Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
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	)	GN Docket No. 07-45
	)	

To: The Commission

COMMENTS OF PCIA – THE WIRELESS INFRASTRUCTURE ASSOCIATION

This inquiry[1] arises at a promising moment for the broadband marketplace: Wireless broadband providers have begun to provide a real alternative to wireline and cable-based services, reducing prices, improving service quality, and bringing the benefits of advanced communications to formerly unserved areas. As the Commission works diligently to identify impediments to the deployment of broadband service, PCIA – The Wireless Infrastructure Association ("PCIA")[2] urges it to consider the unique barriers faced by wireless service and infrastructure providers. Specifically, while the Commission has worked to eliminate various regulatory barriers to broadband deployment (by removing network-sharing obligations, easing

[1] *See 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,* Notice of Inquiry, GN Docket No. 07-45 (rel. Apr. 16, 2007) ("*Notice*").

[2] PCIA is the trade association representing the wireless telecommunications infrastructure industry. PCIA's members own and manage more than 65,000 telecommunications towers and antenna facilities that support wireless services across the country.

competitive entry into the video market, and auctioning off additional broadband spectrum, among other things), too many state and local governments have adopted policies that impede deployment of the facilities needed to provide advanced wireless services. The burdensome requirements they impose are inhibiting the provision of broadband service, contrary to federal policy goals. Under section 332(c)(7) of the Communications Act of 1934[3] and section 706 of the Telecommunications Act of 1996,[4] the Commission can and should preempt these state and local regulations. Such action will further the deployment of wireless broadband and other mobile service offerings, promoting competition, economic development, and public safety. Elimination of such barriers would also be consistent with the goals of Congress and the Administration.

I. UNREASONABLE STATE AND LOCAL REQUIREMENTS ARE SUPPRESSING INFRASTRUCTURE DEPLOYMENT AND THUS INHIBITING THE PROVISION OF BROADBAND SERVICE.

As Chairman Martin has recently noted, "[w]ireless service is becoming increasingly important as another platform to compete with cable and DSL as a provider of broadband."[5] Wireless broadband offerings combine the benefits associated with high-speed services offered over wireline, cable, and other platforms with the added advantages of mobility. In recent years, high-speed wireless offerings have begun to capture a significant portion of the marketplace. Recent Commission data indicate that nearly half of all growth in broadband deployment over

[3] 47 U.S.C. § 151 *et. seq.*

[4] *Id.* § 157 nt.

[5] *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, Statement of Chairman Kevin J. Martin ("*Wireless Broadband Order*").

the past year has been due to mobile wireless offerings;[6] these services now account for about 17% of all high-speed lines.[7] Furthermore, in addition to offering high-speed service to formerly unserved areas, wireless broadband products also bring the benefits of competition to already-served areas, reducing prices and spurring service improvement.[8] As the Commission recently explained:

> Wireless broadband technologies and the business models for their deployment continue to evolve at a rapid pace. There have been significant technical advances in recent years, and more are anticipated over the next few years. Further, we 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.[9]

Growth in the deployment of high-speed wireless services cannot continue, however, without the capability to expand the infrastructure needed to provide those offerings. Wireless

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[6] *High-Speed Services for Internet Access: Status as of June 30, 2006*, Industry Analysis and Technology Division Wireline Competition Bureau, Federal Communications Commission at Table 1 (January 2007).

[7] *Id.*

[8] The benefits of wireless deployment extend to the entire broadband marketplace. As the Commission has recognized, "the threat of competition from other forms of broadband Internet access, whether satellite, fixed or mobile wireless, or a yet-to-be-realized alternative, will further stimulate deployment of broadband infrastructure," and the competitive pressure exerted by wireless broadband can be expected "to encourage [xDSL and cable modem] providers to deploy broadband Internet access services throughout their respective service areas." *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safe-guards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era*, 20 FCC Rcd 14853, 14884 ¶ 57 (2005).

[9] *Wireless Broadband Order* ¶ 17.

broadband providers rely on the presence of towers on which their antennae can be placed. While the poles and conduits used to run wireline and cable broadband networks have in most cases been in place for many years, wireless carriers and tower companies are still building the infrastructure needed to provide service in many locales. There are approximately 190,000 towers in the United States, and over 200,000 antenna sites.[10] These numbers continue to grow as wireless service and infrastructure providers build new sites to improve coverage and capacity. Consumer demand for wireless services continues to expand at a rapid rate. In order to meet these demands, wireless service and infrastructure providers must develop additional infrastructure to support additional users and services.

Even areas currently served by traditional voice networks often require new or expanded infrastructure to facilitate the provision of high-speed data services, which utilize far more capacity and therefore necessitate the placement of new antennae. According to PCIA membership, the AWS build-out will require more tower sites due to the higher frequency at which the band is operating and the type of technology used to deliver services. For example, if a provider is offering WiMax service, its offering will require additional sites. Furthermore, the majority of sites will likely be non-traditional sites (*e.g.*, rooftops, poles, etc.). It is estimated that the AWS band will require three times the number of sites required for PCS and cellular services. In sum, in "served" and "unserved" areas alike, if providers are unable to construct new towers, hopes for a ubiquitous wireless broadband option will remain unrealized.

In too many cases, wireless broadband deployment is being stymied by state and local government regulation that prevents construction of the necessary facilities.[11] Purporting to act

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[10] Data provided by TowerSource. *See* www.towersource.com.

[11] Although this pleading addresses state and local requirements, PCIA notes that in most cases, zoning impediments are imposed at the local level.

under the auspices of their lawful zoning authority, these states and localities have enacted (or attempted to enact) prohibitive requirements that, intentionally or otherwise, have the effect of blocking facilities deployment.[12] As such, however well-intentioned they might be, these requirements are inhibiting the provision of broadband wireless services.

Although the state laws and local wireless ordinances at issue differ in their particulars, the objectionable requirements often contained therein include some or all of the following:

- ***Automatic rejection provisions.*** Some zoning authorities have enacted frameworks presuming that zoning applications will be deemed denied if not acted upon within a specified period. In addition to contravening the Act's requirement that such denials must be issued in writing and supported by substantial evidence, these automatic rejection provisions establish a *de facto* presumption against siting requests, and therefore suppress deployment of new infrastructure.

- ***Technological mandates/prohibitions.*** Zoning authorities are increasingly attempting to mandate the use of particular network architectures, notwithstanding the Commission's exclusive jurisdiction over such matters and its consistent refusal to mandate that carriers use any one network design. For example, several localities have attempted (or are currently attempting) to weight the zoning process strongly in favor of Distributed Antenna Systems ("DAS"), which replace tower-mounted antennae with many more antennae affixed to shorter poles throughout the coverage area. These systems may not always be the ideal network solution for all services, as they can suffer from technological limitations rendering them unsuitable for use in some contexts, and often impose far greater costs on carriers and consumers than traditional towers.

- ***Excessive fees.*** Some zoning authorities have viewed the application process as a cash cow, levying extravagant fees on entities seeking to construct communications towers. While fees of this sort may help fill the authority's own coffers, they bear no relationship to the zoning power retained by states and localities, and will inhibit the provision of broadband service. [13]

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[12] To be sure, many states and localities exercise their zoning powers in a lawful and responsible manner. These comments are focused only on those state and local requirements that inhibit facilities deployment or otherwise intrude on federal communications policy.

[13] For example, Catawaba County North Carolina told Cingular Wireless that the company must place $8500 into escrow for each wireless transmission site it seeks to upgrade. The County will not approve the changes unless the fee is paid. *See* Gary D. Robertson, *North Carolina Wireless*
(continued on next page)

- ***Renewal limitations.*** Zoning authorities have often required tower owners to obtain renewed approval after a very short period – frequently only two years or less after the initial approval has been secured. Clearly, the uncertainty that attends such requirements will dampen the incentive to construct a tower in the first place: Absent any assurance that the tower will continue to operate for any significant time period, no one can know whether the initial investment will be recouped, much less whether construction will be economically viable in the long term.

- ***Forced rent-free access requirements.*** Some zoning authorities have sought to require applicants to reserve space on their facilities to the authority or other government entities at no charge for an undisclosed period of time. In addition to constituting the unconstitutional taking of private property without just compensation, such requirements reduce the value of new construction and thus undermine deployment.

- ***Radiofrequency exposure requirements.*** Zoning authorities often attempt to impose requirements regarding the radiofrequency ("RF") radiation emitted from any antenna placed upon a tower as a condition for authorizing construction, notwithstanding express language in the Act (codified at section 332(c)(7)(B)(iv)) prohibiting any such requirements.

- ***Collocation mandates/prohibitions.*** Zoning authorities often do not adopt policies that effectively promote collocation (the practice by which two or more providers place antennas on the same structure). Examples of such misguided policies include attempts to mandate collocation where collocation is not feasible, or, alternatively, to preclude collocation where collocation would be appropriate from a technological and economic standpoint. Either of these outcomes will impede the expansion of service offerings by suppressing efficient facilities deployment.

- ***Universal structural requirements.*** In some cases, zoning authorities have imposed rigid height limitations or concealment requirements that cannot be waived, even when circumstances warrant. In one case, for example, concealment requirements even applied to poles sited in industrial parks, where a "concealed" tower (for example, one designed to resemble a tree) would be more conspicuous than an "unconcealed" tower. Inflexible requirements of this sort are unnecessarily wasteful, and absorb funds that might better be used for additional deployment that would improve service.

Bill Gets Poor Reception From Some, WRAL, at http://www.wral.com/news/state/story/1410899/ (May 13, 2007).

- ***Undue planning board discretion.*** Perhaps seeking to retain the prerogative to grant or deny an application for whatever reasons they see fit, many zoning authorities have refused to enact specific criteria to govern the approval process. This uncertainty violates the Act's requirements and also chills facilities deployment: deprived of any way to know whether a particular application is likely to be approved, investors are likely to seek other, more easily assessed, opportunities.

Regulations of the types described above deter infrastructure investment, inhibit deployment, and thus constrain the provision of broadband service. In many cases, the requirements imposed by states and localities simply render new tower construction infeasible, either economically, technologically, or both. Even where state and local mandates do not erect an *absolute* bar on infrastructure, however, burdens of the sort described here will render facilities investments less attractive *vis-à-vis* alternative projects. In a competitive industry, capital can be expected to flow away from ventures characterized by uncertainty and burdensome requirements. Thus, even where construction remains *possible* in the face of intrusive state and local requirements, such requirements will undercut investment in new wireless facilities and will undermine the expansion of broadband service offerings.

In summary, intrusive state and local regulations imposed in the name of "zoning" are in many cases having a concrete and profound impact on the provision of wireless broadband services to the American public. Amidst widespread recognition of the critical role played by wireless offerings in the broadband market, these regulations are deterring investment in the very infrastructure necessary to their continued viability. The Commission should recognize that such requirements pose a very real threat to broadband deployment, and should take appropriate action to address the situation.

II. THE COMMISSION HAS THE AUTHORITY TO ELIMINATE UNREASONABLE REQUIREMENTS THAT INHIBIT THE PROVISION OF BROADBAND SERVICES, AND SHOULD DO SO.

As it investigates the state of broadband deployment and ways in which to accelerate such deployment, the Commission should adopt a more proactive posture toward the unlawful state and local requirements described above. In section 706 of the 1996 Act, Congress directed the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans … by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[14] Sections 253 and 332(c)(7) of the Act, moreover, empower the Commission to remove barriers to infrastructure deployment by superseding the state and local practices at issue here. Given the strong federal interest in promoting broadband deployment, the Commission should exercise the powers granted by these provisions to preempt short-sighted infrastructure regulations that inhibit the provision of next-generation wireless service offerings.

In passing the 1996 Act, Congress was concerned that "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 as well as the rebuilding of a digital technology-based cellular telecommunications network."[15] Accordingly, section 332(c)(7), which reserves to state and local governments "decisions regarding the placement, construction, and modification of personal wireless service

[14] 47 U.S.C. § 157 nt. *See also Notice* ¶ 32 (quoting same).

[15] H.R. Rep. 104-204, at 94 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 61.

facilities," specifically provides that the reservation of such power is subject to important constraints set forth in subsection (c)(7)(B).[16] Among other things, section 332(c)(7) provides that state and local zoning requirements may not "prohibit or have the effect of prohibiting the provision of personal wireless services"; may not regulate the placement of facilities on the basis of RF emissions; and may not deny siting authority except in writing and based on substantial evidence.[17] Section 253 of the Act separately provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service,"[18] and authorizes the Commission to preempt incompatible requirements.[19] Thus, in Congress's words, while the Act retained state and local siting authority, that reservation related exclusively to "local land use regulations and [was] not intended to limit or affect the [FCC's]

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[16] 47 U.S.C. § 332(c)(7). In the *Wireless Broadband Order*, the Commission concluded that section 332(c)(7)(B) apply to facilities used to provide wireless broadband Internet access services where those facilities are also used to provide commercial mobile services, unlicensed wireless services, or common carrier wireless exchange access services. *See Wireless Broadband Order* ¶¶ 63-65. Because wireless broadband services are generally commingled with some or all of thee other offerings, this section continues to apply to facilities used to provision virtually all wireless broadband.

[17] 47 U.S.C. § 332(c)(7)(B)(i)(I), (B)(iv), (B)(iii). As the Commission has stated, section 332 "expressly authorize[s] [it] to preempt" requirements that violate the limits placed on that provision's reservation of state or local siting authority. *Rulemaking To Amend Parts 1, 2, 21, and 25 Of the Commission's Rules to Redesignate The 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules; Suite 12 Group Petition for Pioneer Preference*, 12 FCC Rcd 12545, 12703 ¶ 381 (1997).

[18] 47 U.S.C. § 253(a).

[19] *Id.* § 253(d). While section 332(c)(7) preempts specific zoning decisions, section 253 may preempt an entire siting regime on its face. *See, e.g.*, *Sprint Telephony PCS v. San Diego*, Nos. 05-56076 *et al.*, slip op. at 3008-18 (9th Cir. Mar. 13, 2007).

general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities."[20]

These provisions afford the Commission far-reaching power to preempt state or local siting requirements that undermine federal communications policy. Section 332(c)(7) "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."[21] Section 253, similarly, prohibits localities from enacting a "'third tier' of telecommunications regulation that extends far beyond the statutorily protected municipal interests in managing the public rights-of-way and protecting public safety and welfare."[22] A local requirement need not be insurmountable to violate these provisions; all that matters is whether the regulatory requirement at issue "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[23] Nor must a state or local requirement conflict directly with a federal requirement to be barred by federal law. As the Commission has recognized, "a patchwork quilt of differing local regulations" – even regulations that might otherwise be facially lawful – "may well discourage regional or national strategies by telecommunications providers, and thus adversely affect the economics of their

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[20] H. Conf. Rep. No. 104-458, 209 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 124, 223.

[21] *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 736 (9th Cir. 2005) (emphasis added).

[22] *TCI Cablevision of Oakland County, Inc., Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*, 12 FCC Rcd 21396, 21399 ¶ 8 (1997). *See generally Classic Telephone Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief*, 11 FCC Rcd 13082, 13094 ¶ 23 (1996) (stating that section 253 preempts state and local decisions to the extent necessary to protect federal policy).

[23] *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) (internal citations omitted).

competitive strategies," and can be preempted on that basis.[24] Finally, these provisions bar siting regimes that confer unfettered discretion on state or local bodies making siting decisions.[25]

In addition to the more general prohibition against policies that inhibit the provision of service or otherwise undermine federal goals, the Act also precludes certain specific zoning practices. Section 332(c)(7)(B)(iv), for example, provides that "[n]o 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."[26] Similarly, section 332(c)(7)(B)(iii) provides that zoning authorities may only deny siting requests "in writing and supported by substantial evidence contained in a written record." Moreover, section 253 precludes the use of siting regimes that "grant the [decisionmaker] unfettered discretion … to grant, deny, or revoke" approvals "based on unnamed factors,"[27] because regimes of this sort "provide[] precisely the sort of discretion to prohibit telecommunications services that § 253 preempts."[28]

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[24] *TCI Cablevision of Oakland County, Inc., Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*, 12 FCC Rcd 21396, 21442 ¶ 106 (1997).

[25] *See, e.g.*, *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1179 (9th Cir. 2001).

[26] 47 U.S.C. § 332(c)(7)(B)(iv).

[27] *City of Auburn*, 260 F.3d at 1179.

[28] *TCG New York, Inc.*, 305 F.3d at 81. *See also Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271 (10th Cir. 2004) (citing "free ranging discretion" as reason to invalidate local franchising ordinance); *GTE Mobilenet of California Limited Partnership v. City and County of San Francisco*, No. C 05-04056 SI, slip op. at 10 (N.D. Cal. rel. Feb. 6, 2007) (finding that "the complete discretion left to the City to grant or deny a major encroachment permit" was unlawful).

As this discussion should make clear, state and local regulations of the type described above are incompatible with section 253 and/or 332(c)(7), and thus may be preempted. At the very least, these requirements certainly deter investment in wireless infrastructure: Some (including those imposing technological requirements, unreasonably short renewal periods, universal structural requirements, or excessive fees) increase unnecessarily the costs of deployment. Some (including those imposing collocation requirements and/or prohibitions, technological requirements, renewal limitations, or forced rent-free access requirements) undermine the value of new facilities. Nearly *all* inject unjustified uncertainty into the investment calculus, disincentivizing capital investment that might otherwise have been applied to facilities deployment. State and local regulations of this sort "prohibit or have the effect of prohibiting the provision of personal wireless services" and are therefore unlawful.

In some cases, moreover, the regulations detailed above directly conflict with more specific requirements embodied in the statute. For example, requirements relating to RF exposure directly conflict with the statute's prohibition against RF-based siting decisions. As the Commission has made clear, "a local government may not require a facility to comply with RF emissions or exposure limits that are stricter than those set forth in the Commission's rules, and it may not restrict how a facility authorized by the Commission may operate based on RF emissions or any other cause."[29] Similarly, "automatic rejection" provisions conflict with section 332(c)(7)(B)(iii)'s express requirement that denials be issued in writing, based on substantial evidence contained in a written record. Moreover, regimes that accord siting authorities unduly

[29] *See Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, 15 FCC Rcd 22821, 22828 ¶ 17 (2000).

broad discretion in evaluating applications also conflict with settled interpretations of 332(c)(7).[30]

Thus, the Commission can – and should – act to preempt state and local requirements that have the effect of inhibiting facilities deployment. Such requirements not only exceed the lawful scope of state and local zoning powers, but affirmatively undermine the provision of advanced services to Americans. These mandates, in short, stand in opposition to federal broadband goals. PCIA urges the Commission to recognize that they constitute important barriers to the development of a robust market for high-speed communications services, and to propose an affirmative regulatory approach that will allow for timely, effective preemption of offending efforts when identified.

[30] *See supra* note 25 and accompanying text.

CONCLUSION

For the reasons described above, the Commission should recognize the threat posed by unlawful state and local siting requirements to the provision of wireless broadband service, and should strongly consider actions to strike such requirements.

Respectfully submitted,

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