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# CITY OF CERRITOS

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EX PARTE OR LATE FILED

OFFICE OF THE MAYOR
**BRUCE W. BARROWS**

November 3, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M. Street, NW
Washington, DC 20554

Ex Parte Letter Re: Cases WT 97-197, MM Docket 97-182, and DA 96-1240

Dear Mr. Caton:

On behalf of the City of Cerritos, I would request that you terminate all actions in the preceding cases. They represent an ill-advised series of attempts to designate the Federal Communications Commission (FCC) as a supra-national "Zoning Commission" for cellular and broadcast towers and violate the intent of Congress in approving Section 332(c)(7) of the 1996 Telecommunications Act, as well as the principles of Federalism on which this country was founded. Further, they infringe upon the Constitutional rights guaranteed to all Americans.

The recent attempts of the Federal Communications Commission (FCC) to preempt the zoning authority of local governments over cellular, radio and televisions towers and its efforts to impose itself as a de facto "Federal Zoning Commission" for all cellular telephone and broadcast towers are a violation of the basic principles of Federalism where zoning has long been recognized, by both Congress and the courts, as a distinctive local concern on which the Federal government cannot and should not intrude. In addition, in approving the 1996 Telecommunication Act, Congress expressly reaffirmed local zoning authority over cellular towers. Further, the record clearly indicates that Congress directed the FCC to immediately halt all rule-making proceedings in which the FCC was attempting to impose its judgement as a Federal Zoning Commission or Appeals Board for zoning decisions involving personal communications system towers. Despite all of the above mentioned, the FCC

is still attempting to preempt local zoning authority in three different current rule-makings through the issuance of rules which improperly infringe upon local zoning authority. These actions are improper, illegal and unconstitutional as well.

Section 332(c)(7) of the 1996 Telecommunications Act specifically provides that the only instance in which an applicant can appeal to the FCC for relief is where the local governments regulation is based on the environmental effects of radio frequency emissions and the applicant's facility has been shown to comply with the Commission's regulations concerning such emissions. This provision is now being interpreted by the FCC in such a way as to affect virtually all decisions made at the local level regarding personal wireless services. The FCC has tentatively concluded that they would have jurisdiction, and the ability to reverse or alter the local decision, in any situation in which there is even the slightest indication that radio frequency emissions were mentioned, regardless of the context. For example, a concerned resident speaking as a part of the public hearing, or even addressing the local board or commission as part of the general public comments portion of the meeting would be sufficient basis for the FCC to review, and possibly overturn, a local cellular zoning decision. The FCC has stated that they could, and will, take this action irregardless of what information is contained in the written record as the stated reasons for the local decision, and even before the action is final at the local level. Thus, a recommendation by a single advisory body, with no force of law, could result in a draconian response by the FCC. Further, said response may bear no relation to the actual reasons, as contained in findings and the written record, on which a decision by the jurisdiction was based. The FCC, like the courts, is bound by the stated reasons given by a jurisdiction for its decision. If these reasons are unclear, or insufficient, then the issue should be remanded for further action. However, to assert that in effect the decision was not based on those findings, or that peripheral comments which the reviewing body never even considered was the "true" reason for a decision, and hence, regardless of the outcome, the FCC can preempt and overrule the decision, is a clear attempt to seize the zoning authority which has historically belonged to local governments. In short, communities can be "penalized" by the FCC and forced to approve a personal wireless service facility because some of their residents exercised their First Amendment rights to freedom of speech,

and this action can be taken by the FCC at any time during the local review process without regard to the established procedures, lines of authority within that jurisdiction, or the evidence contained in the written record.

Similarly, the FCC's proposal to ban moratoria on personal wireless service facilities is objectionable for many of the reasons set forth above. In addition to the previously mentioned reasons, it ignores the fact that many moratoria were adopted in accordance with state laws regulating their timing and use, and also ignores the fact that different socio-economic and physical [development] characteristics of each jurisdiction can greatly affect the type, number and variety of personal wireless service installations which that community may encounter. Indeed the FCC's own Wireless Telecommunication Bureau has stated in one of its Fact Sheets that, "In certain instances, state and local governments may benefit from a brief, finite period of consideration in order to set up a process for the orderly handling of facilities siting requests." Further, the FCC's own Local and State Government Advisory Committee (LSGAC) recommended that the FCC refrain from interfering in local moratoria and deny any petitions to preempt moratoria in accordance with the opinions expressed in the United States Conference of Mayors Resolution No. 10.

Setting artificial time limits for municipalities to act on environmental, zoning and building permit approvals for personal wireless service facilities serves no useful purpose either. It is a violation of the U.S. Constitution, the Communications Act and the principles of Federalism for a government commission such as the FCC to impose artificial and arbitrary time limits, with no substantiation, on local governments for such approvals and then state that failure to comply with these time limits will result in the automatic approval of the request, regardless of incomplete or incorrect information or any actual or potential violations of state or local laws. If the FCC truly is serious about imposing such draconian deadlines on local governments, it should consider imposing the same 30 to 45 day deadlines on requests for approval of broadcast licenses that it [the FCC] reviews for approval. The deadline would, of course, apply regardless of whether or not the application was complete, the information was correct, the frequencies requested were available, or even if the facilities needed were being placed in an environmentally sensitive or historically important area.

For all of the above mentioned reasons, the actions proposed and contemplated in the listed proceedings should be terminated without delay. We would request that you do so immediately.

Sincerely,

Bruce Barrows
MAYOR

cc Commissioner Designate Harold Furchtgott-Roth
Commissioner Designate Michael Powell
Commissioner Designate Gloria Tristani
Commissioner Susan Ness
Shaun A. Maher, Esq., Federal Communications Commission
Keith Larsen, Federal Communications Commission
Susanna Swerling, Federal Communications Commission
Rosalind Allen, Federal Communications Commission
Dan Phythyon, Federal Communications Commission
Roy J. Steward, Federal Communications Commission
Barrie Tabin, National League of Cities
Eileen Huggard, NATOA
Robert Fogel, National Association of Counties
Kevin McCarty, U.S. Conference of Mayors
Cheryl Maynard, American Planning Association