Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)
	)
Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance	)

To: The Commission

PETITION FOR DECLARATORY RULING

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July 11, 2008

TABLE OF CONTENTS

SUMMARY

CTIA–The Wireless Association® respectfully asks the Commission to interpret ambiguous provisions of Section 332(c)(7) of the Communications Act of 1934 to ensure that the federal goals favoring the deployment of wireless telecommunications networks and competition are not undermined by the state and local zoning authorities charged with taking action on wireless facility siting requests. Specifically, CTIA asks the Commission to resolve open questions regarding the time frames in which zoning authorities must act on siting requests, the importance of competitive entry by multiple providers in each market, and the impropriety of unduly burdensome requirements imposed on wireless providers but not on other entities.

In the Communications Act's very first sentence, Congress stated that one of the primary goals of the Act is "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide . . . radio communication service with adequate facilities. . . ." Since 1934, radio communications have assumed a critical role in meeting the nation's demands for ubiquitous connectivity. In recent years, the American public has relied more and more on mobile wireless services for voice communications, and increasingly for broadband services. Wireless offerings play a central part in furthering key objectives and policies of the Commission, including broadband deployment, universal service, and public safety.

The ability to deploy wireless systems and expand wireless service, however, depends on the availability of sites for the construction and placement of towers and transmitters. Ambiguities in the Act have allowed some zoning authorities to impose substantial impediments to wireless facility siting and the provision of wireless services. For example, carriers surveyed by CTIA collectively indicate that 3,300 wireless siting applications are currently pending before local jurisdictions. Almost one-quarter of those applications – approximately 760 – have been pending final action for more than one year. Over 180 such applications have been awaiting final action for more than 3 years. The Declaratory Ruling sought here will help restore the appropriate balance established by Congress between state and local zoning authority and federal deployment imperatives – a balance that gives great weight to the importance of swift deployment of wireless service and competitive wireless offerings – and will preserve the ability of consumers to enjoy access to robust and ubiquitous wireless broadband services.

In the Telecommunications Act of 1996, Congress adopted provisions designed to cabin the role of state and local zoning authorities in the tower-siting process to ensure that the zoning process is not a barrier to reasonable deployment of, and competition among, diverse wireless networks. In the Supreme Court's words, these provisions were adopted to reduce "the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers." Among other things, Congress prohibited state and local zoning authorities from taking unreasonably long periods of time to act on tower-related zoning applications, and barred decisions that would "prohibit or have the effect of prohibiting the provision of personal wireless services." Congress permitted applicants to seek judicial review within 30 days of a zoning authority's "action or failure to act."

A dozen years later, the local zoning approval process remains a substantial impediment to the provision of wireless services in many areas. Lingering ambiguities in several key statutory provisions have been exploited by a subset of zoning authorities, substantially impeding

wireless buildout. In particular, some zoning authorities have refused to resolve zoning applications within a reasonable period of time, taking far longer than their peers and leaving providers unable to expand their service offerings in the interim. Under the statute, it is unclear just when a zoning authority has "fail[ed] to act," and thus unclear when a claim becomes suitable for review in court. Similarly, some localities have adopted the view that a decision cannot be understood to "prohibit or have the effect of prohibiting" wireless service unless it precludes *all* wireless providers from offering service in an area, notwithstanding the Act's clear preference for competition over monopoly. Further, some localities have required providers to obtain "variances" from otherwise applicable zoning rules for all wireless siting requests, including those that do not involve any construction of new facilities whatsoever.

In light of these impediments to wireless buildout, CTIA respectfully requests that the Commission take four actions:

First, the Commission should clarify the time periods in which a state or locality must act on wireless facility siting requests under Section 332(c)(7)(B). As the Sixth Circuit recently reaffirmed, the Commission is empowered to interpret relevant statutory language and to impose specific time frames for action when the statute speaks only in general terms. Specifically, the Commission should issue a declaratory ruling explaining that (1) a failure to act on a wireless facility siting application only involving collocation occurs if there is no final action within 45 days from submission of the request to the local zoning authority; and (2) a failure to act on any other wireless siting facility application occurs if there is no final action within 75 days from submission of the request to the local zoning authority. As described below, many zoning authorities meet these time frames, and there is no reason why other authorities cannot do so as well.

Second, the Commission should find that, in the event that a failure-to-act benchmark is triggered, the application should be deemed granted. In the alternative, the Commission should establish a presumption that, once judicial review is triggered by a failure to act, a wireless carrier is entitled to an injunction ordering the state or local zoning authority to grant the siting application unless it can justify the delay. These procedural steps will ensure that the goals and objectives of the Act are fully effectuated by expediting wireless deployment within the construct of the local zoning process.

Third, the Commission should clarify that, contrary to claims that the Act is satisfied by the presence of a single wireless provider, the statute bars zoning decisions that have the effect of prohibiting an additional entrant from offering service in a given area. The 1996 Act was designed to promote competition among providers of telecommunications, and Section 332(c)(7) cannot be satisfied by the presence of a single wireless provider in a given area. That section of the Act specifically prevents zoning authorities from discriminating. The Commission should exercise its authority to make this clear, and to ensure that local zoning authorities cannot bar specific providers from entering a market on the basis of another provider's presence there.

Finally, in accordance with Section 253 of the Act, the Commission should preempt local ordinances and state laws that subject wireless siting applications to unique, burdensome requirements, such as those treating all wireless siting requests as requiring a variance. Section 253(a) bars state and local laws that erect barriers to competition, and applies to both wireless and wireline services alike. That provision prohibits state and local policies that have the effect

of barring a wireless provider from offering service in a given location. The Commission should clarify that any regulatory framework that automatically requires a provider to obtain a variance before siting an antenna, is preempted under Section 253.

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To: The Commission

PETITION FOR DECLARATORY RULING

Pursuant to Section 1.2 of the Commission's Rules[1] and Section 554(e) of the Administrative Procedure Act ("APA"),[2] CTIA–The Wireless Association® ("CTIA") requests that the Federal Communications Commission ("FCC" or "Commission") issue a Declaratory Ruling clarifying provisions of the Communications Act of 1934, as amended (the "Act") regarding state and local review of wireless facility siting applications.

Specifically, CTIA asks the Commission to eliminate ambiguities that currently exist in Section 332(c)(7)(B) of the Act by (i) clarifying the time period in which a state or local zoning authority must take action on a wireless facility siting request under Section 332(c)(7)(B), (ii) declaring that, if a zoning authority fails to act within the relevant time frame, the application shall be "deemed granted," or alternatively establish a presumption that entitles an applicant to a court-ordered injunction granting the application unless the zoning authority can justify the

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[1] 47 C.F.R. § 1.2 (stating that "the Commission may . . . issue a declaratory ruling . . . removing uncertainty").

[2] 5 U.S.C. § 554(e) (stating that an agency, "in its sound discretion, may issue a declaratory order to . . . remove uncertainty").

delay, (iii) clarifying that, contrary to claims that the Act is satisfied by the presence of a single wireless provider in a given market, Section 332(c)(7)(B)(i) bars zoning decisions that have the effect of prohibiting an additional entrant from offering service in a given area; and (iv) preempting, under Section 253 of the Act, local ordinances and state laws that treat every wireless siting application as requiring a variance.

The ability to deploy wireless systems and expand wireless service depends on the availability of sites for the construction and placement of towers and transmitters. Ambiguities in the Act, however, have allowed some zoning authorities to impose substantial impediments to wireless facility siting, and consequently, the provision of wireless services, and in certain cases, immunizing state and local activities from the judicial review contemplated by Congress. The Declaratory Ruling sought here will help restore the balance established by Congress – a balance that gives great weight to the importance of wireless service deployment and competitive wireless offerings – and will preserve the ability of consumers to enjoy access to robust and ubiquitous wireless broadband services. Notably, the United States Court of Appeals for the Sixth Circuit's recent decision on video franchising reaffirmed the Commission's authority to interpret all provisions of the Telecommunications Act of 1996 and undeniably clarified that the Commission is authorized to establish time frames in which decisions prescribed by the Act must be rendered.

INTRODUCTION

The Commission was created in part "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide . . . radio communication service with adequate facilities. . . ."[3] Congress deemed the availability of such service essential "for the purpose of promoting safety of life and property."[4] Consistent with this objective, Section 7 of the Act states: "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public."[5]

The Telecommunications Act of 1996 ("1996 Act")[6] was designed to foster competition among telecommunications providers, to improve the quality of their services, and to encourage the rollout of new technologies without delay.[7] To further these objectives, Congress adopted numerous provisions designed to spur the deployment of new facilities. For example, Section 706 directed the Commission to "encourage the deployment *on a reasonable and timely basis* of advanced telecommunications capability to all Americans."[8] Congress also enacted Section 254(b), which instructs the Commission to establish universal service support mechanisms with the goal of ensuring the delivery of affordable telecommunications services – including wireless – to all Americans.[9]

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[3] Communications Act of 1934, as amended § 1, reproduced in 47 U.S.C. § 151 (2007) ("Act").
[4] *Id.*
[5] 47 U.S.C. § 157.
[6] Pub. L. No. 104-104, 110 Stat 153.
[7] *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005).
[8] Telecommunications Act of 1996 § 706 (emphasis added), reproduced in 47 U.S.C. § 157(c) ("1996 Act"); *see Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, *Notice of Proposed Rulemaking and Notice of Inquiry*, 14 FCC Rcd 12673, 12691 ¶ 33 (1999).
[9] 47 U.S.C. § 254(b); *see Universal Service Contribution Methodology,* WC Docket No. 06-122, *Report and Order and Notice of Proposed Rulemaking*, 21 FCC Rcd 7518, 7521 ¶ 5 (2006).

The ability to deploy wireless systems is dependent, however, upon the availability of sites for the construction of towers and transmitters.[10] Before a location can be utilized as a wireless tower or antenna site, zoning approval is generally required at the local level – a process that can be extremely time-consuming. Indeed, the Commission has previously acknowledged that "site acquisition and zoning approval for new facilities is both a major cost component and a major delay factor in deploying wireless systems."[11]

Congress expressly recognized local zoning as one of the key impediments to the rapid deployment of wireless services to all Americans. In drafting the provision that ultimately became Section 332(c)(7), the U.S. House of Representatives concluded that "current State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services (PCS) as well as the rebuilding of a digital technology-based cellular telecommunications network."[12]

Thus, in the words of the Supreme Court, Congress enacted specific provisions in the 1996 Act designed to reduce "the impediments imposed by local governments upon the

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[10] *See, e.g., Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, GN Docket No. 96-228, *Report and Order*, 12 FCC Rcd 10785, 10833 ¶ 90 (1997) (describing site acquisition and zoning as a "major cost component" and a "major delay factor" of wireless deployment); *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, WT Docket No. 03-128, *Report and Order*, 20 FCC Rcd 1073, 1077 ¶ 6 (2004) (describing delays in Section 106 tower site approvals as a threat to wireless deployment); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, WT Docket No. 04-70, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21576 ¶ 137 (2004) (describing the difficulty of acquiring tower siting permits as a possible obstacle to effective competition in wireless communications).

[11] *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, GN Docket No. 96-228, *Report and Order*, 12 FCC Rcd 10785, 10833 ¶ 90 (1997).

[12] H.R. Rep. No. 104-204, pt. 1, at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61.

installation of facilities for wireless communications, such as antenna towers."[13] Section 253 preempts any "State or local statute or regulation, or any other State or local legal requirement" that "prohibit[s] or [has] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" – including wireless service.[14] Section 332(c)(7) "imposes specific limitations on the traditional authority of state and local authorities to regulate the location, construction, and modification" of the facilities necessary for wireless communications.[15] These "limitations" are set forth in Section 332(c)(7)(B) of the Act:

> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof–
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> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
>
> (ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.
>
> (iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.
>
> (iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

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[13] *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005).
[14] 47 U.S.C. § 253(a).
[15] *City of Rancho Palos Verdes*, 544 U.S. at 115 (describing the purpose of 47 U.S.C. § 332(c)(7)).

> (v) Any person adversely affected by any final action or *failure to act* by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.[16]

Thus, Congress expressly constrained the ability of local authorities to exercise their zoning powers and set forth substantive and procedural standards to ensure that the zoning approval process does not undermine the federal policies regarding wireless service deployment.

* * *

A dozen years later, the local zoning approval process still remains a substantial impediment to the provision of wireless services in many areas. The delays associated with local zoning have come into even sharper focus as wireless service providers face the most aggressive Commission-mandated build-out obligations ever promulgated. The new requirements applicable to the recently auctioned 700 MHz spectrum were designed to ensure the deployment of state-of-the-art wireless broadband services throughout the country. Yet, in some cases, these aggressive goals are put at risk by the inability of wireless service providers to obtain timely action by local authorities for site construction. Thus, in many areas, local zoning policies are frustrating the goals of the Act and delaying the provision of wireless broadband services to millions of Americans.

Congress enacted Section 332(c)(7)(B)(v) to ensure that the wireless siting process involves a balance of local review and federal goals, and specifically provided for expedited judicial review where the local authority has failed to act within a reasonable period of time. An

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[16] 47 U.S.C. § 332(c)(7)(B) (emphasis added).

aggrieved party is required to go to court "within 30 days after such . . . failure to act."[17] However, the Act does not define when a "failure to act" occurs or what constitutes a "failure to act." Without a uniform guidepost for courts to follow, the statutory scheme is easily subverted by localities under the mistaken impression that they have no obligation to act within *any* set period of time. As a result, it often takes more than a year to obtain a final zoning decision on a siting application. In other cases, zoning authorities have denied a wireless service provider's facilities siting request because another provider already serves the area. Other localities have created additional delay by enacting ordinances that subject every wireless siting application to a variance process – effectively requiring wireless carriers to always get a waiver of local regulations before they can obtain approval to construct a facility or collocate a transmitter on an existing structure.

Given Congress' intent to facilitate expeditious wireless build-out and its adoption of federal limits on the zoning review process, CTIA hereby requests a declaratory ruling (i) clarifying the time period in which a state or local zoning authority must take action on a wireless facility siting request under Section 332(c)(7)(B); (ii) declaring that a zoning authority's failure to act within the requisite time frame will result in the application being "deemed granted," or alternatively, will warrant a presumption that the applicant is entitled to a court-ordered injunction granting the application, unless the zoning authority can justify the delay; (iii) clarifying that Section 332(c)(7)(B)(i) bars zoning decisions that have the effect of prohibiting a particular provider from offering service in a given area; and (iv) preempting all ordinances and regulations that automatically require all wireless siting applications – regardless of the proposed location or scope of the project – to obtain a special variance.

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[17] 47 U.S.C. § 332(c)(7)(B)(v).

DISCUSSION

I. TIMELY DEPLOYMENT OF WIRELESS FACILITIES IS ESSENTIAL TO ACHIEVING THE ACT'S PUBLIC INTEREST GOALS.

A core goal of the Act is the establishment of ubiquitous, nationwide wireless communications services for all Americans.[18] Congress reinforced the importance of this goal by adopting the 1996 Act, which contained provisions designed to promote universal service (Section 254), to ensure the rapid deployment of advanced telecommunications services (Section 706), to eliminate barriers to deployment caused by zoning ordinances (Section 253) and to impose limits on zoning boards' authority over wireless siting requests (Section 332(c)(7)(B)).

With these statutory goals in mind, the FCC has pursued core policy priorities that will be enhanced by granting of this petition, including the following:

Broadband. Broadband deployment is a key national policy goal.[19] Chairman Martin has noted that broadband deployment "is the number one priority for the Commission,"[20] with

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[18] 47 U.S.C. § 151.

[19] *See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Docket No. 06-150, *Second Report and Order,* 22 FCC Rcd 15289, 15362 ¶ 196 (2007) (stating that the "[r]apid deployment and ubiquitous availability of broadband services across the country are among the Commission's most critical policy objectives" and that "[b]roadband technology is a key driver of economic growth"); *Appropriate Framework For Broadband Access to the Internet*, CC Docket No. 02-33 *Notice of Proposed Rulemaking*, 17 FCC Rcd 3019, 3020-21 ¶ 1 (2002) (stating that "[t]he widespread deployment of broadband infrastructure has become the central communications policy objective of the day"); *Remarks of Commissioner Michael J. Copps*, Northern Michigan Broadband Summit, Grayling, Michigan (Oct. 1, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-277026A1.doc, *last visited* July 11, 2008; *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, *Separate Statement of Commissioner Jonathan Adelstein*, GN Docket No. 04-54, *Fourth Notice of Inquiry*, 19 FCC Rcd 5136, 5158 (2004) (stating that "reasonable and timely access to advanced telecommunications capability, such as broadband services, . . . is of critical importance to the health of our economy and our quality of life"); *Service Rules for Advanced Wireless Services in the 2155-75 MHz Band*, *Separate Statement of Commissioner Jonathan S. Adelstein*, WT Docket
(continued on next page)

wireless service being critical to achieving that goal.[21] Commissioner Copps has stated the imperative this way:

> [B]roadband is the central infrastructure challenge facing this generation. High capacity networks are to the Twenty-first century what the roads and canals and railroads were to the Nineteenth and highways and telecommunications were to the Twentieth. Our future will be driven by how quickly and how well we build out broadband connectivity to all our people. Our role here needs to be as proactive as possible. . . .[22]

The availability of wireless broadband is critical to this vision and achieving the national goal of swift deployment of broadband services, particularly to traditionally unserved and

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No. 07-195, *Notice of Proposed Rulemaking*, 22 FCC Rcd 17035, 17111 (2007) ("I have talked many times about my belief that wireless broadband is one of the keys to economic growth in this digital information age"); *Service Rules for Advanced Wireless Services in the 2155-75 MHz Band*, *Notice of Proposed Rulemaking*, *Separate Statement of Commissioner Deborah Taylor Tate*, WT Docket No. 07-195, *Notice of Proposed Rulemaking*, 22 FCC Rcd 17035, 17112 (2007) (stating that the AWS rules "represent our continuing commitment to ensure the availability of spectrum for innovative and advanced services, especially broadband services"); *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, *Separate Statement of Commissioner Robert McDowell*, WC Docket No. 07-38, *Report and Order and Further Notice of Proposed Rulemaking*, 2008 FCC LEXIS 4823, *102 (rel. June 12, 2008) (stating that "[w]ireless broadband Internet access service holds great potential to bring service to customers throughout America").

[20] Paul Krill, *FCC Chairman Champions Wireless Broadband Access*, InfoWorld, May 3, 2007, *available at* http://www.infoworld.com/article/07/05/03/martin-fcc_1.html, *last visited* July 11, 2008.

[21] *See Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, *Declaratory Ruling*, 22 FCC Rcd 5901, 5908 ¶ 17 (2007) ("[W]e expect that wireless broadband will play a critical role in ensuring that broadband reaches rural and underserved areas, where it may be the most efficient means of delivering these services"); *see also supra* note 19.

[22] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, *Separate Statement of Commissioner Copps*, GN Docket No. 04-54, *Fourth Notice of Inquiry*, 19 FCC Rcd 5136, 5157 (2004).

underserved areas.[23] Shortly before enactment of the 1996 Act, there were approximately 33.8 million wireless subscribers. By the end of 2007, that number had grown exponentially, to more than 255.4 million subscriptions.[24] During the same period, wireless penetration increased from 13% of the U.S. population to 84%.[25] The number of subscribers with wireless broadband capability grew by 220% between June 2006 and June 2007.[26] Whereas DSL and cable modem services grew by approximately 4.6 million lines combined during this period, wireless broadband grew by nearly 25 million lines.[27] By 2016, it is estimated that 83% of business users will be using wireless broadband.[28] But wireless broadband requires the deployment of new facilities – not only in unserved areas but also in areas currently served by wireless networks that require upgrades for the provision of high-speed data services.

Spectrum Build-out Requirements. The Commission has chosen to impose build-out requirements on wireless licensees to ensure that licensed spectrum is put to use. Licensees that won spectrum in the recent 700 MHz auction are subject to build-out requirements that were intended to be "the most stringent ever imposed by the Commission – designed to encourage

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[23] *See, e.g., Service Rules for Advanced Wireless Services in the 2155-75 MHz Band*, *Separate Statement of Commissioner Jonathan S. Adelstein*, WT Docket No. 07-195, *Notice of Proposed Rulemaking*, 22 FCC Rcd 17035, 17111 (2007) ("I have talked many times about my belief that wireless broadband is one of the keys to economic growth in this digital information age").

[24] *See* CTIA, *Wireless Quick Facts*, available at http://www.ctia.org/advocacy/research/index.cfm/AID/10323, *last visited* July 11, 2008.

[25] *Id.*

[26] Industry Analysis and Technology Division, Federal Communications Commission, *High-Speed Services for Internet Access: Status as of June 30, 2007*, Table 1 (March 2008), *available at* http://www.fcc.gov/wcb/stats, *last visited* July 11, 2008.

[27] *Id.*

[28] *See* Ovum, *The Increasingly Important Impact of Wireless Broadband Technology and Services on the U.S. Economy*, 7 (2008), *available at* http://files.ctia.org/pdf/Final_OvumEconomicImpact_Report_5_21_08.pdf, *last visited* July 11, 2008.

prompt deployment of services."[29] For example, 700 MHz licensees with CMA and EA licenses are required to provide service sufficient to cover 35 percent of the geographic area of their licenses within four years, and 70 percent of this area within ten years (the license term); those with REAG licenses must provide service sufficient to cover 40 percent of the population of their license areas within four years and 75 percent of the population within ten years, on an EA by EA basis.[30] At the end of the license term, licensees that fail to meet the end-of-term benchmark will be subject to a "keep what you use" rule, which will make unbuilt spectrum available to other potential users.[31]

Public Safety and E911. The Commission has repeatedly emphasized the importance of wireless E911 to the nation's public safety.[32] The availability of these critical emergency services, however, is inextricably linked to wireless service coverage.[33] If there is no wireless coverage in a particular area, there will be no E911. Moreover, tower siting issues also frustrate efforts by federal, state and local public safety authorities to construct their network infrastructures as well.

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[29] *See Applications for License and Authority to Operate in the 2155-2175 MHz Band*, WT Docket No. 07-16, *Order*, 22 FCC Rcd 16563, 16572-73 ¶ 15 n.52 (2007).

[30] *See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Docket No. 06-150, *Second Report and Order*, 22 FCC Rcd 15289, 15293, 15348-51 ¶¶ 6, 153-60 (2007).

[31] *See id.*

[32] *See, e.g., Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Second Report and Order*, 19 FCC Rcd 16964, 16965 ¶ 2 (2004).

[33] *See, e.g.*, *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 04-70, File Nos. 0001656065, et al., *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21609 ¶ 229 (2004) (noting deleterious effect of wireless coverage gaps on first responders and the public in times of emergency).

Achieving the objectives set forth in Sections 1 and 7 of the Act, as embodied in the FCC's policies and rules governing broadband, build-out, and public safety, is dependent upon the construction of towers and other facilities necessary for the provision of wireless services. As Commissioner Adelstein has recognized:

> The construction of communications towers and other infrastructure improvements is essential to the rapid deployment to the American public of ubiquitous, advanced and competitive communications services, as well as for public safety and homeland security.[34]

To advance these policies, the wireless industry is constantly engaged in constructing wireless infrastructure and upgrading technologies. Just prior to adoption of the 1996 Act, there were 22,663 cell sites serving fewer than 34 million subscribers.[35] Due in large part to flourishing innovation and robust competition, wireless carriers invested heavily in the deployment of new systems and the expansion of existing networks. As a result, by the end of 2007, there were more than 213,299 cell sites serving 255 million subscribers.[36] This expansion of service also has enhanced public safety, as reflected in the number of wireless 911 calls made per day – 55,000 per day in 1995 as compared with about 275,000 per day in 2006.[37]

This exponential growth, however, is not occurring uniformly across the nation. Many localities have embraced the importance of wireless services and adjusted to the new wireless

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[34] *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, *Separate Joint Statement of Chairman Michael Powell and Commissioner Jonathan S. Adelstein*, WT Docket No. 03-128, *Report and Order*, 20 FCC Rcd 1073, 1227 (2004).

[35] *See* CTIA, *Wireless Quick Facts*, available at http://www.ctia.org/advocacy/research/index.cfm/AID/10323, *last visited* July 11, 2008.

[36] *Id.*

[37] *See* National Emergency Numbering Association, *Cellular Wireless*, available at https://www.nena.org/pages/ContentList.asp?CTID=10 (estimating 100 million wireless E911 calls placed in 2006), *last visited* July 11, 2008.

siting paradigm created by the 1996 Act by rendering final decisions on siting applications promptly. In some areas, however, local authorities have refused to process wireless siting applications expeditiously. Moreover, CTIA members indicate that the local zoning process is taking significantly longer than in the past. Local governments are thwarting the will of Congress that the American people enjoy the advantages of advanced wireless broadband networks and the competitive and public safety benefits they create. More specifically, the failure to promptly act on pending applications threatens to slow the growth of wireless services in contravention of the specific limits set forth in Section 332(c)(7)(B), jeopardizes the Commission's broadband and public safety priorities, and potentially puts countless wireless licenses at risk by undermining their ability to deploy the facilities necessary to comply with the Commission's wireless build-out requirements.

II. THE FAILURE OF ZONING AUTHORITIES TO PROMPTLY ACT ON WIRELESS SITING REQUESTS THWARTS CONSUMERS' ACCESS TO WIRELESS BROADBAND SERVICES AND UNDERMINES COMPETITION.

Despite Congress' adoption of specific limitations to ensure that wireless siting applications are not needlessly delayed by the zoning process, problems remain. In particular, because a "failure to act" is not defined in the Act, some localities have been able to drag out the review process while remaining shielded from the judicial scrutiny Congress intended. Carriers are faced with a Hobson's choice – seek judicial review based on the locality's failure to act with the risk that the court will determine that the appeal was filed too soon, or continue working with the local government in the hope that a decision ultimately will be reached in less time than judicial review would take and at the risk of waiting more than 30 days past the date on which the zoning authority's inaction is deemed to have accrued.

There are many examples of egregious delays in the wireless facility siting process that frustrate the will of Congress. In some jurisdictions, final action on wireless siting applications often takes more than a year and in some cases takes several years. A few examples include:

- In one community in New Jersey, all major carriers agreed to collocate on a single tower that would resolve coverage gaps for each of the carriers. It took three years and 31 hearings for the zoning board to finally act on the application, which it denied. The carriers then spent an additional six years successfully challenging the decision in court.

- In another New Jersey community, two carriers spent three years pursuing a joint application to construct a monopole, which the borough denied after 44 hearings. The carriers successfully appealed the denial. The borough conducted 17 more hearings before finally granting the application.

- In one community in New York, a wireless siting application remained pending for nearly 2½ years, at which point the county finally decided to hire a radio frequency ("RF") consultant to evaluate the proposal. That application remains pending.

- In New York state, a carrier executed a lease with a community to construct a new tower next to a water tank. Final zoning approval was not obtained for 9 months, at which point the Building Department refused to issue a building permit. After one year, the Building Department informed the carrier that the zoning approval had expired and the carrier must re-start the process.

- In one California city, numerous applications seeking approval to flush-mount antennas to buildings have been delayed for years. One application that sought to mount the antenna on a rooftop of a commercial building, screened from view, has remained pending for more than 4 years.

- In rural Maine, along a section of a road with no mobile service coverage, a carrier has been seeking siting approval since 2005. The application has been reviewed in over 17 planning board and board of appeals meetings, and ultimately moved to court.

- In another California community, carriers are facing typical processing times that range between 28 and 36 months.

- In a Virginia county outside Washington, D.C., wireless facility siting applicants currently face typical processing times of 1-2 years for new towers.

- In another California county, applications that were filed 2½ years ago and 2 years ago, respectively remain pending and hearing dates have only recently been set.

- In New Mexico, one carrier experienced a delay exceeding 2½ years before receiving final approval granting its application.

- In one Texas community, applications seeking approval for new towers/major modifications have remained pending for more than 2 years.

- In one Mississippi community, a carrier proposed a new tower to be located next to a junkyard and a dumpster storage facility. In response, the Mayor publicly declared: "We can't deny them from having a public hearing, but we haven't approved a cell phone tower since I've been Mayor. We don't want cell phone towers."[38]

- In one Pennsylvania community, the township itself approached wireless carriers proposing a new tower in 2005, yet the application remains pending three years later.

CTIA compiled data on siting from multiple members in advance of drafting this Petition. Collectively, those members have more than 3,300 wireless siting applications pending before local jurisdictions. Of those, approximately 760 have been pending final action for more than one year. More than 180 such applications have been awaiting final action for *more than 3 years*. Even where the wireless siting application merely seeks to collocate on an existing site, delay may be substantial. Nearly 350 of the 760 applications pending for more than one year are collocation requests, with approximately 135 of these pending for more than 3 years. Thus, despite the clear intent of Congress to ensure prompt action on wireless siting applications, the data indicates that many localities ignore this mandate.

Worse yet, in many jurisdictions, the time period associated with obtaining final action on wireless applications is getting *longer*, not shorter. One carrier reported that, in the Washington, DC metropolitan area, collocation requests were generally approved in 15-30 days in 2003, in 30-60 days in 2005, and now generally take beyond 90 days for approval. It was also reported that approvals in the state of Ohio, which took two to three weeks in 2003, now take

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[38] *See* http://www.mast-victims.org/index.php?content=news&action=view&type=newsitem&id=2702, *last visited* July 11, 2008.

between six and eight weeks. In other areas where processing was historically slow, approvals have become even slower. In Chicago, for example, one wireless carrier reported that processing times had doubled from an average of 5 months in 2003 to approximately 10 months in 2007.

This process does not have to take this long. Of the carriers surveyed, over 80% have had some collocation requests granted within one week. The same situation exists for requests for new builds. Over 80% of those surveyed have had requests granted within 2 weeks. The process does not have to take over a year, or even several months, as it does in too many cases.

Finally, an increasing number of localities are adopting regulations that single out wireless siting applications for more onerous filing and approval requirements "usually reserved for landfills, cemeteries, and power plants,' not utilities."[39] In many cases, wireless carriers must seek approval for a variance – a waiver – from the local land use regulations regardless of the nature and scope of the wireless siting application. Under these regulations, a variance is required even if the wireless carrier is merely seeking approval to place a single antenna on an existing tower located within an antenna farm.

In each of these cases, the careful balance established by Congress between local and state prerogatives and federal deployment goals has been disrupted. Absent Commission intervention, the timely deployment of ubiquitous wireless services – a primary goal of the Act – is jeopardized. There is no reason that many zoning authorities are able to render final decisions on the vast majority of wireless siting applications within weeks, yet other jurisdictions vastly exceed that period – in some cases by years.

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[39] *Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700, 716 (9th Cir. 2007) (quoting Sprint's brief).

III. THE COMMISSION SHOULD CLARIFY WHAT CONSTITUTES A "FAILURE TO ACT" UNDER SECTION 332(c)(7)(B).

Congress has limited the discretion of state and local zoning authorities to address wireless communications facilities siting. These limits, codified at Section 332(c)(7)(B) of the Act, ensure that important federal objectives are not undermined by unreasonable denials of, or inaction on, wireless siting requests. Refusals to act promptly on siting requests have had the effect of shielding the zoning process from the expeditious judicial review contemplated by the Act and impeded federal policy goals. The Commission should therefore clarify relevant statutory terms to ensure that the federal interest in expeditious deployment of wireless service facilities is met. Specifically, CTIA seeks a proceeding in which the Commission would, after public comment, exercise its statutory authority to interpret Section 332(c)(7)(B) with respect to the time frames in which zoning authorities must act on siting applications.

A. Some Zoning Practices Have Disrupted the Balance in Section 332(c)(7)(B) Between State and Local Zoning Authority and the Federal Interest in Deployment of Wireless Facilities.

As numerous courts have recognized, the 1996 Act reflected a careful balancing of state and local authority, on the one hand, and federal policy objectives, on the other.[40] Section 332(c)(7) was designed to retain state and local zoning prerogatives, but only to the extent they did not conflict with Congress' desire "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced

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[40] *See, e.g.*, *City of Ranchos Palos Verdes v. Abrams*, 544 U.S. 113, 127-29 (2005) (Breyer, J., concurring); *Core Communs., Inc. v. Verizon Pa., Inc.*, 493 F.3d 333, 335 (3d Cir. 2007); *Verizon MD, Inc. v. Global NAPS, Inc.*, 377 F.3d 355, 384 (4th Cir. 2004); *Puerto Rico Tel. Co. v. Telecomms. Regulatory Bd.*, 189 F.3d 1, 8 (1st Cir. 1999).

telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . ."[41]

Section 332(c)(7) created a framework in which states and localities could make zoning decisions "subject to minimum federal standards – both substantive and procedural – as well as federal judicial review."[42] Specifically, that section preserves "the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities," but only insofar as that authority is exercised in accordance with various limitations.[43] Among other things, zoning authorities may not render decisions that "prohibit or have the effect of prohibiting the provision of personal wireless services" or "unreasonably discriminate among providers of functionally equivalent services." They are required to act "within a reasonable period of time … taking into account the nature and scope of such request."[44] Moreover, Section 332(c)(7)(B) permits parties alleging a violation of any of its requirements to bring suit in court within "within 30 days after" an "action or failure to act."[45]

Section 332(c)(7) "is a deliberate compromise between two competing aims – to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over

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[41] H.R. Conf. Rep. No. 104-458 at 113 (1996) *reprinted in* 1996 U.S.C.C.A.N. 124, 124.

[42] *City of Ranchos Palos Verdes v. Abrams*, 544 U.S. 113, 128 (2005) (Breyer, J., concurring). As the First Circuit has held: "[T]he [1996 Act] reflects Congress' intent to expand wireless services and increase competition among those providers. Congress sought to accomplish this goal by reducing the regulation and bureaucracy that stood in the way of steady and rapid expansion of personal wireless services." *Southwestern Bell Mobile Systems Inc. v. Todd*, 244 F.3d 51, 57 (1st Cir. 2001) (internal citations omitted).

[43] 47 U.S.C. § 332(c)(7)(A).

[44] 47 U.S.C. § 332(c)(7)(B)(i)(II), (i)(I), (ii).

[45] *Id.* § 332(c)(7)(B)(v).

the siting of towers."[46] It would be a mistake, however, to suggest that Section 332(c)(7) placed the autonomy of states and localities *above* federal policy goals: As the Supreme Court has emphasized, Section 332(c)(7)(B)'s primary purpose is to "reduc[e] … the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers."[47] Indeed, Section 332(c)(7)'s legislative history reveals that Congress was concerned about the "inconsistent and, at times, conflicting patchwork" of state and local zoning requirements, believing that this patchwork threatened "the deployment" of wireless communications,[48] and that it sought a framework that would "speed deployment and the availability of competitive wireless telecommunications services which ultimately w[ould] provide consumers with lower costs as well as with a greater range and options for such services."[49] As one Federal court correctly stated, this provision "represents a congressional judgment that local zoning decisions harmless to the FCC's greater regulatory scheme – and *only those proven to be harmless* – should be allowed to stand."[50]

The jurisdictional balance effectuated by Section 332(c)(7) has been disrupted by zoning authorities that have refused to act promptly on siting requests. These entities have frustrated federal goals concerning swift deployment of advanced telecommunications services while effectively robbing applicants of the opportunity to invoke their statutory right to judicial review and consumers of their rights to rapidly deployed wireless networks as envisioned by the Act.

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[46] *Town of Amherst v. Omnipoint Communications Enterprises*, 173 F.3d 9, 13 (1st Cir. 1999). *See also Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 639 (2d Cir. 1999) (quoting *Abrams*).
[47] *City of Ranchos Palos Verdes v. Abrams*, 544 U.S. 113, 128 (2005)
[48] H.R. Rep. No. 104-204, pt. 1 at 94 (1995).
[49] *Id.*
[50] *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 736 (9th Cir. 2005) (emphasis added).

Section 332(c)(7)(B)(v) provides that "[a]ny person adversely affected by any final action or failure to act by a State or local government" that is inconsistent with the terms of Section 332(c)(7)(B) may bring suit in court "within 30 days after such action or failure to act." But the Act does not explain when a "failure to act" accrues, and such a failure – unlike an "action" – has thus been impossible to pinpoint. Applicants therefore face an impossible choice: They can endure further delay in the futile hope that action will be forthcoming and possibly miss the 30-day window to "commence an action in any court of competent jurisdiction."[51] Alternatively, they can incur the substantial costs and additional time associated with initiating litigation, risking a judicial determination dismissing the suit on the basis that insufficient time has passed for the siting authority to have "fail[ed] to act." By withholding action on siting requests, states and localities have been able to evade the judicial oversight contemplated by 332(c)(7), and to disturb the balance of state, local and federal power envisioned by Congress.

B. To Correct the Imbalance, the Commission Should Issue a Declaratory Ruling to Interpret Section 332(c)(7)(B)(v).

The Commission should restore the balance contemplated by Congress by issuing a declaratory ruling establishing reasonable time frames in which state and local zoning authorities must act on zoning requests. The Commission is entitled to issue determinations regarding the meaning of terms set forth in the Communications Act generally and the 1996 Act specifically. The declaratory ruling sought here will clarify ambiguities in the statute and ensure that the federal policy goals at issue here are achieved, as Congress intended.

The Commission is entitled to issue an interpretation of Section 332(c)(7)(B)(v). Section 201(b) of the Act states that "[t]he Commission may prescribe such rules and regulations as may

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[51] Section 332(c)(7)(B)(v).

be necessary in the public interest to carry out the provisions of this Act."[52] In 1999's *AT&T v. Iowa Utilities Board*, the Supreme Court held that this provision conferred on the Commission jurisdiction to interpret and implement all provisions contained in the 1996 Act. The Court determined, "We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of the Act,' which include [provisions] added by the Telecommunications Act of 1996."[53]

The Sixth Circuit recently reiterated this point in a case that is directly on point with the request of this Petition. In *Alliance for Community Media v. FCC*,[54] the court affirmed the Commission's March 2007 order modifying the video franchising framework. In that case, various local franchising authorities ("LFAs") challenged the FCC's authority to interpret Section 621(a)(1) of the Act, which prohibits LFAs from "unreasonably refus[ing] to award an additional competitive franchise" beyond that awarded to a cable incumbent.[55] The court disagreed, finding the *Iowa Utilities Board* precedent "controlling" given Section 621(a)(1)'s status as a "provision[] of" the Act for purposes of Section 201(b).[56] The court recognized "the absence of any reference to the Commission in the language of Section 621(a)(1)," but held that

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[52] 47 U.S.C. § 201(b). In this regard, the term "rule" refers to any "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . ." Administrative Procedure Act, 5 U.S.C. § 500, § 551(4). *See also id.* § 551(5) (defining "rule making" to mean any "agency process for formulating, amending, or repealing" such a "rule").

[53] *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999). *See also id.* at 380 ("§ 201(b) *explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies.") (emphasis in original); *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980-81 (2005) ("*Brand X*").

[54] Nos. 07-3391 et al., 2008 U.S. App. LEXIS 13628 (6th Cir. June 27, 2008).

[55] 47 U.S.C. § 621(a)(1).

[56] *Alliance for Community Media v. FCC*, Nos. 07-3391 et al., 2008 U.S. App. LEXIS 13628, *24-25 (6th Cir. June 27, 2008).

the absence of such reference "d[id] not divest the agency of its express authority to prescribe rules interpreting that provision."[57]

The *Alliance for Community Media* court also specifically upheld the Commission's authority to establish time limits for LFAs' deliberations. In the court's view, Congress could have *required* the Commission to establish time frames, and this requirement would have *necessitated* specific language, but the fact that the provision includes no specific mention of the FCC did not preclude the agency from such activity. "That is, the absence of a statutory deadline in Section 621(a)(1) leads us to conclude that Congress authorized, but did not require, the FCC to impose time limits on the issuance of new franchises."[58]

Finally, the *Alliance for Community Media* court repudiated claims that Commission efforts to establish time frames improperly intruded on decisions left by Congress to the courts. "[T]he availability of a judicial remedy for unreasonable denials of competitive franchise applications does not foreclose the agency's rulemaking authority over Section 621(a)(1)."[59] Rather, the *Franchising Order* had spoken to "reasonable versus unreasonable distribution of franchises," and courts could "grant deference to the Order while maintaining their Congressionally-granted authority to make factual determinations and provide relief to aggrieved cable operators."[60]

The authorities discussed above make clear the Commission's authority to issue the declaratory ruling that CTIA seeks. There is no doubt that the Commission is entitled to interpret Section 332(c)(7), which is not only a part of the Communications Act, but also falls

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[57] *Id.* at *26 (citing *City of Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir. 1999); *National Cable Television Ass'n v. FCC*, 33 F.3d 66 (D.C. Cir. 1994)).
[58] *Alliance for Community Media*, 2008 U.S. App. LEXIS 13628 at *42.
[59] *Id.* at *28-29.
[60] *Id.* at *30.

directly under the *Iowa Utilities Board* precedent, having been adopted as part the 1996 Act. In fact, the Conference Committee Report on what became Section 332(c)(7) confirms the Commission's authority to safeguard the federal prerogatives codified in this provision, noting that "[t]he limitations on the role and powers of the Commission under this subparagraph … are not intended to limit or affect the Commission's general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities."[61] Moreover, the absence of specified time frames in Section 332(c)(7)(B)(v) does not prohibit the Commission from adopting such limits, any more than the absence of such language in Section 621(a)(1) limited the Commission's authority in that context. Similarly, Commission action here would be fully consistent with the judicial role contemplated by Section 332(c)(7)(B)(v) – just as in the video franchising matter, the Commission would merely be setting standards.

Moreover, the declaratory ruling sought here would, from a procedural perspective, be identical to the sort that the Commission issued in its *Cable Modem Declaratory Ruling.*[62] In 2000, the Commission sought comment on how statutory terms such as "cable service," "telecommunications service," and "information service" should be interpreted in the context of cable-based broadband Internet access offerings.[63] In 2002's *Cable Modem Declaratory Ruling*, the Commission determined that "cable modem service … is properly classified as an interstate

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[61] S. Rep. No. 104-230 at 209 (Feb. 1, 1996).

[62] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798, 4832 ¶ 59 (2002) ("*Cable Modem Declaratory Ruling*").

[63] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, *Notice of Inquiry*, 15 FCC Rcd 19287, 19293, 19294-95, 19297 ¶¶ 15, 18, 23 (2000).

information service, not as a cable service, and that there is no separate offering of telecommunications service."[64] The Supreme Court upheld the Commission's findings in *Brand X*.[65] Here, as in the case of cable modem service, CTIA seeks from the Commission a declaratory ruling adopting an interpretation of a statutory provision whose interpretation Congress has delegated to the Commission following public comment.

C. Benchmarks Should Be Established to Govern the Tower Siting Process.

In interpreting "failure to act," the FCC should recognize that the amount of time necessary to process a wireless siting application may vary depending upon the type of approval sought. For purposes of Section 332(c)(7)(B), wireless siting applications should be divided into two categories: requests involving collocations on existing towers and requests for zoning approval involving all other wireless facility siting applications. The Commission should clarify the time period that results in a "failure to act" under each of these categories. CTIA urges the Commission to adopt the following benchmarks based on input from CTIA's members.

1. A Failure To Act On A Collocation Application Occurs If There Is No Final Action Within 45 Days.

The Commission should declare that the failure to render a final decision within 45 days of a filing of a wireless siting application proposing to collocate on an existing facility constitutes a failure to act for purposes of Section 332(c)(7)(B)(v). Collocation requests should present the least troublesome applications from a local zoning perspective – there is no new

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[64] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4802 ¶ 7.

[65] *See National Cable & Telecommunications Assoc. v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*"); *id.* at 980-81 ("Congress has delegated to the Commission the authority o 'execute and enforce' the Communications Act … and to 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act. … [T]he Commission issued the order under review of the exercise of that authority; and no one questions that the order is within the Commission's jurisdiction.").

tower being constructed. The applicant is merely seeking to add antennas to an existing facility that has already gone through the zoning process and has been approved. Based on input from CTIA members, final action on collocation applications has been rendered in as little as one day in many localities across the country. Indeed, a majority of carriers surveyed reported that they have obtained collocation approvals in as quickly as one day. In many other areas, final action has been rendered in two weeks or less. Each of the carriers reported receiving some collocation zoning approvals within 14 days – and all but one have obtained approvals within one week. Unfortunately, some jurisdictions fail to act in such a timely manner. Different CTIA members have reported lengthy delays in obtaining final action, including some pending for more than three years, on collocation applications:

- Five different members, for example, reported collocation zoning approvals that took more than one year.
- In one case, the zoning approval process took nearly five years, and in another case, it took nearly six years.
- Approximately 135 collocation applications remain pending with no final action after more than three years.

To eliminate these egregious delays and promote the rapid deployment of wireless facilities envisioned by Congress, the Commission should declare that, in the case of wireless collocation applications, failure to render a final decision within 45 days will constitute a "failure to act" pursuant to Section 332(c)(7)(B)(v). This timeframe is inherently reasonable given that (i) it is limited to collocations and (ii) numerous jurisdictions routinely grant such applications within a matter of days.

2. A Failure To Act On Other Wireless Siting Applications Occurs If There Is No Final Action Within 75 Days.

The Commission should declare that the failure to render a final decision on any other, non-collocation wireless siting application within 75 days constitutes a failure to act for purposes

of Section 332(c)(7)(B)(v). CTIA recognizes that wireless siting applications proposing new facilities or major modifications or involving a variance may require more extensive review than applications for collocations on existing facilities. Adding an additional 30 days should provide sufficient time to conduct any necessary evaluation and public hearings on such applications. CTIA members reported receiving final action on applications proposing new facilities or major modifications in as little as one day, with hundreds of grants within 75 days. All of the carriers submitting data on this issue reported receiving approvals for new facilities within 30 days, and the majority of them reported approvals of such requests within one week. Moreover, applications requiring a zoning variance have been granted in as few as 14 days in some jurisdictions. However, as noted above, some jurisdictions drag out the process and fail to render final action on an application within one year (or, in some cases, several years). Some examples, referenced above, are as follows:

- In New Mexico, one carrier experienced a delay exceeding 2½ years before receiving final approval granting its application.

- In one Texas community, applications seeking approval for new towers/major modifications have remained pending for more than 2 years.

- In another Texas community, an application remained pending for approximately 2 years before final action.

- In a Virginia county outside Washington, D.C., carriers currently face typical processing times of 1-2 years for new towers.

- In a California county, two applications that were filed 2½ years ago and 2 years ago, respectively, remain pending and hearing dates have only recently been set.

- In New York state, a carrier executed a lease with a community to construct a new tower next to a water tank. Final zoning approval was not obtained for 9 months, at which point the Building Department refused to issue a building permit. After one year, the Building Department informed the carrier that the zoning approval had expired and the carrier must re-start the process.

- In one Mississippi community, a carrier proposed a new tower to be located next to a junkyard and a dumpster storage facility. In response, the Mayor publicly declared:

> "We can't deny them from having a public hearing, but we haven't approved a cell phone tower since I've been Mayor. We don't want cell phone towers."[66]

To eliminate egregious delays and promote the rapid deployment of wireless facilities envisioned by Congress, the Commission should declare that wireless applications seeking approval for a new site or major modification at an existing site or requiring a variance will constitute a "failure to act" if a final decision in not rendered within 75 days after filing a request for approval.

IV. THE COMMISSION SHOULD PROMPT ACTION BY ZONING AUTHORITIES WITHIN THE BENCHMARKS SET FORTH ABOVE.

Adoption of the benchmark time frames set forth above would bring clarity to the judicial review process under Section 332(c)(7)(B)(v) and ensure that siting applicants are able to challenge unreasonable delays in court on a timely basis. However, the Commission can and should take further action to prompt zoning authorities to act *within* the prescribed time frames, so that costly and time-consuming litigation can be avoided. As the Commission recognized in the recently upheld *Franchising Order*, such incentives are necessary to ensure that federal pro-deployment goals are met. Thus, the Commission should declare that when a zoning authority has failed to act within the time frames set forth above, the authority did not act within a reasonable period of time and the application will be deemed granted. At a minimum, the Commission should adopt a presumption that, once a "failure to act" benchmark has been triggered, the appropriate remedy is for a reviewing court to issue an injunction ordering the zoning authority to grant the siting request, unless the zoning authority can demonstrate that the delay was reasonable.

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[66] *See* http://www.mast-victims.org/index.php?content=news&action=view&type=newsitem&id=2702, *last visited* July 11, 2008.

A "deemed grant" approach would be consistent with judicial decisions addressing failures to act in the Section 332(c)(7)(B)(v) context. In 1999, the Second Circuit noted that "the majority of district courts that have heard these cases have held that the appropriate remedy is injunctive relief in the form of an order to issue the relevant permits."[67] Other Federal courts of appeals have agreed with these district courts.[68] Indeed, numerous federal district courts have made clear that such relief is the *only* appropriate relief in the case of a zoning authority's failure to act.[69] Upon finding that the locality's failure to act constituted an unreasonable delay under Section 332(c)(7)(B)(ii), one court concluded that the locality had "relinquished its right to seek further review of [the pending] application," and that it was "unlikely [that] remand would serve any purpose" other than to "further delay [the] application in a swamp of hearings and meetings with no resolution in sight.[70] The fundamental premise of such decisions is that Section 332(c)(7) authorizes an applicant to site facilities *upon the failure to act*. However, too often, the litigation itself takes months or years to resolve, thereby depriving the applicant of additional construction time even after the failure to act has accrued. By concluding that a deemed grant shall occur once the relevant benchmark time period has lapsed, the Commission will prompt timely zoning authority action or at least ensure that applicants have the option to begin

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[67] *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2d Cir. 1999). *See also Omnipoint Communications MB Operations, LLC v. Lincoln*, 107 F. Supp. 2d 108, 120-121 (D. Mass. 2000) (noting same).

[68] *See, e.g.*, *New Par v. City of Saginaw*, 301 F.3d 390, 399-400 (6th Cir. 2002); *National Tower, LLC v. Plainville Zoning Board of Appeals*, 297 F.3d 14, 24-25 (1st Cir. 2002); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1222 (11th Cir. 2002); *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp.*, 181 F.3d 403, 410 (3d Cir. 1999).

[69] *See, e.g.*, *NextG Networks v. Los Angeles,* 522 F. Supp. 2d 1240 (C.D. Cal. 2007); *Cincinnati Bell Wireless, LLC v. Brown County*, 2005 U.S. Dist. LEXIS 45866 (S.D. Oh. July 6, 2005); *T-Mobile USA, Inc. v. City of Anacortes,* 2008 U.S. Dist. Lexis 37481 (W.D. Wash. 2008).

[70] *Masterpage Communications, Inc. v. Town of Olive*, 418 F.Supp.2d 66, 81 (N.D.N.Y. 2005).

construction (if they wish) immediately following the failure to act, while the zoning process or litigation proceeds.

The relief sought here is consistent with other relevant authorities – authorities the Commission recently highlighted in defense of the *Franchising Order*. As noted previously, Section 201(b) authorizes the Commission to interpret and implement all provisions of the Act. Long ago, the Supreme Court made clear that the "statutorily authorized regulations of an agency will pre-empt" state or local action (or *inaction*) "that conflicts with such regulations or frustrates the purposes thereof."[71] As the Commission emphasized in its *Alliance for Community Media* brief, the Supreme Court held in 2004 that the Environmental Protection Agency could override certain state decisions notwithstanding a statutory reservation of state power.[72] These authorities clearly support that the Commission is empowered to ensure that federal goals are not frustrated by a locality's unlawful failure to resolve siting applications on a timely basis.

If, however, the Commission is unwilling to adopt a deemed grant regime, it should at the very least establish a presumption that when a zoning authority cannot explain a failure to act within the time frames described above, a reviewing court should find a violation of Section 332(c)(7)(B)(ii) and issue an injunction granting the underlying application. The purpose of the 1996 Act is to expedite the deployment of advanced services to consumers, and Section 332(c)(7)(B) was enacted to limit the ability of state and local authorities to prohibit or delay such deployment. In particular, Section 332(c)(7)(B)(ii) requires zoning authorities to act on requests "within a reasonable period of time … taking into account the nature and scope of such

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[71] *New York v. FCC*, 486 U.S. 57, 64 (1988).

[72] *See* Brief for Respondents Federal Communications Commission and United States of America, *Alliance for Community Media v. FCC*, No. 07-3391 at 26-27 (filed September 17, 2007), *citing Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004).

request."[73] The benchmarks described above reflect reasonable time frames for zoning authority action in different circumstances, and a state or locality responsible for acting on a wireless siting application should not be entitled to deference when a decision has not been rendered within the relevant period of time often associated with such applications.[74] Thus, absent a "deemed grant" holding, a state or locality should be required to justify its inaction once the benchmarks set forth above have been exceeded. Failure to justify the delay to the court's satisfaction should result in a finding that the zoning authority has violated Section 332(c)(7)(B)(ii), and should trigger the court's issuance of an injunction granting the siting application.

V. THE COMMISSION SHOULD CLARIFY THAT A ZONING DECISION VIOLATES SECTION 332(c)(7)(B)(i) IF IT PROHIBITS THE APPLICANT FROM PROVIDING WIRELESS SERVICE IN A GIVEN AREA.

Section 332(c)(7)(B)(i)(II) limits state and local zoning authority by barring decisions that "prohibit or have the effect of prohibiting the provision of personal wireless services."[75] The Act does not, however, specifically explain what constitutes a prohibition of service. The Commission should declare that Section 332(c)(7)(B)(i)(II) bars zoning decisions that have the effect of prohibiting a particular provider from offering service in a given geographic area.

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[73] 47 U.S.C. § 332(c)(7)(B)(ii).

[74] Although some courts have deemed even extended reviews to have concluded within a "reasonable period of time," the Commission can adopt a presumption setting a standard for what constitutes timely action. *See, e.g.*, *New York SMSA LP v. Town of Riverhead Town Board,* 118 F. Supp. 2d 333 (E.D. NY 2000), *aff'd* 45 Fed. Appx. 24 (2d Cir. 2002) (nine-month delay reasonable); *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732 (C.D. Ill. 1997) (six-month delay reasonable). The benchmarks described above for triggering judicial review due to inaction were identified based on input from CTIA members after a review of processing times for action on wireless siting applications. Thus, the failure to render a decision on a wireless siting application within these time periods should be viewed with skepticism, and the state or local government responsible for rendering such decisions should bear the burden of demonstrating that the delay was reasonable.

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

Despite the clear pro-competitive intent of the 1996 Act, there is disagreement among the courts as to Section 332(c)(7)(B)(i)(II)'s proper interpretation.[76] In particular, some localities have successfully argued that a denial of a wireless siting application does not violate this provision as long as wireless service is available from a single monopoly carrier in the area that would have been served by the rejected site.[77] Although commentators have noted a national trend away from this conclusion,[78] these "monopoly is enough" decisions create uncertainty regarding the rights of wireless carriers and are contrary to the Act's intended pro-competitive and pro-deployment goals. Accordingly, the Commission should clarify that Section 332(c)(7)(B)(i)(II) preserves a carrier's right to make reasonable deployments, even if the area in question is already served by another provider. More significantly, the Commission should clearly state that consumers are entitled to competition where carriers are ready and willing to compete but are thwarted by local zoning decisions. Thus, CTIA respectfully asks the

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[76] *See, e.g., Metheny v. Becker*, 352 F.3d 458, 461 n.2 (1st Cir. 2003) (finding that "a provider is not precluded from obtaining relief under the Act simply because some other provider services the gap in question"); *Omnipoint Communs., Inc. v. City of White Plains*, 430 F.3d 529, 536 n.3 (2d Cir. 2005) (stating that "[i]t is unsettled whether, under the [Act], a coverage gap must be measured from the perspective individual provider … or the perspective of users") (internal quotes removed); *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715, 729 n.6 (9th Cir. 2005) (stating that "[f]ar from prohibiting zoning decisions based on redundancy …., the [Act] itself appear[s] to be totally agnostic on this issue"); *AT&T Wireless PCS v. City Council of Va. Beach*, 155 F.3d 423, 428-29 (4th Cir. 1998) (finding that only a blanket ban on *all* tower siting would violate Section 332(c)(7)(B)(i)(II)).

[77] *APT Pittsburgh Ltd. Pshp. v. Penn. Township Butler County*, 196 F.3d 469, 480 (3d Cir. 1999); s*ee also Nextel W. Corp. v. Unity Township.*, 282 F.3d 257, 265-66 (3d Cir. 2002) (citing same); *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 428-29 (4th Cir. 1998); *USCOC of Va. RSA No. 3 v. Montgomery County Bd. of Supervisors*, 343 F.3d 262, 268 (4th Cir. 2003) (citing same).

[78] *See* Mitchell A. Carrel, *Railroad Tracks by Walden Pond: The Ongoing Struggle Between Towns and Providers Under the Telecommunications Act of 1996*, 33 Urb. Law. 781, 785-86 (Summer 2001); Stephanie E. Niehaus, Note, *Bridging the (Significant) Gap: To What Extent Does the Telecommunications Act of 1996 Contemplate Seamless Service*, 77 Notre Dame L. Rev. 641, 662-64 (2002).

Commission to declare that the fact that one or more other carriers serve a given geographic market is not by itself a sufficient defense against a suit brought under Section 332(c)(7)(B)(i)(II). Put differently, consistent with the pro-competitive goals of the 1996 Act, Section 332(c)(7)(B)(i)(II) is not satisfied by the existence of a single provider: What matters is whether the decision has the effect of prohibiting the provision of a service by the carrier whose application has been denied.

Such a declaration would be most consonant with the statutory text. Section 332(c)(7)(B)(i)(II) is framed in the plural: "The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof … shall not prohibit or have the effect of prohibiting the provision of personal wireless *services*."[79] Had Congress meant only to ensure that an area was served by a single provider, it would have proscribed only actions that prohibited the provision of "service." Instead, it made clear its preference for competition by barring action that would inhibit the provision of multiple "services" by disparate providers. This interpretation is buttressed by the terms of Section 332(c)(7)(B)(i)(I), which bars zoning authorities from "unreasonably discriminat[ing] among providers of functionally equivalent services."[80] These provisions – as well as the 1996 Act's other provisions designed to foment intra- and inter-modal competition, support the "multiple providers" interpretation of Section 332(c)(7)(B)(i)(II).

Moreover, the declaration sought here would be consistent with prior interpretations rendered by various courts. The First Circuit, for example, has held that "a provider is not precluded from obtaining relief under the Act simply because some other provider services the

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[79] 47 U.S.C. § 332(c)(7)(B)(i) (emphasis added).
[80] *Id.*

gap in question."[81] This declaration would also be most consistent with the pro-competitive intent of the 1996 Act. As one Federal appellate judge has stated, the "one carrier is sufficient" approach to Section 332(c)(7)(B)(i)(II) "could … create a monopoly" and thereby undermine Congress' expressly pro-competitive goals.[82] This approach also impedes technological progress, by looking only at *whether* an area is served, and, if so, effectively locking in the existing technology. "The existence of older, less functional cellular networks should not be permitted to impede the development of new, digital technologies like PCS and undermine competition in the telecommunications industry."[83] Similarly, the existence of digital narrowband offerings today should not be permitted to impede the deployment of next-generation broadband services such as those expected to be provided using recently auctioned 700 MHz and AWS spectrum.[84] As the Wireless Telecommunications Bureau ("WTB") has concluded, if "a personal wireless service provider is effectively prohibited from

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[81] *Metheny v. Becker*, 352 F.3d 458, 461 n.2 (1st Cir. 2003).

[82] *Omnipoint Communications Enterprises v. Zoning Hearing Bd. Of Easttown Township*, 331 F.3d 386, 403 n.6 (3d Cir. 2003) (Rosenn, dissenting). *See also Metheny v. Becker*, 352 F.3d 458, 461 n.2 (1st Cir. 2003) ("a provider is not precluded from obtaining relief under the Act simply because some other provider services the gap in question"); *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715, 729 n.6 (9th Cir. 2005) ("Far from prohibiting zoning decisions based on redundancy …, the [Act] itself appear[s] to be totally agnostic on this issue").

[83] *Omnipoint Communications Enterprises*, 331 F.3d at 405 (Rosenn, dissenting).

[84] Moreover, such a result could not have been intended by Congress because it would protect existing providers from competition in violation of the anti-discrimination prohibition set forth in Section 332(c)(7)(B)(i)(I). *See* 47 U.S.C. § 332(c)(7)(B)(i)(I); *see also Sprint Spectrum L.P. v. Town Of Easton,* 982 F. Supp. 47 (D. Mass. 1997) ("The effect of the Board's decision, on this basis, is to protect existing providers of wireless services within Easton from further competition. As the court in *Jefferson County* recognized, this is precisely the type of "disadvantage" Congress sought to eliminate by prohibiting local boards from discriminating between providers of equivalent services and from acting in a manner prohibiting the provision of new technology. *See Sprint Spectrum L.P. v. Jefferson County*, 968 F. Supp. 1457 (N.D. Ala. 1997). By deciding as it did, the Board favors existing providers, sheltering them from the very competition Congress sought to create when it enacted the [1996 Act]. Accordingly, new entrants offering potentially superior technology are burdened.").

offering service in the county or any portion of the county because of the [zoning] Board's action, that action would appear to be insupportable" under Section 332(c)(7)(B)(i)(II).[85]

Finally, the interpretation requested here would be consistent with the goals of Section 253 of the Act, which invalidates state or local policies that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[86] The "one provider is enough" approach to Section 332(c)(7)(B)(i)(II) would obviously preclude entry by additional providers into markets already served by a single wireless provider, unreasonably discriminate among providers of the same or similar services, and would protect from scrutiny policies that barred such entry. As Section 253 further emphasizes, Congress opposed such limitations. It could not have meant to permit in Section 332(c)(7) that which it simultaneously prohibited in Section 253.

The Commission should play a critical and salutary role in promoting deployment by interpreting Section 332(c)(7)(B)(i)(II). Specifically, the Commission should make clear that the statute prohibits local decisions that bar additional providers from entering a given market based on the existence of one or more other providers. The principle goal of the Act is to facilitate competition between and among differing providers. To the extent some courts have determined that the presence of one provider can justify a ban on all other wireless providers, those determinations are in clear conflict with the goals Congress set forth in advancing the expeditious deployment of wireless facilities. For the reasons cited above, the Commission has

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[85] Letter from Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, to Thomas E. Wheeler, President and CEO, CTIA, 1997 FCC LEXIS 312, *7 (Jan. 17, 1997).
[86] 47 U.S.C. § 253(a).

the legal authority to clarify its own enabling act.[87] In the interest of competition, deployment, and technological advancement, it should issue such a declaration and resolve the current uncertainty.

VI. THE COMMISSION SHOULD PREEMPT ORDINANCES THAT TREAT EVERY WIRELESS SITING REQUEST AS REQUIRING A VARIANCE UNDER SECTION 253.

Finally, Section 253 bars laws and ordinances that require, or effectively require, a variance for every wireless siting application. Whereas Section 332(c)(7)(B) addresses the validity of a local authority's action or inaction on a specific wireless siting application, Section 253(a) addresses the validity of ordinances (including zoning ordinances) and preempts "any state or local statute or regulation, or other state or local legal requirement" that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," including wireless services.[88] Courts have determined that:

> Section 253(a)'s preemption applies not only to general prohibitions on telecommunications services, but . . . [also when] a combination of certain conditions imposed by local ordinances amounts to a prohibition for purposes of Section 253(a). The following features of a local ordinance have caused courts to find preemption: (1) an onerous permit application process, (2) a franchise requirement, (3) penalties for failure to comply with ordinance requirements, (4) subjective aesthetic design requirements, and (5) regulations granting unfettered discretion to the zoning authority to deny permits.[89]

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[87] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984); *National Cable & Telecommunications Assoc. v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) (finding that Chevron requires a federal court to defer to an agency's reasonable interpretation of any ambiguities in a statute which it administers).

[88] 47 U.S.C. § 253(a). *See also Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700 (9th Cir. 2007) (holding that Section 253 provided appropriate vehicle for challenging policies affecting wireless offerings).

[89] *T-Mobile USA v. City of Anacortes*, 2008 U.S. Dist. LEXIS 37481, *8-9 (W.D. Wash. 2008) (citing *Sprint Telephony PCS v. County of San Diego*, 490 F.3d 700, 716 (9th Cir. 2006); *City of*
(continued on next page)

Despite this language, some localities have subjected ***all*** wireless siting applications to a special process that in effect requires carriers to obtain a special variance – effectively a waiver – from the zoning authority.[90] For example:

- A zoning ordinance adopted by a New Hampshire community limits wireless facilities to a height no more than 10 feet above the tree line. A limitation like this severely limits the coverage of a wireless facility and could effectively preclude the provider from serving the entire community, thus forcing the wireless carrier to seek a variance; and

- A zoning ordinance adopted by a Vermont community contains a setback requirement of between several hundred feet and fifteen hundred feet. Again, a limitation like this effectively requires a variance to construct a wireless facility in that community.

The degree of regulation imposed by these and similar ordinances is of the type "'usually reserved for landfills, cemeteries, and power plants,' not utilities."[91] Applicants seeking variance of zoning ordinances generally face a much more onerous application process as well as mandatory public hearings. Applicants seeking a variance encounter much longer delay in obtaining approval and shoulder the burden of demonstrating that a waiver is warranted, a burden unique to applicants required to seek a variance.

The FCC should declare that any ordinance that automatically requires a wireless carrier to seek a variance, regardless of the type and location of the proposal, is preempted as "an

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Auburn v. Qwest Corp., 260 F.3d 1160, 1175-76 (9th Cir. 2001); and *Cox Communications PCS v. City of San Marcos*, 204 F.Supp. 2d 1260, 1265-66 (S.D. Cal. 2002)).

[90] A variance is a waiver of the general zoning regulations and is "meant to be an infrequent remedy where an ordinance imposes a unique and substantial burden." *See, e.g. Variance Application for Marquette County, Wisconsin*, available at http://co.marquette.wi.us/Zoning_Department/pdf/Forms/Variance_Application.pdf, *last visited* July 11, 2008; *see also Variance Application for Waupaca County, Wisconsin*, available at http://www.co.waupaca.wi.us/zoning/ZONING%20VARIANCE.pdf, *last visited* July 11, 2008.

[91] *Sprint Telephony PCS, L.P. v. County of San Diego* , 490 F.3d 700, 715 (9th Cir. 2006) (quoting Sprint's brief).

onerous permit application process"[92] and an impermissible barrier to entry under Section 253(a).

Indeed, a number of localities have recognized that Section 253 lacks clarity and have acknowledged that the FCC has jurisdiction to address this ambiguity.[93] In particular, various courts have disagreed over what constitutes a prohibition of service under Section 253,[94] and various localities have asked the U.S. Court of Appeals for the Ninth Circuit to clarify what constitutes a prohibition of service under Section 253 – including a declaration that Section 253 is inapplicable to zoning ordinances.[95] In doing so, the localities recognize that the starting point for the court is "FCC cases interpreting Section 253."[96] Given the disagreement between various federal courts, the FCC should act promptly to eliminate any ambiguity in Section 253 by issuing the declaratory ruling requested herein.

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[92] *T-Mobile USA v. City of Anacortes*, 2008 U.S. Dist. LEXIS 37481, *8 (W.D. Wash. 2008).

[93] *See* Brief for Portland, Oregon, Tacoma Washington, and Anacortes, Washington as Amici Curiae Supporting Defendents-Appellees at 1, 6-12; *Sprint Telephony PCS, L.P. vs. County of San Diego*, Case No. 05-56076 (9th Cir. June 5, 2008) ("Localities' Brief").

[94] *See id.; see also T-Mobile v. City of Anacortes*, 2008 U.S. Dist. LEXIS 37481, *8 (W.D. Wash. 2008); *Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700, 715 (9th Cir. 2006); *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175-76 (9th Cir. 2001); *Cox Communications PCS v. City of San Marcos*, 204 F.Supp. 2d 1260, 1265-66 (S.D. Cal. 2002); *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240-41 (9th Cir. 2004) (finding that Section 253(a) preempts "ordinances [that] include features that, in combination, have the effect of prohibiting the provision of telecommunication services"); *City of Portland*, 385 F.3d at 1240 (finding that a plaintiff need not demonstrate an actual inability to enter the market; it is sufficient that regulations "may have the effect of prohibiting the provision of telecommunication services"); *NextG Networks of Cal. v. City of San Francisco*, 2006 U.S. Dist. LEXIS 36101, *11-22 (N.D. Cal. June 2, 2006) (same).

[95] Localities' Brief at 2, 25-27.

[96] *Id.* at 9.

CONCLUSION

For the foregoing reasons, the Commission should (i) clarify the time period in which a state or local zoning authority must take action on a wireless facility siting request under Section 332(c)(7)(B), (ii) declare that a zoning authority's failure to act within the relevant time frame will result in the application "deemed granted" or in the alternative will warrant a court-ordered injunction granting the application unless the zoning authority can justify the delay, (iii) clarify that Section 332(c)(7)(B)(i) bars zoning decisions that have the effect of prohibiting a particular provider from offering service in a given area, and (iv) preempt under Section 253 zoning ordinances that require variances for all wireless siting applications.

Respectfully submitted,

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DECLARATION OF CHRISTOPHER GUTTMAN-MCCABE

I, Christopher Guttman-McCabe, have reviewed the foregoing Petition for Declaratory Ruling and declare under penalty of perjury that the information is accurate to the best of my knowledge, information and belief.

Executed July 11, 2008

/s/ Christopher Guttman-McCabe

Christopher Guttman-McCabe
Vice President, Regulatory Affairs