

**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
)	

COMMENTS OF CROWN CASTLE

Crown Castle¹ hereby submits these comments in response to the Commission’s Notice of Proposed Rulemaking (“NPRM”), proposing to adopt measures to accelerate broadband deployment by improving wireless facility siting rules and policies.

INTRODUCTION AND SUMMARY

Founded in 1994, Crown Castle is the country’s largest independent owner and operator of shared wireless infrastructure, with more than 40,000 towers, 11,000 DAS and Small Cell installations, and over 6,000 miles of fiber. As the largest tower and DAS/Small Cell provider, Crown Castle is uniquely positioned to comment in this rulemaking proceeding regarding the challenges faced by the industry in its attempt to deploy broadband communications nationwide.

¹ Crown Castle is Crown Castle International Corp. (CCI:NYSE) and its subsidiaries.

As the Commission recognized in the NPRM and as stated in the National Broadband Plan, broadband deployment is “driving innovation and playing an increasingly important role in our lives and our economy”² and thus it is essential to take action to remove any unnecessary obstacles in order to ensure efficient broadband buildout.³ Such broadband deployment is not possible without a robust infrastructure and networks to support the services that are assisting in our nation’s economic recovery.

DAS and Small Cell networks provide an increasingly important role in facilitating the deployment of broadband infrastructure, as network operators seek to target broadband capacity to the locations where their customers use wireless broadband and to improve in-building coverage. In these comments, Crown Castle requests the Commission exclude DAS and Small Cell facilities from review under both the National Environmental Protection Act (“NEPA”) and the National Historic Preservation Act (“NHPA”). Crown Castle also requests the Commission take certain actions to clarify the application of Section 6409(a)⁴ and develop rules necessary for the effective implementation of the Commission’s 2009 Shot Clock Order’s⁵ time frames. Together, these actions will have a significant impact on the industry’s ability to expeditiously deploy broadband infrastructure.

² FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, at 9-10 (2010) (“National Broadband Plan”), <http://download.broadband.gov/plan/national-broadband-plan.pdf> (visited Jan. 16, 2014). *See also*, NPRM at ¶ 2.

³ National Broadband Plan, Chapter 6, 107-118.

⁴ Middle Class Tax Relief and Job Creation Act of 2012, 112 Pub. L. 96, Title VI, § 6409(a), 126 Stat. 156, 232 (2012) (“Section 6409(a)”), *codified at* 47 U.S.C. § 1455(a).

⁵ *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009) (“*Shot Clock Order*”), *recon. denied*, 25 FCC Rcd 11157 (2010), *aff’d sub nom. City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013).

DISCUSSION

I. DAS AND SMALL CELL TECHNOLOGIES SHOULD BE EXCLUDED FROM NEPA AND NHPA REVIEW

Crown Castle strongly supports the adoption of a rule that would create an exclusion of DAS and Small Cell facilities from review under both NEPA and NHPA. Such exclusion is appropriate because the environmental and historic preservation impact of DAS and Small Cell facilities are nonexistent or *de minimis*. By adopting a technology-neutral definition of broadband communications equipment and adding it to the exclusions already included in Note 1 of 47 C.F.R. 1.1306, the Commission will facilitate the nationwide deployment of broadband services while ensuring that only minimally invasive broadband facilities are excluded from review.

Existing rules, applicable to the environmental and historic review of DAS and Small Cell facility deployment, were developed at a time when such technology was relatively unheard of. Thus in some instances the rules result in absurd consequences. For example, currently under Section 1.1307(a) facilities that are to be located in 100-year flood plains must undergo extensive environmental review, culminating in a formal environmental assessment document. The environmental assessment must be submitted to the FCC through the Antenna Structure Registration process or through the Form 601 process and published for comment prior to the FCC issuance of a Finding of No Significant Impact (“FONSI”). Technically, this could result in the preparation of environmental assessments for each new utility pole installed in a 100-year flood plain to support the deployment of a DAS or Small Cell network, despite the fact that: (i) the utility poles will be located within the previously disturbed public right-of-way; (ii) the same utility poles would not require such environmental review if installed for another public utility purpose; and (iii) the placement of utility poles within the right-of-way would not significantly

impact the 100-year floodplain. Practically speaking, much of the area along the Gulf Coast and other coastal regions fall within 100-year flood plains. In rural areas with little or no existing coverage, this may result in hundreds of new utility poles, each with an individual environmental assessment for construction in the right-of-way. Thus if Crown Castle attempts to provide DAS or Small Cell service coverage in coastal areas (or, for that matter, much of Louisiana), each utility pole will require an environmental assessment, a filing with the FCC, public notice (local and national) and the granting of a FONSI.

Similarly absurd results occur with regard to historic preservation review on DAS and Small Cell facility deployments. Because utility poles are not exempt from NHPA and are not covered by the 2001 Nationwide Programmatic Agreement for the Collocation of Wireless Antennas,⁶ DAS and Small Cell deployments on utility poles that are 45 years or older must undergo historic preservation review. In cases where the age of the pole is unknown, review must also occur to ensure compliance with the rules. Because of pole preservation technology, the percentage of poles in the United States that exceed 45 years of age is growing exponentially and it is unclear how this rule is helping to preserve historic properties or districts. Similarly, the replacement of utility poles in the right-of-way is not excluded from routine Section 106 review despite the fact that the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission currently allows for the replacement of an existing tower in the right-of-way to be excluded if it meets certain criteria.⁷

⁶ 47 C.F.R. Part I, Appendix B (“Collocation Agreement”).

⁷ See Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission, § III.B (“2004 NPA”).

A. The Commission Should Revise Section 1.1306 Note 1 to Exclude DAS and Small Cell Facility Deployments

Crown Castle supports PCIA's proposal to devise a flexible, technology-neutral definition of broadband communications facilities that would categorically exclude DAS and Small Cell facilities from NEPA and NHPA review. Such an appropriately-defined exclusion, included as part of Note 1 to Section 1.1306 of the Commission's rules, will ensure that only minimally invasive installations (that do not have an adverse effect on the environment or historic properties) qualify for exemption from environmental and historic preservation review. This modification to Note 1 will enable carriers to expeditiously deploy DAS and Small Cell facilities without being mired in unnecessary, burdensome and costly regulatory procedures.

Crown Castle also supports PCIA's proposed modification to the DAS and Small Cell definition to ensure the definition refers to "communications" facility installations instead of "wireless" facility installations. As noted in PCIA's comments, DAS and Small Cell networks are primarily comprised of fiber or cable used to transport broadband services between the nodes and a central communications hub site. Moreover, as a neutral host provider, Crown Castle is authorized to provide DAS and Small Cell services as a competitive access carrier, a "carrier's carrier," and does not itself provide wireless services. Thus, a description of the facilities Crown Castle deploys as a part of its fiber-fed DAS and Small Cell networks as "wireless" inaccurately describes the equipment that is designed for the sole purpose of converting our wireless carrier customers' traffic from RF to light signals that can be transported over Crown Castle's fiber network to a designated interconnection point, and causes confusion regarding the status and service offering of neutral host DAS and Small Cell service providers.

Crown Castle proposes one further modification to the definition proffered by PCIA, specifically with regard to the proposed volume limitation for antennas at three (3) cubic feet.

Crown Castle proposes that, for situations where multiple carriers will be collocated, the maximum antenna volume be increased to five (5) cubic feet. In fact Crown Castle currently deploys antennas in its DAS and Small Cell networks that are significantly larger than three cubic feet in volume in order to accommodate multiple carriers. For example, one commonly deployed antenna today is approximately 14.5” diameter by 48” tall with a total displacement volume of 4.7 cubic feet. Another antenna that is being considered for future deployment is 18” diameter by 24” tall with a total displacement volume of 3.6 cubic feet. One of the largest antennas being deployed by Crown Castle in its DAS and Small Cell networks is 18” diameter by 48” tall, with a total displacement volume of 7.1 cubic feet. Although these antennas have somewhat larger volume than what is proposed by PCIA, Crown Castle maintains that one larger antenna deployed in a single node location may have less overall impact than multiple carrier or multiple technology installations installed in close proximity to one another.

Crown Castle is also concerned that the Commission’s adoption of PCIA’s proposed definition of DAS and Small Cell facilities may result in municipalities’ and pole owners’ use of that definition to limit the maximum allowable size of DAS and Small Cell antenna deployments, despite the fact that the definition is being proffered for the purpose of determining exclusion from environmental and historic review. Consequently, to the extent the Commission decides to adopt PCIA’s proposed definition, Crown Castle requests that the Commission make clear that such a limitation in size is not intended to restrict carriers from deploying larger DAS and Small Cell facilities, rather it is simply intended for the purpose of this rulemaking to determine the type of facilities that should not be subject to environmental or historical review.

B. The Adoption of the Categorical Exclusion Is Consistent With the Rules Applicable to Public Right-Of-Way Installations

The adoption of a categorical exclusion in Note 1 is appropriate for multiple reasons. First and foremost, the facilities being deployed in DAS and Small Cell networks are minimally invasive to environmental and historic resources because of their limited size and location within previously disturbed public rights-of-way, largely on facilities (primarily utility poles) that have already been permitted.⁸ In fact, most DAS and Small Cell facilities are comparable to other exempt utility equipment that is also being deployed in the public right-of-way. Furthermore, similar facilities, such as Wi-Fi and other unlicensed wireless technologies are not required to submit to corresponding environmental or historic preservation requirements, despite the fact that they are deployed by competitors of Crown Castle and Crown Castle's customers for competitive service offerings. Because of their regulatory classification, these other services have avoided NEPA and NHPA review, despite the fact that they are deployed in the public right-of-way in a similar manner as DAS and Small Cell facilities, primarily on existing utility infrastructure.

With regard to NEPA, the proposed categorical exclusion in large part is a clarification of existing law and falls within the scope of categorical exclusions already adopted by the Commission and other agencies for facilities with comparable negligible environmental impacts. For example, the Commission already categorically excludes collocations and installation of aerial and underground lines in corridors of prior or permitted use.⁹ Likewise, the Department of Commerce has issued categorical exclusions from NEPA for construction of broadband facilities

⁸ See Amos J. Loveday, Ph.D., *DAS/Small Cells & Historic Preservation: An Analysis of the Impact of Historic Preservation Rules on Distributed Antenna Systems and Small Cell Deployment*, at 2-5 (Feb. 27, 2013) ("DAS/Small Cell Report") (discussing why these exclusions are limited in their practical application for DAS and small cells).

⁹ See 47 C.F.R. 1.1306 note 1.

that are considerably larger than DAS or Small Cell installations.¹⁰ Given the existing exclusions for other, sometimes considerably larger telecommunications projects, the Commission should issue categorical exclusions for the relatively smaller DAS and Small Cell facilities, including any related enclosures and associated equipment.

The installation of DAS and Small Cell facilities is also consistent with the intent underlying the Collocation Agreement and the 2004 NPA, regardless whether any given installation fits within the specific classes of installations covered by those agreements. Notably, those agreements largely focused on macro site deployments because at the time they were entered into (2000 to 2004) DAS and Small Cell deployments were relatively unheard of. Yet, despite the fact that the agreements do not reference the DAS or Small Cell technologies that were newly emerging at the time, they both appear to promote such minimally invasive deployments.¹¹ In fact, the 2004 NPA specifically excluded certain facilities located in or near specified right-of-way or utility corridors.¹² Likewise, the Collocation Agreement recognized the benefit of encouraging collocations, noting that they “reduce the need for the construction of new towers, thereby reducing potential effects on historic properties ...”¹³ In adopting the 2004 NPA, the Commission also acknowledged that “the likelihood of an incremental adverse impact on historic properties [from antennas on utility poles] is minimal” and that it promotes historic

¹⁰ See National Environmental Policy Act—Categorical Exclusions covering the Broadband Technology Opportunities Program (BTOP), 74 Fed. Reg. 52456 (Oct. 13, 2009) (excluding in some instances the construction of facilities involving up to 10 acres of physical disturbance) (“BTOP Categorical Exclusions”).

¹¹ See Collocation Agreement, § V (excluding the collocation of antennas on certain existing non-tower structures outside of historic districts); 2004 NPA, § III(E) (excluding certain facilities located in or near specified right-of-way or utility corridors); see also Loveday, *supra* note 6, at 2-5 (Feb. 27, 2013) (“DAS/Small Cell Report”) (discussing why these exclusions are limited in their practical application for DAS and small cells).

¹² See 2004 NPA, § III(E).

¹³ Collocation Agreement at 2.

preservation to encourage construction of such minimally intrusive facilities rather than larger, potentially more damaging structures.”¹⁴

II. RULES SHOULD BE ADOPTED TO ENFORCE AND IMPLEMENT SECTION 6409(a) OF THE SPECTRUM ACT

Crown Castle supports the adoption of rules that both clarify the application of Section 6409(a) and provide definitions of key terms necessary for properly applying this law. Unfortunately, despite the clear language of Section 6409(a) and FCC Guidance already issued on the subject,¹⁵ Crown Castle has already faced significant resistance on behalf of some localities implementing the law.

In San Francisco, Crown Castle and other parties are currently involved in litigation to determine, among other things, whether part of City and County of San Francisco’s ordinance is unlawful because it violates Section 6409(a). San Francisco contends that the DAS facilities installed in San Francisco by Crown Castle are not subject to Section 6409(a). Unwilling to accept the Wireless Bureau’s guidance on the issue, San Francisco asserts that Section 6409(a) “... only applies to the larger installations on private property that the wireless industry has traditionally called ‘base stations’” and requests that the court determine “... if these [DAS and Small Cell] facilities are base stations within the meaning of [Section 6409(a)], [and whether] the federal law violates the Tenth Amendment by forcing local governments to issue permits.”¹⁶ While Crown Castle believes that it will ultimately prevail on this issue, the fact remains that such protracted and costly litigation adversely affects the timely deployment of broadband

¹⁴ *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Report and Order, 20 FCC Rcd 1073, 1098 ¶ 63 (2004).

¹⁵ *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) Public Notice*”).

¹⁶ Defendants’ Trial Brief, *T-Mobile W. Corp. v. City and Cnty. of S.F.*, (No. CGC-11-510703) (Super. Ct. of Cal. Filed Jan. 21, 2012) (attached hereto as Exhibit “A”).

services and diverts capital away from critical infrastructure investment while bolstering the position of states and localities that want to continue to apply discretionary review over eligible facility requests.¹⁷

Crown Castle supports the comments submitted by PCIA on this subject and, as discussed below, encourages the Commission to provide clear directives for eligible facility requests under Section 6409(a).

A. The Commission Should Adopt a Federal Standard Requiring State and Local Governments to Use an Administrative Process to Review Requests Covered by Section 6409(a).

An existing tower or base station has already passed a jurisdiction's local zoning review. Consequently, subsequent collocation on an existing structure should not subject the entire facility to yet another discretionary *de novo* health, safety, and welfare review. Regarding a proposed collocation's impact on public health, verifying compliance with requirements related to radio frequency emissions is, at both the time of initial construction and subsequent collocation, outside the jurisdiction of local land use review and solely within the purview of the Commission. As for safety, a review of the subsequent collocation's compliance with building regulations is addressed through the submission of a stamped engineering report at the building permit application stage. Finally, a welfare review is unnecessary because any collocation request that is covered under Section 6409(a) will not substantially change the tower or base station, and thus there will be no adverse visual impact associated with the collocation. A redundant zoning review at the time of a subsequent collocation covered under Section 6409(a) is simply unnecessary and contrary to the public interest in facilitating the deployment of broadband communications services.

¹⁷ See NPRM at ¶ 97 (citing such litigation as potentially impacting the timely deployment of a nationwide public safety network and delaying the intended streamlining benefits of the statute).

By requiring states and local governments to approve requests covered under Section 6409(a), Congress clearly recognized that a collocation on existing towers and base stations should be ministerial in nature and should not require a lengthy discretionary review of an already lawfully permitted and operated structure. Crown Castle therefore submits that the scope of review of a collocation request covered under Section 6409(a) should be limited to verifying whether the request is, in fact, “covered.” That is, a covered request should trigger no more than an administrative-level review of whether: (1) it is an “eligible facilities request;” and (2) there is no “substantial change.” And if the answers to these inquiries are yes, the jurisdiction must approve the request.

Crown Castle further submits that such a review should require only such information and documentation that is necessary to verify whether a request is covered under Section 6409(a). Specifically, an application for an eligible facilities request should include only: (1) a signed application form, including a statement certifying that the application is an eligible facilities request; (2) a demonstration of the applicant’s entitlement or authorization to pursue the application; and (3) a site plan or diagram showing that the application does not involve a substantial change to the physical dimensions of the subject tower or base station. An application may also include a stamped engineering report demonstrating compliance with applicable structural standards.

An applicant should not, however, be required to provide justification of radio frequency need. Such a requirement conflicts with the Section 6409(a)’s mandate to approve all covered requests. This mandate is based on the notion that the wireless service providers are in the best position to manage the technical and operational aspects of their networks and to determine whether there is a need for a new antenna location. If a covered request is submitted, then under

Section 6409(a) it is presumptively deemed to be needed by the provider. In addition, applicants should not be required to submit radio frequency reports or other information and documentation related to radio frequency emissions since the regulation of radio frequency emissions, is solely within the jurisdiction of the Commission.

A streamlined collocation process will facilitate deployment of the broadband facilities on which the public and private sector are becoming increasingly reliant in their daily lives.¹⁸ Collocation applications containing only those materials that are necessary to verify whether the request is covered under Section 6409(a) can be readily reviewed and timely processed by a jurisdiction's own professional staff. A requirement that such applications receive no more than an administrative-level review will eliminate unnecessary and redundant discretionary zoning review of a previously approved structure. For these reasons, Crown Castle urges the Commission to adopt a rule requiring state and local governments to use an administrative process to review requests covered by Section 6409(a).

B. The Commission Should Adopt a Rule That Requires States and Localities to Approve a Covered Request to Collocate on a Tower or Base Station that Has “Legal, Non-Conforming” Status.

Like many other commenters, Crown Castle has also experienced difficulty deploying eligible facilities on existing towers and base stations that have been classified as “legal, non-conforming.” A “legal, non-conforming” structure is one that was lawfully permitted at the time of its initial construction, but no longer complies with the current building and zoning

¹⁸ Notably, in the past few years several states have adopted siting legislation that streamlines the zoning process for collocation, eliminating discretionary zoning hearings, and prohibiting municipalities from evaluating an applicant's business need or otherwise requiring information related to the technical or operational aspects of an applicant's network. *See, e.g.*, Advanced Broadband Collocation Act, Ga. Code §§ 36-66B-1-36-66B-4; N.C. Gen. Stat. §§ 16A-400.50-16A400.53; and Pennsylvania Wireless Broadband Collocation Act, 53 Pa. Stat. §§ 11702.1-11702.6. Such laws have tremendously impacted the ability to deploy facilities in those states.

regulations due to a subsequent change to the regulations. The changes that render a tower or base station “legal, non-conforming” typically involve rezoning, annexation, or revisions to the zoning code. For example, it is not uncommon for a zoning ordinance amendment to prohibit wireless facilities in certain locations where towers or base stations may already exist, or for a zoning ordinance amendment to place height restrictions on towers in a jurisdiction where there are existing towers that were lawfully permitted to exceed those new height restrictions, under the prior regulations.

Even in the case of collocations covered under Section 6409(a), a number of jurisdictions have deemed such “legal, non-conforming” structures unfit for future collocation. And despite the mandate to approve covered collocations, many jurisdictions have continued to exercise considerable discretion in reviewing eligible facilities requests on “legal, non-conforming” structures. Some jurisdictions require a collocation applicant to obtain a variance, which is typically a lengthy discretionary process that requires the applicant to make a showing of hardship. Other jurisdictions seek to impose conditions of approval that effectively block collocation by requiring such cost-prohibitive measures as retrofitting or replacing the entire structure.

In enacting Section 6409(a), Congress recognized that collocation on existing infrastructure is the most cost-effective, least visually intrusive means to deploying wireless broadband facilities. An existing tower or base station has already passed a jurisdiction’s health, safety, and welfare review and has been deemed compatible with neighboring uses. Over time that tower or base station becomes engrained in the surrounding visual landscape. The basic premise behind Section 6409(a) is that collocation on existing infrastructure, therefore, strikes the best balance between ensuring reliable access to state of the art wireless communications

services while also preserving the intrinsic aesthetic character of the communities served. The obstacles to collocation on “legal, non-conforming” towers and base stations are wholly inconsistent with Section 6409(a)’s mandate to approve collocations on existing infrastructure. These obstacles leave a facility owner with an unappealing choice between constructing additional towers and base stations or abandoning the project altogether. Under such circumstances, a redundant zoning review of an existing tower or base station is simply unnecessary and often contrary to the best interests of the stakeholders involved.

While Crown Castle supports the adoption of a rule that requires approval of requests to collocate on “non-conforming” towers and base stations, there are situations in which a full zoning review is warranted. As noted above, a proposed substantial change to a tower or base station is justifiable grounds for a full zoning review. To that end, if a structure’s original zoning approval was conditioned on a design element intended to mitigate visual impact (e.g., a “stealth” requirement, landscape buffer, fencing, etc.), and a proposed collocation would have the effect of defeating such a condition, then the proposal should be viewed as a substantial change which may require a full zoning review.

Where there is no substantial change, however, Crown Castle maintains that, for the reasons discussed above, Section 6409(a)’s policy goal of encouraging collocation on existing infrastructure is in the best interests of all stakeholders involved. We therefore urge the Commission to adopt a rule which clarifies that Section 6409(a) applies to all existing towers and base stations, including those that are “legal, non-conforming.”

III. FURTHER STEPS ARE NECESSARY TO IMPLEMENT SECTION 332(c)(7)

Despite the Commission’s 2009 Declaratory Ruling’s Shot Clock time frames, the industry continues to face enormous delays in attempting to construct DAS, Small Cell and other infrastructure necessary to deploy broadband communications services. Crown Castle supports

PCIA's comments on this issue. Namely, Crown Castle urges the Commission to adopt a standard by which to determine an application is complete. Crown Castle further supports the adoption of a rule establishing that the Shot Clock begins to run regardless of the implementation of moratoria. Finally, the Commission should also adopt a "deemed granted" remedy in cases where localities fail to abide by the Shot Clock timeframes.

In numerous jurisdictions Crown Castle has faced significant delays in the application process for new DAS and Small Cell facility deployments. Where a locality either refused to accept permit applications or refused to deem permit applications complete Crown Castle has been unable to take advantage of the Shot Clock timeframes. In some cases moratoria have been issued by localities after Crown Castle proposed DAS and Small Cell deployments in that jurisdiction and such moratoria are sometimes extended for up to two years. In other situations, jurisdictions refuse to accept applications or fail to ever deem applications complete, instead issuing multiple data requests in an attempt to delay a determination of "completeness," thereby delaying the start of Shot Clock timeframes.

By way of example, in attempting to deploy DAS facilities in the Town of Greenburgh, New York, Crown Castle faced significant delays in the processing of its permit applications.¹⁹ In November 2009 Crown Castle approached the Town for permission to build a DAS network. After going before the Town's Antenna Review Board eight times (with each review the Town alleged new and different "deficiencies" with the permit applications) Crown Castle ultimately asked the Town to vote on the "incomplete" application. The Town denied Crown Castle's permit applications on July 25, 2012, based on the alleged failure of Crown Castle to

¹⁹ Notably the Town insisted on applying its wireless ordinance to Crown Castle's application to build DAS facilities despite the fact that the ordinance was clearly designed to apply to a macro-cell siting and many of the provisions of the ordinance were inapplicable to DAS or Small Cell facilities.

demonstrate that the facilities were “needed” under the Town’s applicable ordinance and whether the proposed facilities were of “minimal height and aesthetic intrusion” necessary to provide service.²⁰ Crown Castle filed suit in the Southern District of New York alleging, among other things, violation of 47 U.S.C. 332(c)(7)(B)(ii) for failure of the Town to act on Crown Castle’s applications in a reasonable time, and 47 U.S.C. 332(c)(7)(B)(iii) because the Town’s decision was not supported by substantial evidence. The Court found that the only equitable relief available for the 332(c)(7)(ii) claim would have been to require a written decision by the Town, which had already been provided at the time the action had been filed, dismissing the claim as moot. The Court instead found that that the Town violated Section 332(c)(7)(iii) because the Town’s denial of Crown Castle’s permits to construct DAS facilities was not “supported by substantial evidence contained in the written record.”²¹ Although the Court required Greenburgh to issue the permits for the construction of Crown Castle’s facilities, the Town’s actions resulted in nearly four years of delay and significant legal expense before the network could be constructed.²²

A. The Commission Should Adopt Application Completeness Standards

While the facts surrounding Greenburgh are exceptional, it is illustrative of a problem that Crown Castle has faced in numerous jurisdictions. Unfortunately the Shot Clock is rendered ineffective any time a state or locality delays or refuses to act on permit applications to construct facilities. Consequently, Crown Castle supports the creation of a revision to the Shot Clock,

²⁰ *Crown Castle NG E. Inc. v. Town of Greenburgh*, No. 12-CV-6157 (CS) at 36 (S.D.N.Y. June 3, 2013) (attached hereto as Exhibit “B”).

²¹ *Id.* quoting 47 U.S.C. § 332(c)(7)(iii).

²² The Town appealed the District Court’s decision. Thus a final decision on appeal was not issued by the Second Circuit until January 17, 2014. The Second Circuit affirmed the District Court’s grant of summary judgment to Crown in a Summary Order. *Crown Castle NG E. Inc. v. Town of Greenburgh*, No. 13-2921 (CV) (2nd Cir Jan 17, 2014).

adding both a rule establishing a specifically enumerated floor for determining when a permit application is complete and adopting a “deemed granted” remedy in cases where localities fail to abide by the Shot Clock.

Crown Castle supports PCIA’s proposals on this issue. Namely, if a state or locality indicates that an application is not complete, certain steps should be taken to ensure adequate notice to the applicant. Any municipal request for additional information from an applicant for a new wireless telecommunications facility should: (1) be in writing, (2) clearly delineate any information alleged to be missing, and (3) specify the particular subsection of the applicable code that requires the service provider to submit this particular information. Further, the Shot Clock should continue running if a jurisdiction asks for further information that is not specifically outlined in the zoning application’s requirements. The Shot Clock timeframes should also apply to all discretionary and ministerial approvals required by a state or locality, and timeframes may be extended by the unilateral written action request of the applicant.

B. The Commission Should Adopt a Deemed Granted Remedy Where Localities Fail to Abide by the Shot Clock

Where the state or locality fails to act under the Shot Clock, applicants must decide whether to litigate, potentially involving considerable time and expense (and creating the likelihood of generating ill will by the jurisdiction toward the applicant in the future), or continue to pursue the application with an uncertain time frame for action and outcome. And even if an applicant decides to expend the funds and risk future ill will by taking the jurisdiction to court, it is still not guaranteed a positive outcome.

Accordingly, Crown Castle encourages the Commission to revisit its decision not to apply a deemed granted rule to applications that jurisdictions fail to act on by the end of the Shot

Clock cut-off periods.²³ Adding a “deemed granted” rule is critical to ensuring that states and localities act within the prescribed timelines for *all* siting applications—not just those covered by Section 6409(a). Doing so will also reduce costly and time-consuming litigation, allowing resources to be used to fund, rather than defend, the expansion of broadband deployment. Thus, the Commission should declare by rule that when a jurisdiction fails to act within the Shot Clock time frames, the application will be deemed granted.

Indeed, the Commission’s authority to adopt such a rule implementing Section 332(c)(7) that may have the effect of overriding local or state law was squarely confirmed by the Supreme Court in *City of Arlington*. The Court held that the FCC’s determination that it had authority to implement Section 332(c)(7) was entitled deference.²⁴ The argument that the FCC has impinged on a matter of traditional local concern was found to be “faux-federalism,” since it was federal law at issue, and that federal law “explicitly supplants state authority” by requiring decisions under local law to be made within a reasonable period of time.²⁵

Consistent with that ruling, adopting a deemed granted approach to address “failure[s] to act” on siting applications within “a reasonable period of time” falls well within the Commission’s interpretive authority under Section 332(c)(7).²⁶ Moreover, under 332(c)(7)(B)(v), the Commission has authority to grant relief when petitioned by a party adversely affected by an act or failure to act by a state or locality inconsistent with

²³ See *Shot Clock Order*, 24 FCC Rcd at 14009 ¶ 39.

²⁴ *City of Arlington, Texas v. FCC*, 133 S.Ct. 1863, 1871 (2013).

²⁵ *Id.* at 1873.

²⁶ *Id.* at 1874-75 (holding courts must defer to a reasonable interpretation by the agency as long as the agency does not overstep the lines drawn by Congress and “the agency’s answer is based on a permissible construction of the statute”). As noted above, the Commission has adopted a “deemed granted” remedy in analogous circumstances. See e.g., *Cable Franchise R&O*, 22 FCC Rcd at 5103 ¶ 4, 5127-28 ¶ 54, 5132 ¶ 62, 5134-35 ¶ 68, 5139 ¶¶ 77-78.

332(c)(7)(B)(iv). PCIA and others have effectively petitioned on behalf of the impacted industries,²⁷ and the Commission therefore expressly has authority to grant the requested relief.

CONCLUSION

Crown Castle requests the Commission take the action outlined in these comments to improve policies impacting the deployment of broadband communications services. By adopting the measures recommended herein, the Commission can take another critical step toward increasing broadband deployment throughout the nation.

Respectfully submitted,

/s/ E. Blake Hawk

E. Blake Hawk
General Counsel

Monica Gambino
Vice President, Legal

Robert Millar
Associate General Counsel

Nick Limberopoulos
Counsel

Crown Castle
2000 Corporate Drive
Canonsburg, PA 15317
(510) 290-3086

February 3, 2014

²⁷ See Comments of PCIA–The Wireless Infrastructure Association and The DAS Forum, WC Docket No. 11-59, at 42-43 (Jul 18, 2011); 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, at 27-30 (July 11, 2008).