), the application with an EA would not be exempt from environmental notice. Alternatively, should we provide that temporary towers that require an EA would be eligible for the exemption, or that they would be subject to national but not local notice?

87. We note that under the NPA, the exclusion from Section 106 review for temporary towers expressly includes but is not limited to the following: a cell on wheels ("COW") transmission facility, a broadcast auxiliary services truck, a TV pickup station, a remote pickup broadcast station (*e.g.*, electronic newsgathering vehicle) authorized under Part 74, a temporary fixed or transportable earth station in the fixed satellite service (*e.g.*, satellite newsgathering vehicle) authorized under Part 25, a temporary ballast mount tower, or any facility authorized by a Commission grant of an experimental authorization.[191] CTIA's Temporary Towers Petition does not specify the types of temporary towers that would be eligible for the exemption, apart from the other criteria CTIA proposes. Should we list or provide examples of specific types of facilities potentially eligible for an exemption from our environmental notification rules? What would be the purpose of limiting the exemption to listed facilities? If we do specify a list of facilities eligible for the exemption, should we replicate or modify in any way the list provided in the NPA? Could limiting the exemption to listed facilities have unintended consequences, such as inadvertently excluding new technologies or types of structures?

88. We seek comment on what process should apply when an applicant determines, subsequent to registering a tower under the temporary towers notification exemption, that the relevant tower will or may be needed beyond the maximum period for the exemption. Should we adopt a process for extending the period the tower may remain in place without environmental notice? Alternatively, should we condition the grant of the exemption on the requirement that, if the applicant needs the tower beyond the maximum period for the exemption, it must either: (1) provide environmental notification before the end of the specified period; (2) obtain a case-specific waiver; or (3) remove the tower at the end of the permitted period and not redeploy it until environmental notice has been completed? Should there be any other consequences for exceeding the maximum period, even if post-construction notice is subsequently provided?

89. Finally, we seek comment generally on the costs and benefits of the proposed exemption. We ask commenters to quantify costs and benefits and provide supporting evidence, where possible. If we determine that there is no or very little potential for significant environmental effects from these antenna structures, would environmental notification confer any benefits? If so, would they be outweighed by the costs from delays that might prevent deployment of these towers and result in a loss of service to the public? We specifically seek comment on the costs and benefits of the exemption as measured against the alternative of applying a case-by-case waiver process similar to that which applies to emergency situations. Under this case-by-case waiver process, applicants are required to file a waiver request and wait for a Bureau determination of whether to grant the request.[192] AT&T states that a waiver

[189] 47 C.F.R. § 1.1307(c), (d).

[190] *See* 47 C.F.R. § 17.4(c)(7); *Order on Remand*, 26 FCC Rcd at 16726 para. 66 (noting that 30 days is the "time period that is currently in place for challenges to ASR filings with EAs") & n. 173. *See also id.*, 26 FCC Rcd at 16720-21 para. 53 (providing that replacement towers and modifications to towers that are otherwise exempt from the ASR notification requirements are not exempt in cases where an EA is required to be filed).

[191] NPA, § III.C.

[192] *Order on Remand*, 26 FCC Rcd at 16717 n. 117.

process similar to that which currently applies to emergency situations is an inefficient approach for the narrow category of temporary towers within the scope of our proposal and creates unnecessary uncertainty and delay.[193] We seek comment on the costs of the case-by-case waiver process that would be avoided by adopting a rule. We also seek comment on the potential that an exemption by rule would be over-inclusive, and on any costs that might result.

IV. IMPLEMENTATION OF SECTION 6409(A)

90. In this section, we seek comment on whether to adopt rules interpreting and implementing Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act"),[194] which establishes a new Federal law governing the State and local review of eligible requests for modification of existing wireless towers or base stations, including requests for collocation. As discussed in detail below, we tentatively find that it would serve the public interest to clarify the requirements and scope of this provision. We therefore seek comment on the interpretation of various statutory terms in Section 6409(a) and on other questions of implementation, including whether we should establish time periods for the review of eligible requests and whether we should specify remedies for noncompliance.

A. Background

91. Section 6409(a), codified at 47 U.S.C. § 1455(a), was passed on February 22, 2012, as part of Title VI of the Spectrum Act, which Congress adopted to "advance wireless broadband service" for both public safety and commercial users.[195] To accomplish this goal, among other things, Title VI established the First Responder Network Authority ("FirstNet") to oversee the construction and operation of a nationwide public safety wireless broadband network ("PSBN") over dedicated spectrum for which the Spectrum Act directed the Commission to issue FirstNet a license.[196] The Spectrum Act also authorized the Commission to conduct an incentive auction of broadcast television spectrum in order to make additional spectrum available for commercial broadband service and to help fund the deployment of the PSBN.[197] Section 6409 contributes to the twin goals of commercial and public safety wireless broadband deployment through several measures that promote rapid deployment of the network facilities needed for the provision of broadband wireless services. These measures include Section 6409(a), entitled "Facilities Modification."

92. Section 6409(a) has three provisions. Subsection (a)(1) provides that "[n]otwithstanding section 704 of the Telecommunications Act of 1996 [codified as 47 U.S.C. § 332(c)(7)] or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station."[198] Subsection (a)(2) defines the term "eligible facilities request" as any request for modification of an existing wireless tower or base station that

[193] *See* AT&T Comments, RM-11688, at 5, 7-8.

[194] *See* Title VI – Public Safety Communications and Electromagnetic Spectrum Auctions, Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 156 (2012) (codified at 47 U.S.C. § 1455(a)). We refer hereinafter to the Middle Class Tax Relief and Job Creation Act of 2012 as the "Spectrum Act."

[195] *See* H.R. Rep. 112-399, at 136 (2012) ("Conf. Rep.").

[196] *See* Spectrum Act §§ 6201, 6202, 6206. *See also* Implementing Public Safety Broadband Provisions of the Middle Class Tax Relief and Job Creation Act of 2012; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, PS Docket No. 12-94, PS Docket No. 06-229, WT Docket No. 06-150, *Notice of Proposed Rulemaking*, 28 FCC Rcd 2715 (2013).

[197] *See* Spectrum Act §§ 6402, 6403. *See also* Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Docket No. 12-268, *Notice of Proposed Rulemaking*, 27 FCC Rcd 12357 (2012).

[198] Spectrum Act § 6409(a)(1).

involves (a) collocation of new transmission equipment; (b) removal of transmission equipment; or (c) replacement of transmission equipment.[199] Subsection (a)(3) provides that "[n]othing in paragraph (a) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969."[200] Aside from the definition of "eligible facilities request," Section 6409(a) does not define any of its terms. Similarly, neither the definitional section of the Spectrum Act nor that of the Communications Act contains definitions of the Section 6409(a) terms discussed here.[201]

93. On January 25, 2013, the Wireless Telecommunications Bureau ("Wireless Bureau" or "Bureau") issued a public notice offering interpretive guidance regarding the meaning and application of Section 6409(a) ("*Section 6409(a) PN*").[202] Specifically, the Bureau provided guidance on how to interpret the term "wireless tower or base station," on what it means to "substantially change the physical dimensions" of a tower or base station, on whether a State or local government may require an application for a modification covered under Section 6409(a), and on whether there is a time limit within which such an application must be approved.[203] The Bureau noted that the Commission remains free to address the interpretation of Section 6409(a) through its rulemaking authority or through adjudication, pursuant to its authority to "implement and enforce [the provisions of the Spectrum Act] as if . . . part of the Communications Act of 1934 (47 U.S.C. 151 et seq.)."[204]

94. On July 31, 2013, the Intergovernmental Advisory Committee ("IAC") submitted recommendations to the Commission regarding the interpretation of Section 6409(a) and the Bureau's guidance in the *Section 6409(a) PN*.[205] In its submission, the IAC disagreed with certain aspects of the Bureau's guidance and recommended that, "in any future action that would have formal or binding status, the Commission take certain different approaches" to these matters.[206] Specifically, the IAC recommended that the Commission modify the Bureau's guidance regarding how to interpret the terms "substantially change the physical dimensions" and "base station."[207] The IAC also recommended that the Commission clarify that "the scope of Section 6409 is properly understood as affecting state, local and tribal land use regulation and not proprietary or contractual activity" and that "state, local and tribal land

[199] Spectrum Act § 6409(a)(2).

[200] Spectrum Act § 6409(a)(3).

[201] Spectrum Act, § 6001; 47 U.S.C. § 153.

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

[203] *See id.*

[204] *See id.*, 28 FCC Rcd at n. 3 (quoting 47 U.S.C. § 1403(a)). Under the Communications Act, the Commission has broad authority to implement and enforce its provisions through rulemaking. *See, e.g.,* 47 U.S.C. § 201(b); *AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366, 377-78 (1999); *accord, Alliance for Community Media v. FCC,* 529 F.3d 763, 773-76 (6th Cir. 2008). *See also City of Arlington v. FCC,* 668 F.3d 229, 247-54 (5th Cir. 2012), *aff'd,* 133 S. Ct. 1863 (2013) (application to 47 U.S.C. § 332(c)(7)).

[205] *See* Intergovernmental Advisory Committee to the Federal Communications Commission: Advisory Recommendation Number 2013-9, "Response to Wireless Telecommunications Bureau's Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012," dated July 31, 2013 ("IAC Recommendation"). This document has been filed in WC Docket No. 11-59 (Aug. 2, 2013) and is also available at http://www.fcc.gov/encyclopedia/intergovernmental-advisory-committee-comments.

[206] IAC Recommendation at 1.

[207] *Id.* at 1-3.

use authorities are properly recognized as the threshold decisions-makers with respect to whether the standards for Section 6409's applicability are met in particular cases."[208]

B. Discussion

95. We tentatively find that it will serve the public interest for the Commission to establish rules clarifying the requirements of Section 6409(a) to ensure that the benefits of a streamlined review process for collocations and other minor facility modifications are not unnecessarily delayed. As the Commission noted in the *Sixteenth Competition Report*, collocation on existing structures is often the most efficient and economical solution for mobile wireless service providers that need new cell sites, either to expand their existing coverage area, increase their capacity, or deploy new advanced services.[209] Therefore, the Commission has taken several significant steps to facilitate collocations, including tailoring environmental review of collocations through the Collocation Agreement, adopting a time frame for local review of collocations in the *2009 Declaratory Ruling*, and adopting comprehensive rules to streamline the pole attachment process in the *Pole Attachment Order*.[210] Collocation is also commonly encouraged by zoning authorities to reduce the number of new communications towers.[211] In addition, collocations on existing towers will be critical to deployment and ongoing operation of the nationwide PSBN mandated by the Spectrum Act. Indeed, the Spectrum Act requires FirstNet to utilize, to the maximum extent economically desirable, "existing [] commercial or other communications infrastructure [and] Federal, State, tribal, or local infrastructure" in carrying out its statutory requirement to deploy the PSBN.[212] It also authorizes FirstNet to assess and collect lease fees from other entities that seek access to or use of "any equipment or infrastructure, including antennas or towers, constructed or otherwise owned" by FirstNet "resulting from a public-private arrangement to construct, manage, and operate" the PSBN.[213] Such fees are a portion of the monies that FirstNet is authorized to collect to recoup its total expenses each fiscal year to enable it to carry out its annual Spectrum Act duties and responsibilities.[214]

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[208] *Id.* at 3-4.

[209] *Sixteenth Competition Report*, 28 FCC Rcd at 3909 para. 331. PCIA estimates that the average cost to build a new tower is between $250,000 and $300,000, whereas the average deployment cost for a collocation is between $25,000 and $30,000. *See* PCIA Comments, WT Docket 11-186, at 7.

[210] *See*, *e.g.,* Collocation Agreement, 47 C.F.R. Part 1, App. B; Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Declaratory Ruling*, 24 FCC Rcd 13994 (2009) ("*2009 Declaratory Ruling*") (finding that a presumptively "reasonable period of time" under Section 332(c)(7)(B) for a State or locality to act on a wireless facility siting application is 90 days for collocation applications and 150 days for non-collocation applications); Implementation of Section 224 of the Act*;* A National Broadband Plan for Our Future*,* WC Docket No. 07-245, GN Docket No. 09-51, *Report and Order and Order on Reconsideration,* 26 FCC Rcd 5240 (2011) ("*Pole Attachment Order*") (comprehensively revising pole attachment rules to improve the efficiency and reduce the potentially excessive costs of deploying telecommunications, cable, and broadband networks). In addition, in 2012, the Wireless Bureau, in cooperation with NATOA, hosted a workshop to "provide an overview of how collocations can promote the availability of mobile broadband, public safety, and other wireless services in a manner consistent with community priorities." *See* http://www.fcc.gov/document/collocation-workshop-may-1-2012-promoting-mobile-brandband; http://www.fcc.gov/events/collocation-workshop (archived webcast).

[211] *See, e.g.,* http://www.loyalsocktownshipbos.com/Documents/Telecommunications%20Towers%20Ordinance.pdf.

[212] Spectrum Act, § 6206(c)(3).

[213] 47 U.S.C. § 1428(a)(3).

[214] *Id*. at § 1428(b).

96. Since Congress adopted Section 6409(a) more than a year ago, parties have expressed widely divergent views as to the meaning of its terms and the scope of its requirements.[215] Although the Bureau's release of the *Section 6409(a) PN* provided guidance on certain questions of interpretation under this provision, the Bureau left other issues unaddressed, and parties have also raised questions and concerns regarding the *Section 6409(a) PN* guidance itself.[216] While these issues could be addressed in practice through local interpretations, judicial decisions, and voluntary agreements, we believe on balance it serves the public interest for us proactively to seek comment at this time on implementing rules to define terms that the statute leaves undefined, and to fill in other interstices that may serve to delay the intended benefits of Section 6409(a). We invite comment on our decision to do so and on any reasons why we should limit or decline to take regulatory action in this proceeding.

97. In particular, we anticipate that, in the absence of definitive guidance from the Commission, the uncertainties under Section 6409(a) may lead to protracted and costly litigation and could adversely affect the timely deployment of a nationwide public safety network and delay the intended streamlining benefits of the statute with respect to other communications services. Further, addressing the interpretation of Section 6409(a) in a rulemaking, with notice and opportunity for comment, will provide a broader opportunity for participation and input in the implementation of this provision than, for example, one or more adjudicatory proceedings. In addition, we believe that State and local governments, FirstNet, Commission licensees, and tower companies will benefit from having settled interpretations on which they can rely in determining how to comply with the new law. We therefore take this opportunity to examine Section 6409(a) and to seek public comment on its interpretation. We seek comment on this reasoning.

98. We acknowledge, however, that there may also be countervailing benefits to offering governments additional opportunity to implement some or all of the provisions of Section 6409(a) before adopting prescriptive rules. Such an approach would provide State and local governments more opportunity and flexibility to develop solutions that best meet the needs of their communities consistent with the requirements of the provision and may also help to distinguish those issues that require clarification by the Commission from those on which there is general consensus. In particular, we believe that best practices or model ordinances that reflect a consensus of industry and municipal interests may facilitate the practical and efficient implementation of Section 6409(a), and we are aware of ongoing discussions between industry and municipal government representatives in that regard.[217] Therefore, we

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[215] *See*, *e.g.*, Isotrope LLC, "New Wireless Regulation from the 2012 Middle Class Tax Relief and Job Creation Act," March 2012, *available at* http://www.town.billerica.ma.us/index.php?option=com_docman&task=doc_view&gid=1164&Itemid=114; Municipal Minute, "Amendment to Telecommunications Act Limits Local Control of Cellular Facilities," *available at* http://municipalminute.ancelglink.com/2012/02/amendment-to-telecommunications-act.html; PCIA—The Wireless Infrastructure Association, California Wireless Association, "Wireless Infrastructure Industry Policy Position Points: Middle Class Tax Relief and Job Creation Act of 2012," *available at* http://calwa.org/wp-content/uploads/2012/08/CalWA-PCIA-Bullets-on-6409-for-JVSV.pdf; PCIA—The Wireless Infrastructure Association, "Streamlined Wireless Facilities Deployment: Federal Regulation in the Middle Class Tax Relief and Job Creation Act of 2012," *available at* http://calwa.org/wp-content/uploads/2012/08/PCIA-Federal-Siting-Legislation-Guidance-5.pdf.

[216] *See*, *e.g.*, IAC Recommendation.

[217] *See*, *e.g.*, Letter from Stephen Traylor, NATOA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-59, filed June 21, 2013 ("NATOA June 21, 2013 *Ex Parte*") (referencing NATOA's "ongoing efforts with PCIA to draft best practices addressing wireless facilities siting issues, especially those arising from Section 6409 of the Middle Class Tax Relief and Jobs Creation Act of 2012."); Letter from Yejin Jang, National Association of Counties, to Marlene. H. Dortch, Secretary, FCC, WC Docket No. 11-59, filed July 10, 2013 (updating efforts to draft best practices with PCIA); PCIA July 22, 2013 *Ex Parte* at 3 (updating efforts to draft voluntary best practices for wireless facility siting, and "noting that they are designed to facilitate discussion of common issues that arise in the

(continued….)

invite comment on whether we should refrain from addressing any or all of the issues discussed below at the present time, on how we might encourage efforts to develop best practices for applying Section 6409(a), and on what role best practices might play in the interpretation or implementation of this statutory provision.

99. We also note legislative efforts by State and local governments to streamline their collocation review processes in response to Section 6409(a) and other considerations.[218] We seek comment on how the Commission could accommodate and encourage such efforts consistent with Section 6409(a) and the factors discussed above. In particular, we seek comment on how this consideration affects whether and to what extent the Commission should leave issues unaddressed at this time. We also seek comment on other ways in which principles of federalism should inform our approach to implementation of Section 6409(a). In this connection, we note that our goal is not to "operate as a national zoning board."[219] Rather, we seek to implement and enforce the intent of Congress to make compliance with Federal standards "a precondition to continued state regulation in an otherwise pre-empted field."[220] In establishing such Federal standards, how should we most appropriately address the traditional responsibility of State and local governments for land use matters?

100. To the extent that we do adopt rules implementing Section 6409(a), we also seek comment on whether we should provide a transition period to allow States and localities time to implement the requirements in their laws, ordinances, and procedures. If so, how would we establish such a mechanism consistent with the provision? If so, what transition period would be appropriate?[221]

1. Terms in Section 6409(a)

101. As noted above, under Section 6409(a), States and localities must grant an "eligible facilities request," defined as "any request for modification of an existing wireless tower or base station" that involves collocation, removal or replacement of "transmission equipment," if the request does not "substantially change the physical dimensions" of the tower or base station.[222] We will refer to an eligible request that does not substantially change the physical dimensions of the tower or base station, and therefore that shall be approved and must not be denied, as a "covered request."

102. The scope of Section 6409(a) depends on the proper interpretation of a number of terms. We seek comment on how to interpret or define these terms, including "transmission equipment," "existing wireless tower or base station," "substantially change the physical dimensions," and

(Continued from previous page)
course of industry negotiations with local governments" but "urg[ing] the Commission not to view voluntary best practices as a substitute for a rulemaking process . . . .").

[218] *See, e.g.,* Mich. Comp. Laws § 125.3514; MO ST § 67.590 *et seq.*, H.B. No. 331 (2013) ("Uniform Wireless Communications Infrastructure Deployment Act"), *stayed by* City of Liberty, Missouri, et al. v. State of Missouri (Mo. Cir. Ct. Aug. 27, 2013); N.C. Session Law 2013-185; PA ST 53 P.S. § 11702.1 *et seq.* ("Wireless Broadband Collocation Act"); 2013 Wisconsin Act 20, §§ 1269I, 1269K.

[219] Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, CC Docket No. 85-87, 59 Rad. Reg. 2d (P&F) 1073, para. 39 (rel. Feb. 5, 1986); *see also* Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59, *Notice of Proposed Rulemaking*, 10 FCC Rcd 6982, 6984 para. 5 (1995).

[220] *See Printz v. United States,* 521 U.S. 898, 925-26 (1997); *Cellular Phone Taskforce v. FCC,* 205 F.3d 82, 96 (2d Cir. 2000) ("The only onus placed on state and local governments exercising their local power is that they may not regulate personal wireless service facilities that conform to the FCC Guidelines on the basis of environmental effects of RF radiation").

[221] Below, we discuss in greater detail whether and how Section 6409(a) limits local discretion over application processes for a covered request, including the maximum time period for review. *See infra*, Section IV. B.3.

[222] Spectrum Act, § 6409(a)(1), (2).

"collocation," as they are used in and apply to an "eligible facilities request" under Section 6409(a). We also seek comment on whether the term "eligible facilities request" itself requires any further clarification beyond the statutory definition provided in Section 6409(a)(2). Commenters addressing these issues are strongly encouraged to offer specific definitions.

103. *"Transmission equipment" and "wireless."* Section 6409(a) refers broadly to "transmission equipment" without referencing any particular service. Similarly, in defining eligible facilities to be modified, it refers broadly to a "wireless" tower or base station. In contrast, Section 332(c)(7) of the Act, an older provision that also places limits on State and local authority to regulate wireless facility siting, extends only to facilities used for "personal wireless services" as defined in that section.[223] In the *Section 6409(a) PN*, the Bureau opined that the scope of a "wireless" tower or base station under Section 6409(a) is not intended to be limited to facilities that support "personal wireless services" under Section 332(c)(7), given Congress's decision not to use the pre-existing definition from another statutory provision relating to wireless siting.[224]

104. Consistent with the Bureau's interpretation, we propose to find that Section 6409(a) applies to the collocation, removal, or replacement of equipment used in connection with any Commission-authorized wireless transmission, licensed or unlicensed, terrestrial or satellite, including commercial mobile, private mobile, broadcast, and public safety services, as well as fixed wireless services such as microwave backhaul or fixed broadband.[225] Similarly, we propose to define a "wireless" tower or base station to include one used for any such purpose. We believe this interpretation is warranted given the clear intent of Congress to facilitate collocation, the substantial number of broadcast and public safety towers that are potentially available for wireless collocation and that are, in many cases, already being used for collocation, and Congress's use of the term "wireless" rather than a more restrictive term. We also note that the definitions of "tower" under both the Collocation Agreement and NPA have a similarly broad scope, encompassing structures used to support any Commission-licensed or authorized service.[226] We seek comment on our proposal and on whether there is a reason to exclude any type of services. With respect to the service involved, should the scope of "transmission equipment" to be collocated, replaced, or removed be different from the scope of structures to be modified? If we were to exclude structures used for certain services, how would we treat a tower or other structure that is used or usable for multiple types of service? What about a tower that is not yet used for any service?

105. We propose to further define "transmission equipment" to encompass antennas and other equipment associated with and necessary to their operation, including, for example, power supply cables and a backup power generator.[227] We believe this is consistent with Congressional intent to streamline the review of collocations and minor modifications and also with Congress's use of the broad term "transmission equipment" rather than a more specific term such as "antenna." We seek comment on this

[223] *See* 47 U.S.C. § 332(c)(7)(C)(i) (defining "personal wireless services" as "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services"). We address the interpretation of Section 332(c)(7) in the next section.

[224] *See Section 6409(a) PN*, 28 FCC Rcd at 3.

[225] We note that microwave dishes provide high speed wireless backhaul from wireless antenna sites.

[226] Under the Collocations Agreement, "tower" is defined as "any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities." 47 C.F.R. Part 1, App. B § I.B. Under the NPA, "tower" is defined as "[a]ny structure built for the sole or primary purpose of supporting Commission-licensed or authorized Antennas, including the on-site fencing, equipment, switches, wiring, cabling, power sources, shelters, or cabinets associated with that Tower but not installed as part of an Antenna as defined herein." 47 C.F.R. Part 1, App. C § II.A.14.

[227] *See also infra* (seeking comment on components of equipment encompassed by the term "base station" and whether such components should be defined to be the same as those included in the term "transmission equipment").

proposal and analysis. In particular, we seek comment on including backup power equipment in light of the public interest in continued service during emergencies.[228] We also seek comment on whether we should specifically include or exclude any equipment to be considered as "transmission equipment" under Section 6409(a).

106. The NPA defines "antenna" in part as "[a]n apparatus designed for the purpose of emitting radio frequency ('RF') radiation, to be operated or operating from a fixed location pursuant to Commission authorization, for the transmission of writing, signs, signals, data, images, pictures, and sounds of all kinds, including the transmitting device and any on-site equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with that antenna and added to a Tower, structure, or building as part of the original installation of the antenna."[229] Should we adopt or adapt this definition of "antenna" to define the term "transmission facility" under Section 6409(a)?

107. "*Existing wireless tower or base station.*" We seek comment on how to define "wireless tower or base station" under Section 6409(a). Initially, we note that both "tower" and "base station" have been previously defined in Commission rules and documents. Under the Collocation Agreement, a "tower" is defined as "any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities."[230] The NPA includes a similar definition of a "tower" as "[a]ny structure built for the sole or primary purpose of supporting Commission-licensed or authorized Antennas, including the on-site fencing, equipment, switches, wiring, cabling, power sources, shelters, or cabinets associated with that Tower but not installed as part of an Antenna."[231] In Part 90 of the Commission's rules, "base station" is defined as a "station at a specified site authorized to communicate with mobile stations,"[232] whereas Part 2 and Part 24 of the Commission's rules define "base station" as "[a] land station in the land mobile service."[233] As noted in the *Section 6409(a) PN*, the Commission has also described a base station in more detail as consisting of "radio transceivers, antennas, coaxial cable, a regular and backup power supply, and other associated electronics."[234] We seek comment generally on the relevance of these definitions for defining "wireless tower or base station" under Section 6409(a).

108. We seek comment on the types of structures that may be considered a "wireless tower or base station" under Section 6409(a). At a minimum, "tower" would appear to include, as in the NPA, structures built for the sole or primary purpose of supporting antennas used for any wireless communications service. However, many other types of structures, from buildings and water towers to

[228] *See* Improving 9-1-1 Reliability; Reliability and Continuity of Communications Networks, Including Broadband Technologies, PS Docket Nos. 13-75, 11-60, *Notice of Proposed Rulemaking*, 28 FCC Rcd 3414 (2013); *see also* Reliability and Continuity of Communications Networks, Including Broadband Technologies; Effects on Broadband Communications Networks of Damage or Failure of Network Equipment or Severe Overload; Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, PS Docket Nos. 11-60, 10-92, EB Docket No. 06-119, *Notice of Inquiry*, 26 FCC Rcd 5614, 5616 para. 5 (2011).

[229] *See* 47 C.F.R. Part 1, App. C § II.A.1.

[230] *See* Collocation Agreement, 47 C.F.R. Part 1, App. B, § I.B.

[231] 47 C.F.R. Part 1, App. C § II.A.14.

[232] 47 C.F.R. § 90.7.

[233] 47 C.F.R. §§ 2.1(c), 24.5.

[234] *See Section 6409(a) PN*, 28 FCC Rcd at 3 (*citing* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, WT Docket No. 10-133, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, *Fifteenth Report*, 26 FCC Rcd 9664, 9841 para. 308 (2011) ("*Fifteenth Competition Report*")).

streetlights and utility poles, may also support antennas or other base station equipment.[235] We also note that the Commission has encouraged the use of these types of structures to enhance capacity for wireless networks.[236] In the *Section 6409(a) PN*, the Bureau opined that it is reasonable to interpret a "base station" to include a structure that supports or houses an antenna, transceiver, or other associated equipment that constitutes part of a base station under Section 6409(a).[237] We propose to find, consistent with the Bureau's guidance, that the term "wireless tower or base station" should be interpreted to encompass structures that support or house an antenna, transceiver, or other associated equipment that constitutes part of a base station, even if they were not built for the sole or primary purpose of providing such support. In particular, we believe that interpreting Section 6409(a) to include structures that house or support base station equipment not only is consistent with Congressional intent to streamline the facilities application process, but also accords with established principles of statutory construction by giving separate meaning to the term "base station" as well as "tower."[238] We seek comment on this interpretation. Should this definition be limited in any way? For example, should a building or cabinet with equipment inside be included in this definition? Is it material to the application of Section 6409(a) whether a structure is a "tower" or a "base station," and if so, how should we distinguish these terms?

109. The IAC argues that "base station" should not be interpreted to encompass structures that support or house only "part of a base station."[239] Rather, the IAC argues, any interpretation of "base station" should reflect that a "base station" is "a set of equipment components that collectively provides a system for transmission and reception of personal wireless services."[240] We seek comment on the IAC's argument.

110. We also seek comment on what equipment constitutes a "base station" under Section 6409(a). We propose, consistent with the *Fifteenth Competition Report* and the definition of "transmission equipment" proposed above, to include antennas, transceivers, and other equipment associated with and necessary to their operation, including coaxial cable and regular and backup power equipment.[241] We seek comment on this proposal. Should the equipment that constitutes a base station be defined in the same way as transmission equipment, more expansively, or less expansively? Should structures housing any particular type of equipment not be included? We further seek comment on how to ensure that the definition of "base station" is sufficiently flexible to encompass, as appropriate to Section 6409(a)'s intent and purpose, future as well as current base station technologies and technological configurations, using either licensed or unlicensed spectrum.[242] In the *Section 6409(a) PN*, the Bureau indicated that the term "base station" encompasses the relevant equipment in any technological configuration, including DAS and small cells.[243] We seek comment on whether to adopt this

[235] For example, new technologies, such as DAS or small cells, are often deployed on utility poles and other structures that were not built for the primary purpose of supporting antennas.

[236] *See*, *generally*, *Pole Attachment Order*.

[237] *Section 6409(a) PN*, 28 FCC Rcd at 3.

[238] *See, e.g., Miller v. Clinton,* 687 F.3d 1332, 1347 (D.C. Cir. 2012) (statutes should be construed "so that no provision is rendered inoperative or superfluous, void or insignificant").

[239] IAC Recommendation at 3 (arguing that "a piece of a base station is not itself a base station" and that "[a] mere equipment or power supply box, for example, is not in and of itself a base station, nor is a structure that supports or houses such boxes.").

[240] *Id.* at 3.

[241] *Fifteenth Competition Report*, 26 FCC Rcd at 9841 para. 308.

[242] We describe some of these technologies elsewhere in this Notice. *See supra,* Section II. A.

[243] *Section 6409(a) PN*, 28 FCC Rcd at 3.

interpretation, and on what constitutes the base station in the context of DAS or other wireless technologies where the various components of what might traditionally be considered a base station are dispersed over a large area and may be owned or controlled by different parties.

111. Under Section 6409(a), a wireless tower or base station must be "existing" in order for its modification to be covered. In the *Section 6409(a) PN*, the Bureau opined that an existing "base station" only includes a structure that "currently" supports or houses base station equipment.[244] Verizon, however, argues that modifications of base stations "encompass collocations on buildings and other structures, even if those structures do not currently house wireless communications equipment."[245] Verizon argues that the Collocation Agreement defines collocation as encompassing the mounting of an antenna on an existing building or structure, and that "collocations" in Section 6409(a) should therefore be given similar scope.[246] We seek comment on this argument. Does "existing" require only that the structure be previously constructed at the time of the collocation application, or does this term also require that the structure be used at that time as a tower or base station? Do the statutory language and context argue in favor of one interpretation or the other? Which interpretation, or some other, would be more consistent with both facilitating deployments that are unlikely to conflict with local land use policies (including policies that favor use of existing structures) and preserving State and local authority to review construction proposals that may have impacts? Should the interpretation of "existing" depend on the type of structure involved? For example, should we consider a structure built for the primary purpose of supporting or housing transmission equipment "existing" under Section 6409(a) whether or not it currently hosts such equipment, while considering other structures "existing" only if they currently support or house transmission equipment?

112. We ask commenters, when discussing the scope of support structures encompassed by Section 6409(a), to discuss the economic costs and benefits of adopting their proposed interpretation and how these might relate to the intent of Congress. Are there different costs and benefits to mandatory approval depending on the type of structure involved?

113. *"Collocation," "removal," and "replacement."* We seek comment on how to define or interpret the terms "collocation," "removal," and "replacement." Under the Collocation Agreement, collocation is defined as "the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes."[247] We seek comment on whether to adopt a similar definition of collocation under Section 6409(a).

114. We also propose to interpret a modification of a "wireless tower or base station" to include collocation, removal, or replacement of an antenna or any other transmission equipment associated with the supporting structure, even if the equipment is not physically located upon it. We note that the Collocation Agreement similarly construes the mounting of an antenna "on a tower" to encompass installation of associated equipment cabinets or shelters on the ground.[248] We seek comment on our proposed interpretation.

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[244] *Id.*

[245] Letter from Tamara Preiss, Verizon, to Marlene H. Dortch, FCC, WC Docket No. 11-59, at 2 (filed Feb. 28, 2013) ("Verizon Feb. 28, 2013 *Ex Parte*").

[246] Verizon Feb. 28, 2013 *Ex Parte,* at 2.

[247] 47 C.F.R. Part 1, App. B, Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, § I.A ("Collocation Agreement").

[248] *See* Collocation Agreement, §§ IV.A.2 (providing that an antenna "may be mounted on an existing tower constructed after March 16, 2001 without such collocation being [subject to historic preservation review]" unless, among other specific cases, "[t]he mounting of the new antenna will result in a substantial increase in the size of the tower"), I.C (defining "substantial increase in the size of the tower" in part as "installation of more than the standard (continued….)

115. We seek comment on whether and to what extent a request to replace or harden a tower or other covered structure should be considered a covered request if the replacement would not substantially change the physical dimensions of the structure. For example, under some circumstances, a tower may need to be replaced, reinforced, or otherwise hardened in connection with an upgrade from 3G to heavier 4G facilities.[249] Should replacement of the underlying structure be covered if it is necessary to support the otherwise covered collocation or replacement of transmission equipment? What if the replacement is constructed with different materials, such as if a wooden pole must be replaced with steel? Should a requested structure replacement be covered only for certain types of structures, such as those originally constructed for the sole or primary purpose of supporting communications equipment?

116. "*Substantially Change the Physical Dimensions.*" We seek comment on whether and how to define when a modification would "substantially change the physical dimensions" of a wireless tower or base station.

117. As the Bureau noted in the *Section 6409(a) PN*, the Collocation Agreement establishes a four-prong test to determine whether a collocation will effect a "substantial increase in the size of a tower."[250] The Commission later adopted the same test in the *2009 Declaratory Ruling* to determine whether an application will be treated as a collocation when applying Section 332(c)(7).[251] The Commission has also applied a similar definition to determine whether a modification of an existing registered tower requires public notice for purposes of environmental review.[252]

118. Under this test, a "substantial increase in the size of the tower" occurs if:

> 1) [t]he mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or
>
> 2) [t]he mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or
>
> 3) [t]he mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or
>
> 4) [t]he mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site.

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number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter").

[249] *See* Piedmont Environmental Council Comments, WC Docket No. 11-59, at 11-12.

[250] Collocation Agreement, § I.C.

[251] *See 2009 Declaratory Ruling*, 24 FCC Rcd at 14012 para. 46.

[252] *See* 47 C.F.R. § 17.4(c)(1)(ii); *Order on Remand*, 26 FCC Rcd at 16720-21 para. 53.

119. We seek comment on whether to adopt the Collocation Agreement's definition of "substantial increase in the size of the tower" as the test for when a modification will "substantially change the physical dimensions" of a tower or base station under Section 6409(a). If we do so, should we apply this test to all modification requests, including collocation, replacement and removal of transmission equipment? Or should we modify or clarify any of the prongs of that test for any type of requests?

120. In determining what constitutes a "substantial change" in "physical dimensions" under Section 6409(a), we seek comment on how to address situations where the tower or other structure has been previously modified since it was originally approved. For example, it is theoretically possible that successive increases of 10 percent could cumulatively increase the height of a structure by double or more.[253] In such situations, should the physical change in dimensions resulting from a collocation be measured based on the structure's original dimensions or the existing dimensions taking into account all pre-existing modifications? Should it matter if previous expansions occurred before or after the enactment of Section 6409(a)?

121. We also seek comment on whether the standard for what constitutes a substantial change should be different depending on the type of structure to be modified. As we noted above, the Collocation Agreement definition applies to "towers," defined as "any structure built for the sole or primary purpose of supporting FCC-licensed antennas and their associated facilities." Should a different standard apply to other types of structures that may be defined as towers or base stations, such as buildings or utility poles? For example, what are the potential effects of adding up to 10 percent to the height of a building? Is a standard that allows for separation from the nearest existing antenna of up to twenty feet appropriate for structures that are much shorter than traditional towers, such as utility poles? We further seek comment on whether a different test should apply to "stealth structures," structures and associated base stations that have been constructed to blend in with their surroundings. Should changes in physical dimensions that would defeat or be inconsistent with the stealth characteristics of the structure be considered substantial?

122. We also seek comment on the views of the IAC regarding when a modification will "substantially change the physical dimensions" of a tower or base station. In particular, the IAC argues that "[t]he question of substantiality . . . cannot be resolved by the adoption of mechanical percentages or numerical rules applicable anywhere and everywhere in the United States, but rather must be evaluated in the context of specific installations and a particular community's land use requirements and decisions."[254] As an example, the IAC suggests that a change in a tower's height of only 5 percent that would "adversely affect substantial safety, esthetic or quality-of-life elements" would represent a substantial change in physical dimensions.[255] We seek comment on this interpretation, and on how, consistent with the IAC's interpretation, we might define the test for what constitutes a substantial change in physical dimensions.

[253] *See* The National League of Cities, The National Association of Counties, The United States Conference of Mayors, The International Municipal Lawyers Association, The National Association of Telecommunications Officers and Advisors, The Government Finance Officers Association, The American Public Works Association, and The International City/County Management Association ("National League of Cities et al.") Comments, WC Docket No. 11-59, at 46-47 (arguing that "[t]hrough the collocation process, a single unobtrusive monopole can morph into a multi-pronged, unsightly structure" and that "each facility added to an existing structure can present safety issues . . . through the added impact on the original structure").

[254] IAC Recommendation at 2.

[255] *Id.*

2. Review and Processing of Applications, Time Limits, and Remedies

123. Section 6409(a)(1) provides that "[n]otwithstanding section 704 of the Telecommunications Act of 1996 . . . or any other provision of law, a State or local government *may not deny, and shall approve*, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station."[256] We ask for comments on the extent to which the statutory language leaves State or local governments discretion or authority to deny or condition approval and what restrictions or requirements, if any, it may place on the processes that a State or locality may adopt for the review of applications. We further seek comment on whether Section 6409(a) warrants establishment of time limits for State and local review and prescription of remedies in the event of a failure to approve a covered request under Section 6409(a)(1).

124. "*May not deny and shall approve.*" We seek comment on whether, by directing that States and localities "may not deny and shall approve" covered requests, Section 6409(a) requires States and localities to approve all requests that meet the definition of eligible facilities requests and do not result in a substantial change in the dimensions of the facility, without exception and/or discretionary review. We also seek comment on whether there are any special circumstances under which, notwithstanding this unqualified language, Section 6409(a) would permit a State or local government to deny an otherwise covered request. We further seek comment on whether States and localities may make the grant of a covered request subject to conditions on or alterations to the request. If so, what types of conditions or alterations may they require that would be consistent with Section 6409(a)? In particular, we seek comment below on whether and/or to what extent States and localities may require any covered requests to comply with State or local building codes and land use laws and whether States and localities are required to approve an otherwise covered modification of a tower or base station that has legal, non-conforming status or that does not conform to a condition or restriction that the State or locality imposed as a prerequisite to its original approval of the tower or base station. We also propose below to find that the requirement that States and localities "may not deny and shall approve" covered requests in any case applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their capacities as property owners.

125. We seek comment whether and/or to what extent States and localities may require any covered requests to comply with State or local building codes and land use laws. For example, we seek comment on whether a State or local government must grant a facilities modification request that would result in an increase in height above the maximum height permitted by an applicable zoning ordinance. May States and localities require a covered request to be in compliance with general building codes or other laws reasonably related to health and safety? For example, we seek comment on whether States or localities can continue to enforce restrictions such as load-bearing limits on applications that otherwise meet the standard for approval under Section 6409(a)(1). May they condition the approval of a modification on the underlying structure's compliance with the hardening standards under TIA-222 Revision G, Structural Standards for Antenna Supporting Structures and Antennas?[257] What is the cost of bringing a structure into compliance with these standards? Similarly, may a State or local government deny an application for an otherwise covered modification if the structure, as modified, would not meet the fall zone or setback distance that its ordinance requires?[258] We further seek comment on the

[256] Spectrum Act § 6409(a)(1) (emphasis added). Section 704 of the Telecommunications Act has in relevant part been codified at 47 U.S.C. § 332(c)(7).

[257] TIA-222 is a design standard for communications towers that is recognized in most United States building codes. The standard provides specifications for the structural design of new antenna-supporting structures and modifications to such structures to prevent structural failure. *See*, *e.g.*, http://global.ihs.com/search_res.cfm?RID=TIA&INPUT_DOC_NUMBER=TIA-222. Revision G is the most recent version of this standard.

[258] Local zoning ordinances often require that towers and other structures maintain a "fall zone" or minimum setback distance from adjacent property lines to safeguard the adjacent land and nearby people, and may provide (continued….)

enforceability of codes that may not be designed for current technologies, *e.g.*, codes establishing set-back minimums appropriate for towers but excessive for much shorter utility poles. We ask commenters to discuss the extent to which principles of federalism require or permit us to construe Section 6409(a) in a manner that preserves traditional State or local land use authority with respect to any of these issues.

126. We also seek comment on whether Section 6409(a) is applicable to eligible facilities requests involving existing towers or base stations that were approved at the time of construction but that are no longer in conformance due to subsequent changes to the governing zoning ordinance. Some jurisdictions routinely deny such requests, while others require full zoning review and impose conditions such as replacement or retrofitting of the underlying structure.[259] We therefore seek comment on whether States and localities are required to approve an otherwise covered modification of a tower or base station that has legal, non-conforming status, and whether Section 6409(a) disallows a jurisdiction from subjecting such a request to full zoning review. We further seek comment on current municipal practices regarding modification or collocation requests in connection with legal, non-conforming wireless towers. What are the reasons or justifications for the local jurisdiction to require a full zoning review? What is the common time frame to process a local zoning review for a request to modify a legal, non-conforming tower? What sorts of conditions have local governments placed on their approval?

127. We also seek comment on whether States and localities are required to approve a modification of an existing tower or base station that does not conform to a condition or restriction that the State or locality imposed as a prerequisite to its original approval of the tower or base station. For example, if a municipality has approved initial installation of some transmission facilities on a building or other structure conditioned on the facilities meeting standards with regard to height, width, bulk, appearance, or other design characteristics intended to camouflage the deployment, is it required to approve subsequent collocations on the structure that do not meet those "stealth" conditions?[260] Should a

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that applicants can seek waivers or reductions in the setback distance in particular cases. *See* The Prince George's County Government Comments, WC Docket No. 11-59, at 2-3; City of Wilmington, North Carolina Comments, WC Docket No. 11-59, Attach. at 2; National League of Cities et al. Reply Comments, WC Docket No. 11-59, at 24-25. We note that, in filing their Reply Comments, National League of Cities et al. also included the American Planning Association. For convenience, we refer to the group as "National League of Cities et al." in connection with both Comments and Reply Comments.

[259] *See, e.g.*, PCIA and DAS Forum Comments, WC Docket No. 11-59, at 20-22; American Tower Corporation Reply Comments, WC Docket No. 11-59, at 11-14; National League of Cities et al. Reply Comments, WC Docket No. 11-59, at 20 ("Governments often must balance the value of requiring all entities to conform to new codes versus the impact on existing structures, and often resolve the issue by allowing 'non-conforming structures' to remain in place as long as they are unchanged."); City of Scottsdale Comments, WC Docket No. 11-59, at 7 (acknowledging city ordinance that prevents collocation on an existing non-conforming use but indicating this aspect of ordinance was under review); City of Torrance, California Reply Comments, WC Docket No. 11-59, at 5 (asserting that "[i]t is common and usual for zoning requirements to change over time, such that once legal uses may become non-conforming ones" and that "a fundamental principle of zoning law is that non-conforming uses should be restricted"). City of Torrance, California explains that measures to promote community interests such as minimizing aesthetic impacts and siting wireless facilities outside of residential areas can lead to facilities becoming non-conforming over time. *Id.* at 5-6.

[260] *See*, *e.g.*, Letter from James R. Hobson, Attorney for City of Arlington et al., to Marlene H. Dortch, Secretary, FCC, filed Mar. 1, 2013 ("Arlington Mar. 1, 2013 *Ex Parte*"), Attach. at 6 (illustration showing rooftop stealth site with various antennas either concealed within faux screening or painted to match the exterior of screening or brick walls). Arlington et al. describe California Code Section 65850.6 as requiring authorities to approve attachments to "facilities that have already undergone a discretionary review, as long as the [collocation] is consistent with the conditions established as part of that initial discretionary review." Arlington Mar. 1, 2013 *Ex Parte* at 2. They further state that "[a]s part of the initial review of a facility that is intended to support co-located facilities, the locality adopts standards for matters like the permitted height, width, bulk and location of the facility, and the permitted design of the facility." *Id.* Arlington et al. assert that this approach "protects localities by ensuring, for
(continued….)

different rule apply depending on whether the condition was imposed before or after the effective date of Section 6409(a)? We seek comment on whether interpreting the statute to require approval of modifications notwithstanding conditions on the original installation may create disincentives for States and localities to approve the initial siting of towers or base stations, and if so, how Section 6409(a) can be implemented to address this concern.[261]

128. More broadly, we seek comment on the extent to which any of these asserted grounds for local substantive review and potential denial of an application should alternatively be understood as factors in determining whether a "wireless tower" or "base station" should be considered "existing" or what constitutes a "substantial change" in the "physical dimensions" of a wireless tower or base station. For example, should modifications that alter a facility in a fashion inconsistent with local ordinance or with conditions on the structure's use be considered to "substantially change" its physical dimensions?[262] Should a tower that is legal but non-conforming not be considered "existing" for purposes of Section 6409(a)?

129. The IAC argues that the mandate that States and localities "may not deny and shall approve" requests applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their capacities as property owners.[263] The IAC asserts, as example, that "[w]here . . . a county government, as landlord rather than as land use regulator, has by contract or lease chosen, in its discretion, to authorize the installation of an antenna on a county courthouse rooftop of certain exact dimensions and specifications, Section 6409 does not require the county, acting in its capacity as landlord rather than its capacity as regulator of private land use, to allow the tenant to exceed to any extent those mutually and contractually agreed-upon exact dimensions and specifications."[264] We propose to adopt this interpretation of Section 6409(a) and seek comment, including comment on how to ensure it is clear in which capacity governmental action is requested and in which capacity a governmental entity is acting, and whether we need to address how Section 6409(a) applies to requests seeking a government's approval in both capacities.[265] For example, would Section 6409(a) impose no limits on such a landlord's ability to refuse or delay action on a collocation request?

130. *Application procedures*. We seek comment on whether Section 6409(a) places restrictions, limitations, or requirements on the filing and review process applicable to applications

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example, that a 'stealth' facility remains a stealth facility, and by allowing for approval of facilities that are not intended to support multiple antennas (allowing for placement of small equipment in sensitive areas)." *Id.* *See also* City of Davis, California Reply Comments, WC Docket No. 11-59, at 4 n.10; City of Lake Forest, California Reply Comments, WC Docket No. 11-59, at 4 (noting that California Government Code Section 65850.6 generally permits collocation where the collocation is consistent with the conditions placed on the underlying facility, including any stealth conditions).

[261] *See* City of Yuma, Arizona Reply Comments, WC Docket No. 11-59, at 6 ("a collocation rule that effectively says 'if any is allowed, more must be' would force the City to either exclude wireless altogether, or to abandon its efforts to protect the integrity of the historic district").

[262] *See*, *e.g.*, IAC Recommendation at 2 (arguing that the test for substantial change should permit denial in cases of a modification "that results in no change in the tower's size, but results in, for example, new atennas that no longer meet local building code requirements for ice loads or wind resistance").

[263] *See id.* at 3.

[264] *Id.*

[265] We note that the Conference Report accompanying the Spectrum Act describes the provision as applying to State and local "zoning law procedures." *See* H.R. Rep. 112-399, at 133 (2012) (Conf. Rep.) (stating that, prior to the adoption of Section 6409(a), "State and local governments [had the] right to apply zoning law procedures for requests to modify existing towers," but that the new provision would "require approval of requests for modification of cell towers.").

subject to Section 6409(a), and if so, what Federal standards would appropriately implement such limitations. Some have suggested that because Section 6409(a) provides that State and local governments "shall approve" covered facilities requests, the provision requires an "expedited" process.[266] Other parties, on the other hand, have argued that a fact-finding is required to determine whether Section 6409(a) applies at all and that local governments need the freedom to adopt procedures that will enable them to resolve this question.[267] In the *Section 6409(a) PN*, the Bureau, noting that the provision on its face contemplates the submission of a "request," indicated that the relevant government entity may still require the filing of an application for administrative approval.[268] The *Section 6409(a) PN* did not provide any further procedural guidance.

131. We propose to find, consistent with the Bureau guidance, that Section 6409(a) permits a State or local government at a minimum to require an application to be filed and to determine whether the application constitutes a covered request. This is consistent with the statutory language providing that the government shall "approve" the application. We seek comment on this proposed finding. We further seek comment on whether, given the directive that the State or local government "shall approve," Section 6409(a) permits and warrants Federal limits on applicable fees, processes, or time for review. If so, should we define what these limits are, or are the variations in circumstances such that it is better to address them case-by-case? If we do define them, what should the limits be? For example, should we find that Section 6409(a) warrants specific expedited procedures or limits on the documentation that may be required with an application?

132. In particular, we seek comment on whether Section 6409(a) warrants limiting the procedures for filing and reviewing an application that the applicant characterizes as stating a covered request to those procedures relevant to resolving whether the request is in fact covered by Section 6409(a). We further seek comment on whether Section 6409(a) permits limitations on which officials may review an application, and if so, whether such limitations are warranted. For example, to the extent that review under Section 6409(a) is ministerial, approval by administrative staff may be more efficient, and no less effective, than submission to an elected Board. Would a Federal standard requiring State and local governments to utilize such an administrative process sufficiently protect their ability to identify applications that are not covered by Section 6409(a) and otherwise to exercise any permitted discretion? Would it be consistent with principles of federalism to constrain State and local government procedures in this manner, as a condition for continuing to review covered requests? Would such a standard contradict some local ordinances and, if so, would it raise concerns that, at least for an interim period, the affected community could not review applications at all? Are administrative practices sufficiently uniform among communities that any rules could be meaningful?

133. We also seek comment on whether Section 6409(a) permits or warrants imposing limits on the kinds of information and documentation that may be required in connection with an application asserted to be a covered request. We note that, in the *NOI* proceeding, some parties asserted that some jurisdictions were requesting extensive documentation for collocation approvals, thereby resulting in

[266] *New York SMSA Ltd. Partnership v. Town of Hempstead*, No. CV 10-4997, 2013 WL 1148898, *6 (E.D.N.Y. Mar. 19, 2013) (noting plaintiff's argument that, under Section 6409(a), defendant "cannot impose exorbitant fees, lengthy application processes, and public hearings" on modifications subject to the provision).

[267] *See, e.g.,* IAC Recommendation at 3 (arguing that the Commission should clarify that applications submitted under Section 6409(a) "are not mere pro forma paperwork but rather reflect the role of the applicable state, local or tribal government as the threshold decisionmaker on the questions of whether the requested modification constitutes an 'eligible facilities request' and whether it would or would not 'substantially change the physical dimensions' of the applicable tower or base station."). *See also McKay Brothers, LLC v. Zoning Bd. Of Adjustment of Tp. Of Randolph*, 13cv1383, 2103 WL 1621360, *3 (D.N.J. Apr. 12, 2013) (finding that, even if Section 6409(a) applies, "there are certain questions that the Zoning Board of Adjustment would have to resolve….").

[268] *See Section 6409(a) PN*, 28 FCC Rcd at 3.

delay, while other jurisdictions required only the limited information necessary to issue a common building permit.[269] We also note that, since the *NOI* was released, additional States have taken steps to streamline local processing of collocation requests, in part through clarifying what information may be required to support such requests.[270] We seek comment on such developments and on whether, given current practices, it is now necessary or appropriate to establish Federal standards governing the information that applicants may be required to provide in connection with an asserted Section 6409(a) request in order to ensure that such information requests do not unnecessarily extend the application process. For example, should we clarify that States and localities may not require information or documents in connection with an eligible facilities request asserted to be a covered request under Section 6409(a) that are not relevant to the criteria for approval under Section 6409(a)?[271]

134. We also seek comment on whether to establish a time limit for the processing of requests under Section 6409(a). In the *Section 6409(a) PN*, the Bureau noted that the *2009 Declaratory Ruling* established 90 days as a presumptively reasonable period of time to process collocation applications under Section 332(c)(7).[272] The Bureau stated that 90 days should be the maximum presumptively reasonable period of time for reviewing requests that are covered by Section 6409(a), whether for "personal wireless services" or other wireless facilities. We seek comment on whether to adopt this conclusion or adopt a shorter period, given that Section 6409(a) considerably narrows the scope of review. Should we also consider specific circumstances under which municipalities may extend the time period? For example, consistent with the Commission's interpretation of Section 332(c)(7), should we provide that a municipality may toll the running of the period if it notifies the applicant in writing within 30 days that an application is incomplete and specifies the additional information or documentation required to complete the application? Does Section 6409(a) warrant imposing any limits on the ability of a municipality to require such additional information or documentation? Should municipalities be able to extend the time period by agreement with the applicant?

135. We note that some jurisdictions have adopted moratoria on the filing or processing of applications for new wireless facilities, including collocations and other modifications that may be covered under Section 6409(a).[273] We seek comment on current developments of this kind, and how they may relate to covered requests under Section 6409(a). Considering Congress's explicit language that a

[269] PCIA and DAS Forum Comments, WC Docket No. 11-59, at 20, 22-26.

[270] For example, prior to the adoption of Section 6409(a), New Jersey enacted a law streamlining the State's review process for collocation of wireless facilities on existing, permitted structures. *See* NJ ST 40:55D-46.2. As noted above, in 2012, Pennsylvania passed the "Wireless Broadband Collocation Act," which provides that an application for replacing, collocating equipment on, or modifying a wireless telecommunications facility or wireless support structure that is entitled to processing under that Act will not be subject to new zoning or land use approvals or review beyond the initial zoning or land use approvals issued for the previously approved wireless support structure or wireless telecommunications facility. *See* PA ST 53 P.S. § 11702.1 *et seq.*

[271] *Cf. TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 81 (2d Cir. 2002) (invalidating provisions of local ordinance requiring certain disclosures in applications to place communications facilities in public rights-of-way, including service to be provided, because "[t]he disclosures mandated by the invalidated provisions were relevant only for regulating telecommunications, which § 253 [of the Act] does not permit White Plains to do, not for regulating use of the rights-of-way, which White Plains may do.").

[272] *See Section 6409(a) PN*, 28 FCC Rcd at 4 (*citing 2009 Declaratory Ruling*, 24 FCC Rcd at 14012-13 paras. 46-47).

[273] PCIA and DAS Forum Comments, WC Docket No. 11-59, at 33. *See also* City of Agoura Hills Reply Comments, WC Docket No. 11-59, at 3-5 (stating that California State law permits a city to adopt a temporary moratorium if it finds it is necessary to protect the public safety, health, and welfare" while also providing certain safeguards, including time limits, to protect developers and "balance the need for good planning with the right of private parties to develop their facilities").

State or local government "may not deny, and shall approve" a covered application, we propose to preempt the application of any such moratoria to covered requests under Section 6409(a), including with respect to the running of any applicable time period. In other words, under our proposal, a State or local government may not prevent or delay the filing of applications asserted to be covered by Section 6409(a) due to a moratorium, and it must approved covered applications within the same time period as if no moratorium were in effect. We seek comment on this proposal. Alternatively, we seek comment on whether we should specify a maximum cumulative time that may be added to the process due to moratoria and, if so, what that time period should be, as well as whether any tolling should be limited to moratoria that are put in place prior to submission of the application or request.[274]

136. We anticipate that in general, review of applications submitted under Section 6409(a) will be limited to determining whether the application states an eligible facilities request, whether the request would substantially change the physical dimensions of the relevant tower or base station, and whether it satisfies any other criteria that, under interpretations we may adopt in this proceeding, allow the State or local government to deny or condition an otherwise covered application. Should we distinguish any set of applications that are unlikely to raise any significant questions of eligibility and therefore should be subject to more stringent limitations on process, timing, or fees? If so, what criteria should identify these applications and what limits are appropriate under Section 6409(a)? For example, should requests for removal of transmission equipment be eligible for a more expedited process than new collocations? Should replacement applications also be subject to a more expedited process and, if so, subject to what limitations on the size or appearance of the new equipment?

137. *Remedy and enforcement.* We seek comment on what remedies should be available to enforce Section 6409(a) in cases of failure to act or decisions adverse to the applicant. We first seek comment on whether we should provide that a covered request is "deemed granted" by operation of law if a State or local government fails to act within a specified period of time. In the *2009 Declaratory Ruling*, the Commission declined to adopt such a "deemed granted" remedy for local government failures to act on facilities siting applications under Section 332(c)(7)(B), finding that Section 332(c)(7)(B)(v) indicated a Congressional intent that courts should have the responsibility to fashion appropriate case-specific remedies.[275] Unlike Section 332(c)(7), however, Section 6409(a) does not explicitly include a judicial remedy. Indeed, whereas the terms of Section 332(c)(7) do not mandate approval of any particular request, Section 6409(a) provides that governments "shall approve" requests covered by the provision. Moreover, Section 6409(a) compels such action "[n]otwithstanding" Section 332(c)(7) in particular. We seek comment on whether this statutory distinction supports a deemed granted remedy for applications subject to Section 6409(a).

[274] We seek comment below on how moratoria affect the running of the presumptively reasonable time periods for review of siting applications under Section 332(c)(7).

[275] *See 2009 Declaratory Ruling,* 24 FCC Rcd at 14009 para. 39. We note that, in other contexts, the Commission has adopted a "deemed granted" or "deemed approved" remedy. *See, e.g.,* Application of Bellsouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, *Memorandum Opinion and Order*, 13 FCC Rcd 20599, 20708-09 para. 176 (1998) (finding that under 47 C.F.R. § 1.1403(b), a pole owner "must deny a request for access within 45 days of receiving such a request or it will otherwise be deemed granted"); Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 5101, 5139 para. 77 (2007) ("*Cable Franchise R&O*") (providing that, if a local cable franchising authority has not made a final decision on a franchise application within the specified period, the authority will be deemed to have granted the applicant an interim franchise until it delivers a final decision).

138. We also seek comment on whether such a remedy raises any constitutional concerns, including concerns under the Tenth Amendment.[276] While the adoption of a "deemed granted" rule for cases of State inaction would result in the grant of facilities siting applications by operation of Federal law pursuant to Section 6409(a), such a rule would not appear to "compel the States to enact or administer a Federal regulatory program."[277] Indeed, rather than drawing the States into such involvement, the rule would simply end the application process without a need for any State or local action at all, since a "deemed granted" approach would operate automatically to grant the application when the trigger event occurs (*e.g.*, inaction on the application for the amount of time specified by the rule). Moreover, other than establishing the automatic grant, a "deemed granted" rule would not prescribe any particular processes or place any obligations on State or local governments, thereby leaving their regulatory authority over the siting matter otherwise undisturbed. In these respects, it would appear that a "deemed granted" rule would no more constitute a Federal regulatory program imposed on the States than would a pure preemption of State action.

139. In addition to the "deemed granted" approach, we also seek comment on any alternative remedies to similarly ensure that cases of State inaction or inordinate delay are addressed as Congress intended. Should we, for example, exercise authority under *City of New York*[278] to preempt State or local authority with respect to covered requests that have been pending for more than a specified period of time? Would such preemption effectively serve the goals of Section 6409(a) by precluding State or local legal action against installations that meet the terms of Section 6409(a)? Would this type of remedy effectively enable the installation to proceed, or would the preemption of the State/local application process prior to its normal conclusion create other potential impediments? For example, if the State or local body typically issues a permit after granting a siting application, would the lack of a permit affect the wireless carrier's ability to hire contractors to perform necessary work for the installation? While a similar problem is conceivable with the "deemed granted" approach, a carrier that receives a grant by operation of Federal law under Section 6409(a) should have recourse through established legal frameworks to obtain any necessary paperwork and credentials to which those receiving a grant from the State or local government are entitled. We seek comment on this aspect of the "deemed granted" approach, as well as on any other practical problems that may arise.

140. We also seek comment on the appropriate remedy when a State or local government impermissibly denies a covered request. Should such a denial also be subject to a deemed granted remedy? How feasible would this approach be when the ostensible reason for the denial is that the request does not qualify as a covered request? Could such denials be excluded from the deemed granted approach without rendering the approach ineffective for addressing impermissible denials of covered requests? Is there any other reason to treat a State or local government's denial of an eligible facilities request differently from its failure to act within a specified period of time?

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[276] *See Printz v. United States*, 521 U.S. 898, 933 (1997) (holding that under the United States Constitution, the Federal Government "may not compel the States to enact or administer a federal regulatory program."); *New York v. United States*, 505 U.S. 144 (1992).

[277] *Printz*, 521 U.S. at 933; *see also New York*, 505 U.S. at 167 (affirming that "where Congress has the authority to regulate private activity under the Commerce Clause," it has the "power to offer States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation.") (citations omitted). *See also Cable Franchise R&O*, 22 FCC Rcd at 5162 para. 136 (finding that rule "requiring local franchising authorities to exercise their regulatory authority according to federal standards, or else local requirements will be preempted" did not violate the Tenth Amendment).

[278] *City of New York v. FCC*, 486 U.S. 57 (1988) (upholding Commission's statutory authority to preempt all State and local technical standards governing the quality of cable television signals, where FCC properly determined that its authority was exclusive; existence of express congressional authorization to displace State law not required).

141. We further seek comment on how a "deemed granted" remedy, if adopted, should operate, when it should be applicable, and how it should be enforced under Section 6409(a). For example, should an applicant be required to notify a State or local government when it believes that a deemed grant has occurred, thus providing that State or local government the opportunity to go to court or the Commission to seek a finding that the "deemed granted" remedy has not been triggered? Or should the onus be placed on the applicant to go to court or the Commission and ask for a finding that an application is a covered request before it can be deemed granted? Would placing the burden on the applicant pursuant to the latter option negate many of the benefits of having a "deemed granted" remedy?

142. For the reasons discussed above, we propose to permit the filing of complaints with the Commission alleging violations of Section 6409(a) along with any implementing rules we choose to adopt,[279] and we propose that such complaints be filed as petitions for declaratory ruling. We seek comment on these proposals, including whether we should adopt other procedures, such as those we have adopted in connection with other local land use actions that affect Commission licensees.[280] What alternative judicial remedies would a party have? We also note that some zoning regulations require that only a court decision can overturn a zoning decision. We seek comment on whether and how Section 6409(a) might operate to preempt such requirements and how this issue should affect the remedies we provide.

143. Finally, we seek comment on the relation between Section 6409(a) and Section 332(c)(7). While the provisions are not coextensive,[281] many collocation applications under Section 6409(a) are also covered under Section 332(c)(7). Where both sections apply, we propose to find that Section 6409(a) governs, consistent with canons of statutory construction that a more recent statute takes precedence over an earlier one and that "normally the specific governs the general."[282] Thus, under this interpretation, because the substantive standard requiring approval of covered requests under Section 6409(a) appears to provide significantly less leeway than Section 337(c)(7) and is therefore in conflict with the latter provision, where both apply, such covered requests would be governed by the substantive standard of Section 6409(a). We seek comment on this proposed finding and any alternatives.

V. IMPLEMENTATION OF SECTION 332(C)(7)

144. In the following section, we seek comment on whether the Commission's interpretations of Section 332(c)(7) in the *2009 Declaratory Ruling* should be clarified and certain additional questions of interpretation addressed in light of certain specific issues raised in comments on the *NOI*.

A. Background

145. Section 332(c)(7) of the Communications Act, adopted as part of the Telecommunications Act of 1996, generally preserves State and local authority over personal wireless service facility siting, while also placing important limitations on that authority.[283] As one of these limits,

[279] *See supra*, Section IV.A.1.

[280] *See* 47 C.F.R. §§ 1.4000 (video reception devices), 25.104 (satellite earth stations). *See also* Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934, WT Docket No. 97-192, *Report and Order,* 15 FCC Rcd 22821 (2000) (establishing procedures under Section 332(c)(7)(B)(v) for petitions for declaratory ruling regarding State and local regulation of facilities siting based on the effects of RF emissions).

[281] *See supra*, Section IV.B.3.

[282] *See*, *e.g., Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158, 170 (2007).

[283] *See* 47 U.S.C. § 332(c)(7)(A) (stating that, "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless services facilities"). Personal wireless services are defined as "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access (continued….)

Section 332(c)(7)(B)(i)(I) states that regulation of the placement, construction, and modification of personal wireless service facilities "shall not unreasonably discriminate among providers of functionally equivalent services . . . ."[284] A second substantive limit provides that a State or local government's siting regulation "shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[285] Further, Section 332(c)(7)(B)(ii) provides that State or local governments must act on requests for personal wireless service facility sitings "within a reasonable period of time."[286] For a remedy, Section 332(c)(7)(B)(v) sets forth a judicial remedy, stating that "[a]ny person adversely affected by any final action or failure to act" by a State or local government on a personal wireless service facility siting application "may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction."[287]

146. On July 11, 2008, CTIA filed a petition requesting clarification of what constitutes a "reasonable period of time" under Section 332(c)(7), after which an aggrieved applicant may file suit for a failure to act.[288] CTIA also requested clarification of zoning authorities' power to restrict competitive entry by multiple providers in a given area under Section 332(c)(7)(B)(i)(II).[289]

147. The Commission addressed CTIA's petition in a Declaratory Ruling on November 18, 2009.[290] In the *2009 Declaratory Ruling*, the Commission found, based on the record, that lengthy and unreasonable delays in a significant number of cases had obstructed the provision of wireless services.[291] Such delays, the Commission concluded, impeded advances in coverage, deployment of advanced

(Continued from previous page)
services." 47 U.S.C. § 332(c)(7)(C)(i). As discussed above, in 2012, Congress expressly modified this preservation of local and State authority by adopting Section 6409(a) of the Spectrum Act, which requires local or State governments to approve certain types of facilities siting applications "[n]otwithstanding section 704 of the Telecommunications Act of 1996 [codified in substantial part as Section 332(c)(7)] . . . or any other provision of law . . . ." Spectrum Act, § 6409(a)(1). *See supra.*

[284] 47 U.S.C. § 332(c)(7)(B)(i)(I).

[285] 47 U.S.C. § 332(c)(7)(B)(i)(II).

[286] 47 U.S.C. § 332(c)(7)(B)(ii). Additional limitations on State and local authority over decisions regarding the placement, construction, and modification of personal wireless service facilities include Sections 332(c)(7)(B)(iii) ("Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record") and 332(c)(7)(B)(iv) ("No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency [RF] emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions").

[287] 47 U.S.C. § 332(c)(7)(B)(v). However, any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with the limitation on regulating on the basis of RF emissions under clause (iv) may petition the Commission for relief. *Id*.

[288] *See* Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, Petition for Declaratory Ruling of CTIA–The Wireless Association, WT Docket No. 08-165, filed July 11, 2008 ("CTIA Petition").

[289] *Id.* at 30-35.

[290] Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Declaratory Ruling*, 24 FCC Rcd 13994 (2009) ("*2009 Declaratory Ruling*").

[291] *See 2009 Declaratory Ruling*, 24 FCC Rcd at 14005-06 paras. 33-34.

wireless communications services, and competition that Congress has deemed critical.[292] The Commission further determined that it should define the statutory terms "reasonable period of time" and "failure to act" in order to clarify when an adversely affected service provider may file suit in court.[293]

148. Interpreting a "reasonable period of time" under Section 332(c)(7)(B)(ii), the Commission found that 90 days is generally a reasonable timeframe for processing applications to collocate antennas on existing structures, and that 150 days is generally a reasonable timeframe for processing applications other than collocations.[294] The Commission further determined that failure to meet the applicable timeframe presumptively constitutes a failure to act under Section 332(c)(7)(B)(v), enabling an applicant to pursue judicial relief within the next 30 days.[295] The Commission defined these time periods as rebuttable presumptions and recognized that more time may be needed in individual cases.[296] The Commission stated that, in the event an applicant pursues a judicial remedy, the State or local authority would have the opportunity to rebut the presumption that the delay was unreasonable.[297] Ultimately, the Commission stated, the court would find whether the delay was in fact unreasonable under the circumstances of each case.[298]

149. The Commission also defined certain circumstances that would warrant adjustments to the presumptive deadlines, including when the applicant fails to submit a complete application or to file necessary additional information in a timely manner.[299] Specifically, the Commission stated that "when applications are incomplete as filed, the time frames do not include the time that applicants take to respond to State and local governments' requests for additional information."[300] This automatic tolling, however, applies only if a zoning authority notifies an applicant within the first 30 days that its application is incomplete.[301] The Commission concluded that allowing for such tolling balances the State or local government's need for sufficient time to review an application for completeness with the interests of the applicant against a last-minute decision finding its application incomplete.[302] In addition, the Commission clarified that the presumptive deadlines for acting on siting applications could be extended beyond 90 or 150 days by mutual consent, and that such an agreement would toll the commencement of the 30-day period for filing suit.[303]

150. Finally, addressing Section 332(c)(7)(B)(i)(II)'s direction that States and localities shall not regulate in a manner that prohibits or has the effect of prohibiting the provision of personal wireless services, the Commission found that this provision prohibits a State or local government from denying a

[292] *Id*. at 14007-08 para. 35.

[293] *Id*. at 14008 para. 37.

[294] *See id.* at 14012 para. 45.

[295] *See id.* at 14005 para. 32, 14012 para. 45.

[296] *See, e.g., id.* at 14004-05 para. 32, 14010 para. 42, 14011 para. 44.

[297] *See id*. at 14004-05 para. 32.

[298] *See id*. at 13995 para. 4.

[299] *See id*. at 14010 para. 42.

[300] *Id.* at 14014 para. 52.

[301] *Id*. at 14014-15 para. 53.

[302] *See id*.

[303] *See id.* at 14013 para. 49.

personal wireless service facility siting application solely because service is available from another provider.[304]

151. In the *2010 Reconsideration Order*, the Commission denied requests by representatives of local governments to reconsider certain of its conclusions.[305] Subsequently, the Commission's interpretations of Section 332(c)(7), as well as its authority to render those interpretations, were upheld by the United States Court of Appeals for the Fifth Circuit.[306] On May 20, 2013, the United States Supreme Court affirmed the Fifth Circuit's decision.[307]

B. Discussion

152. We do not intend in this Notice to seek comment on or otherwise revisit any aspect of our *2009 Declaratory Ruling.* As discussed below, we have received various comments in response to the *NOI* asserting that it is unclear how the standards established in the *2009 Declaratory Ruling* apply in certain specifically identified contexts or seeking clarification regarding questions arising under Section 332(c)(7) that were not addressed by the *2009 Declaratory Ruling*. Additionally, we have been asked to revisit our decision not to impose a "deemed granted" remedy in cases where a State or local government fails to comply with the time limits set forth in the *2009 Declaratory Ruling*.[308] From these comments, we have distilled six discrete issues that have been raised. While we therefore take this opportunity to address these issues, we stress that we are not revisiting – or seeking comment in this proceeding on – any of the matters decided by the *2009 Declaratory Ruling*.[309]

153. *Definition of collocation.* In the *2009 Declaratory Ruling*, the Commission held that the addition of an antenna to an existing tower or other structure constitutes a collocation for purposes of Section 332(c)(7) if it does not involve a "substantial increase in the size of a tower" as defined in the Collocation Agreement.[310] However, we did not further define that term. In the context of defining a substantial change in physical dimensions under Section 6409(a), we seek comment above on whether to adopt a different standard depending on the type of structure to be modified.[311] We similarly seek comment here on whether to refine the "substantial increase in size" test as applied to collocations on structures other than communications towers under Section 332(c)(7). Should we apply the test for substantial increase in size under Section 332(c)(7) in the same manner as we interpret the test under Section 6409(a) for substantial change in physical dimensions? We also seek comment on whether terms

[304] *Id*. at 14016 para. 56. In its petition, CTIA also requested that the Commission find that a State or local regulation that requires a variance or waiver for every wireless facility siting violates Section 253(a) of the Communications Act. 47 U.S.C. § 253(a). The Commission denied this request due to a lack of a specific controversy. *See 2009 Declaratory Ruling*, 24 FCC Rcd at 14019-20 paras. 66-67.

[305] *See generally,* Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Order on Reconsideration*, 25 FCC Rcd 11157 (2010) ("*2010 Reconsideration Order*").

[306] *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S.Ct. 1863 (2013).

[307] *City of Arlington,* 133 S.Ct. at 1874 ("the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority."); s*ee Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

[308] *See, e.g.,* PCIA and DAS Forum Comments, WC Docket No. 11-59, at 42-43

[309] As noted above, we do seek comment on whether requests subject to Section 6409(a) of the Spectrum Act should be governed by the substantive standards of that recently enacted statute.

[310] *See 2009 Declaratory Ruling*, 24 FCC Rcd at 14012 para. 46.

[311] *See supra*, Section IV.B.2.

that we define under both Section 332(c)(7) and Section 6409(a), such as "collocation," should be defined in the same way.

154. *Completeness of applications*. Although the *2009 Declaratory Ruling* held that a State or local government's period for acting on an application is tolled until the applicant completes its application in response to a request for additional information made within the first 30 days, it did not attempt to define when a siting application should be considered "complete" for this purpose. PCIA has asserted that, as a result, jurisdictions may delay processing by repeatedly requesting additional information.[312] AT&T also asserted that some local authorities have tried to extend their period for decision by delaying when they deem the application complete.[313] We seek comment on whether to clarify when a siting application is considered complete for the purpose of triggering the *2009 Declaratory Ruling* time frame and, if so, how that should be determined.

155. *Local moratoria.* Above, we seek comment on whether and how the requirements of Section 6409(a) apply to delays in processing applications that result from local moratoria.[314] Here, we similarly seek comment on whether and how the presumptively reasonable time frames under Section 332(c)(7) apply to such delays. PCIA in its comments to the *NOI* argued that because the *2009 Declaratory Ruling* on timelines for application review did not explicitly discuss moratoria, many jurisdictions have enacted them in an effort to avoid the *2009 Declaratory Ruling* time frames altogether.[315] PCIA asserted that siting moratoria lasting longer than six months are generally contrary to the industry-community agreement signed in 1998, and that local jurisdictions have not followed this agreement and have enacted moratoria extending well beyond the six-month time period.[316] Thus, PCIA requested that the Commission clarify the applicability of the *2009 Declaratory Ruling* to local moratoria.

156. We propose to find that the presumptively reasonable period for State or local government action on an application runs regardless of any local moratorium. Since the *2009 Declaratory Ruling* makes no special provision for moratoria, we believe this is consistent with the plain reading of that decision. Furthermore, we believe this approach creates an appropriate bright-line test for when a State or local government's delay may be brought before a court. Under this reading, the reasonableness of the moratorium may be considered by a reviewing court in determining whether the delay violates Section 332(c)(7). We seek comment on this proposal and analysis.

157. Alternatively, we seek comment on whether the running of the applicable presumptively reasonable period of time should be tolled by a moratorium. We also seek comment on whether, if we adopt this ruling, the tolling period for moratoria should be limited to a maximum cumulative time, what that time period should be, and whether tolling should be limited to moratoria that are put in place prior to the submission of the application or request. We further seek comment on how frequently moratoria are invoked, the typical duration of moratoria, and the local interests served by or justifications for such moratoria. We note that if we hold that the Section 6409(a) substantive standards govern applications covered by both Section 6409(a) and Section 332(c)(7), such standards would include any decisions on moratoria under Section 6409(a). We seek comment on whether treatment of moratoria should be similar under the two provisions.

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[312] PCIA and DAS Forum Comments, WC Docket No. 11-59, at 14.

[313] AT&T Comments, WC Docket No. 11-59, at 15.

[314] *See supra*, Section IV.B.3.

[315] PCIA and DAS Forum Comments, WC Docket No. 11-59, at 33.

[316] *Id.* National League of Cities et al. noted, however, that the agreement also provides that "[a]ll parties understand that cases may arise where the length of a moratorium may need to be longer than 180 days." National League of Cities et al. Reply Comments, WC Docket No. 11-59, at 55. *See also* Guidelines for Facility Siting Implementation, *available at* http://transition.fcc.gov/statelocal/agreement.html.

158. *Application to DAS.* The *NOI* record has shown that in the absence of any explicit discussion, some jurisdictions have interpreted the *2009 Declaratory Ruling* time frames as not applying to DAS deployments.[317] Neither Section 332(c)(7) nor any Commission decision interpreting Section 332(c)(7) makes any distinction among personal wireless service facilities based on technology, and absent a compelling reason to do so, we are not inclined to make such distinctions. In any event, we propose to clarify that to the extent DAS or small cell facilities, including third-party facilities such as neutral host DAS deployments, are or will be used for the provision of personal wireless services, such facilities are subject to the same presumptively reasonable time frames and other requirements as other personal wireless service facilities.

159. The City of Philadelphia responded to the NOI record on this issue, arguing that a number of factors, including the possibility that a DAS network may include a large number of discrete sites, the density of the sites, and their tendency to have a large presence in the public rights-of-way, "dictate a substantially greater time to review and evaluate permitting applications than for traditional cell site applications, making the time frames provided in the [*2009 Declaratory Ruling*] entirely inappropriate."[318] The *2009 Declaratory Ruling* does not prevent a court from taking these factors into consideration in any determination of reasonableness, however, and applicants and municipalities can agree to extensions of time in appropriate cases. We seek comment on our proposal and analysis, including any reason DAS or small cell facilities should be subject to different time frames or other requirements.

160. *Section 332(c)(7)(B)(i)(I).* PCIA has asserted that some local ordinances establish preferences for placing wireless facilities on municipal property and argued that, by limiting the siting flexibility of subsequent wireless entrants in a given area, such ordinances unreasonably discriminate among providers of functionally equivalent services in violation of Section 332(c)(7)(B)(i)(I).[319] Other commenters have argued against such a *per se* conclusion.[320] We seek comment on whether ordinances establishing preferences for the placement of wireless facilities on municipal property are unreasonably discriminatory under Section 332(c)(7).

161. *"Deemed Granted" Remedy.* In our *2009 Declaratory Ruling*, we declined to establish a "deemed granted" remedy in cases where a State or local government failed to abide by the time limits established by the Commission.[321] We noted at the time that "Section 332(c)(7)(B)(v) states that when a failure to act has occurred, aggrieved parties should file with a court of competent jurisdiction within 30 days and that '[t]he court shall hear and decide such action on an expedited basis.'"[322] We then concluded

[317] *See*, *e.g.*, PCIA and DAS Forum Comments, WC Docket No. 11-59, at 13, 47 (*2009 Declaratory Ruling* time frames have not been applied to DAS projects in some jurisdictions due to the lack of clarity or consensus regarding the applicability of the *Ruling* to applications for DAS deployments).

[318] City of Philadelphia Reply Comments, WC Docket No. 11-59, at 8. *See also* National League of Cities et al. Reply Comments, WC Docket No. 11-59, at 51 (arguing that DAS providers are attempting to gain the benefits of Section 332(c)(7) while ignoring the "local rules that the statute protects").

[319] PCIA and DAS Forum Comments, WC Docket No. 11-59, at 44.

[320] *See*, *e.g.*, National League of Cities et al. Reply Comments, WC Docket No. 11-59, at 52-53 (arguing that an "unreasonable discrimination" claim depends on case-specific facts, including whether the provider has "been treated differently from other providers whose facilities are 'similarly situated' . . . ."). National League of Cities et al. also argued that PCIA's interpretation would effectively mean that "local governments may *never* change their zoning ordinances, because any later ordinance will inevitably place different burdens on later applicants." *Id.* at 54 (emphasis in original).

[321] *See 2009 Declaratory Ruling*, 24 FCC Rcd at 14009 para. 39.

[322] *Id*.

that "this provision indicates Congressional intent that courts should have the responsibility to fashion appropriate case-specific remedies."[323]

162. PCIA in its comments asks the Commission to revisit this decision and adopt a "deemed granted" remedy. Specifically, it claims that "[a]dding a deemed granted rule is critical to ensuring that states and localities act within the prescribed timelines."[324] PCIA notes that seeking judicial relief for violations of Section 332(c)(7) can involve "great time and expense"[325] and that a "deemed granted" remedy would "reduce costly and time-consuming litigation, allowing those resources to be used to fund rather than defend the expansion of broadband deployment."[326] What experiences have parties had since the end of the comment period for the NOI in WC Docket 11-59? Should we adopt remedies beyond the one provided in the *2009 Declaratory Ruling* for violations of Section 332(c)(7)? If so, what should they be? What authority do we have to adopt the proposed remedy?

VI. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Analysis

163. As required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on small entities of the policies and rules addressed in this Notice. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments filed in response to this Notice and, if submitted together with comments to the Notice in a single filing, must have a separate and distinct heading designating them as responses to the IRFA. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

B. Initial Paperwork Reduction Act Analysis

164. This document contains proposed modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget ("OMB") to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. § 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

C. Other Procedural Matters

1. Ex Parte Rules – Permit-But-Disclose

165. The proceeding this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[327] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation

[323] *Id*.

[324] PCIA and DAS Forum Comments, WC Docket, No. 11-59, at 43.

[325] *Id.* at 42.

[326] *Id*. at 43.

[327] 47 C.F.R. §§ 1.1200 *et seq.*

must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

2. Comment Filing Procedures

166. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System ("ECFS"). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/.

- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

  - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

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167. *Availability of Documents*. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

168. *Accessibility Information.* To request information in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to fcc504@fcc.gov or call the FCC's

Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at: http://www.fcc.gov.

169. *Additional Information*. For additional information on this proceeding, contact Peter Trachtenberg, Peter.Trachtenberg@fcc.gov, of the Wireless Telecommunications Bureau, Spectrum and Competition Policy Division, (202) 418-7369, or Mania Baghdadi, Mania.Baghdadi@fcc.gov, of the Wireless Telecommunications Bureau, Spectrum and Competition Policy Division, (202) 418-2133.

VII. ORDERING CLAUSES

170. Accordingly, IT IS ORDERED, pursuant to sections 1, 2, 4(i), 7, 201, 301, 303, 309, 332, 1403, and 1455, of the Communications Act of 1934, as amended 47 U.S.C. §§ 151, 152, 154(i), 157, 201, 301, 303, 309, 332, 1403, and 1455, Section 102(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(C), and Section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. § 470f, that this Notice of Proposed Rulemaking IS hereby ADOPTED.

171. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on this Notice of Proposed Rulemaking on or before 60 days after publication of the Notice of Proposed Rulemaking in the *Federal Register* and reply comments on or before 90 days after publication in the *Federal Register*.

172. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Proposed Rules

The Federal Communications Commission proposes to amend 47 C.F.R. Parts 1 and 17 as set forth below:

PART 1 – PRACTICE AND PROCEDURE

1. The authority citation for Part 1 would be amended to read as follows:

AUTHORITY: 15 U.S.C. 79, *et seq*.; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 160, 201, 225, 227, 303, 309, 332, 1403, and 1455.

2. 1.1306 would be amended by revising NOTE 1 to read as follows:

§ 1.1306 Actions which are categorically excluded from environmental processing.

* * * * *

NOTE 1: The provisions of § 1.1307(a) of this part requiring the preparation of EAs do not encompass the mounting of antenna(s) and associated equipment on an existing building, antenna tower, or other structure, or inside an existing building or other structure, unless § 1.1307(a)(4) of this part is applicable. Such antennas and associated equipment are subject to § 1.1307(b) of this part and require EAs if their construction would result in human exposure to radiofrequency radiation in excess of the applicable health and safety guidelines cited in § 1.1307(b) of this part. The provisions of § 1.1307 (a) and (b) of this part do not encompass the installation of aerial wire or cable over existing aerial corridors of prior or permitted use or the underground installation of wire or cable along existing underground corridors of prior or permitted use, established by the applicant or others. The use of existing buildings, towers or corridors is an environmentally desirable alternative to the construction of new facilities and is encouraged. The provisions of § 1.1307(a) and (b) of this part do not encompass the construction of new submarine cable systems.

* * * * *

3. Part 1 would be amended by adding Subpart BB to read as follows:

Subpart BB – State and Local Review of Applications to Site Wireless Facilities

Sec.

1.30001 *Wireless Facility Modifications.*

§ 1.30001 Wireless Facility Modifications.

(a) *Purpose*. These rules are issued under the Communications Act of 1934, as amended, 47 U.S.C. 151 et seq., implementing § 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 (codified at 47 U.S.C. § 1455), which requires a State or local government to approve any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

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

(1) *Base Station.* A station at a specified site that enables wireless communication between user equipment and a communications network, including any associated equipment such as, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply. It includes a structure that currently supports or houses an antenna, transceiver, or other associated equipment that constitutes part of a base station. It may encompass such equipment in any technological configuration, including distributed antenna systems and small cells.

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

(3) *Eligible Facilities Request.* Any request for modification of an existing wireless tower or base station involving (a) collocation of new transmission equipment; (b) removal of transmission equipment; or (c) replacement of transmission equipment.

(4) *Eligible Support Structure.* Any structure that meets the definition of a wireless tower or base station.

(5) *Transmission Equipment.* Any equipment that facilitates transmission for wireless communications, including all the components of a base station, such as, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply, but not including support structures.

(6) *Wireless Tower.* Any structure built for the sole or primary purpose of supporting any FCC-licensed or authorized license-exempt antennas and their associated facilities, including the on-site fencing, equipment, switches, wiring, cabling, power sources, shelters, or cabinets associated with that tower. It includes structures that are constructed solely or primarily for any wireless communications service, such as, but not limited to, private, broadcast, and public safety services, as well as fixed wireless services such as microwave backhaul.

(c) 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.

(d) A modification of an eligible support structure would result in a substantial change in the physical dimension of such structure if

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

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

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

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

PART 17 – CONSTRUCTION, MARKING, AND LIGHTING OF ANTENNA STRUCTURES

1. The authority citation for Part 17 would continue to read as follows:

Authority: §§ 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303, Interpret or apply §§ 301, 309, 48 Stat. 1081, 1085, as amended; 47 U.S.C. §§ 301, 309.

2. Section 17.4 would be amended by revising paragraph (c)(1) to add paragraph (c)(1)(vii) and amending paragraphs (c)(1)(v)-(vi) to read as follows:

§ 17.4 Antenna structure registration.

* * * * *

(c) Each prospective applicant must complete the environmental notification process described in this paragraph, except as specified in paragraph (c)(1) of this section.

(1) Exceptions from the environmental notification process. Completion of the environmental notification process is not required when FCC Form 854 is submitted solely for the following purposes:

* * *

(v) For any other change that does not alter the physical structure, lighting, or geographic location of an existing structure;

(vi) For construction, modification, or replacement of an antenna structure on Federal land where another Federal agency has assumed responsibility for evaluating the potentially significant environmental effect of the proposed antenna structure on the quality of the human environment and for invoking any required environmental impact statement process, or for any other structure where another Federal agency has assumed such responsibilities pursuant to a written agreement with the Commission. See § 1.1311(e) of this chapter; or

(vii) For any antenna structure that meets all of the following criteria:

(A) The antenna structure will be in use for no longer than 60 days;

(B) Construction of the antenna structure requires the filing of Form 7460-1 with the FAA;

(C) The antenna structure does not require marking or lighting pursuant to FAA regulations;

(D) The antenna structure will be less than 200 feet in height;

(E) The antenna structure will involve either no excavation or excavation where the depth of previous disturbance exceeds the proposed construction depth (excluding proposed footings and other anchoring mechanisms) by at least two feet; and

(F) Construction of the antenna structure does not require the filing of an Environmental Assessment pursuant to § 1.1307 of this chapter.

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APPENDIX B

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[1] the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") concerning the possible significant economic impact on small entities of the policies and rules proposed in this Notice of Proposed Rulemaking ("Notice"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the Notice. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[2] In addition, the Notice and IRFA (or summaries thereof) will be published in the *Federal Register*.[3]

A. Need for, and Objectives of, the Proposed Rules

2. In this Notice, we address four major issues regarding the regulation of wireless facility siting and construction with the goal of reducing, where appropriate, the cost and delay associated with the deployment of such infrastructure. First, we seek comment on expediting our environmental review, including review under Section 106 of the NHPA, in connection with proposed deployments of small cells, Distributed Antenna Systems ("DAS"), and other small wireless technologies that may have minimal effects on the environment. While the Commission has acted in the past to tailor our environmental review for the deployment of wireless infrastructure, those processes were largely developed long before small cell technologies became prevalent, and for the most part reflect the scale and level of environmental concern presented by traditional deployments on tall structures. Accordingly, we seek comment on whether to further tailor our environmental review process for technologies such as DAS and small cells through adoption of a categorical exclusion or other means. Second, we propose to adopt a narrow exemption from the Commission's pre-construction environmental notification requirements for certain temporary towers. These notification requirements provide that, before a party can register a proposed communications tower that requires registration under Part 17 of our rules,[4] and thus begin to construct or deploy the tower in question, it must complete a process of local and national notice. The proposed exemption will ensure that providers can timely deploy temporary facilities in response to unanticipated short term needs for broadband and other wireless services, such as in response to newsworthy events that occur without prior notice. Third, we seek comment on proposed rules[5] to clarify and implement the requirements of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act"),[6] which streamlines State and local review of requests for modification of existing towers and base stations to facilitate the deployment of the nationwide public safety broadband network mandated by the Spectrum Act and help providers meet the Nation's growing demand for wireless broadband and other advanced services. Finally, we seek comment on potential

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603(a).

[3] *See id.*

[4] 47 C.F.R. Part 17.

[5] *See* Appendix A to this *Notice.*

[6] *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 156 (2012) (codified at 47 U.S.C. § 1455(a)).

clarifications of the Commission's interpretations in the *2009 Declaratory Ruling*[7] of Section 332(c)(7) of the Communications Act, including the presumptive timeframes for State and local action on wireless facilities siting requests, in order to provide greater notice and clarity to affected stakeholders.[8]

B. Legal Basis

3. The authority for the actions taken in this Notice is contained in Sections 1, 2, 4(i), 7, 201, 301, 303, 309, 332, 1403, and 1455 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 157, 201, 301, 303, 309, 332, 1403, and 1455, Section 102(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(C), and Section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. § 470f.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.[9] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[10] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[11] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[12] Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

5. The Notice proposes rule changes regarding local and Federal regulation of the siting and deployment of communications towers and other wireless facilities. Due to the number and diversity of owners of such infrastructure and other responsible parties, including small entities that are Commission licensees as well as non-licensees, we classify and quantify them in the remainder of this section. We seek comment on our description and estimate of the number of small entities that may be affected.

6. *Small Businesses, Small Organizations, and Small Governmental Jurisdictions.* Our action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards that encompass entities that could be directly affected by the proposals under consideration.[13] As of 2010, there were 27.9 million small businesses in the United States, according to the SBA.[14] Additionally, a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and

[7] Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Declaratory Ruling*, 24 FCC Rcd 13994 (2009) ("*2009 Declaratory Ruling*").

[8] *See* Appendix A of this *Notice.*

[9] 5 U.S.C. § 603(b)(3).

[10] 5 U.S.C. § 601(6).

[11] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[12] 15 U.S.C. § 632.

[13] *See* 5 U.S.C. § 601(3)–(6).

[14] *See* Small Business Administration, Office of Advocacy, "Frequently Asked Questions," *available at* http://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf.

is not dominant in its field."[15] Nationwide, as of 2007, there were approximately 1,621,315 small organizations.[16] Finally, the term "small governmental jurisdiction" is defined generally as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[17] Census Bureau data for 2007 indicate that there were 89,527 governmental jurisdictions in the United States.[18] We estimate that, of this total, as many as 88,761 entities may qualify as "small governmental jurisdictions."[19] Thus, we estimate that most governmental jurisdictions are small.

7. *Wireless Telecommunications Carriers (except satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services.[20] The appropriate size standard under SBA rules is for the category Wireless Telecommunications Carriers. The size standard for that category is that a business is small if it has 1,500 or fewer employees.[21] For this category, census data for 2007 show that there were 11,163 establishments that operated for the entire year.[22] Of this total, 10,791 establishments had employment of 99 or fewer employees and 372 had employment of 1000 employees or more.[23] Thus under this category and the associated small business size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities that may be affected by our proposed action.[24] Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, PCS, and Specialized Mobile Radio ("SMR") Telephony services.[25] Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than

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[15] 5 U.S.C. § 601(4).

[16] INDEPENDENT SECTOR, THE NEW NONPROFIT ALMANAC & DESK REFERENCE (2010).

[17] 5 U.S.C. § 601(5).

[18] U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, Table 426 (2007).

[19] The 2007 U.S. Census data for small governmental organizations are not presented based on the size of the population in each such organization. There were 89,476 local governmental organizations in 2007. If we assume that county, municipal, township, and school district organizations are more likely than larger governmental organizations to have populations of 50,000 or less, the total of these organizations is 52,095. As a basis of estimating how many of these 89,476 local government organizations were small, in 2011, we note that there were a total of 715 cities and towns (incorporated places and minor civil divisions) with populations over 50,000. CITY AND TOWN TOTALS: VINTAGE 2011 – U.S. Census Bureau, *available at* http://www.census.gov/popest/data/cities/totals/2011/index.html. If we subtract the 715 cities and towns that meet or exceed the 50,000 population threshold, we conclude that approximately 88,761 are small. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, Tables 426, 427 (data cited therein are from 2007).

[20] *See* http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517210&search=2007%20NAICS%20Search.

[21] 13 C.F.R. § 121.201, North American Industry Classification System ("NAICS") Code 517210.

[22] U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210" (issued Nov. 2010).

[23] *See* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ2&prodType=table. Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "100 employees or more."

[24] *See id.*

[25] *See Trends in Telephone Service* at Table 5.3.

1,500 employees.[26] Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

8. *Personal Radio Services.* Personal radio services provide short-range, low power radio for personal communications, radio signaling, and business communications not provided for in other services. The Personal Radio Services include spectrum licensed under Part 95 of our rules.[27] These services include Citizen Band Radio Service ("CB"), General Mobile Radio Service ("GMRS"), Radio Control Radio Service ("R/C"), Family Radio Service ("FRS"), Wireless Medical Telemetry Service ("WMTS"), Medical Implant Communications Service ("MICS"), Low Power Radio Service ("LPRS"), and Multi-Use Radio Service ("MURS").[28] There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. Under the RFA, the Commission is required to make a determination of which small entities are directly affected by the rules being proposed. Since all such entities are wireless, we apply the definition of Wireless Telecommunications Carriers (except Satellite), pursuant to which a small entity is defined as employing 1,500 or fewer persons.[29] Many of the licensees in these services are individuals, and thus are not small entities. In addition, due to the mostly unlicensed and shared nature of the spectrum utilized in many of these services, the Commission lacks direct information upon which to base an estimation of the number of small entities under an SBA definition that might be directly affected by our proposed actions.

9. *Public Safety Radio Services.* Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services. There are a total of approximately 127,540 licensees within these services. Governmental entities[30] as well as private businesses comprise the licensees for these services. All governmental entities with populations of less than 50,000 fall within the definition of a small entity.[31]

10. *Private Land Mobile Radio.* Private Land Mobile Radio ("PLMR") systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories that operate and maintain switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services.[32] The SBA has not developed a definition of small entity specifically applicable to PLMR licensees due to the vast array of PLMR users. However, the Commission believes that the most appropriate classification for PLMR is Wireless Communications Carriers (except satellite). The size standard for that category is that a business is small if it has 1,500 or fewer employees.[33] For this category, census data for 2007 show that

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[26] *See id*.

[27] 47 C.F.R. part 90.

[28] The Citizens Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service are governed by subpart D, subpart A, subpart C, subpart B, subpart H, subpart I, subpart G, and subpart J, respectively, of part 95 of the Commission's rules. *See generally* 47 C.F.R. Part 95.

[29] 13 C.F.R. § 121.201, NAICS Code 517210.

[30] 47 C.F.R. § 1.1162.

[31] 5 U.S.C. § 601(5)-(6).

[32] http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517210&search=2007%20NAICS%20Search.

[33] 13 C.F.R. § 121.201, NAICS Code 517210.

there were 11,163 establishments that operated for the entire year.[34] Of this total, 10,791 establishments had employment of 999 or fewer employees and 372 had employment of 1000 employees or more.[35] Thus under this category and the associated small business size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities that may be affected by our proposed action.[36]

11. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, PCS, and Specialized Mobile Radio ("SMR") Telephony services.[37] Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.[38] Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

12. Other relevant information about PLMRs is as follows. The Commission's 1994 Annual Report on PLMRs[39] indicates that at the end of fiscal year 1994 there were 1,087,267 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. Because any entity engaged in a commercial activity is eligible to hold a PLMR license, the revised rules in this context could potentially impact every small business in the United States.

13. *Multiple Address Systems.* Entities using Multiple Address Systems ("MAS") spectrum, in general, fall into two categories: (1) those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, the Commission defines "small entity" for MAS licensees as an entity that has average gross revenues of less than $15 million in the three previous calendar years.[40] "Very small business" is defined as an entity that, together with its affiliates, has average gross revenues of not more than $3 million for the preceding three calendar years.[41] The SBA has approved of these definitions.[42] The majority of these entities will most likely be licensed in bands where the Commission has implemented a geographic area licensing approach that would require the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of April 16, 2010, there were a total of 11,653 site-based MAS station authorizations. Of these, 58 authorizations were associated with common carrier service. In addition, the Commission's licensing database indicates that, as of April 16, 2010, there were a total of 3,330 EA market area MAS authorizations. The Commission's licensing database indicates that, as of April 16, 2010, of the 11,653 total MAS station authorizations, 10,773 authorizations were for private radio service.

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[34] U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210" (issued Nov. 2010).

[35] *See* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ2&prodType=table. Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "100 employees or more."

[36] *See id.*

[37] *See Trends in Telephone Service* at Table 5.3.

[38] *See id*.

[39] Federal Communications Commission, 60th Annual Report, Fiscal Year 1994.

[40] *See* Amendment of the Commission's Rules Regarding Multiple Address Systems, WT Docket No. 97-81, *Report and Order*, 15 FCC Rcd 11956, 12008 para. 123 (2000).

[41] *Id*.

[42] *See* Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, dated June 4, 1999.

14. With respect to the second category, which consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definition developed by the SBA would be more appropriate than the Commission's definition. The applicable definition of small entity in this instance appears to be the "Wireless Telecommunications Carriers (except satellite)" definition under the SBA rules.[43] Under that SBA category, a business is small if it has 1,500 or fewer employees.[44] For this category, census data for 2007 show that there were 11,163 establishments that operated for the entire year.[45] Of this total, 10,791 establishments had employment of 99 or fewer employees and 372 had employment of 100 employees or more.[46] Thus under this category and the associated small business size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities that may be affected by our proposed action.[47]

15. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service ("MDS") and Multichannel Multipoint Distribution Service ("MMDS") systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") (previously referred to as the Instructional Television Fixed Service ("ITFS")).[48] In connection with the 1996 BRS auction, the Commission established a small business size standard as designating an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[49] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.[50] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA's or the Commission's rules.

[43] 13 C.F.R. § 121.201, NAICS Code 517210.

[44] *Id*.

[45] U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210" (issued Nov. 2010).

[46] *See* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ2&prodType=table. Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "100 employees or more."

[47] *See id.*

[48] Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding, MM Docket No. 94-131, PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589, 9593 para. 7 (1995).

[49] 47 C.F.R. § 21.961(b)(1) (1996).

[50] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1,500 or fewer employees.

16. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.[51] The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid.[52] Auction 86 concluded in 2009 with the sale of 61 licenses.[53] Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

17. *Location and Monitoring Service ("LMS").* Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined a "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed $15 million.[54] A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not to exceed $3 million.[55] These definitions have been approved by the SBA.[56] An auction for LMS licenses commenced on February 23, 1999 and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses.

18. *Television Broadcasting.* The SBA defines a television broadcasting station that has no more than $35.5 million in annual receipts as a small business.[57] Business concerns included in this industry are those primarily engaged in broadcasting images together with sound.[58] These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.[59] These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule.[60]

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[51] Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86, AU Docket No. 09-56, *Public Notice*, 24 FCC Rcd 8277 (2009).

[52] *Id.* at 8296 para. 73.

[53] Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period, *Public Notice*, 24 FCC Rcd 13572 (2009).

[54] Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, PR Docket No. 93-61, *Second Report and Order*, 13 FCC Rcd 15182, 15192 para. 20 (1998); *see also* 47 C.F.R. § 90.1103.

[55] *Id*.

[56] *See* Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission (Feb. 22, 1999).

[57] Television broadcasting stations with no more than $35.5 million in annual receipts are considered a small business pursuant to the SBA's standards. *See* Small Business Size Standards: Information, 77 Fed. Reg. 72702, 72704 (Dec. 6, 2012).

[58] *See* 13 C.F.R. § 121.201, NAICS Code 515120 (2007).

[59] *Id.*

[60] *Id.*

Programming may originate in the station's own studio, from an affiliated network, or from an external source.[61]

19. According to Commission staff review of the BIA Financial Network, Inc. Media Access Pro Television Database as of March 31, 2013, about 90 percent of an estimated 1,385 commercial television stations in the United States have revenues of $35.5 million or less. Based on this data and the associated size standard, we conclude that the majority of such establishments are small. The Commission has estimated the number of licensed noncommercial educational ("NCE") stations to be 396.[62] We do not have revenue estimates for NCE stations. These stations rely primarily on grants and contributions for their operations, so we will assume that all of these entities qualify as small businesses. In addition, there are approximately 567 licensed Class A stations, 2,227 licensed low power television ("LPTV") stations, and 4,518 licensed TV translators.[63] Given the nature of these services, we will presume that all LPTV licensees qualify as small entities under the above SBA small business size standard.

20. We note that in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included.[64] Our estimate, therefore, likely overstates the number of small entities affected by the proposed rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

21. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. The Commission is unable at this time and in this context to define or quantify the criteria that would establish whether a specific television station is dominant in its market of operation. Accordingly, the foregoing estimate of small businesses to which the rules may apply does not exclude any television stations from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. It is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

22. *Radio Broadcasting.* This Economic Census category comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in the station's own studio, from an affiliated network, or from an external source.[65] The SBA defines a radio broadcasting entity that has $35.5 million or less in annual receipts as a small business.[66] According to Commission staff review of the BIA Kelsey Inc. Media Access Radio Analyzer Database as of June 5, 2013, about 90 percent of the 11,340 of commercial radio stations in the United States have revenues of $35.5 million or less. Therefore, the majority of such entities are small entities. The Commission has estimated the number of licensed noncommercial radio stations to be 3,917.[67] We do not have revenue

[61] U.S. Census Bureau, 2007 NAICS Definitions, "515112 Radio Stations"; http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515112&search=2007 NAICS Search.

[62] News Release, *Broadcast Station Totals as of March 31, 2013* (MB rel. Apr. 12, 2013) ("*March 31, 2013 Broadcast Station Totals Press Release*"), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0412/DOC-320138A1.pdf.

[63] *See March 31, 2013 Broadcast Station Totals Press Release*.

[64] "[Businesses] are affiliates of each other when one [business] controls or has the power to control the other, or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.103(a)(1).

[65] U.S. Census Bureau, 2007 NAICS Definitions, "515112 Radio Stations"; http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515112&search=2007 NAICS Search.

[66] *See* 13 C.F.R. § 121.201, NAICS Code 515112. *See also* Small Business Size Standards, 77 Fed. Reg. at 72704.

[67] *March 31, 2013 Broadcast Station Totals Press Release*.

data or revenue estimates for these stations. These stations rely primarily on grants and contributions for their operations, so we will assume that all of these entities qualify as small businesses. We note that in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included.[68] In addition, to be determined to be a "small business," the entity may not be dominant in its field of operation.[69] We note that it is difficult at times to assess these criteria in the context of media entities, and our estimate of small businesses may therefore be over-inclusive.

23. *FM translator stations and low power FM stations.* The proposed rules and policies could affect licensees of FM translator and booster stations and low power FM ("LPFM") stations, as well as potential licensees in these radio services. The same SBA definition that applies to radio broadcast licensees would apply to these stations. The SBA defines a radio broadcast station as a small business if such station has no more than $35.5 million in annual receipts.[70] Currently, there are approximately 6,155 licensed FM translator and booster stations and 864 licensed LPFM stations.[71] Given the nature of these services, we will presume that all of these licensees qualify as small entities under the SBA definition.

24. *Multichannel Video Distribution and Data Service.* MVDDS is a terrestrial fixed microwave service operating in the 12.2-12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding $3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding $15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding $40 million for the preceding three years.[72] These definitions were approved by the SBA.[73] On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.[74] Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.[75]

[68] "[Businesses] are affiliates of each other when one [business] controls or has the power to control the other or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.103(a)(1).

[69] *See* 13 C.F.R. § 121.102(b).

[70] *See* 13 C.F.R. § 121.201, NAICS Code 515112.

[71] *See* News Release, "Broadcast Station Totals as of December 31, 2009" (rel. Feb. 26, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296538A1.pdf269784A1.doc.

[72] Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2–12.7 GHz Band by Direct Broadcast Satellite Licensees and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2–12.7 GHz Band, ET Docket No. 98-206, *Memorandum Opinion and Order and Second Report and Order*, 17 FCC Rcd 9614, 9711 para. 252 (2002).

[73] *See* Letter from Hector V. Barreto, Administrator, U.S. Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, WTB, FCC (Feb. 13, 2002).

[74] *See* "Multichannel Video Distribution and Data Service Spectrum Auction Closes," *Public Notice*, 19 FCC Rcd 1834 (2004).

[75] *See* "Auction of Multichannel Video Distribution and Data Service Licenses Closes; Winning Bidders Announced for Auction No. 63," *Public Notice*, 20 FCC Rcd 19807 (2005).

25. *Satellite Telecommunications.* Two economic census categories address the satellite industry. The first category has a small business size standard of $30 million or less in average annual receipts, under SBA rules.[76] The second has a size standard of $30 million or less in annual receipts.[77]

26. The category of "Satellite Telecommunications" "comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications."[78] Census Bureau data for 2007 show that 607 Satellite Telecommunications establishments operated for that entire year.[79] Of this total, 533 establishments had annual receipts of under $10 million, and 74 establishments had receipts of $10 million or more.[80] Consequently, the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

27. The second category, *i.e.*, "All Other Telecommunications," comprises "establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry."[81] For this category, Census data for 2007 shows that there were a total of 2,639 establishments that operated for the entire year.[82] Of those 2,639 establishments, 2,333 operated with annual receipts of less than $10 million and 306 with annual receipts of $10 million or more.[83] Consequently, the Commission estimates that a majority of All Other Telecommunications establishments are small entities that might be affected by our action.

28. *Non-Licensee Tower Owners.* Although at one time, most communications towers were owned by the licensee using the tower to provide communications service, many towers are now owned by third-party businesses that do not provide communications services themselves but lease space on their towers to other companies that provide communications services. The Commission's rules require that any entity, including a non-licensee, proposing to construct a tower over 200 feet in height or within the glide slope of an airport must register the tower with the Commission on FCC Form 854.[84] Thus, non-licensee tower owners may be subject to the environmental notification requirements associated with Antenna Structure Registration ("ASR"), and may benefit from the exemption for certain temporary antenna structures that we propose in this Notice. In addition, non-licensee tower owners may be affected

[76] 13 C.F.R. § 121.201, NAICS Code 517410.

[77] 13 C.F.R. § 121.201, NAICS Code 517919.

[78] U.S. Census Bureau, 2007 NAICS Definition, 517410 Satellite Telecommunications.

[79] *See* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ1&prodType=table.

[80] *See id.*

[81] *See* http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2007%20NAICS%20Search.

[82] *See* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table.

[83] *See id.*

[84] 47 C.F.R. §§ 17.4(a), 17.7(a)-(b).

by interpretations of Section 6409(a) of the Spectrum Act or by any revisions to our interpretation of Section 332(c)(7) of the Communications Act.[85]

29. As of June 28, 2013, there are approximately 113,612 registration records in a 'Constructed' status and 13,572 registration records in a 'Granted, Not Constructed' status in the ASR database. This includes both towers registered to licensees and towers registered to non-licensee tower owners. The Commission does not keep information from which we can easily determine how many of these towers are registered to non-licensees or how many non-licensees have registered towers.[86] Regarding towers that do not require antenna structure registration, we do not collect information as to the number of such towers in use and therefore cannot estimate the number of tower owners who would be subject to the proposed rules. Moreover, the SBA has not developed a size standard for small businesses in the category "Tower Owners." Therefore, we are unable to determine the number of non-licensee tower owners that are small entities. We believe, however, that when all individuals owning 10 or fewer towers and leasing space for collocation are included, non-licensee tower owners number in the thousands, and that nearly all of these qualify as small businesses under the SBA's definition for "All Other Telecommunications."[87] In addition, there may be other non-licensee owners of other wireless infrastructure, including DAS and small cells, that might be affected by the regulatory measures proposed in this Notice. We do not have any basis for estimating the number of such non-licensee owners that are small entities.

D. Description of Projected Reporting, Recordkeeping, and other Compliance Requirements for Small Entities

30. The Notice proposes an exemption from the environmental notification process that, if adopted, may require amending a current information collection. Under the environmental notification rules, prior to filing a completed Antenna Structure Registration ("ASR") application for any new antenna structure or for certain categories of antenna structure modifications or replacements, the ASR applicant must initially submit into the ASR system a partially completed FCC Form 854 that includes information about the proposed antenna structure but is not yet complete for filing.[88] The applicant must also provide local notice of its proposed tower through publication in a local newspaper or other appropriate means, such as by following the local zoning public notice process. The Commission then posts information about the proposal on its website for thirty days, relying on information submitted by the applicant.[89] Applicants claiming either a waiver from the notification process or entitlement to a defined exemption from the notification process must so indicate on their Form 854 submission.[90]

31. This Notice proposes to adopt a new limited exemption from the environmental notification requirements. This exemption would apply to temporary antenna structures that, because of their characteristics, do not have the potential for significant environmental effects. For these antenna structures, the Notice proposes to find that the risk that carriers will not be able to meet short-term capacity needs if required to complete the notification process outweighs the small likelihood that the

[85] *See supra*, Sections IV, V.

[86] We note, however, that approximately 13,000 towers are registered to 10 cellular carriers with 1,000 or more employees.

[87] 13 C.F.R. § 121.201, NAICS Code 517919. Under this category, a business is small if it has $30 million or less in annual receipts.

[88] For an overview of the environmental notification process, *see ASR Guidance PN*; *Order on Remand*, Appendix E. *See also* http://www.fcc.gov/help/environmental-notification-process-registration-antenna-structures-overview.

[89] *See* 47 C.F.R. § 17.4(c)(3)-(4).

[90] *See*, *e.g.*, FCC Form 854, Question 45 ("Does the applicant request a waiver of the Commission's rules for environmental notice prior to construction due to an emergency situation?"), available at http://www.fcc.gov/forms.

process will confer any benefit. The Notice further seeks comment on the specific criteria for such an exemption, and whether it is sufficient for exemption if an antenna structure (i) will be in use for 60 days or less, (ii) requires notice of construction to the Federal Aviation Administration ("FAA"), (iii) does not require marking or lighting pursuant to FAA regulations, (iv) will be less than 200 feet in height, and (v) will involve minimal or no excavation.[91] Should such an exemption be adopted, applicants would be required to indicate on their Form 854 filing that they are claiming the notification exemption for new towers and to demonstrate that they satisfy any applicable criteria.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

32. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[92]

33. In this proceeding, the Commission seeks to encourage and promote the deployment of advanced wireless broadband and other services by tailoring or streamlining the regulatory review of new wireless network infrastructure consistent with the law and the public interest. We therefore anticipate that the steps we propose or on which we seek comment will not impose any significant economic impacts on small entities, and will in fact help reduce burdens on small entities that may need to deploy wireless infrastructure by reducing the cost and delay associated with the deployment of such infrastructure. As discussed below, however, certain proposals may impose regulatory compliance costs on small jurisdictions.

34. The Notice seeks comment in four major areas relating to the regulation of wireless facility siting and construction. First, it seeks comment on whether and by what measures the Commission should expedite environmental review under the National Environmental Policy Act of 1969 and Section 106 of the National Historic Preservation Act of 1966 for DAS and small cell deployments and other new wireless network technologies involving the deployment of small facilities that may have minimal potential for significant environmental effects.[93] The proposed measures should reduce existing regulatory costs for small entities that construct or deploy wireless infrastructure, and will not impose any additional costs on such entities. We seek comment on the economic impact of these clarifications and exclusions on small entities and invite commenters addressing these options to discuss alternatives that could further lessen the burden on small businesses and reduce unnecessary costs and delays associated with the deployment of wireless network infrastructure, without risking significant environmental impact.

35. In particular, the Notice proposes to amend the first sentence of Note 1 to Section 1.1306 of the Commission's rules to clarify that the existing NEPA exclusion for collocations of "antennas" on "an existing building or antenna tower" also applies to collocations on other structures, including the types of short structures upon which DAS and small facilities may be collocated. This change would clarify that small entities proposing to collocate wireless equipment on structures such as poles or water towers would be entitled to the same relief from the requirement to prepare an Environmental Assessment ("EA") that they receive under Note 1 when collocating on buildings and antenna towers.[94] The Notice also seeks comment on whether to further amend the first sentence of Note 1 to clarify that the collocation

[91] For the text of the proposed rule, *see* Appendix A of this Notice.

[92] *See* 5 U.S.C. § 603(c).

[93] *See* 42 U.S.C. § 4321 *et seq.*; 16 U.S.C. § 470f.

[94] *See* 47 C.F.R. §§ 1.1306, 1.1307.

exclusion applies to collocations of equipment inside buildings as well as to equipment attached externally, and whether to provide expressly that the exclusion for "antennas" also applies to associated equipment. This change would clarify that entities, including small entities, proposing to place wireless equipment inside buildings or on structures such as poles or water towers would be entitled to the same relief from the requirement to prepare an EA that they receive under Note 1 when collocating on the outside of buildings.

36. The Notice further seeks comment on whether to adopt new categorical exclusions from NEPA and Section 106 review for DAS and small cells and on how such exclusions should be defined to encompass other wireless technologies that similarly involve deployment of small facilities and therefore warrant similar treatment for purposes of NEPA and Section 106 review. These new exclusions would reduce environmental compliance costs of small entities by providing that eligible proposed deployments of small wireless facilities do not require the preparation of an EA.

37. Second, the Notice proposes to adopt an exemption from the pre-construction environmental notification process for certain temporary towers that have characteristics (very short duration, height limits, minimal or no excavation, and no lighting) that minimize their potential to cause significant environmental effects, and seeks comment specifically on an exemption for antenna structures that (i) will be in use for 60 days or less, (ii) require notice of construction to the FAA, (iii) do not require marking or lighting pursuant to FAA regulations, (iv) will be less than 200 feet in height, and (v) will involve minimal or no excavation. The Notice tentatively concludes that this exemption will serve the public interest by reducing the burden on broadband and other wireless service providers, including small entities. We seek comment on the economic impact of this proposal on small entities, and any alternative approaches that may further reduce the burden on such entities.

38. Third, the Notice seeks comment on rules interpreting and implementing Section 6409(a) of the Spectrum Act, which governs State and local review of eligible requests for modification of existing wireless towers or base stations, including requests for collocation. In particular, it seeks comment on the interpretation of various statutory terms, on time limits for the review of applications covered by Section 6409(a), and other issues relevant to how State or local governments process and review applications under the provision.[95] In considering what interpretations to adopt from among potential alternatives, the Commission will give full consideration to the effects on small entities, including small governmental jurisdictions, and will not adopt an interpretation that significantly burdens small entities unless necessary to effectuate the intent of the statute. We invite commenters to discuss the economic impact on small entities of the interpretations of Section 6409(a) on which we seek comment and to suggest alternatives that may reduce the impact on small entities while achieving the goals of the Commission and the provision. For example, the Notice seeks comment on how the Commission might encourage efforts to develop best practices for applying Section 6409(a), and on whether the Commission should provide a transition period to allow States and localities to implement the requirements of Section 6409(a) in their laws, ordinances, and procedures, without risking significant delay in implementation of the provision.

39. Finally, the Notice seeks comment on whether to clarify certain aspects of the Commission's interpretations of Section 332(c)(7) in the *2009 Declaratory Ruling*. In particular, it seeks comment on whether to clarify when a siting application is considered complete, how the presumptive time frames apply in the context of local moratoria, whether to refine the "substantial increase in size" test as applied to collocations on structures other than communications towers under Section 332(c)(7), and

[95] *See* Section IV of this *Notice*. Statutory terms in Section 6409(a) include "existing wireless tower or base station," "transmission equipment", "collocation," "removal," "replacement," and "substantially change the physical dimensions." Other issues include, *inter alia*, substantive and procedural issues regarding how State or local governments should process facility modification requests under Section 6409(a)(1), treatment of moratoria, and potential remedies in cases of failure to act or adverse decisions remedies.

how the decisions in the *2009 Declaratory Ruling* apply to deployments of DAS and small cell facilities. The Notice also seeks comment on whether ordinances establishing preferences for municipal property sitings violate Section 332(c)(7)(B)(i)(I).[96] We invite commenters to discuss the economic impact of any clarification of those rulings on small entities, including small jurisdictions, and on any alternatives that would reduce the economic impact on such entities.

40. For the options discussed in this Notice, we seek comment on the effect or burden of the prospective regulation on small entities, including small jurisdictions, the extent to which the regulation would relieve burdens on small entities, and whether there are any alternatives the Commission could implement that could achieve the Commission's goals while at the same time minimizing or further reducing the burdens on small entities.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

41. None.

[96] 47 U.S.C. § 332(c)(7)(B)(i)(I).

APPENDIX C

Text of Section 6409(a)

SEC. 6409. WIRELESS FACILITIES DEPLOYMENT.

(a) FACILITY MODIFICATIONS.

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

(2) ELIGIBLE FACILITIES REQUEST. For purposes of this subsection, the term ‘‘eligible facilities request’’ means any request for modification of an existing wireless tower or base station that involves —
(A) collocation of new transmission equipment;
(B) removal of transmission equipment; or
(C) replacement of transmission equipment.

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

STATEMENT OF
ACTING CHAIRWOMAN MIGNON L. CLYBURN

Re: ***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; 2012 Biennial Review of Telecommunications Regulations, WT Docket No. 13-32***

Our Nation's demand for mobile broadband services continues to grow at an exponential rate and the ability of wireless providers to meet this demand depends not only on access to spectrum, but also on the deployment of new mobile infrastructure. That is why the Commission has made it a priority to cut red tape that saps resources and slows broadband deployment.

Today, we seek comment on how we can change our processes to encourage greater deployment of new technologies such as small cells and Distributed Antenna Systems. These innovative solutions multiply wireless capacity within existing spectrum resources and can be deployed relatively easily and inexpensively by consumers, enterprise users, and service providers. These newer technologies can be deployed on utility poles, street lamps, water towers, or rooftops -- a big reason why they are becoming more common. The time is ripe for the Commission to look at updating our rules for these new technologies.

This item continues the review of our procedures which apply to temporary towers. Often in demand, with very little advance warning or for very short periods of time, temporary towers are used to restore communications, during natural disasters or other emergencies, and to provide additional capacity during events. Relaxing the rules, which apply to these towers, makes perfect sense. In this item, we propose a narrow exemption from the Commission's pre-construction environmental notification requirements for certain temporary towers. Under our proposed exemption, eligible towers must meet specified criteria. Specifically, they will: be in use for 60 days or less; be shorter than 200 feet in height; involve minimal or no excavation; and not require FAA marking or lighting.

We are mindful of our statutory mandate to protect the nation's historical and environmental resources, and have a special duty to protect Native American sacred sites and places of Tribal cultural importance. The proposals in today's Notice recognize that mandate.

We also seek comment on rules, to implement Section 6409(a) of the 2012 Spectrum Act. Under this section of the Act, "a State or local government…shall approve, any … 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." Eligible facility requests, include collocation applications, and requests to replace existing equipment.

Collocation, which involves placing wireless equipment on pre-existing structures, is often the most efficient means, of expanding wireless coverage and capacity. Because most of the terms in the statute are undefined, however, we propose rules to clarify these terms and help all parties implement its requirements.

Over the past four years, the Commission has taken a number of significant steps, to reduce barriers to wireless infrastructure investment. We established a "shot clock" for processing of wireless tower and antenna siting requests, and ensured timely and rationally priced access, to utility poles. Just this year, we established rules for signal boosters that will promote the deployment of such devices to expand wireless coverage.

Today's Notice is another step toward removing barriers to the deployment of much-needed wireless infrastructure. I commend Ruth Milkman, Jane Jackson, Jeffrey Steinberg, Peter Trachtenberg, Michael Smith, Mania Baghdadi and Won Kim, for providing us with a thorough and thoughtful item, on these critically important issues. I especially want to thank Peter for staying late last night to accommodate suggested edits to the NPRM. I also want to thank Michele Ellison and Louis Peraertz for their endurance in working on this NPRM.

STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL

Re: ***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; *2012 Biennial Review of Telecommunications Regulations*, WT Docket No. 13-32.**

Spectrum gets all the glory. But the unsung hero of the wireless revolution is infrastructure. Because no amount of spectrum will lead to better wireless service without good infrastructure.

Today, however, the Commission gives facilities siting its proper due. In this rulemaking, we consider how to streamline our tower siting rules to facilitate infrastructure deployment, particularly in those cases where new facilities have minimal or no impact on the local environment. We ask about speeding approvals as we move from macro towers to micro cells. We consider how to expedite approvals as we move from permanent structures to short-term facilities. We also ask how to better define our rules for colocations, when new antennas do not require new structures, but can be appended to already existing ones.

Down the road, these infrastructure issues become even more critical. Because what lies ahead is much more than the recent explosion of wireless phones and tablet computers. The Internet of Things is around the bend. We will have 50 billion machine-to-machine devices communicating wirelessly by the end of the decade.

The complexity of new machine-to-machine deployments, however, is not just some far off thing. It is already happening. Although not specifically addressed here, consider the Rail Safety Improvement Act of 2008. This law requires the deployment of Positive Train Control systems on major freight, passenger, and commuter rail systems by the end of 2015. Positive Train Control involves computers onboard trains that communicate wirelessly with wayside units along tracks. In turn, these units relay signals back to a central dispatch unit and provide essential data about location, speed, and safety.

To meet this deadline—and improve rail safety—Positive Train Control technology requires the deployment of tens of thousands of new wireless towers. This agency can take steps now to get this infrastructure in place and on the ground. To do so, I would like us to review tower applications in batches—so we treat similar deployments similarly and we process them fast. That way, the knottiest applications do not hold up broader deployment. Furthermore, I hope we can find ways to prioritize our review of towers so that we can enable early testing. Finally, to the extent that deployments impact sites of significance to Tribal Nations, all of these efforts must proceed in a way that honors the principles of sovereignty and federal trust responsibility. In the end, Positive Train Control is only one example of the need for this agency to update its facilities siting policies to reflect the emerging reality of new wireless deployments.

Back to the proceeding at hand. Though spectrum usually gets the spotlight, for the wireless show to go on, it is infrastructure that requires our rapt attention. Today's rulemaking provides that attention, so I am pleased to offer my support.

STATEMENT OF
COMMISSIONER AJIT PAI

Re: ***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; *2012 Biennial Review of Telecommunications Regulations*, WT Docket No. 13-32.**

In July 2012, I met some entrepreneurs in San Francisco who were developing cutting-edge applications for mobile devices. I was impressed by their work on things like instant video optimization and mobile cloud computing. But what I found most striking—and not in a good way—was their response to a question about bottlenecks in the wireless industry. They brought up the usual suspects like spectrum, but they also mentioned how ridiculous it was that they couldn't get a good signal in their own building. Why? Because regulations made it nearly impossible for any wireless company to deploy more physical infrastructure in the city.

So what did these innovators do? They innovated. On the roof of their building, they built a wireless mesh network using chicken wire. Let me posit here that something has gone wrong with regulation—really wrong—if the best wireless solution for entrepreneurs in San Francisco is the same technology that farmers in Kansas use to keep wayward birds in the coop.

This experience informs my view that wireless infrastructure often seems to be the unsung hero of the ongoing mobile broadband revolution. We don't talk about it much, but without vast networks of towers, rooftop antennas, microcells, picocells, distributed antenna systems (DAS), and other types of physical infrastructure, Americans wouldn't be able to send emails, surf the web, or watch video over their wireless devices. And as our use of tablets and smartphones proliferates, so too does the need to deploy more wireless infrastructure to accommodate more mobile data traffic.

But as my opening suggests, it's not easy to deploy wireless infrastructure in the United States. The federal government has erected some unnecessary obstacles. Federal regulations that were written with two-hundred-foot tall towers in mind just don't make sense when applied to recent innovations like small cells. State and local governments have slowed deployment as well. Every consumer wants fast, dependable wireless service in his or her neighborhood. But many aren't as enthusiastic about having nearby the physical infrastructure that makes such service possible. This kind of "not in my back yard" sentiment can lead municipalities to needlessly delay or block the installation of wireless infrastructure.

To remove these roadblocks, I proposed last fall a comprehensive set of reforms to expedite the deployment of wireless infrastructure. Specifically, I called for the Commission to: (1) exempt DAS from our environmental processing requirements; (2) update our historic preservation regulations to take account of DAS and small cells; (3) declare that the shot clock adopted by the Commission in 2009 applies to DAS; (4) make clear that local moratoria on the approval of new wireless infrastructure that evade the Commission's shot clock violate section 332(c)(7) of the Communications Act; and (5) provide that if a local government does not act on a wireless facilities application by the end of our shot clock, that application will be deemed granted, as is the case in the video franchising context.[1]

[1] Remarks of Commissioner Ajit Pai at CTIA's MobileCon, San Diego, California (Oct. 10, 2012), http://go.usa.gov/Dd6k.

I'm excited that, less than a year later, the Commission is seeking comment on all of these ideas in today's Notice of Proposed Rulemaking (NPRM). I'm also pleased that we are soliciting feedback on other worthwhile proposals to implement Section 6409(a) of the Spectrum Act and to permanently exempt temporary towers from pre-construction environmental notification requirements.

I am particularly happy that we seek comment on whether to adopt a "deemed granted" remedy for violations of both Section 6409(a) of the Spectrum Act and Section 332(c)(7) of the Communications Act. Right now, if a city does not process an application by the end of the FCC's shot clock, an applicant's only remedy is to file a lawsuit. In other words, the solution to municipal delay is . . . litigation, a word that is often synonymous with delay. In one case, for example, Sprint was forced to battle for seven years in federal and state courts as it attempted to build two towers in Los Angeles County.

If a local government does not act on a wireless facilities application by the end of the shot clock, I believe that application should be deemed granted. This would maximize the incentive for local governments to rule on applications promptly. It would allow companies to stop litigating over infrastructure and start building it.

On all of the issues that are teed up in today's NPRM, it is critical that we move forward with alacrity. Indeed, we should bring the same urgency to the task that animates our push to make available additional spectrum for mobile broadband. For if our efforts on wireless infrastructure falter, much of our work on spectrum will be for naught. After all, even an unlimited supply of spectrum won't mean much without the infrastructure to carry wireless traffic to its destination.

I thank Chairwoman Clyburn for her leadership on this item and the staff in the Wireless Telecommunications Bureau for all of their hard work: Jeffrey Steinberg, Peter Trachtenberg, Mania Baghdadi, Won Kim, Michael C. Smith, Joyce Jones, Ivy Harris, Donald Johnson, Saurbh Chhabra, Stephen Delsordo, Weiren Wang, Ruth Milkman, Jane Jackson, Maria Kirby, and Jessica Almond. The success of your efforts is evident to us today and will be evident to consumers in years to come when they enjoy better, more reliable, more advanced wireless services.