No. 20-71765 (L)
(consolidated with Nos. 20-72734 and 20-72749)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEAGUE OF CALIFORNIA CITIES, *ET AL.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

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

OPENING BRIEF OF INTERVENORS CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, MARIN COUNTY, CALIFORNIA, AND NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS IN SUPPORT OF PETITIONERS

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January 18, 2021

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, undersigned counsel states that the City and County of San Francisco, California, and Marin County, California, are governmental parties and are therefore exempt from Rule 26.1.

Date: January 18, 2021

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, undersigned counsel states that the National Association of Telecommunications Officers and Advisors ("NATOA") is a non-governmental corporation. It does not have a parent corporation, nor does any publicly held corporation own 10% or more of its stock.

Date: January 18, 2021

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Intervenors City and County of San Francisco, California ("San Francisco"), Marin County, California ("Marin"), and National Association of Telecommunications Officers and Advisors ("NATOA") request oral argument for the reasons set forth in Petitioners' Opening Briefs.[1]

JURISDICTIONAL STATEMENT

Intervenors adopt the jurisdictional statements set forth in Petitioners' Opening Briefs, with the following additional facts. Intervenors San Francisco and Marin (No. 20-72734) timely filed a motion to intervene on September 4, 2020, in the D.C. Circuit (ECF No. 4). That motion was subsequently transferred to the Ninth Circuit on September 14, 2020 (ECF No. 1). Intervenor NATOA (No. 20-71765) timely filed a motion to intervene on September 9, 2020, in the Ninth Circuit (ECF No. 28). On November 20, 2020, this Court granted the Commission's unopposed motion to consolidate Case Nos. 20-72734 and 20-72749 with Case No. 20-71765, and granted Intervenors' motions to intervene. Order, Nov. 20, 2020, ECF No. 34.

[1] Pet'r's Br., *City of Boston v. FCC*, No. 20-72749, ECF No. 27; Jt. Pet'r's Br., *League of Cali. Cities v. FCC*, No. 20-71765, ECF No. 47 (collectively "Petitioners' Opening Briefs").

STATUTORY AUTHORITIES

All applicable statutory and regulatory authorities appear in the addenda of Petitioners' Opening Briefs.

ISSUES PRESENTED

Intervenors adopt the Statements of Issues set forth in Petitioners' Opening Briefs.

STATEMENT OF THE CASE

Intervenors adopt the Statements of the Case set forth in Petitioners' Opening Briefs.

SUMMARY OF THE ARGUMENT

The Federal Communications Commission ("FCC" or "Commission") claims that the *Ruling*[2] under review in this case merely "interpret[s] and clarif[ies] the meaning and scope of the [Commission's] existing rules" implementing Section 6409(a) of the 2012 Spectrum Act.[3] *Ruling* ¶ 13 (1-ER-11-12). But the

[2] *In the Matter of Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250 and RM-11849, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 20-75, 35 FCC Rcd. 5977 (rel. June 10, 2020) ("*Ruling*") (Petitioners' Joint Excerpts of Record, No. 20-71765, ECF No. 46 ("ER") at 2).

[3] The Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, 232-233 ("Spectrum Act"). In this Brief, all references to "Section 6409(a)" refer to Section 6409(a) of the Spectrum Act, codified at 47 U.S.C. § 1455(a).

Ruling does far more than that. It establishes new, binding requirements on State and local governments that lack any basis in either Section 6409(a)'s language or the Commission's Section 6409(a) regulations. The *Ruling*'s interference with State and local governments' land use and zoning authority extends well beyond what Congress provided for in the statute, which reaches only those modifications to existing wireless facilities that do not result in substantial changes to those facilities. The *Ruling* also retroactively renders unenforceable conditions relating to localities' approvals of initial construction of wireless facilities, which by definition fall outside of Section 6409(a) and the Commission's authority. Finally, the *Ruling* conflicts with the plain language of the Commission's own codified regulations, which the *Ruling* claims to interpret. Intervenors San Francisco, Marin, and NATOA support the positions of Petitioners in these consolidated cases and also wish to highlight four fundamental flaws in the *Ruling*.

First. The *Ruling* limits Section 6409(a)'s "substantially change" standard to only those facility modifications that frustrate concealment elements that make a wireless facility look like something else (like a tree or a chimney), excluding numerous other concealment elements that hide a wireless facility from view (like a rooftop setback requirement or a wall or vegetation screen). There is no basis in Section 6409(a) for drawing such a distinction between extant conditions that conceal a wireless facility from view. Moreover, the Commission's own codified

regulation refers generally to *any* "concealment elements of the eligible support structure." 47 C.F.R. § 1.6100(b)(7)(v). The *Ruling*'s unreasonably narrow interpretation of "concealment elements" also creates a Commission-imposed preference for initial siting approval conditions that require applicants to incur the cost of installing camouflage equipment or materials to make a facility look like something else, while prohibiting State and local governments from enforcing other types of natural or preexisting concealment elements that would cost less. That would have the perverse effect of increasing wireless deployment costs, in direct conflict with the purpose of the statute and the Commission's own stated goals. Section 6409(a) does not empower the Commission to micromanage local siting decisions, much less to do so in such a counterproductive way.

Second. The Commission's "express evidence" requirement impermissibly imposes retroactive legal consequences on State and local governments' prior approvals of original wireless facilities. In the context of any subsequent Section 6409(a) application to modify an existing wireless facility, the *Ruling* would retroactively invalidate concealment elements or other conditions associated with the initial approval of that wireless facility absent "express evidence" in the record of the initial approval that these conditions were considered at the time. The Spectrum Act does not give the Commission any authority to promulgate retroactive rules, and the Commission's power "to promulgate legislative

regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). The Commission therefore cannot subsequently interpret its legislative rules implementing Section 6409(a) to give those rules an impermissible retroactive effect. Moreover, the Commission's failure to meaningfully contend with the retroactivity issue, or localities' serious reliance interests, independently justifies invalidating the "express evidence" requirement.

Third. The *Ruling* wrongly declares that there is no cumulative limit on the number of new equipment cabinets that can be added to an existing base station that would result in a substantial change under Section 6409(a). In violation of Section 6409(a), the *Ruling* allows for an otherwise "substantial" modification to be treated as non-substantial if accomplished piecemeal through multiple requests. It would also improperly measure the number of new equipment cabinets against the most recent *federally mandated* approval under Section 6409(a). To be consistent with Section 6409(a), the Commission's regulations require modifications to be measured against an existing facility as it was reviewed and approved under *State or local* siting authority.

Fourth. The Commission's "clarification" that the height of a new antenna is irrelevant in determining whether or not the dimensions of an existing tower or base station have "substantially changed" is incompatible with the plain meaning

of the word "substantially" in Section 6409(a). The Commission's justifications fail to engage with the statutory standard or even meaningfully acknowledge that limiting the class of modifications entitled to the statute's protection is one of the core purposes of Section 6409(a). The Commission's reliance on its 2001 *Collocation Agreement*[4]—an agreement predicated on entirely different and separate statutes that govern *federal* environmental and historic preservation review, not State and local land use zoning authority—is equally unavailing.

Each of these aspects of the *Ruling* must therefore be vacated.

ARGUMENT

I. STANDARD OF REVIEW

Under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, the Commission *Ruling* under review cannot be upheld if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or in excess of the Commission's "statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A), (C); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*Motor Vehicle*"); *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1244, 1250 (9th Cir. 2013).

[4] Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 CFR pt. 1, Appx. B (originally issued in 66 Fed. Reg. 17,554 (Apr. 2, 2001), https://www.govinfo.gov/content/pkg/FR-2001-04-02/pdf/01-7875.pdf#page=1) ("*Collocation Agreement*").

Challenges to the Commission's statutory interpretation are subject to the two-step *Chevron* framework: (1) whether "Congress has directly spoken to the precise question at issue," which, if so, "is the end of the matter"; and, if not, (2) whether the agency's answer is based on a permissible construction of the ambiguous statute. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

When interpreting its regulations, the Commission receives no deference "unless the regulation is genuinely ambiguous." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) ("*Kisor*") (citing *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). If no uncertainty exists, "[t]he regulation then just means what it means—and the court must give it effect, as the court would any law." *Id.*

II. THE COMMISSION'S CLAIMED CLARIFICATION OF THE SCOPE OF "CONCEALMENT ELEMENTS" IS CONTRARY TO SECTION 6409(a) AND ITS OWN REGULATION.

Section 6409(a) of the 2012 Spectrum Act applies to modifications of existing wireless towers or base stations that "do[] not substantially change the physical dimensions of such tower or base station." 47 U.S.C. § 1455(a)(1). An FCC regulation, adopted in the Commission's *2014 Infrastructure Order*,[5] defines

[5] *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies; Acceleration of Broadband Deployment: Expanding the*

what constitutes a "substantial change." 47 C.F.R. § 1.6100(b)(7). This definition sets forth numerical thresholds for size increases, but it also, as the Fourth Circuit explained in upholding the regulation, "incorporate[s] considerations of context in its definitions of substantiality." *Montgomery Cnty. v. FCC*, 811 F.3d 121, 131 (4th Cir. 2015) ("*Montgomery County*"). Specifically, the Commission's regulations "preserve existing concealment requirements for facilities." *Id.* (citing *2014 Infrastructure Order* ¶ 21; 47 C.F.R. § 1.40001(b)(7)(v) (now codified at 47 C.F.R. § 1.6100(b)(7)(v))). Thus, consistent with the statute, the Commission and the *Montgomery County* court have previously recognized that what makes a change "substantial[]" depends not only on the numerically-defined change in a facility's size, but also on the relationship of that size change to the surrounding environment.

In the *Ruling*, however, the Commission largely writes considerations of context out of the "substantial change" definition, contrary to Section 6409(a) and in conflict with the Commission's *2014 Infrastructure Order* and the basis on which the *Montgomery County* court upheld that definition. The codified regulation refers generally to any "concealment elements of the eligible support

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Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting; 2012 Biennial Review of Telecommunications Regulations, WT Docket No. 13-238, WT-13-32 and WC-11-59, Report and Order, FCC 14-153, 29 FCC RCD 12865 (rel. Oct. 21, 2014) ("*2014 Infrastructure Order*").

structure." 47 C.F.R. § 1.6100(b)(7)(v). Yet the Commission now declares that the *only* means of concealing facilities that Subsection 1.6100(b)(7) preserves are those "elements of a stealth-designed facility intended to make the facility look like something other than a wireless tower or base station." *Ruling* ¶ 34 (1-ER-21). According to the Commission, preserved concealment elements do not include attributes "such as a specific location on a rooftop site or placement behind a tree line or fence" (*id.* ¶ 35 (1-ER-21-22))—even though these elements undeniably "conceal" a facility under any ordinary understanding of the word. The *Ruling*'s contrary conclusion should be vacated for at least three reasons.

First, there is no basis in the statute for limiting the "substantially change" standard to only those facility modifications that frustrate elements that make the facility look like something else, as opposed to modifications that frustrate elements that conceal the existing facility from view. State and local governments have long employed "a range of tools to conceal wireless towers, including height limits and set backs." NATOA, June 2, 2020 *Ex Parte* Letter at 3 (2-ER-116). For instance, San Francisco, like other localities, requires rooftop concealment elements that include a required setback of a facility from the edge of a building's roof, which can render the facility invisible from the sidewalk below.
San Francisco, Reply Comments at 3 (2-ER-236); NATOA, Comments at 9 (2-ER-264). Other localities prohibit towers from exceeding the height of the surrounding

tree line or require them not to be visible above other existing natural or manmade features. NATOA, Comments at 8-9 (2-ER-267-68). These are all legitimate and well-recognized tools for concealing wireless facilities. A proposed facility modification that would defeat these means of concealing a facility from view is every bit as "substantial" as a change that would defeat a design requirement intended to make a facility look like something else.

The Supreme Court has long recognized that State and local governments have the authority to impose land use, zoning, and other aesthetic requirements. *See, e.g. T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293, 300 (2015) ("The [Telecommunications] Act generally preserves 'the traditional authority of state and local governments to regulate the location, construction, and modification' of wireless communications facilities like cell phone towers, but imposes 'specific limitations' on that authority.") (citing *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005)); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 744 (1995) ("It is obvious that land use—the subject of petitioner's zoning code—is an area traditionally regulated by the States rather than by Congress, and that land use regulation is one of the historic powers of the States. . . . '[Z]oning laws and their provisions . . . are peculiarly within the province of state and local legislative authorities.'") (quoting *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975)); *accord Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) ("[T]he authority of state and

local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).”). Section 6409(a)’s “substantially change” standard evinces no congressional intent to alter or micromanage how State and local governments address the visual impact of wireless towers and base stations. *See Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543 (2002) (“When ‘Congress intends to alter the “usual constitutional balance between the States and the Federal Government,” it must make its intention to do so “unmistakably clear in the language of the statute.”’”) (quoting *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242, *reh’g denied*, 473 U.S. 926 (1985))).

Yet the *Ruling* would create a federally-imposed preference for local siting approval conditions that require a facility to look like something else (like a steeple or tree), while prohibiting State and local governments from enforcing other types of local siting approval conditions that similarly conceal a facility from view (such as rooftop setbacks or pre-existing tree or vegetation screening at the site). If the *Ruling*’s “look like something else” standard for concealment elements were allowed to stand, local governments would no longer be able to rely on existing environmental features like tree lines or rooftop setback requirements—which impose minimal, if any, incremental cost on the applicant—to minimize the visual

impact of new deployments of wireless facilities. Instead, the Commission's action would require localities to invariably impose more expensive camouflage design requirements on all original wireless facilities applications, as these would be the only form of permissible "concealment elements" that could be preserved in the event of future Section 6409(a) modifications. The Commission's approach not only interferes with State and local government siting authority beyond what Section 6409(a) authorizes; it also creates a perverse incentive to impose more expensive concealment element requirements on initial wireless facility applications that would increase the cost of wireless facility deployment.

Second, the *Ruling* is inconsistent with the plain meaning of "concealment" contained in the text of Subsection 1.6100(b)(7)(v). Unless a regulation is genuinely ambiguous, it "just means what it means—and the court must give it effect, as the court would any law." *Kisor* at 2415. The term "concealment" is not a technical term with which the Commission has any particular expertise. In fact, State and local governments—*not* the Commission—have the exclusive authority and expertise, based on their familiarity with the unique sites, features, and structures within their jurisdictions, to fashion concealment element requirements, be they setback requirements, natural or artificial screening, or camouflage material, that will most effectively minimize the visual impact of wireless facilities at the least cost.

Nor is the term ambiguous. In addressing the meaning of "conceals" in the context of obstruction of justice under 18 U.S.C. § 1519, this Court explained that:

> "Conceal" is not a term of art, and it is unambiguous, so we are obligated to give the term its plain meaning. . . . "Conceal" means "to prevent disclosure or recognition of; avoid revelation of; refrain from revealing recognition of; draw attention from; *treat so as to be unnoticed; to place out of sight; withdraw from being observed; shield from vision or notice.*"

United States v. Katakis, 800 F.3d 1017, 1028 (9th Cir. 2015) (emphasis added) (quoting Webster's Third New International Dictionary (1993)) (other citations omitted).

The meaning of "concealment" is equally plain here. The stealth design requirements protected under the *Ruling*—making a facility look like something else (such as a tree or a steeple)—are not the only kinds of "elements" that can place existing facilities "out of sight" or "shield" them "from vision or notice." Existing tree lines, other natural geographic features, and setbacks are also relied on by local authorities to conceal wireless facilities. These means of concealing a facility from view are every bit as much of a "concealment element" as facility design requirements that make a facility look like something else. They therefore are, under any plain reading, "concealment elements." The *Ruling* provides no rational explanation for concluding otherwise, and its ruling on this issue must therefore be vacated.

Third, the Commission's effort to sidestep local governments' concerns about the *Ruling*'s narrowing of what constitutes a "concealment element"—its claim that "[o]ur rules separately address conditions to minimize the visual impact of non-stealth facilities under section 1.6100(b)(7)(vi)," *Ruling* ¶ 35 (1-ER-21-22)—fails. On its face, Subsection 1.6100(b)(7)(vi) does not specifically address conditions to minimize the visual impact of non-stealth facilities, and the Commission's regulation draws no distinction between so-called stealth and non-stealth facilities. Subsection 1.6100(b)(7)(vi) applies to "conditions associated with the siting approval," 47 C.F.R. § 1.6100(b)(7)(vi), which the *2014 Infrastructure Order* explains includes conditions such as "fencing, access to the site, [and] drainage." *2014 Infrastructure Order* ¶ 200. But elements that minimize, or conceal, the visual impact of a facility fall squarely under Subsection 1.6100(b)(7)(v)'s specific provision on concealment elements. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007) ("[N]ormally the specific governs the general.") (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992); *Simpson v. United States*, 435 U.S. 6, 15 (1978)).

Moreover, Subsection 1.6100(b)(7)(vi) "does not apply to any modification that is non-compliant only in a manner that would not exceed the thresholds identified in [Subsections] (b)(7)(i) through (iv)." 47 U.S.C. § 1.6100(b)(7)(vi). Unlike Subsection 1.6100(b)(7)(v), which explicitly addresses concealment

elements, Subsection 1.6100(b)(7)(vi) fails to recognize that height increases that otherwise comply with the FCC's regulations governing height increases may nevertheless result in substantial changes in certain contexts—specifically, when they would defeat setback requirements or preexisting screening elements that conceal facilities. Indeed, in the *Ruling* the Commission admits that Subsection 1.6100(b)(7)(vi) would *not* apply to a condition that a tower's height remain lower than the surrounding tree line. *Ruling* ¶ 44 (1-ER-26-27). It is arbitrary and capricious—and disingenuous—for the Commission to claim that "[o]ur rules separately address conditions to minimize the visual impact of non-stealth facilities under section 1.6100(b)(7)(vi)," *Ruling* ¶ 35 (1-ER-22), to support its narrow interpretation of "concealment elements" under Subsection 1.6100(b)(7)(v), when in fact Subsection 1.6100(b)(7)(vi) does no such thing.

III. THE COMMISSION'S "EXPRESS EVIDENCE" REQUIREMENT IS CONTRARY TO LAW.

A. In promulgating the "express evidence" requirement, the Commission exceeded its authority under the Spectrum Act by unlawfully engaging in retroactive rulemaking.

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("*Bowen*"). Though Congress has the power to authorize agencies to promulgate retroactive rules, the retroactive

application of statutes and administrative rules is "not favored in the law." *Id.* Accordingly, "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Id.* (citing *Brimstone R. & Canal Co. v. United States*, 276 U.S. 104, 122 (1928)).

At the outset, the Commission cannot circumvent the limits on its authority to promulgate retroactive rules by insisting that its "determinations in this *Declaratory Ruling* are intended solely to interpret and clarify the meaning and scope of the existing rules set forth in the *2014 Infrastructure Order*." *Ruling* ¶ 13 (1-ER-11). The retroactivity issue here is not whether the Commission can apply its new interpretation to actions that took place prior to the *Ruling*. It is whether the Commission's regulations implementing Section 6409(a), as those regulations have now been newly "interpreted" in the *Ruling*, can attach new legal consequences to actions that local authorities took prior to the *2014 Infrastructure Order* and, indeed, prior to the 2012 enactment of Section 6409(a). *See Landgraf v. Usi Film Prods.*, 511 U.S. 244, 270 (1994) ("*Landgraf*"). As shown below, the Spectrum Act did not give the Commission the authority to promulgate retroactive rules, and the Commission therefore cannot subsequently interpret its legislative rules implementing Section 6409(a) to give those rules an impermissible retroactive effect.

Moreover, the *Ruling* leaves no doubt that the "express evidence" requirement is not merely a non-binding interpretation of existing regulations. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) ("Interpretive rules . . . do not have the force and effect of law and are not accorded that weight in the adjudicatory process"). The *Ruling* flatly commands that "localities *cannot* merely assert that a detail or feature of the facility was a condition of the siting approval; there *must* be express evidence . . . *at the time of [the original facility] approval* . . . in order for non-compliance with the condition to disqualify a modification from being an eligible facilities request." *Ruling* ¶ 42 (1-ER-25) (emphasis added) (footnote omitted). Because the *Ruling*'s "express evidence" requirement "commands, it requires, it orders, it dictates," *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000), the Court must treat that requirement as the legislative rule it is in practice. *Hemp Indus. Ass'n v. Drug Enf't. Admin.*, 333 F.3d 1082, 1087 (9th Cir. 2003) ("Legislative rules . . . create rights [or] impose obligations . . . .") (citing *Yesler Terrace Cmty. Council v. Cisnero*, 37 F.3d 442, 449 (9th Cir. 1994)); *Gunderson v. Hood*, 268 F.3d 1149, 1154 (9th Cir. 2001) (footnote omitted) ("If a rule is inconsistent with or amends an existing legislative rule, then it cannot be interpretive.").

Here, the Commission lacks the authority to issue retroactive rules implementing Section 6409(a). Nothing in the statute authorizes the Commission

to retroactively alter the processes that localities have followed for years to document conditions associated with their original siting approvals, or to engage in any retroactive rulemaking. Indeed, the statute does not reflect any intent by Congress to interfere at all with State and local authority with respect to wireless siting approvals that are not subject to Section 6409(a)'s "may not deny" mandate. 47 U.S.C. § 1455(a)(1). To the contrary, by its terms, Section 6409(a) applies only to modifications or replacements of preexisting wireless facilities; it does not apply to, much less place "express evidence" or any other restrictions on, a locality's initial approval of a facility that a subsequent Section 6409(a) application proposes to modify or replace. As a result, the Commission lacks the authority to promulgate rules that retroactively impose legal consequences on such prior initial approval of a wireless facility by a State or local government. *Bowen* at 208. The Commission likewise lacks the authority to newly declare that legislative rules it previously promulgated apply retroactively.

The *Ruling*'s "express evidence" requirement is an impermissible retroactive rule. A statute or administrative rule is retroactive when it "'attaches new disabilit[ies] in respect to transactions or considerations already past.'" *Vartelas v. Holder*, 566 U.S. 257, 266 (2012) (quoting *Society for Propagation of Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.N.H. 1814)). To determine retroactivity, "the court must ask whether the new provision attaches new legal consequences to

events completed before its enactment. . . . [F]amiliar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance [in evaluating the retroactive effects of a rule].” *Landgraf* at 269-270.

The “express evidence” requirement is unquestionably retroactive. It attaches new consequences to prior, completed State and local siting approvals and disrupts settled reliance interests in the local land use review and approval process. It would require that, at the time of a locality’s original approval of an existing facility, there must have been express evidence of (1) concealment elements under 47 C.F.R. § 1.6100(b)(7)(v), and (2) conditions associated with siting approvals under 47 C.F.R. § 1.6100(b)(7)(vi). *Ruling* ¶¶ 38, 42 (1-ER-23, 25-26). Under the *Ruling*, if the record of a past siting approval did not include this express evidence, a subsequent modification request that defeats a concealment element that existed at the time of the initial approval or fails to comply with a siting condition would still qualify for Section 6409(a)’s “shall approve” and “may not deny” treatment. *Id.*

As a result, the *Ruling* would deprive a locality of its right to enforce, or rely on, extant conditions at the time of its original approval of a wireless facility, conditions that may have been critical to the approval’s issuance in the first place, and even though the approval was “over and done well before” the *Ruling*’s “express evidence” requirement or even the Spectrum Act’s enactment. *Vartelas* at

267. This plainly constitutes a "new disability" imposed on past conduct, rendering the "express evidence" requirement a retroactive rule. *Id.* at 267-68. *See also Martin v. Hadix*, 527 U.S. 343, 358 (1998).

An example from the record illustrates the point. Prior to the *Ruling*, a locality may have approved an application for a wireless facility that the applicant proposed to paint a certain color to match the surrounding environment. The locality relied on that, and other concealment features, in granting the application, but there would have been no reason for the locality to expressly identify the purpose of those features at that time, much less to anticipate that those features must make the facility "look like something else" rather than simply concealing it from view. *See* NATOA, Comments at 9-10 (2-ER-268-69). The *Ruling* would now require "express evidence in the record to demonstrate that a locality considered in its approval that a stealth design for a telecommunications facility would look like something else"; otherwise those concealment elements would not be preserved under 47 C.F.R. § 1.6100(b)(7)(v). *Ruling* ¶ 38 (1-ER-23); *see also id.* ¶ 42 (1-ER-25-26) (imposing the same retroactive requirement for conditions associated with siting approval under 47 C.F.R. § 1.6100(b)(7)(vi)).

The *Ruling* responds to the argument that the "express evidence" requirement constitutes retroactive rulemaking (and thus exceeds the Commission's statutory authority) with the claim that the "express evidence"

requirement is merely a "clarification" restating the "basic principle that applicants should have clear notice of what is required by a condition and how long the requirement lasts." *Ruling* ¶ 42 n.123 (1-ER-25). But this claim is unavailing.

First, the Commission's "clarification" is inconsistent with Section 6409(a) and the Commission's *2014 Infrastructure Order*. At no point did either Congress or the Commission indicate that localities needed to comply with an "express evidence" requirement—or any other federal procedural requirement, for that matter—with respect to concealment elements or conditions relating to their approvals of applications for initial construction of a wireless facility (which, by definition, fall outside of Section 6409(a)).[6] To the contrary, the Commission itself acknowledged in its *2014 Infrastructure Order* that one of the reasons behind its approach in interpreting Section 6409(a) and, correspondingly, promulgating Subsection 1.6100(b)(7)(vi), was to "properly preserve[] municipal authority to determine which structures are appropriate for wireless use and under what conditions." *2014 Infrastructure Order* ¶ 200.

[6] To be sure, 47 U.S.C. § 332(c)(7)(B)(iii) provides that "[a]ny 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." (emphasis added.) But the *Ruling* seeks to impose a new requirement on prior *approvals*, not denials, of initial, non-Section 6409(a) wireless facility applications.

Second, the Commission wrongly claims that the "express evidence" requirement merely makes clear to localities their obligation to "demonstrate that the applicant was on notice that noncompliance with the condition could result in disqualification." *Ruling* ¶ 42 n.122 (1-ER-25). As an initial matter, why an applicant would need any additional such "notice," beyond common sense, to know that noncompliance with a condition *could* result in disqualification, the *Ruling* does not say. But in any event, the *Ruling* does much more than that; it dictates—after the fact—specifically how a locality must have demonstrated that notice in its prior approval of a non-Section 6409(a) wireless facility application. That unquestionably imposes a new retroactive requirement on localities.

In fact, the text of Subsection 1.6100(b)(7)(vi) does not address notice at all, appropriately leaving it to localities to determine how they will document conditions of approval and notify applicants of what is required. The "express evidence" requirement substantively alters this dynamic, actively requiring not just that localities give applicants notice of the conditions associated with approval, but that localities include express evidence in the record of concealment elements or other conditions associated with approval as a prerequisite to having these conditions enforced. The Spectrum Act does not grant the Commission such sweeping authority to dictate the terms of State or local governments' prior approvals of non-Section 6409(a) applications, nor does it grant the Commission

the authority to attach new legal consequences to past non-Section 6409(a) siting approvals based on the manner in which those approvals were granted.

B. Localities that included or relied on concealment elements and other then-existing conditions associated with their initial siting approvals did so in reasonable reliance on the statute and Commission rules in effect at the time.

The Commission's lack of authority to promulgate a retroactive rule in and of itself is enough to invalidate the "express evidence" requirement. However, the fact that the requirement would unreasonably disrupt settled reliance interests if implemented would independently justify its invalidation.

While the presumption against retroactivity "does not require a showing of detrimental reliance, . . . reasonable reliance has been noted among the 'familiar considerations' animating the presumption." *Vartelas* at 273-274 (citing *Landgraf* at 270) (internal citation omitted). The principle that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly" requires that parties' reasonable, "settled expectations . . . not be lightly disrupted." *Landgraf* at 265 (footnote omitted). To that end, the Commission cannot "apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests." *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 60 n.12 (1984) (internal citations omitted).

"[R]eliance on the state of the law at the time the conduct took place" is inherently reasonable. *Republic of Austria v. Altmann*, 541 U.S. 677, 715 (2004) (Breyer, J., concurring). *See also Martin v. Hadix*, 527 U.S. 343, 358-60 (1998). Moreover, the likelier it is that a party relied on "prior law . . . [the stronger] the case for reading a newly enacted law prospectively." *Vartelas* at 274 (citing *Olatunji v. Ashcroft*, 387 F.3d 383, 393 (4th Cir. 2004)).

Here, localities that included concealment elements and other conditions, or relied on extant concealment elements or conditions, in their wireless siting approvals reasonably relied on the legal requirements in effect at the time of approval, whether those were applicable State and local law requirements (before the Spectrum Act was enacted) or Spectrum Act requirements. Before the Spectrum Act, there was no reason for State and local governments to have included express evidence in their siting approvals, unless State or local law required it. But even after the Spectrum Act was enacted, localities that included or relied on concealment elements and other conditions in their non-Section 6409(a) siting approvals were not on notice that express evidence of these elements was required. Instead, they reasonably relied on the express language of Section 6409(a) and the Commission rules in effect prior to the *Ruling*. Those rules applied (and still apply) to towers and base stations that have been "reviewed and approved under the applicable zoning or siting process," 47 C.F.R. § 1.6100(b)(5), a standard

that gives every indication that a local government's "applicable" process is all that is required to establish the baseline from which modifications may occur.

Similarly, there was no way for localities to know that their conditions of approval would be ignored—"mak[ing] worthless substantial past investment incurred in reliance upon the prior rule"—if they did not meet requirements that, at the time of approval, did not exist. *Bowen* at 220 (Scalia J., concurring). To claim that a locality's original approval of a wireless facility that was largely invisible because it was to be located behind a tree line, or because it satisfied a rooftop setback requirement, did not rely on concealment elements blinks reality and holds localities to an intolerable standard of clairvoyance.

Even if the Court were to find that the "express evidence" requirement is a clarification of an existing rule, rather than a new, retroactive rule, courts cannot "defer to a new interpretation, whether or not introduced in litigation, that creates 'unfair surprise' to regulated parties." *Kisor* at 2417-18 (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007)). Agency interpretations that "impose[] retroactive liability on parties for longstanding conduct that the agency had never before addressed" plainly "'unfair[ly] surprise'" affected parties. *Kisor* at 2418 (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155-56 (2012); quoting *Long Island* at 170). Having unfairly surprised localities with the "express evidence" requirement, the Commission cannot be permitted to disrupt a

locality's serious reliance interests and deprive it of its right to enforce concealment elements or other conditions that were present at the time that the initial facility application was approved.

C. The Commission's failure to address the retroactive effects of the **Ruling** *was arbitrary and capricious.*

Agency action is rendered arbitrary and capricious "if the agency has . . . entirely failed to consider an important aspect of the problem," *Motor Vehicle* at 43, or has otherwise "failed to consider relevant factors," *Am. Mining Cong. v. U.S. EPA*, 965 F.2d 759, 772 (9th Cir. 1992) ("*American Mining*") (internal citations omitted). Here, the Commission has done just that by failing to consider that the "express evidence" requirement retroactively renders unenforceable extant conditions on which many localities relied in granting prior wireless siting approvals. The Commission's failure to meaningfully address this issue is particularly egregious, as the permissibility of the requirement's retroactive effects is plainly a relevant and important factor—in fact, it is critical to the requirement's validity. *American Mining* at 772; *Motor Vehicle* at 43.

Notably, several local government commenters raised concerns that the "express evidence" requirement would have impermissible retroactive effects on State and local governments. *See*, *e.g.* NATOA, Comments at 9 (2-ER-268); NATOA, June 2, 2020 *Ex Parte* Letter at 4 (2-ER-117); Lakewood, *Ex Parte* Letter

at 2 (2-ER-167); Greenbelt, *Ex Parte* Letter at 2 (2-ER-164). Yet the Commission's response to these concerns dodges the issue of retroactivity.

According to the Commission, commenters' arguments were unpersuasive because the "express evidence" requirement "does not mean that a concealment element must have been explicitly articulated by the locality as a condition or requirement of a prior approval"; it requires only that "there . . . be express evidence in the record to demonstrate that a locality considered in its approval that a stealth design for a telecommunications facility would look like something else, such as a pine tree, flag pole, or chimney." *Ruling* ¶ 38 (1-ER-23). But that is no response to the issue of the *Ruling*'s retroactive effect. Whether the requirement requires "explicit articulation" or "express evidence," it affects all localities whose past siting approvals do not meet the Commission's new standard. Again, commenters' concern was that the "express evidence" requirement might have unlawful retroactive effects on State and local governments. Neither the Commission's purpose in promulgating the requirement, nor the difference between an "explicit articulation" requirement and an "express evidence" requirement, is responsive to that concern.

Between the Commission's general failure to address the retroactive effects of the "express evidence" requirement and its failure to meaningfully respond to commenters' concerns about those retroactive effects, the Commission's

promulgation of the requirement was clearly arbitrary, capricious, and unlawful, and therefore must be vacated.

IV. THE COMMISSION'S DECLARATION THAT THERE IS NO CUMULATIVE LIMIT ON HOW MANY NEW EQUIPMENT CABINETS CONSTITUTES A SUBSTANTIAL CHANGE CONFLICTS WITH THE STATUTE AND THE CODIFIED REGULATION.

Subsection 1.6100(b)(7)(iii) of the Commission's regulations provides that a modification "substantially changes" an existing base station if "it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets." 47 C.F.R. § 1.6100(b)(7)(iii). In the *Ruling*, the Commission declared that the rule's phrase, "not to exceed four cabinets," does not establish a cumulative limit on the number of new equipment cabinets that can be added to an existing base station without constituting a substantial change within the meaning of Section 6409(a). *Ruling* ¶ 20 (1-ER-15). According to the Commission, the "not to exceed four" limit applies only to an individual request, thereby allowing providers to make repeated additions of four new equipment cabinets to the same facility, all of which would be entitled to the benefits of Section 6409(a). This declaration is contrary to the statute's standard regarding substantial changes to existing facilities, as well as the plain meaning of the Commission's regulation.

Section 6409(a) distinguishes between (1) modifications that make substantial changes to existing facilities, and (2) those that "do[] not substantially change the physical dimensions of [an existing] tower or base station." 47 U.S.C. § 1455(a)(1). The former are subject to local land use and zoning authority, whereas the latter are granted "by operation of federal law" pursuant to Section 6409(a). *Montgomery County* at 129. The statute requires modifications to be measured against the *existing* tower or base station, and the Commission has defined "the term 'existing' [to] require[] that wireless towers or base stations have been reviewed and approved under the applicable *local* zoning or siting process or . . . another form of affirmative *State or local* approval." *2014 Infrastructure Order* ¶ 174 (emphasis added); *accord* 47 C.F.R. § 1.6100(b)(5) (codifying this definition).

The requirement that modifications be measured against facilities that have been reviewed and approved under the applicable State or local government process is a critical touchstone. It defines the scope of Section 6409(a) and ensures that the statute applies only to non-substantial modifications to facilities that have previously been found to comply with local land use requirements. *See 2014 Infrastructure Order* ¶ 174 (noting "the purposes of Section 6409(a) to facilitate deployments that are unlikely to conflict with local land use policies and preserve State and local authority to review proposals that may have impacts" and

"congressional intent that deployments subject to Section 6409(a) will not pose a threat of harm to local land use values").

The *Ruling* violates this core purpose of the statute. It would allow for an otherwise "substantial" modification to be treated as non-substantial if accomplished piecemeal through multiple requests. This approach would measure the number of new equipment cabinets against the most recent *federally mandated* approval under Section 6409(a), not against the existing facility as it had been reviewed and approved under State or local siting authority. That approach cannot be squared with the clear scope and purpose of the statute.

Indeed, the *2014 Infrastructure Order* correctly recognized that Section 6409(a)'s "substantially change" standard is a limit on cumulative changes. In the context of height increases, the *2014 Infrastructure Order* states that "our substantial change criteria . . . should be applied *as limits on cumulative changes*; otherwise, a series of permissible small changes could result in an overall change that significantly exceeds our adopted standards." *2014 Infrastructure Order* ¶ 196 (emphasis added) (footnote omitted). Accordingly, whether a modification is substantial "must be determined by measuring the change in height from the dimensions of the 'tower or base station' as originally approved or as of the most recent [approved] modification that received local zoning or similar regulatory approval prior to the passage of the Spectrum Act, whichever is greater." *Id.*

(emphasis added). The Commission confirmed this approach in the *Ruling* (¶ 28) (1-ER-16).

That same reasoning applies with equal force to modifications that increase the number of equipment cabinets. Without a cumulative limit, a series of small additions of new equipment cabinets could result in an overall substantial change to the physical dimensions of an existing base station as that facility was approved by a State or local government. For instance, if the standard number of new equipment cabinets for a specific technology is three, it may not be a substantial change for a provider to add three new cabinets in total to the original site. But it would be a substantial change cumulatively to add twelve new cabinets over the course of four separate three-cabinet additions, thereby quadrupling the standard number of new cabinets.

The *Ruling* fails to address this conflict with the statute. Instead, the Commission states that "[w]e disagree that this clarification permits an unlimited number of cabinets on a structure," citing Subsection 1.6100(b)(7)(iii)'s limit regarding "'the standard number of new equipment cabinets for the technology involved.'" *Ruling* ¶ 31 (1-ER-20). But the Commission cannot plausibly interpret the regulation's "standard number" limit as distinct from and unrelated to its "not to exceed four cabinets" limit. The phase "not to exceed four cabinets" qualifies the otherwise undefined "standard number of new equipment cabinets for the

technology involved." 47 C.F.R. § 1.6100(b)(7)(iii). If the "standard number of new equipment cabinets" prevents incremental additions of an unlimited number of cabinets, as the Commission admits, then so too must its qualifier "not to exceed four cabinets."

If the "standard number" limit were instead unhinged from the "not to exceed four cabinets" limit, then the only restriction on the number of new cabinets that could be added would be the number of new cabinets that could physically be squeezed into an existing base station site, regardless of their size. The Commission does not, and cannot, rationally explain how such modifications could *in all cases* result in no substantial change under Section 6409(a).

The Commission is equally wrong to claim that the text of Subsection 1.6100(b)(7)(iii) precludes a cumulative limit not to exceed four cabinets. *See Ruling* ¶ 30 (1-ER-19). Although "the word 'it' in the rule refers to a 'modification,'" *id.*, the Commission ignores that the rule, in full, refers to "[a] modification . . . *of an eligible support structure*," 47 U.S.C. § 1.6100(b)(7) (emphasis added). The regulatory definition of "eligible support structure," in turn, requires the tower or base station to be "existing," and the Commission has defined "existing" as requiring the tower or base station to "ha[ve] been reviewed and approved *under the applicable zoning or siting process, or under another State or local regulatory review process*." 47 C.F.R. § 1.600(b)(1)(iii), (b)(5) (emphasis

added). Any additional cabinets beyond the first four would therefore not be to an "existing" tower or base station. Thus, the Commission's own regulation precludes the measuring of substantial changes against a facility as modified by one or more previous modifications only made under Section 6409(a)'s *federal* process.

V. THE COMMISSION'S "CLARIFICATION" THAT ANTENNA HEIGHT IS IRRELEVANT TO SECTION 6409(a)'S "SUBSTANTIALLY CHANGE" STANDARD IS AT ODDS WITH THE STATUTE.

The Commission ruled that, when applying Subsection 1.6100(b)(7)(i) of its rules, "the height of the new antenna itself should not be included when calculating the allowable height increase." *Ruling* ¶ 25 (1-ER-16-17). The Commission's conclusion cannot be squared with Section 6409(a)'s plain language regarding substantial changes to the physical dimensions of an existing tower or base station,[7] and the Commission's reliance on the *Collocation Agreement* to support its contrary conclusion is misplaced.

A. The Commission's "clarification" of Subsection 1.6100(b)(7)(i) is incompatible with the plain language of Section 6409(a)'s "substantially change" standard.

Just as the separation between antennas affects the extent to which a modification changes an existing facility's physical dimensions (even measured as the Commission suggests), so too does the height of the new antenna. The statutory

[7] The definition of "base station" includes "antennas." *See* 47 C.F.R. § 1.6100(b)(1)(ii).

phrase, "substantially change" an existing facility's "physical dimensions," cannot plausibly be interpreted to allow unlimited increases in antenna height (and, ultimately, a facility's overall height). A "substantial" change is one that is "significant," "considerable," or "large." *See, e.g.*, *Pierce v. Underwood*, 487 U.S. 552, 564 (1988) ("The word 'substantial' . . . can mean '[c]onsiderable in amount, value, or the like; large'"), citing *Substantial*, Webster's New International Dictionary 2514 (2d ed. 1945); *see also Substantial*, *thelawdictionary.org*, https://thelawdictionary.org/substantial/ (last visited Jan. 11, 2021) (defining "substantial" as "being significant or large"). Under Section 6409(a), then, changes in height that are "significant," "considerable," or "large" are outside the range of facility height increases that are entitled to the benefits of that provision. The Commission's conclusion—that the height of a new antenna is irrelevant in determining whether or not there has been a substantial change to the physical dimensions of an existing tower or base station (*Ruling* ¶ 25 (1-ER-16-17))—is incompatible with both the statutory standard and the plain meaning of the word "substantial."

Moreover, the *Ruling*'s antenna height clarification is internally inconsistent. The *Ruling* implicitly recognizes that antenna heights are relevant to the physical dimensions of an existing facility; it would measure the twenty-foot distance from the top of the highest existing antenna. *Ruling* ¶ 25 (1-ER-16-17). The Commission

offers no explanation for why the height of an existing antenna is relevant to physical dimensions, but the height of new antennas is not. Nor does it explain why the top of an antenna is the measuring stick of substantial change in one instance, but the bottom of an antenna is the measuring stick in another.

Rather than engage with the statutory standard or its current rules, the Commission justified its antenna height "clarification" largely on the ground that any smaller increase in permissible antenna size "could limit the number of proposed height increases that would qualify for section 6409(a) treatment." *Ruling* ¶ 25 (1-ER-16-17). That is no doubt true, but the truism is irrelevant. After all, construing Section 6409(a) to permit 300-foot increases in height would also no doubt expand the number of proposed height increases that would qualify for Section 6409(a) treatment. Conversely, limiting the cumulative increases in height from modifications—as the Commission in fact did in the *2014 Infrastructure Order*—inherently restricts the number of proposed height increases eligible for Section 6409(a) treatment. *2014 Infrastructure Order* ¶ 196; *Ruling* ¶ 27 (1-ER-18). But the statutory standard set forth in Section 6409(a) is whether the proposed modification "substantially change[s]" the physical dimensions of an existing facility—*not* whether the interpretation of Section 6409(a) results in more, or fewer, applications qualifying for Section 6409(a) treatment. The Commission's application of Subsection 1.6100(b)(7)(i) must be consistent with the underlying

statute; the Commission's policy preference to minimize the number of facility size changes that are "substantial" does not entitle it to rewrite the statute's language.

Nor can the Commission's open-ended antenna height expansion be justified on the ground that *one* of the general purposes of Section 6409(a) is to afford wireless providers with streamlined treatment of their State and local applications to make non-substantial changes to existing wireless facilities. As the Supreme Court has repeatedly recognized, statutes are the "product of multiple and somewhat inconsistent purposes that led to certain compromises." *R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring), *reh'g denied*, 450 U.S. 960 (1981); *Fitzgerald v. Racing Ass'n*, 539 U.S. 103, 108 (2003). To that end, "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

Yet that is just what the Commission has done here. Section 6409(a) reflects Congress's intent to balance the competing goals of (1) easing local restrictions on certain modifications of existing wireless facilities, while (2) limiting the class of modifications entitled to the statute's protection to only those that do not "substantially change" the size of the existing facility. The *Ruling* improperly elevates the former goal over the latter, in direct conflict with the statute's "substantially change" language.

B. The Commission's argument that the 2001 Collocation Agreement *justifies its conclusions regarding Subsection 1.6100(b)(7)(i) is unavailing.*

The Commission also justifies its "no antenna height limit" interpretation of the language used in Subsection 1.6100(b)(7)(i) on the ground that it is "consistent with the long-established interpretation of the comparable standard set forth in the 2001 *Collocation Agreement* for determining the maximum size of a proposed collocation that is categorically excluded from historic preservation review." *Ruling* ¶ 26 (footnote omitted) (1-ER-17). But the Commission ignores the fundamental differences between the language and purposes of the *Collocation Agreement*, on the one hand, and the language and purposes of Section 6409(a), on the other. Those differences are fatal to the Commission's reliance on the *Collocation Agreement* as a justification for its antenna height increase ruling here.

The *Collocation Agreement*, which pre-dates Section 6409(a), addresses the Commission's National Historic Preservation Act[8] ("NHPA") and National Environmental Policy Act[9] ("NEPA") review obligations for wireless facilities. The *Collocation Agreement* thus pertains only to the scope of *federal* environmental and historic preservation review of the siting of wireless facilities. Section 6409(a), in contrast, addresses federal constraints on *State and local* land

[8] National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915, as amended.

[9] National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852.

use and zoning review of modifications to wireless facilities. Indeed, the Commission has relied on this very distinction in justifying its prior decision to largely exempt so-called "small cell" wireless facilities from NHPA and NEPA review, emphasizing that its relaxation of federal NHPA and NEPA review of such facilities would in no way affect or limit State and local review processes for those facilities. *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Second Report and Order, FCC 18-30, 33 FCC Rcd. 3102, ¶ 77 (rel. March 30, 2018).[10]

Moreover, the Commission recognized in its *2014 Infrastructure Order* that the *Collocation Agreement*, unlike Section 6409(a), reflected no balancing with State or local land use authority. Although the Commission looked to the *Collocation Agreement* as a "starting point" in its original Section 6409(a) rulemaking, it "modif[ied] and supplement[ed] the [*Collocation Agreement*'s] factors to establish an appropriate balance between promoting rapid wireless facility deployment and preserving States' and localities' ability to manage and protect local land-use interests." *2014 Infrastructure Order* ¶ 190. Having

[10] The D.C. Circuit subsequently vacated the order exempting most small cell construction from NHPA and NEPA review because the FCC "failed to justify its confidence that small cell deployments pose little to no cognizable religious, cultural, or environmental risk, particularly given the vast number of proposed deployments and the reality that the [order at issue] will principally affect small cells that require new construction." *United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, 933 F.3d 728, 733 (D.C. Cir. 2019).

recognized that, unlike the *Collocation Agreement*, Section 6409(a) embodies its own unique balancing of federal interests and State and local interests, the Commission cannot now rely on the *Collocation Agreement*, which reflects no such balancing, to sidestep the requirements of Section 6409(a).

The *Collocation Agreement* was predicated on entirely different and separate statutes (NHPA and NEPA), with their own separate and distinct purposes. The Commission therefore cannot use the *Collocation Agreement* to justify its open-ended "clarification" regarding antenna height increases under Section 6409(a), with its very different language and purposes. Accordingly, the *Ruling*'s antenna height "clarification" must be vacated.

CONCLUSION

The Court should grant the petitions and vacate the *Ruling*.

Respectfully submitted,

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The above-signed counsel attests that all Intervenors on whose behalf this Brief is submitted concur in the filing's content.

January 18, 2021

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the undersigned counsel state that: (1) the *Ruling* has not been subject to review by this Court or any other court; (2) all petitions for judicial review related to the *Ruling* have been consolidated before this Court; and (3) counsel is not aware of any other cases raising the same or closely related issues pending before this Court.

Date: January 18, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 18th day of January, 2021, caused the foregoing document to be served electronically through the Court's CM/ECF system.

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