

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of WT Docket No. 08-165

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

OPPOSITION TO PETITION FOR DECLARATORY RULING

Submitted by

THE PIEDMONT ENVIRONMENTAL COUNCIL, CITIZENS FOR FAUQUIER  
COUNTY, SHENANDOAH VALLEY NETWORK, and APPALACHIAN TRAIL  
CONSERVANCY

**Introduction**

The Piedmont Environmental Council, Citizens for Fauquier County, Shenandoah Valley Network, and Appalachian Trail Conservancy are extremely concerned over the proliferation of improperly sited and constructed telecommunications towers because of the impact they have on open space, areas of visual beauty, and rural character. According to data available on the Federal Telecommunications Commission's web site, there are over 128,000 cell towers in the United States and her territories. We oppose the CTIA's Petition in WT Docket No. 08-165 because of its lack of legal merit and its threat to future siting decisions by local elected officials particularly.

**Count 1 - Request to "clarify" when a zoning authority has failed to act**

*The Federal Communications Commission has no authority to grant the requested relief*

CTIA contends that an ambiguity exists in Section 332(c)(7)(B)(v) of the Telecommunications Act of 1996 and asks the Federal Communications Commission ("Commission") to clarify the time period in which a state or local zoning authority will be deemed to have failed to act on a wireless facility siting application. By the express

terms of the Telecommunications Act, the Commission has no lawful authority to enter the proposed ruling. The relief provided to aggrieved persons under the challenged provision of the Telecommunications Act is commencement of an action in a court of competent jurisdiction:

(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.

Section 332(c)(7)(B)(v)

The relief chosen here, petition to the Commission, is limited to persons adversely affected by acts inconsistent with clause (iv) – local regulation based upon the effects of radio frequency emissions. CTIA claims to be aggrieved because of other aspects of various zoning ordinances. The Telecommunications Act limits CTIA to seeking relief from a court of competent jurisdiction.

The United States Supreme Court ruled on this precise matter in *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005). In holding that a plaintiff could not bring an action pursuant to 42 U.S.C. Sec. 1983 for relief of a violation of the Telecommunications Act, the Court stated: “ [t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.” *Id.* at 121, quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001). The Court went on to hold that Section 332(c)(7) provides a restrictive private remedy for statutory violations of the Telecommunications Act.

The lack of subject matter jurisdiction of the Commission in this instance is reaffirmed by the Conference Report for the Telecommunications Act of 1996, Report 104-458 (January 31, 1996)(emphasis added): “The conference agreement also provides a mechanism for judicial relief from zoning decisions that fail to comply with this section. It is the intent of the conferees that other than under section 332(c)(7)(B)(iv) of the

Communications Act of 1934 as amended by this Act and Section 704 of the Telecommunications Act of 1966 *the courts shall have exclusive jurisdiction over all other disputes arising under this section.*”

The clear language of the Telecommunications Act coupled with unambiguous language from the Conference Report makes it abundantly clear that the Commission is without authority to grant the relief requested. This count of the petition must be denied.

***CTIA fails to set forth facts or allegations upon which the requested relief may be granted***

The alleged gravamen of this Count is that some approvals for the siting of personal wireless telecommunication facilities take too long. In support thereof, CTIA cites a number of alleged horror stories and statistics. However, under the terms of the Telecommunications Act length of time to act is based upon: (1) whether the application was duly filed; and (2) the nature and scope of such request. Section 332(c)(7)(B)(ii). CTIA’s Petition is lacking sufficient allegations or facts for the Commission to make a determination on the timeliness (or failure thereof) of action even if it had the authority to do so.

As further noted in the Conference Report:

Under subsection (c)(7)(B)(ii), decisions are to be rendered in a reasonable time, taking into account the nature and scope of each request. If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment<sup>1</sup> to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames on a case-by-case basis.

CTIA claims that over 900 applications have not been processed in a timely manner. For each such application, the Commission must not only determine that it was duly filed and the nature and scope of the request, but the Conference Report suggests that the fact finding authority must also consider the normal processing times for each jurisdiction when processing comparable applications. Such detailed fact finding is

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<sup>1</sup> Counts 1 and 2 of CTIA’s Petition are, in effect, requests for the Commission to undertake a substantive rule making to grant providers of personal wireless telecommunications facilities preferential treatment under zoning ordinances throughout the Country.

inconsistent with CTIA's request to the Commission to construe the meaning of Section 332(c)(7)(B)(v) of the Telecommunications Act.

Recognizing that "timeliness" required a case-by-case factual inquiry into the usual practices of a locality, the nature and scope of the application, and whether the application was duly filed, the Congress adopted Section 332(c)(7)(B)(iv) limiting relief to courts of competent jurisdiction.

For the foregoing reasons, PEC requests that the first count of the Petition be denied.

**Count 2 – Promulgation of remedies for a locality's failure to act within an arbitrary time frame created by the Commission**

*The Federal Communications Commission has no authority to grant the requested relief*

Count 2 asks the Commission to establish remedies for when a locality fails to act in a manner demanded by CTIA in Count 1. Specifically, CTIA requests the Commission to implement a rule that an application not acted upon within time frames promulgated by the Commission are deemed approved. Alternatively, CTIA requests the Commission to establish a rule that that entitles an applicant to a court-ordered injunction granting the application unless the zoning authority can justify the delay.

In essence, this is a request for regulatory relief premised upon the relief requested in Count 1. To the extent that the relief in Count 1 cannot be granted in this proceeding, Count 2 fails. For the reasons previously stated, the relief in Count 1 is unavailable and, thus, Count 2 also fails.

Moreover, Count 2 is an attempt to have the Commission preempt local zoning laws. This the Commission may not do.

Section 332 (c)(3) of the Communications Act delineates when state preemption occurs. Zoning procedures are not included therein. The possibility of implied preemption is removed by the express language of Section 332(c)(7)(A): "Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." As previously

discussed, the only authority given to the Commission regarding zoning issues is for matters arising under Section 332(c)(7)(B)(iv) – issues not alleged in CTIA’s Petition.

For the foregoing reasons, Count 2 should be dismissed.

### **Count 3 – Clarification of Section 332(c)(7)(B)(i)(II)**

#### ***The Federal Communications Commission has no authority to grant the requested relief***

In this Count, CTIA states that the “Commission should declare that that Section 332(c)(7)(B)(i)(II) bars zoning decisions that have the effect of prohibiting a particular provider from offering services in a given geographic area.” CTIA Petition at 30. CTIA makes clear that it is challenging the single provider rule. This rule provides “if any single provider offers coverage in a given area, localities may preclude other providers from entering the area (as long as the preclusion is a valid nondiscriminatory zoning decision that satisfies the other provisions of the TCA [Telecommunications Act of 1996].” *MetroPCS, Inc. v. The City of San Francisco*, 400 F.ed715, 731 (9<sup>th</sup> Cir.2005).

In support of this Count 3, CTIA cites *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-5 (1984) for the proposition that courts must defer to an agency’s reasonable interpretation of any ambiguities in a statute which it administers. CTIA Petition at 35, fn. 87.<sup>2</sup>

The fallacy with this argument is that the Commission is not charged with administering Section 332(c)(7)(B)(i)(II). Section 332(c)(7)(B)(i)(II) is administered by local zoning authorities subject to review of courts of competent jurisdiction. As with Counts 1 and 2, the Commission has no subject matter jurisdiction under Section 332(c)(7)(B)(i)(II). Count 3 must be dismissed.

Moreover, CTIA requests relief that far exceeds the grievance alleged and relief that destroys the careful federal balance contained in the Telecommunications Act. For example, because of the presence of subparagraph (B)(iii)<sup>3</sup>, the Fourth Circuit Court of

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<sup>2</sup> The fact that CTIA does not cite *Chevron* or similar cases until Count 3 is a tacit admission that Counts 1 and 2 are requests for the Commission to undertake rule making rather than interpretation of ambiguities within the Communications Act.

<sup>3</sup> Section 332(c)(7)(B)(iii) states: “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 the record.”

Appeals has held that the “prohibits” clause applies to general blanket bans on services and not to individual zoning decisions. *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423, 428 (4<sup>th</sup> Cir. 1998).

Even courts that reject the one provider rule do not grant the broad relief requested. *See, eg., MetroPCSs, Inc. v. The City of San Francisco*, 400 F.ed715, 731 (9<sup>th</sup> Cir. 2005). In *MetroPCS*, the Ninth Circuit Court of Appeals rejected the single provider rule. But, this did not result in the determination that a locality could not deny a zoning application for a personal wireless telecommunications facility. Other detailed analysis applying fact to law was required and the case was remanded for further fact finding under the “prohibits” clause.

The relief requested greatly alters the Telecommunications Act. According to the Fourth Circuit it eliminates Section 332(c)(7)(B)(iii) from the law. In other circuits, the proposed remedy would preclude additional necessary fact finding to determine whether a locality had violated the “prohibits” clause. Even if the Commission had subject matter jurisdiction of this Count, its power to “construe” Section 332(c)(7)(B)(i)(II) could not extend to a legislative redrafting of the Telecommunications Act. For these additional reasons, relief under Count 3 must be denied

#### **Count 4 – Preemption of zoning ordinances that require variances**

##### ***The Commission has no authority to preempt local zoning except as authorized in the Communications Act***

In Count 4, CTIA requests preemption, under Section 253 of the Communications Act, of local ordinances that automatically require a wireless service provider to obtain a variance.

As noted earlier, Section 332 (c)(3) of the Telecommunications Act delineates when state preemption occurs. Zoning procedures are not included therein. The possibility of implied preemption is removed by the express language of Section 332(c)(7)(A): “Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless

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service facilities.” As previously discussed, the only authority given to the Commission regarding zoning issues is for matters arising under Section 332(c)(7)(B)(iv) – issues not alleged in CTIA’s Petition. Raising the preemption argument under Section 253 of the Telecommunications Act does not alter this. For this reason, Count 4 must be dismissed.

Relying upon Section 253 to render meaningless the provisions of Section 332 does not alter this. The primary goal of statutory interpretation is to interpret statute in accordance with legislative intent. Legislative intent must be gathered from the words used, unless a literal construction would involve a manifest absurdity. The entire statutory provision must be read together to ascertain legislative intent. Using these rules, it remains clear that CTIA's recourse for complaints about zoning is to the courts, not the Commission.

***Count 4 is based upon a flawed understanding of how zoning works and relief should be denied***

In general, zoning is a valid exercise of the police power. Zoning ordinances, of necessity, regulate land use uniformly within large districts. It is impracticable to tailor such ordinances to meet the condition of each individual parcel within the district. The size, shape, topography or other conditions affecting such a parcel may, if the zoning ordinance is applied to it as written, render it relatively useless. Thus, a zoning ordinance, valid on its face, might be unconstitutional, as a regulatory taking, as applied to an individual parcel.

Because a facially valid zoning ordinance may prove unconstitutional in application to a particular landowner, some device is needed to protect landowners' rights without destroying the viability of zoning ordinances. The variance traditionally has been designed to serve this function. In this role, the variance aptly has been called an "escape hatch" or "escape valve" to prevent regulatory takings.

In its most benign form, CTIA is requesting the Commission (to improperly use rule making authority) and eliminate this constitutional escape valve benefiting CTIA’s members under local ordinances. Such a request makes no sense. Therefore this can not be what CTIA seeks.

In its most pernicious form, CTIA seeks a ruling that would allow all nonconforming structures to be built under the theory that since they do not conform to zoning a variance is required.<sup>4</sup> Such a ruling would completely remove local zoning authority from all siting decisions and, impermissibly, remove Section 332 from the Telecommunications Act.

In more limited circumstances, a statute or ordinance may authorize variances in cases where an ordinance's application to particular property is not unconstitutional. In these limited cases, the variance process works more like the much more common processes used for special use permits or special exceptions (collectively “special exceptions”). Uses allowed by special exceptions by their nature can have an undue impact upon or be incompatible with other uses of land within a given zoning district. In many states issuance of these exceptions is an administrative process. In Virginia it is legislative. The applicable zoning authority reserves the right to deny any application for a special exception for one of these uses if it deems such use to be incompatible with existing or planned development in the district. The authority may also impose such conditions and restrictions as it thinks proper to insure that such a use will be homogeneous with the neighborhood.

Such uses are not restricted to landfills, cemeteries, and power plants as argued on page 36 of CTIA’s Petition. Rather, uses subject to special exceptions vary depending on the underlying zoning. By way of example, one Virginia locality uses special exceptions, depending on underlying zoning, for duplexes, single family attached homes, certain home occupations, certain recreational uses, schools, equestrian facilities, commercial hunting preserves, private clubs, pool halls, marinas, animal shelters and kennels, parks, governmental facilities, convenience stores, farm supply stores, welding shops, car washes, auto repair shops, farm equipment sales, recreational vehicle storage, outdoor

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<sup>4</sup> Under Virginia law, if all similar uses require a variance, then a variance is not available. Variances are only permitted when the regulation interferes with *all reasonable beneficial uses of the property, taken as a whole*. Thus, in general, if a use cannot conform to the applicable zoning but the property has other beneficial value, a variance is not available; rather, the only available relief is through new legislation. This general rule is modified by the Telecommunications Act so that when rules applied on a case-by-case basis, guarantee the rejection of every cell tower application the zoning ordinance violates the Telecommunications Act and will be struck down. *AT&T Wireless PCS v. City Council of Virginia Beach*, 155 F.3d 423, 429 (4<sup>th</sup> Cir. 1998). This is the law in all jurisdictions and “clarification” by the Commission is not needed.

auctions, and winery events. This same jurisdiction allows, by right, personal telecommunication wireless facilities under 80 feet in height and subject to certain other conditions. All other such facilities require a special exception.

CTIA's characterization of special exceptions, if this is what is meant by their challenge to variances, is simply wrong. It is a common zoning tool intended to minimize or reduce the undue impact of certain uses with other uses of land within a given zoning district.

Even if the Commission had authority to entertain Count 4, which it does not, CTIA's argument demonstrates either an abysmal lack of understanding of zoning law or a pernicious attempt to grossly overreach in the relief prayed for. In either case, relief should be denied.

#### Conclusion

The Telecommunications Act placed extremely limited restrictions on the authority of local governments to regulate the placement of personal wireless communication facilities. Section 704 of the Telecommunications Act was added during the House/Senate conference on the bill. The House-passed version of the bill included a provision that would have fully preempted local authority over tower siting in favor of a "uniform policy" for the siting of personal wireless communication facilities, developed by the Commission and a panel of local regulators. The conference agreement removed this provision, replacing it with Section 704 which prevents Commission with preemption of local and State land use decisions and preserves the authority of State and local governments except in limited circumstances. Various courts have repeatedly affirmed the separation of powers contained in the Telecommunications Act. *See, 360 [Degrees] Telecommunications Company of Charlottesville v. The Board of Supervisors of Albemarle County*, 211 F.3d 79, \_\_\_ (4<sup>th</sup> Cir. 2000)("While Congress sought to limit the ability of state and local governments to frustrate the Act's national purpose..., Congress also intended to preserve state and local control over the siting of towers and other facilities that provide wireless service. It struck a balance...."); *Town of Amherst v. Omnipoint Communications*, 173 F.3d 9, 13 (1<sup>st</sup> Cir. 1999)(Section 704 "is a deliberate compromise between two competing aims – to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers.")

CTIA's Petition represents a bold attack on the congressional compromises of 1996 that produced a careful balancing of local and federal interests. Under the guise of "interpretation", CTIA requests the Commission to undertake substantive rule making to undermine local zoning authority. The language of the Telecommunications Act is quite clear – the Commission has no subject matter jurisdiction over local zoning with one limited exception not presented here.

CTIA premises its Petition on the argument that local governments are thwarting the goal of national service, yet over 128,000 cell towers have been erected.

The Petition should be dismissed and the relief requested, denied.

Respectfully submitted,

**The Piedmont Environmental Council**

45 Horner Street  
Warrenton, Virginia 20188

**Citizens for Fauquier County**

PO Box 3486  
Warrenton, Virginia 20188

**Shenandoah Valley Network**

5618 Rock Hill Mill Road  
The Plains, Virginia 20198

**Appalachian Trail Conservancy**

PO Box 807  
Harpers Ferry, West Virginia 25425

By:   
W. Todd Benson  
Piedmont Environmental Council  
45 Horner Street  
Warrenton, Virginia 20188

**CERTIFICATE OF SERVICE**

I hereby certify that on the 18th day of September 2008, I caused copy of the foregoing Opposition to Petition for Declaratory Ruling with the Secretary, Federal Telecommunications Commission, Office of the Secretary, 445 12<sup>th</sup> Street, S.W., Washington, D.C. 20554 using the Commission's Electronic comment Filing System located at <http://www.fcc.gov/cgb/ecfs/> and one copy by e-mail to Best Copy and Printing, Inc. at [FCC@BCPIWEB.com](mailto:FCC@BCPIWEB.com).

  
W. Todd Benson