IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

MONTGOMERY COUNTY, MARYLAND, et al.,
Petitioners and Supporting Intervenors,

v.

UNITED STATES OF AMERICA, et al.,
Respondents;

CTIA - THE WIRELESS ASSOCIATION, et al.,
Intervenors.

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

BRIEF OF *AMICI CURIAE* LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, LEAGUE OF OREGON CITIES, AND SCAN NATOA, INC. IN SUPPORT OF PETITIONERS AND SUPPORTING INTERVENORS

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

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

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

No. 15-1240(L) Caption: Montgomery County, Maryland v. United States

Pursuant to FRAP 26.1 and Local Rule 26.1,

League of California Cities
(name of party/amicus)

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

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

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

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

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

Corporate entities engaged in building and leasing wireless towers and base stations; providers of commercial mobile radio and similar services; and owners of towers that could support antennas have a direct financial interest in the outcome of the proceedings either as service providers, or as lessors of structures. See lists of entities in Attachment 1.

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

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

Signature: /s/ Javan N. Rad Date: April 30, 2015

Counsel for: Amici Curiae

CERTIFICATE OF SERVICE

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I certify that on April 30, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Javan N. Rad (signature) April 30, 2015 (date)

ATTACHMENT 1 TO AMICI CURIAE'S DISCLOSURE STATEMENT

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

1. AT&T Services, Inc.
2. Cox Communications, Inc.
3. Crown Castle
4. ExteNet Systems, Inc.
5. Fibertech Networks, LLC
6. QUALCOMM Incorporated
7. Rama Communications, Inc.
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I.

INTEREST OF *AMICI CURIAE*

Amici curiae League of California Cities (the "California League"), California State Association of Counties ("CSAC"), League of Oregon Cities (the "Oregon League"), and SCAN NATOA, Inc. (collectively "*Amici*") submit this brief in support of the Petitioners and Supporting Intervenors (collectively "Petitioners"). All parties have consented to the filing of this brief under Rule 29(a) of the Federal Rules of Appellate Procedure.

The California League is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians. The California League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels

throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The Oregon League, originally founded in 1925, is an intergovernmental entity consisting of Oregon's 242 incorporated cities that was formed to be, among other things, the effective and collective voice of Oregon's cities before the legislative assembly and state and federal courts. The Oregon League has identified this case as being of significance to cities statewide.

SCAN NATOA, Inc., which is the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors, has a history spanning over 20 years representing the interests of over 300 members consisting primarily of local government telecommunications officers and advisors located in California. SCAN NATOA, Inc. has identified this case as matter of significance to its members.

II.

STATEMENT REGARDING PARTICIPATION BY PARTIES, THEIR ATTORNEYS, OR OTHER PERSONS IN FUNDING OR AUTHORING THIS BRIEF

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *Amici* certify that no counsel for a party authored this brief in whole or in part, and

that no person other than *Amici*, their members or their counsel made a monetary contribution to its preparation or submission.

III.

STATEMENT OF FACTS

Amici adopt the statement of facts in the opening brief of Petitioners in this matter, which is a challenge to the Federal Communication Commission's (the "Commission") report and order entitled *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd. 12865 (2014) (the "R&O"). *Amici* participated in the Commission's proceeding that resulted in the R&O, filing both comments and reply comments with the Commission.

IV.

THE R&O IMPERMISSIBLY INTRUDES ON LOCAL AUTHORITY

When it enacted the Telecommunications Act of 1996, Congress expressly preserved local zoning authority over wireless facility siting. *See* 47 U.S.C. § 332(c)(7); *VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 829 (7th Cir. 2003) (noting that in Section 332(c)(7), Congress struck "a delicate balance between the need for a uniform federal policy and the interests of state and local governments in continuing to regulate the siting of wireless communications

facilities"). In Section 6409(a),[1] Congress did not abandon the federal government's limited role in wireless facility siting. Congress intended Section 6409(a) to limit preemption to less-then-substantial changes to existing wireless facilities. Yet, through the R&O, the Commission would turn Section 6409(a) into an administrative mandate to locally approve unreasonably large expansions on structures that might not even support all the equipment necessary for a wireless facility.

A court may set aside an administrative action that the court finds is "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law." 5 U.S.C. § 706(2)(A). Although a deferential standard, deference to administrative agencies "does not reduce judicial review to a mere rubber stamp." *Friends of Back Bay v. U.S. Army Corps of Engineers*, 681 F.3d 581, 586–87 (4th Cir. 2012) (quoting *Ohio River Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009)).

The Court should set aside the R&O. It is, at the same time, broader and narrower than Congress ever intended. The R&O is broader in the sense that the Commission's mandate of local approval for deployments was not contemplated by Congress. And the R&O is narrower in the sense that the Commission's

[1] Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156 (Feb. 22, 2012), codified as 47 U.S.C. § 1455(a).

regulations only see one side in a conflict between policies to accelerate deployment and preserve local land-use authority. While the Commission goes to great lengths to explain how its rules accelerate wireless infrastructure deployment, it fails to cogently explain why that policy objective is a lawful basis for the federal government to run roughshod over the local zoning authority that Congress intended to preserve.

Although *Amici* agree with Petitioners that the Court should set aside the entire R&O, this brief focuses the Court's attention on three rules in particular: (1) the Commission's definition of the term "base station;" (2) the Commission's thresholds for a "substantial change;" and (3) the Commission's imposition of an unprecedented "deemed granted" remedy. The Commission's regulations should not be allowed to stand, because they give short shrift to the limitations on preemption imposed by Congress through Section 6409(a).

A. The Commission's Definition of "Base Station" is Arbitrary and Capricious

In Section 6409(a), Congress limited preemption only to "existing wireless tower[s] or base station[s]" 47 U.S.C. § 1455(a). However, the Commission's arbitrary and capricious construction of the term "existing . . . base station" turns this preservation of local authority on its head by: (1) ignoring the generally accepted wireless industry definition of the term "base station" that Congress presumably knew and adopted when it used this term of art; and (2) disregarding

Congressional intent to confine preemption to previously approved wireless facilities.[2]

1. The R&O Disregards the Accepted (and Limited) Definition of "Base Station"

The Court should find the Commission's definition of a "base station" arbitrary and capricious because it flouts the term of art Congress presumably adopted. When a statute uses a term of art from a specific technical field, the courts presume that Congress adopted "the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *Federal Aviation Administration v. Cooper*, ___ U.S. ___ 132 S.Ct. 1441, 1449 (2012) (internal quotations omitted).

For this reason, Congress did not need to include a definition of the term "base station" in Section 6409(a). Congress presumably knew and adopted the same definition that had been contemporaneously ascribed to it by the

[2] The Commission defines a "base station" as "[a] structure or equipment at a fixed location that enables Commission-licensed or authorized wireless communications between a user and a communications network" or any structure that supports any "transmission equipment" that received approval under some "[s]tate or local regulatory review process." 47 C.F.R. § 1.40001(b)(1). The Commission defines "transmission equipment" as "[e]quipment that facilitates transmission for any Commission-licensed or authorized wireless communication service, including, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply." 47 C.F.R. § 1.40001(b)(8).

Commission. In 2011, the year before Congress adopted Section 6409(a), the Commission defined "base station" to mean:

> . . . radio transceivers, antennas, coaxial cable, a regular and backup power supply, and other associated electronics. These base stations are generally placed atop a purpose-built communications tower, or on a tall building, water tower, or other structure providing sufficient height above the surrounding area.[3]

In the Commission's own prior definition, a "base station" constitutes a system greater than its component parts, and with an existence distinct from whatever structure it inhabits. Even before its 2011 definition, the Commission's regulations referring to a "base station" distinguished between the base station equipment and support structure on which it sits.[4] Only now has the Commission combined the two.

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[3] *See* In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Fifteenth Report*, 26 FCC Rcd. 9664, 9841, ¶ 308 (2011).

[4] *See, e.g.*, 47 C.F.R. § 95.25(e); 47 C.F.R. § 90.7 (defining "base station" as "[a] station at a specified site authorized to communicate with mobile stations"); 47 C.F.R. §§ 1.907, 101.3 (defining "radio station" in both sections as "[a] separate transmitter or group of transmitters under simultaneous common control, including the accessory equipment required for carrying on a radiocommunications service"); 47 C.F.R. §§ 2.1, 24.5, 27.4 (defining "base station" in all three sections as "[a] land station in the land mobile service"); 47 C.F.R. § 22.99 (defining "base transmitter" as "[a] stationary transmitter that provides radio telecommunications service to mobile and/or fixed receivers, including those associated with mobile stations" and as distinct from an "antenna" or "antenna structure"). Moreover, the distinction between the equipment and the structure also carries forward in how the Commission defines a generic "station" for communications purposes. *See, e.g.*, 47 C.F.R. § 2.1 (defining a "station" as "One or more transmitters or receivers or a

What a definition excludes can be just as important as what it includes. In the R&O, the Commission ignored the "cluster of ideas" that Congress presumably knew and adopted, and redefined a "base station" to mean not just the system, but each of its individual component parts – and not just the component parts, but the structures on which those individual parts sit. Accordingly, the Commission arbitrarily and capriciously ignored the generally accepted definition of "base station" that Congress presumably knew and accepted when it used that term of art in Section 6409(a) without a legislatively enacted definition.

2. The Definition of the Term "Existing . . . Base Station" Conflicts with Congressional Intent to Preserve Local Authority Over New Wireless Facilities Because It Could Transmute Existing Wireline Facilities Into Existing Base Stations

The Commission's radical departure from the generally accepted definition of a "base station" potentially expands the preemptive reach of Section 6409(a) beyond those structures that Congress intended. A court may find that an agency's adopted definition is arbitrary and capricious if its failure to incorporate any limiting principle renders the definition "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle*

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combination of transmitters and receivers, including the accessory equipment, necessary at one location for carrying on a radiocommunication service, or the radio astronomy service"); 47 C.F.R. § 74.401 (defining a "station" as "each remote pickup broadcast transmitter, and its associated accessory equipment necessary to the radio communication function" and a "remote pickup broadcast base station" as a "station authorized for operation at a specific location").

Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983). That is exactly what the Commission did here with its "base station" definition.

The Commission (correctly) recognized that Congress intended the term "existing . . . base station" in Section 6409(a) to limit the preemptive scope of the statute by preserving local authority "to initially determine what types of structures are appropriate for supporting wireless transmission equipment." R&O at ¶ 168. The preservation of local authority over new wireless facilities – especially on commercial buildings, utility structures and other non-tower structures – is consistent with existing federal law that generally preserves local authority "over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). As such, the Commission required that, for a base station to obtain the benefit of Section 6409(a), it must have first been "reviewed and approved under the applicable zoning or siting process." 47 C.F.R. § 1.40001(b)(1)(iii).

Despite Congress's intent to preserve local authority, the Commission's regulations could be construed to include equipment that was not necessarily approved for use as a wireless facility, because the prior local approval requirement could be construed to relate to each individual transmission equipment

component, rather than the entirety of a structure that is used as a base station. *See* 47 C.F.R. § 1.40001(b)(1).

To illustrate the conflict between the rule and its intent, if a local government had approved wired communications equipment on, for example, a wooden telephone pole, the Commission's rules could be construed to transmute that wooden pole into a wireless base station simply because it is being used to support "transmission equipment" that was "reviewed and approved under the applicable zoning or siting process."[5] 47 C.F.R. § 1.40001(b)(1)(iii). But the Commission's definition might not stop there. Taken to its logical extreme, a "base station" could potentially encompass structures merely connected to the electricity grid, because the term "transmission equipment" includes "regular and backup power suppl[ies]." 47 C.F.R. § 1.40001(b)(8).

As a practical matter, the requirement for local approval of transmission equipment sets such a low standard that the rule hardly serves its purpose. For example, many states, including California and Oregon, provide means for the authorization of telephone lines in the public rights-of-way, sometimes by deference to state agencies or local governments. *See*, *e.g.*, Cal. Pub. Util. Code

[5] As the Commission found, distributed antenna systems ("DAS") rely on fiber-optic cables backbone to transmit to connect that DAS nodes (where the antennas are located) to the hubs. See R&O at ¶ 31. These fiber-optic cables are often installed on wooden utility poles.

§ 7901;[6] Or. Rev. Stat. § 758.010. Such authority, if considered some kind of prior regulatory approval, could transform an ordinary telephone pole with coaxial or fiber-optic cable into a wireless "base station" subject to the mandatory approval provisions of the Commission's regulations.

More implausible still, the Commission's failure to confine preemption to structures approved for use as a wireless facility clashes with its refusal to adopt an industry proposal to define an "existing base station" as any structure that merely could support transmission equipment. *See* R&O at ¶ 168. Although the Commission rejected this proposal on the ground that it would preempt the type of local authority that Congress had intended to preserve, the Commission's overly broad definition of "base station" – coupled with an unreasonably low standard for "existing" – renders the Commission's rule and the rejected proposal practically indistinguishable. Accordingly, this Court should find the Commission's rule "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *See State Farm*, 463 U.S. at 43.

[6] California Public Utilities Code § 7901 has been construed to grant a telephone corporation a "franchise" to install its facilities in the public right-of-ways throughout the state. Local authority to regulate this use is limited to ensuring that such facilities do not "incommode" the use of the public right-of-way. *See Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716 (9th Cir. 2009).

3. The Commission's Application of Section 6409(a) to Distributed Antenna Systems Illustrates the Departure from Congressional Intent to Confine the Term "Base Station" to Existing Wireless Facilities

Another example of the arbitrary and capricious nature of the Commission's rulemaking is its application of Section 6409(a) to DAS networks. At the most basic level, DAS involve a "hub" that is connected via fiber-optic cables to geographically dispersed remote units with antennas and radio equipment called "nodes." *See* R&O at ¶ 31. The Commission's reference to an outdoor DAS network in its definition of a "base station," 47 C.F.R. § 1.40001(b)(1)(ii) clearly illustrates how the Commission undermined the limitations Congress intended to place on Section 6409(a).

The Commission's rules would treat each component of a DAS network as "transmission equipment" because it "facilitates transmission." 47 C.F.R. § 1.40001(b)(8). The Commission's rules would also consider each structure used by a DAS network to be a "base station." DAS networks are generally installed on existing utility poles in the public right-of-way. That means that not only the utility poles where the nodes are installed, but all of the utility poles used by a DAS provider as part of its network, are potentially "base stations" under Section 6409(a). DAS networks can consist of dozens of nodes and many miles of fiber-optic cables connecting the nodes to the DAS hubs.

Using the Commission's definition, one DAS network connected by fiber-optic cables installed on telephone poles through an urban area could turn each of those poles into "base stations." This could result in potentially hundreds of "base stations" available for mandatory modifications, even though most of those poles only have fiber-optic cables – not any antennas or radio equipment.

Under the Commission's logic, a DAS provider that has built an outdoor DAS network could add new node equipment to any pole that is part of its network – whether or not that pole has an existing antenna or radio equipment – as a "matter of right." Moreover, there is nothing to prevent a second DAS provider from adding its own node to a utility pole containing fiber-optic cables that is part of an existing DAS network.

With wireless carriers increasingly relying on DAS to expand their networks, particularly in cities, the implications of the Commission's construction of the term "base station" are readily discernible.

If a local government were to grant a single permit to install a DAS network on a handful of city blocks, the Commission's rules suggest that this approval could be bootstrapped into a blanket authorization to add dozens of additional antennas and radio equipment to existing utility poles, whether or not those poles have an existing antenna – or radio equipment. This could not have been what Congress had intended.

The Commission's overbroad definition of "base station" results in illogical treatment of DAS facilities. For this reason, the R&O is arbitrary and capricious and should be vacated.

B. Context Matters – The Commission Has Ignored Congressional Intent that a "Substantial Change" Depend on the Facility to be Modified

Congress not only limited Section 6409(a) to previously permitted wireless facilities, but further confined its preemptive effects to only those modifications that would not "substantially change the physical dimensions of such wireless tower or base station." 47 U.S.C. § 1455(a). Just as the Commission overstepped its Congressional authority in interpreting "base station," it did the same in ignoring factors Congress deemed relevant to whether a proposed modification would result in a "substantial change."

The plain text of Section 6409(a) demonstrates that Congress intended a substantial change to depend on "the physical dimensions of such existing tower or base station." 47 U.S.C. § 1455(a) (emphasis added). "[A] word is known by the company it keeps – a rule that is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486–87 (2006) (internal quotation marks omitted). The word "such" refers to a definite object – in this case, the specific tower or base station being modified – and it grounds a

"substantial change" in the context of a specific tower's or base station's location and appearance to prevent an unreasonably broad construction of the statute.

Consider the example below of a pole with a simulated 10-foot extension and six-foot width increase that, under the Commission's rules, would not be considered a "substantial change."

This photo-simulation demonstrates that a "substantial change" must be taken in context as Congress intended. The original design, with its low profile equipment mounted at roughly the height of a typical utility pole, did not occur by accident. In many local planning departments, planners work carefully with DAS providers to develop appropriate designs. In so doing, planners recognize that many DAS nodes, like the one pictured above, are installed in residential

neighborhoods. Others are installed in densely populated urban streets, which could already be cluttered with other types of street "furniture," historic districts, or aesthetically sensitive areas. To put it simply, "context matters." *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, ___ U.S. ___, 132 S.Ct. 1670, 1681 (2012).

In contrast to the plain text of Section 6409(a), the Commission improperly construed a "substantial change" to depend entirely on whether the structure to be modified qualifies as a tower or base station. *See* 47 C.F.R. § 1.40001(b)(7). The Commission simply does not care if a tower or base station is on a deserted stretch of an interstate highway or in the middle of Manhattan. A court can find a regulation arbitrary and capricious when "the agency relies upon improper factors." *State Farm*, 463 U.S. at 43. Even though Congress described the "existing tower or base station" as a relevant factor, the Commission arbitrarily and capriciously did not adequately address context.

But the Commission did not entirely ignore context. The Commission seemed to recognize the need to establish "substantial change" thresholds that account for context by establishing different thresholds for towers on private property or elsewhere.[7] For most structures, the "fixed minimum" thresholds –

[7] The Commission refers to its minimum height requirements that would constitute a "substantial change" as a "fixed minimum" in paragraph 193 of the R&O. The

approximately 20 feet taller for towers on private property and 10 feet taller for everything else – will be the applicable height threshold. For example, the fixed minimum thresholds would allow a rooftop site at a 20-foot tall building to grow 10 more feet to 30 feet, a massive 50 percent increase. Indeed, the Commission's rule could be construed to allow a wireless carrier to increase the height of a building itself by 10 feet, if such a height increase were necessary to accommodate the carrier's additional wireless transmission facilities, regardless of any local zoning laws restricting height increases.

These fixed minimums, however, are completely unresponsive to where "such existing tower or base stations" happen to be located. The Commission has ignored the fact that local governments carefully and deliberately establish development standards that conform to the intended uses within a specific zone. These zoning districts play an important part in local government planning and urban design. The Supreme Court has observed that, in broad general terms, the purpose of zoning law is "to prevent problems caused by the 'pig in the parlor instead of the barnyard.'" *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725,

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Commission adopted the "fixed minimum" thresholds by providing that, for towers other than towers in the public right of way, a "substantial change" is an increase in "the height of the tower by more than 10% or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater; for other eligible support structures, it increases the height of the structure by more than 10% or more than ten feet, whichever is greater." 47 C.F.R. § 1.40001(b)(7)(i).

732 (1995) (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)).

The Commission also erred in applying the very same thresholds to wireless facilities on streetlights that it found were appropriate for wireless facilities on skyscrapers, as both could be considered "base stations." Once again, the Commission recognized the problem by declining to hold utility and right-of-way structures to the same standard as towers despite their physical similarities – but the Commission came up with the wrong solution.

The Commission correctly recognized that "utility structures are often located in easements adjacent to vehicular and pedestrian rights-of-way where extensions are more likely to raise aesthetic, safety, and other issues." R&O at ¶ 195. It further recognized that the "heightened potential for impact from extensions" in the public rights-of-way, R&O at ¶ 193.

Yet, the Commission inexplicably determined that a 30% increase in the height of average 30-foot-tall wooden telephone pole (to 39 feet) would not be a substantial change. *See* 47 C.F.R. § 1.40001(b)(7)(i). Because Congress determined that a substantial change depends on the physical dimensions of the structure to be modified, the Commission's application of these fixed minimum thresholds to utility poles is another reason this Court should find the Commission's rules are arbitrary and capricious.

Congress was not alone in its opinion that context matters. Standards for a substantial change in several state collocation statutes demonstrate the inferiority of any fixed minimum threshold. North Carolina allows municipalities to consider subjective criteria in determining whether a modification to a wireless facility would amount to a "substantial change," even if the modification does not meet the thresholds in the statute. *See* N.C. Gen. Stat. 160A-400.51(7a) (requiring local government "to demonstrate that a mounting that does not meet the listed criteria" is still, nonetheless, a "substantial change"). Michigan allows for application of Section 6409(a) only after a wireless facility is found to be in compliance with terms of any previous zoning approval. *See* Mich. Comp. Laws § 125.3514(b). Georgia allows for streamlined processing of modification applications only if "[t]he proposed modification or collocation [does] not increase the overall height or width of the wireless support structure." Ga. Code Ann. 36-66B-4(b)(1). And New Jersey allows collocated wireless facility applications to be exempt from site plan review only if the proposed collocation would not require "variance relief." N.J. Stat. Ann. § 40:55D-46.2(a)(3). Ironically, the Commission cites some of these (flexible) statutes as support for its fixed minimum thresholds.

In the end, land use regulation is not as simple as the Commission makes it out to be. *See Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 67 (4th

Cir. 1992) (noting that, in most instances, decisions involving "local land-use controls properly rest with the community that is ultimately – and intimately – affected"). The Commission's mathematical formulae for substantial change thresholds are arbitrary and capricious because they ignore the most important (and only) factor Congress deemed relevant – context.

C. The "Deemed Granted" Remedy Intrudes Upon the Powers Reserved to the States Under the Tenth Amendment

Because the Court should vacate the R&O on the grounds discussed above, the Court need not reach the constitutional question presented by the Petitioners. *See Nw. Austin Mun. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009) (stating that courts normally "will not decide a constitutional question if there is some other ground upon which to dispose of the case"). However, assuming this Court does not otherwise vacate the R&O, it should find that the "deemed granted" remedy imposed by the Commission intrudes upon the powers reserved to the states under the Tenth Amendment.

The Supreme Court has interpreted the powers reserved to the states under the Tenth Amendment to mean that Congress: (1) may not require a state or local government to enact laws or regulations; and (2) may not command state or local officers to administer or enforce a federal regulatory program. *See Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

1. Local Governments Cannot Decline to Implement the "Deemed Granted" Remedy – It is a Command Disguised as a Choice

This Court may consider whether the Commission's regulations violate the Tenth Amendment, just as it could with an act of Congress. Federal regulations intended to induce the states to regulate in accordance with Congress's wishes exceed constitutionally limited legislative powers when the states lack any "meaningful opportunity [to] opt out." *Petersburg Cellular Partnership v. Board Supervisors of Nottoway County*, 205 F.3d 688, 700 (4th Cir. 2000) (Niemeyer, J., writing for himself in the per curiam opinion).

A meaningful chance to opt out exists only where local governments can abandon the regulatory subject matter without further participation. *See FERC v. Mississippi*, 456 U.S. 742, 764 (1982). The Supreme Court in *FERC* upheld a federal law that conditioned continued state regulation of public utilities rates on compliance with federal standards, because the laws did not require the states that deregulated the preempted subject matter to enforce federal standards, expend funds, or otherwise participate in the program at all.

In contrast, in *New York*, the Supreme Court struck down a federal statute that required states to either enact radioactive waste disposal programs or "take title" to such waste (and its liabilities), because the scheme ultimately forced the states to be responsible for radioactive waste disposal whether they acquiesced or received the involuntary transfer. *See New York*, 505 U.S. at 176–77.

Here, the plain text of Section 6409(a) ("may not deny, and shall approve") and the "deemed granted" remedy in the Commission's rule compel state and local action here – compliance is not optional. The absence of a meaningful opportunity to opt out proves the essential flaw in the Commission's rules. "A state may not decline to administer the federal program. No matter which path the State chooses, it must follow the direction of [the Commission]." *Id.* at 177.

The case at bar differs from those that did not implicate the Tenth Amendment, because the federal government had not imposed any obligation on states or local governments. *See, e.g.*, *Cellular Phone Taskforce v. F.C.C.*, 205 F.3d 82, 96 (2d Cir. 2000) (dismissing Tenth Amendment challenge to federal preemption of radiofrequency emissions regulation because "[s]tate and local governments are not required to approve or prohibit anything").

The Commission erroneously surmises that it has not "commandeered" state and local officials because Section 1.40001(c)(4) does not "require State or local authorities to review wireless siting applications." R&O at ¶ 213 n.593. The Commission misses the point. The Commission has construed Section 6409(a) to allow for and impose a "deemed granted" remedy that forces state and local governments to facilitate, approve, and ultimately take the blame for, a federal wireless infrastructure deployment program.

The fundamental defect in the "deemed granted" remedy is that it presents a "Hobson's choice" that causes local governments to act even when they choose otherwise – approve a modification or it will be deemed approved.[8] Local governments that choose to regulate the installation of wireless facilities through local zoning laws have no choice but to implement the Commission's rules to affirmatively approve Section 6409(a) modifications, even if those approvals would conflict with their local zoning laws. Declining to implement the federal program would not be an option, because the Commission's rules would deem the application granted. In other words, the "deemed granted" remedy amounts to a command disguised as a choice.

2. The "Deemed Granted" Remedy Shifts Responsibility Away from the Federal Government

While the "deemed granted" remedy might "solve" the Commission's problem of how to accelerate infrastructure deployment, it violates the Tenth Amendment by threatening a fundamental attribute of sovereignty – accountability – by permitting the avoidance of "personal responsibility." *New York*, 505 U.S. at

[8] A "Hobson's choice" is a free choice in which only one option is offered. As a person may refuse to take that option, the choice is therefore between taking the option or not; "take it or leave it." The phrase is said to have originated from Thomas Hobson (1544–1631), a livery stable owner at Cambridge, England. To rotate the use of his horses, he offered customers the choice of either taking the horse in the stall nearest the door or taking none at all. *See* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 551 (10th ed. 1997).

183. "Where state officials purport to submit to the direction of Congress in this manner, federalism is hardly being advanced." *Id*.

The Commission's efforts to foster the deployment of wireless infrastructure can only be rightly pursued through the proper channels (i.e., following the text of Section 6409(a)), and not at the expense of the Constitution:

> The result may appear "formalistic" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

Id. at 187. Stated another way, "[w]hile there may be many constitutional methods of [accelerating wireless infrastructure deployment], the method [the Commission] has chosen is not one of them." *Id.* at 188. As such, this Court should hold that the "deemed granted" remedy intrudes upon the powers reserved to the states under the Tenth Amendment.

V.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Review and vacate the R&O and the rules adopted by the Commission therein.

Respectfully submitted,

Dated: April 30, 2015

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 15-1240(L) **Caption:** Montgomery County, Maryland v. United States

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Dated: April 30, 2015

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