Before the
Federal Communications Commission
Washington D.C. 20554

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

COMMENTS OF THE CITY OF NEW YORK
IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

I. Introduction.

The City of New York ("the City") submits these comments in response to the portion of the above-captioned Notice of Proposed Rulemaking (the "NPRM") which seeks comment on issues relating to the implementation of 47 USC Section 1455(a) ("1455(a)"). While there are numerous issues raised in the NPRM on which the City could comment, the City will limit its comments to a few specific matters while otherwise referring the Commission to the comments

of groups representing the interests of municipalities, such as the U.S. Conference of Mayors and the National Association of Telecommunications Officers and Advisors, which the City supports. The City may submit reply comments on other issues raised by the NPRM in the reply comment phase of this rulemaking process.

II. Discussion

1. The first matter on which the City offers comment at this time is a procedural issue, but no less important for that. The City agrees with the NPRM's proposal (at Para. 129) to find that 1455(a) "permits a State or local government at a minimum to require an application to be filed and to determine whether the application constitutes a covered request". Such a finding follows inevitably from the structure of 1455(a), which firmly locates the action to be taken under 1455(a) at the applicable State or local government level ("a State or local government may not deny, and shall approve…") and not elsewhere. As such it is the State or local government (i.e., the applicable zoning and land use decision-making authority under applicable State law; which will usually be a local government body) to which an application pursuant to 1455(a) must be submitted and by which the threshold question of the applicability of 1455(a) must be decided in the first instance.

The City further notes in this connection that such decisions as to the applicability of 1455(a) by a local zoning authority are not merely "ministerial" actions. Para. 132 of the NPRM suggests that such decisions might be treated as "ministerial", but that reference seems to incorrectly conflate the different concepts of a "threshold" decision and a "ministerial" action. The term "ministerial" connotes an act that requires essentially no judgment, whereas a "threshold" decision is one that needs to be made as a condition to the need for other decisions,

but may nevertheless require substantial judgment. As any judge or administrative agency will recognize, threshold issues such as standing and jurisdiction can often require substantial judgment and will thus often be very far from ministerial. The question of whether a particular application is a request covered by 1455(a) will often require considerable judgment on matters such as the substantiality of a change in physical dimensions as that concept is expressed in 1455(a)(1). As such, the City urges the Commission to avoid creating any constraints on the identity of the State or local decision-maker who would be empowered to make such threshold decisions, or on the scope, timing or other procedural aspects of such threshold decision-making other than those already applicable to wireless siting decisions generally. Threshold decisions such as the applicability of 1455(a) may often be simpler matters to handle than the more substantive issues which they may precede, but that will not always be the case, and the Commission should not attempt to pre-judge what will be required for appropriate and effective-decisions making with respect to the issue in any particular case of the applicability of 1455(a).

2. The City agrees with, and urges the Commission to adopt, the proposal in the NPRM (at Para. 129), agreeing in turn with a recommendation of the Intergovernmental Advisory Committee, that 1455(a) is properly construed only to apply to zoning and similar land use regulation decisions regarding use of private property, and is not applicable to actions of state, local and tribal governments with respect to proposed sitings on their own government land or property, that is, when such governments are acting as landlord or otherwise in a proprietary rather than a regulatory capacity. As the NPRM notes, the legislative history of 1455(a) leaves no doubt that Congress intended 1455(a) to constrain only the exercise of state and local zoning

actions, i.e., the regulation of the use of *private* land and property, and not the decisions that state and local governments make when they act in a capacity similar to private property owners.

For example, the City has for years now granted franchises that allow franchisees to install small wireless facilities on certain City street light poles and traffic light poles.[1] The City has developed a process that seeks to fairly accommodate the needs of multiple providers to such pole sites. However, the City's practical property management and operational concerns limit the use of any one pole to a single wireless provider. Were the City to be required to accommodate multiple providers on a single pole, the City would certainly need to re-think whether it could even continue to authorize at all this kind of use of its own street pole properties. Where state and local governments are acting in their proprietary capacity, administering their own land and properties, the law is properly understood as treating them no differently than it treats other private property owners vis a vis the use of their own property. Using that test, 1455(a), which of course does not purport to limit the decisions of private property owners in any respect, should similarly be understood as not limiting in any regard decisions of state and local governments regarding the use of their own land and properties.

3. Para. 119 of the NPRM asks whether the Commission should adopt, in construing the phrase "substantially change the physical dimensions" in 1455(a), a set of predetermined physical tests which apparently would then be applied uniformly to every wireless facility of every size, shape and type across the country. Adopting such a set of mechanical tests would represent a profound misapplication of the language and intent of the statute, and a similarly profound policy mistake. As the Intergovernmental Advisory Committee has pointed out, the

[1] The City's practice of offering franchise-based access for small wireless facilities to street lights and other poles on City-owned streets predates the industry's practice of referring to these facilities, which in effect are simply small wireless antenna and equipment sites, as "distributed antenna system" or "DAS" facilities.

statutory language in 1455(a) referring to a "substantial change in physical dimensions" of a tower or base station is meaningfully different than the terminology "substantial increase in size" which was interpreted in the National Collocation Agreement referenced in NPRM.

The language of 1455(a) properly reflects Congressional sensitivity to the full range of esthetic, safety and other quality-of-life elements that go into state and local decisions regarding the placement of structures such as wireless antennas and base stations. For example, a "substantial change in physical dimensions" may occur even if the size of a tower were increasing less than ten percent. If a tower were originally authorized at its current size because a tower perhaps 5% taller or 3% wider, would adversely affect substantial safety, esthetic or quality-of-life elements at its particular location, a proposed change larger than that in the relevant dimension would represent a "substantial change in physical dimensions" with respect to that tower. The question of substantiality in the context of 1455(a) cannot be resolved by the adoption of mechanical percentages or numerical rules applicable anywhere and everywhere in the United States, but rather must be evaluated in the context of specific installations and a particular community's land use requirements and decisions, including as they apply to the specific location in question. It is not plausible to understand 1455(a) as authorizing, for example, a blanket 10% increase in the height of every wireless antenna tower for collocation purposes across the entire country.

In addition, a change in attachments to a tower that results in no change in the tower's size, but results in, for example, a collocation that results in the tower no longer meeting local building code requirements for snow loads or wind resistance, could not be approved by a land use authority, given the public safety issues at stake. The Congressional language regarding "physical dimensions" allows the land use authority the necessary scope for public protection in

such a case. The type of test broached in Para. 118 of the NPRM by focusing only on an arbitrary percentage increase in "size" of a tower or base station, or similar uniform and mechanical tests, incorrectly suggests that there would be no such option for local authorities to protect public safety regarding, for example, a proposed code-non-compliant co-location. The Commission should not, cannot and surely will not adopt an approach to 1455(a) in which a collocation at a tower that, while not substantially increasing the size of the tower, clearly and definitively violates state, local, or tribal safety codes and presents a danger to the public would qualify for mandatory approval.

The City conditions construction of wireless antenna sites on rooftops on receipt of building permits that are intended to assure that the proposed installation has met tests for structural integrity, fire safety and other aspects of building safety. It would be absurd for the Commission to adopt an interpretation of 1455(a) that would mandate the grant of a building permit for a rooftop collocation that fails to meet public safety standards merely because mechanical standards of the type described in Para. 118 of the NPRM have been met.

The City urges the Commission to recognize the need of local authorities to reflect local conditions and local needs in the consideration of what would constitute a "substantial change" in physical dimensions arising from a proposed collocation. Congress intentionally avoided setting a mechanical test for such a standard and so must the Commission.

III. Conclusion.

The City has historically sought to create a friendly environment for installation of wireless facilities throughout our five boroughs, both on private and public properties. We, like communities across the country, recognize the extraordinary value wireless communications services offer to City residents, businesses and visitors. Though, it is also true that the

importance of wireless service availability does not automatically trump every other public value, including the values of safety and esthetics. In drafting the language of 1455(a), Congress preserved the ability of local authorities to evaluate the substantiality of collocations so as to assure a reasonable balance of public interests is preserved. The Commission should take care to preserve that ability, and that balance, as well.

Respectfully submitted

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