

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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**

WT Docket No. 08-165

COMMENTS OF THE COUNTY OF ALBEMARLE, VIRGINIA

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The County of Albemarle, Virginia, by its counsel, submits the following comments regarding the above-referenced Petition for Declaratory Ruling (hereinafter, the "Petition") filed by CTIA – The Wireless Association (hereinafter, the "CTIA"):

THE COMMENTER

The County of Albemarle, Virginia (hereinafter, the "County") is located in the west-central portion of Virginia, extending from the Piedmont plateau on the east to the Blue Ridge Mountains and the Shenandoah National Park to the west, over approximately 740 square miles. The County has a population of approximately 90,000 and is primarily rural in character, with an urbanized ring surrounding the independent City of Charlottesville (hereinafter, the "City"). Approximately 95% of the County's territory has a "Rural Areas" zoning designation.

The County is rich in history. Monticello, the home of Thomas Jefferson, is on the World Heritage List administered by the United Nations. Ash Lawn-Highland, the home of James Monroe, is also located in the County. The University of Virginia, founded by Thomas Jefferson in 1819, is located within both the County and the City, and the Rotunda at the University is a National Historic Landmark. The University's academical village is a National Historic District. The County has eight historic districts on the National Register of Historic Places, including the Southwest Mountains Rural Historic District (approximately 31,000 acres) and the Southern Albemarle Rural Historic District (83,627 acres). Several roads through the City and the County are currently under consideration for designation as national scenic highways as part of the Journey Through Hallowed Ground program. The County is also the home of numerous other National and State Historic Landmarks and sites that are on the National Register of Historic Places.

Notwithstanding the foregoing, the County recognizes the important and valuable role that wireless telecommunications plays in not only the national and local economies, but also in the County residents' and visitors' daily lives. Therefore, the County has endeavored to protect its very unique character while allowing the personal wireless service facility (hereinafter, "PWSF") infrastructure to be built out. Between 1990 and September 16, 1998, the County's Board of Supervisors granted 17 special use permits for PWSFs and denied 6 (which include the denial of the two special use permits on September 16, 1998 that ultimately resulted in *360 Communications v. Board of Supervisors of Albemarle County*, 211 F.3d 79 (4th Cir. 2000) (holding that the County Board of Supervisors' denial of special use permits for a 100-foot tall PWSF on a pristine mountain ridge did not violate the Telecommunications Act of 1996). The County has approved every PWSF request it has acted on after September 16, 1998.

In developing ways to balance the interests of the County and its residents with those of the telecommunications industry, the County and its residents have benefitted from a number of innovative and cooperative wireless carriers licensed to provide service in this area. The County's zoning regulations that allowed PWSFs by special use permit were amended October 13, 2004 to establish a three-tiered system, whereby the applicable substantive and procedural regulations depend on the nature of the PWSF requested. The vast majority of PWSF requests are now processed and approved ministerially.

SUMMARY OF COMMENTS

1. The Petition is based on the erroneous premise that the rapid deployment of PWSFs was the sole purpose of the Telecommunications Act of 1996.

2. The Declaratory Rulings sought by the Petition pertaining to 47 U.S.C. § 332(c)(7) would unlawfully intrude on historic powers vested in the states.
3. The legislative history of 47 U.S.C. § 332(c)(7) is clear that Congress did not want the FCC intruding into local zoning matters and wanted to continue to allow decisions related to the siting of PWSFs to be based on state and local zoning laws.
4. The Declaratory Rulings sought by the Petition pertaining to 47 U.S.C. § 253 and 47 U.S.C. § 332(c)(7) are prohibited by Section 601(c)(1) of the Telecommunications Act.
5. The Declaratory Rulings sought by the Petition pertaining to 47 U.S.C. § 332(c)(7) are contrary to the plain and unambiguous language of the statute, and would be tantamount to the FCC rewriting, not interpreting, 47 U.S.C. § 332(c)(7) to preempt state and local zoning laws.
6. *Alliance for Community Media v. Federal Communications Commission* is not controlling authority for the Declaratory Ruling sought by the Petition pertaining to the time within which a PWSF request must be acted on.
7. *Chevron USA v. Natural Resources Defense Council, Inc.* is not controlling authority for the Declaratory Ruling sought by the Petition regarding the prohibition of services.
8. The Declaratory Ruling sought by the Petition pertaining to 47 U.S.C. § 253 is contrary to the plain and unambiguous language of the statute and asks the FCC to intrude into the siting of PWSFs, a matter reserved to localities under state and local zoning laws; *Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700 (9th Cir. 2006), the primary authority supporting the expansive interpretation of 47 U.S.C. § 253 sought by the Petition, was vacated on May 14, 2008 and a new decision, effectively reversing the prior decision, was issued on September 11, 2008 at 2008 U.S. App. LEXIS 19316 (9th Cir. 2008).
9. The anecdotal examples of unreasonable delays in action by localities do not justify the Declaratory Ruling sought by the Petition.

COMMENTS AND AUTHORITY IN SUPPORT THEREOF

1. **The Petition is based on the erroneous premise that the rapid deployment of PWSFs was the sole purpose of the Telecommunications Act of 1996.**

The Petition leads the reader to the mistaken impression that the rapid deployment of PWSFs was the sole purpose of the Telecommunications Act of 1996 (hereinafter, the “Telecommunications Act”).

Section 704 of the Telecommunications Act, codified in 47 U.S.C. § 332(c), has been described as a deliberate compromise between two competing goals of the Act – to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over the siting of PWSFs. *Town of Amherst v. Omnipoint Communications Enterprises*, 173 F.3d 9, 12 (1st Cir. 1999). Congress “struck a balance between the national interest in facilitating the growth of telecommunications and the local interest in making zoning decisions” over the siting of towers and other facilities that provide wireless services. *360 Communications v. Board of Supervisors of Albemarle County*, 211 F.3d 79, 86 (4th Cir. 2000). While expressly preserving local zoning authority

(47 U.S.C. § 332(c)(7)(A)), the Telecommunications Act requires that decisions denying wireless facilities be in writing and supported by substantial evidence (47 U.S.C. § 332(c)(7)(B)(iii)). The Act also prohibits localities from adopting regulations that prohibit or have the effect of prohibiting wireless services, or unreasonably discriminate against functionally equivalent providers. 47 U.S.C. § 332(c)(7)(B)(i). The only complete preemption contained in 47 U.S.C. § 332(c)(7)(B) is found in subparagraph (iv), which preempts localities from regulating the placement, construction, and modification of wireless facilities on the basis of the environmental effects of radio frequency emissions if those facilities comply with the FCC's regulations concerning emissions.

In fashioning the language of 47 U.S.C. § 332(c)(7), Congress was aware that localities have enjoyed broad powers to implement land use controls to meet the increasing encroachment of urbanization on the quality of life. *See, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). "The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981). Thus, Congress left most of the substantive authority to approve the location of PWSFs in the hands of state or local governments. *Aegerter v. City of Delafield*, 174 F.3d 886, 891 (7th Cir. 1999). This compromise preserves a locality's lawful exercise of its zoning authority, even in the face of claims that an individual zoning decision thwarts the Telecommunications Act's goal of increased competition through the rapid deployment of the wireless infrastructure. *See, Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 639 (2^d Cir. 1999) ("We do not read the TCA to allow the goals of increased competition and rapid deployment of new technology to trump all other important considerations, including the preservation of the autonomy of states and municipalities").

The CTIA "may disagree with Congress's decision to leave so much authority in the hands of state and local governments to affect the placement of the physical infrastructure of an important part of the nation's evolving telecommunications network. But that is what it did when it passed the Telecommunications Act of 1996 . . ." *Aegerter, supra*. "The statute's balance of local autonomy subject to federal limitations does not offer a single 'cookie cutter' solution for diverse local situations . . . Congress conceived that this course would produce (albeit at some cost and delay for the carriers) individual solutions best adapted to the needs and desires of particular communities." *Amherst, supra*.

Congress was clear that, beyond the limited exceptions to local zoning authority in 47 U.S.C. § 332(c)(7)(B), the fundamental and important purpose of local zoning authority is not to be sacrificed to the Telecommunications Act's other goal of promoting competition among the wireless service providers through the rapid deployment of wireless facilities.

2. The Declaratory Rulings sought by the Petition pertaining to 47 U.S.C. § 332(c)(7) would unlawfully intrude on historic powers vested in the states.

The Declaratory Rulings sought by the Petition pertaining to 47 U.S.C. § 332(c)(7) are two-fold. First, they would impose specific deadlines on local zoning decisions and, if those decisions were not timely made, would deem the PWSF requests approved, even those that require a legislative act under applicable state law. Second, they would strip localities of local zoning authority to deny a specific PWSF if to do so would prevent a particular carrier from providing service in a given area.

47 U.S.C. § 332(c)(7)(A) expressly preserved local zoning authority and, inherently, the authority to make decisions consistent with state and local law. If Congress had intended to authorize local decision-making authority to be supplanted, it would have expressly so provided. This passage

from *Gregory v. Ashcroft*, 501 U.S. 452, 460-461 (1991) is apt:

... [I]f Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’ ... Congress should make its intention ‘clear and manifest’ if it intends to preempt the historic powers of the States ...”

See also, *Feikema v. Texaco, Inc.*, 16 F.3d 1408 at 1413 (4th Cir. 1994) (recognizing the rule that historic police powers of states are not to be superseded by federal law unless supersession is the clear and manifest intent of Congress).

Zoning is a historic power of the states. As with most, if not all other states, a Virginia county is a subordinate agency of state government and is invested by the General Assembly with subordinate powers of legislation and administration relative to local affairs within a prescribed area. *Murray v. City of Roanoke*, 192 Va. 321 (1951). Under the Virginia Constitution, all county powers are delegations of authority granted by the General Assembly and, unless otherwise indicated by statute or the constitution, are vested in the board of supervisors. *Constitution of Virginia, Art. VII, § 3; Virginia Code § 15.2-1401*.

With respect to the regulation of land use, the General Assembly has granted to counties, cities and towns numerous powers to provide for comprehensive planning and to regulate the use and development of land by adopting zoning and subdivision ordinances. *Virginia Code § 15.2-2200 et seq.* As explained by the Virginia Supreme Court, the state “legislature may, in the exercise of the police power, restrict personal and property rights in the interest of public health, public safety, and for the promotion of the general welfare.” *Gorieb v. Fox*, 145 Va. 554 (1926), affirmed 274 U.S. 603 (1927). Thus, the power of a locality to regulate the use of land through zoning and other regulations arises from the locality’s police power, which is a residual power, intrinsic in the sovereign, to protect the public health, safety and welfare.

The important role of local land use planning, zoning and other related matters in localities throughout the country is exemplified in the following passages from opinions of the Fourth Circuit Court of Appeals. “Land use planning and the adoption of land use restrictions constitute some of the most important functions performed by local government.” *Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597, 604 (4th Cir. 1997). “Zoning ... may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. ... We can conceive of few matters of public concern more substantial than zoning and land use laws.” *Pomponio v. Fauquier County Board of Supervisors*, 21 F.3d 1319, 1327 (4th Cir. 1994) (including an excerpt from Justice Marshall’s dissent in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974)), overruled in part on other grounds by *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996).

In this case, Congress has not made its intention “clear and manifest” to preempt local zoning authority beyond the limited exceptions established by Congress in 47 U.S.C. § 332(c)(7)(B). In fact, as explained in the discussion under Comment 3, Congress’ clear intent on this issue was to preserve local zoning authority.

A. State law determines when action on a land use application is required.

Under the County’s zoning regulations, requests for PWSFs are processed as various types of

building or land use applications, and state laws determine the time within which action must be taken. All PWSF requests acted on by the County after September 16, 1998 have been approved. Prior to October 13, 2004, PWSFs required a special use permit. Since that date, the County's zoning regulations provide a three-tiered system for considering and acting on various types of PWSFs, and the vast majority of the PWSF requests are processed and approved ministerially.

PWSFs that will be located within or upon existing structures qualify as Tier I facilities and require only a building permit. *Albemarle County Code § 18-5.1.40(c) (Tier I facilities)*. The Virginia Uniform Statewide Building Code requires that building permits be issued "within a reasonable time after filing." *Virginia Uniform Statewide Building Code § 110.1*. The County's Building Official states that building permits for Tier I facilities are typically issued within 10 working days. The County does not track the number of Tier I facilities requested and approved. However, the Building Official assures that to date all Tier I requests have been approved.

PWSFs that will be not more than 10 feet taller than the nearest tree within 25 feet qualify as Tier II facilities and are subject to a ministerial review that is conducted in conjunction with a site plan. *Albemarle County Code § 18-5.1.40(d) (Tier II facilities)*. By state law, preliminary and final site plans must be acted on within 60 days, with additional time allowed where state agency review is required. *Virginia Code §§ 15.2-2259 and 15.2-2260; Albemarle County Code §§ 18-5.1.40(d) and 18-32.4.2.6*. All 12 Tier II requests that have been acted on since October 13, 2004 have been approved.

PWSFs that are neither Tier I nor Tier II facilities are classified as Tier III facilities and require special use permits. *Albemarle County Code § 18-5.1.40(e) (Tier III facilities)*. Special use permits are legislative in nature (*Richardson v. City of Suffolk*, 252 Va. 336 (1996)) and require public hearings before the County's planning commission and the board of supervisors. *Albemarle County Code § 18.1-32.2.4*. The planning commission must make its recommendation to the board of supervisors within 90 days, and the board must act within a reasonable time. *Albemarle County Code § 18-31.2.4.2*. Special use permits are similar in some respects to rezonings which must be acted on by the locality within 12 months. *Virginia Code § 15.2-2286(A)(7)*. All three Tier III/special use permit requests that have been acted on since February 2, 2004, when the County's project tracking software was put in place, have been approved. The average review period has been 135 days (actual time for each: 134, 135 and 136 days).

B. State law determines the scope of the authority of a locality to approve the location of PWSFs

The Telecommunications Act does not affect or encroach upon the substantive standards to be applied under established principles of state and local law. *Cellular Telephone Company v. Town of Oyster Bay*, 166 F.3d 490, 494 (2^d Cir. 1999); *Aegerter*, 174 F.3d at 891. However, the Declaratory Ruling sought by the Petition pertaining to the prohibition of service would do just that.

Under Virginia law, the zoning power granted to local governing bodies includes the authority to: (1) adopt a comprehensive plan (*Virginia Code § 15.2-2223*); (2) regulate, restrict, permit, and prohibit the use of land and the size, height, location and construction of structures (*Virginia Code §§ 15.2-2280(1) and (2)*); and (3) allow certain uses by special use permit, subject to suitable regulations and safeguards (*Virginia Code § 15.2-2286(A)(3)*). Thus, a Virginia locality retains its authority under 47 U.S.C. § 332(c)(7)(A) to:

- Allow PWSFs by right subject to complying with standard regulations. *Virginia Code § 15.2-2280(1)*.
- Determine the appropriate height, location and bulk of PWSFs. *Virginia Code § 15.2-2280(2)*.
- Allow PWSFs by special use permit, subject to suitable regulations and safeguards. *Virginia Code § 15.2-2286(A)(3)*.
- Deny applications for special use permits if the requisite findings for the granting of a permit cannot be made. *See, e.g., County of Lancaster v. Cowardin*, 239 Va. 522, 526 (1990).
- Deny applications for special use permits if the proposed uses are inconsistent with the comprehensive plan. *National Memorial Park v. Board of Zoning Appeals*, 232 Va. 89, 92-93 (1986).
- Prohibit uses, including wireless facilities, within certain zoning districts. *Resource Conservation Management, Inc. v. Board of Supervisors of Prince William County*, 238 Va.15, 20 (1989).

Of course, the exercise of this authority must otherwise comply with state and local land use laws, and may not violate the limited exceptions in 47 U.S.C. § 332(c)(7)(B).

The Telecommunications Act's preservation of local zoning authority over the placement of wireless facilities, while restricting localities from prohibiting service, reflects Congress' desire to assure the introduction of competitive wireless services while at the same time preserving local control over the physical facilities themselves. *See AT&T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 155 F.3d 423, 428-429 (4th Cir. 1998) (referring to the Act's explicit goals of facilitating competition by strengthening the hands of new market entrants and of preserving a large portion of local authority).

3. The legislative history of 47 U.S.C. § 332(c)(7) is clear that Congress did not want the FCC intruding into local zoning matters and wanted to continue to allow decisions related to the siting of PWSFs to be based on state and local zoning laws.

The Declaratory Rulings sought by the Petition pertaining to 47 U.S.C. § 332(c)(7) are directly contrary to Congress' intent in adopting 47 U.S.C. § 332(c)(7). Three short, but key, passages from the legislative history make it absolutely clear that Congress did not want the FCC intruding into local zoning matters, wanted the time in which a PWSF request must be acted on to be based on state law, and did not intend the prohibition of service clause to usurp the authority of localities to make case-by-case decisions.

The legislative history is clear that Congress did not want the FCC getting involved in local land use matters:

The conference agreement creates a new section 704 which prevents [Federal Communications] Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement. The conference agreement also provides a mechanism for judicial relief from zoning

decisions that fail to comply with the provisions of 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 1996 the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities should be terminated.

...

The limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations and 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.

H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 207-208 (1996).

On the issue of the time in which a PWSF request must be acted on, the legislative history is equally clear:

Under subsection (c)(7)(B)(ii), decisions are to be rendered in a reasonable period of 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 to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision.

H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 208 (1996).

Finally, on the issue of the meaning of the "prohibition of services" clause in 47 U.S.C. § 332(c)(7)(B)(i), the legislative history provides:

Actions taken by State or local governments shall not prohibit or have the effect of prohibiting the placement, construction or modification of personal wireless services. It is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-case basis.

H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 208 (1996).

The Declaratory Rulings sought by the Petition pertaining to 47 U.S.C. § 332(c)(7) require the FCC to enter an area in which Congress intended that it have no role.

4. **The Declaratory Rulings sought by the Petition pertaining to 47 U.S.C. § 253 and 47 U.S.C. § 332(c)(7) are prohibited by Section 601(c)(1) of the Telecommunications Act.**

The Declaratory Rulings sought by the Petition would modify state and local laws pertaining to

how and when a locality would consider a PWSF request. Because state and local zoning authority pertaining to the siting of PWSFs is preserved under 47 U.S.C. § 332(c)(7)(A), subject only to the limited exceptions in 47 U.S.C. § 253 and 47 U.S.C. § 332(c)(7)(B), the Declaratory Rulings are prohibited by Section 601(c)(1) of the Telecommunications Act of 1996, which states:

No implied effect.-- This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, state, or local law unless expressly so provided in such Act or amendments.

Pub. L. No. 104-104, § 601, 110 Stat. 143 (1996), reprinted in 47 U.S.C. § 152, historical and statutory notes.

5. The Declaratory Rulings sought by the Petition pertaining to 47 U.S.C. § 332(c)(7) are contrary to the plain and unambiguous language of the statute and would be tantamount to the FCC rewriting, not interpreting, 47 U.S.C. § 332(c)(7) to preempt state and local zoning laws.

The Petition argues that a “reasonable period of time” as used in 47 U.S.C. § 332(c)(7)(B)(ii) is ambiguous and in need of interpretation by the FCC. The Petition also asks that the FCC interpret 47 U.S.C. § 332(c)(7)(B)(i) so as to bar localities from making zoning decisions that have the effect of prohibiting a particular provider from offering service in a given geographic area. The discussion that follows applies the universal rules of statutory construction (citing Virginia case law) to further show why the Petition’s proposed “interpretations” are wrong.

When the terms are unambiguous, the first step in interpreting a statute is to employ the plain and natural meaning of the words used. *West Lewinsville Heights Citizens Association v. Board of Supervisors of Fairfax County*, 270 Va. 259 (2005). When employing the plain and natural meaning to language that is unambiguous, the key question is not what the legislative body intended to enact, but the meaning of the words of the statute enacted. *Carter v. Nelms*, 204 Va. 338 (1963). The legislative body’s *intent* is determined only from what the statute says, and not from what anyone thinks it should have said. *Carter, supra*; *Logan v. City Council of the City of Roanoke*, 275 Va. 483 (2008) (“We determine the General Assembly’s intent from the words employed in the statutes”). Dictionaries may be used as aids in obtaining the plain and natural meaning of a word. *Fritts v. Carolinas Cement Company*, 262 Va. 401 (2001). It must be assumed that the legislative body chose, with deliberation and care, the words it used when it adopted the statute at issue. *Miller v. Highland County*, 274 Va. 355 (2007). The words used are binding when the statute is interpreted, *Barr v. Town & Country Properties, Inc.*, 240 Va. 292 (1990), unless such a literal interpretation would involve a manifest absurdity. *Dominion Trust Co. v. Kenbridge Construction Co.*, 248 Va. 393 (1994). If the rule was otherwise, the legislative power of the legislative body would be usurped by those not holding that power. *Barr, supra*. A statute should not be extended by interpretation beyond its intended purpose. *Higgs v. Kirkbride*, 258 Va. 567 (1999). It is perfectly reasonable to conclude that if the legislative body had intended to include a provision in a statute, it could, and would, have done so. *Board of Zoning Appeals ex rel. County of York v. 852 L.L.C.*, 257 Va. 485 (1999).

A. The time in which a PWSF request must be acted on.

The Petition suggests that a “reasonable period of time” be interpreted to mean the 45- and 75-day action periods, with requests deemed approved if the locality fails to act within those deadlines.

The language of 47 U.S.C. § 332(c)(7)(B)(ii) is plain and unambiguous. The Petition argues that uniform nationwide rules establishing one or more specific deadlines and consequences (deemed approval) if a locality fails to act within those deadlines are necessary to allow the rapid deployment of PWSFs. The argument cannot reasonably be made within the framework Congress established in 47 U.S.C. § 332(c)(7).

47 U.S.C. § 332(c)(7)(B)(ii) requires that a locality act on a request for a wireless permit within a reasonable period of time:

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.

Although a “reasonable period of time” is not defined, a careful reading of the language used by Congress makes it clear that “reasonableness” is to be determined on a case-by-case basis, rather than by uniform nationwide rules as requested in the Petition. Under 47 U.S.C. § 332(c)(7)(B)(ii), a locality must act on “any request . . . within a reasonable period of time . . . *taking into account the nature and scope of such request.*” The legislative history examined in Comment 4 fully supports this analysis.

Applying the foregoing rules of statutory interpretation to 47 U.S.C. § 332(c)(7)(B)(ii), the term “reasonable” is not ambiguous and need not be interpreted by the FCC beyond its plain and ordinary meaning, *e.g.*, that a reasonable period of time is a period of time that is “within the bounds of reason: not extreme: not excessive.” *Webster’s Third New International Dictionary (definition of “reasonable”)*. If Congress had intended to impose a specific deadline for locality action, it would have done so. Instead, it did just the opposite by providing that what would be a “reasonable” time for action would be determined for a particular request by “*taking into account the nature and scope of such request.*” It must be assumed that Congress intentionally decided not to impose a specific deadline. This is clearly consistent with Congress’ desire to preserve local zoning authority.

The fact that Congress decided to not impose a specific deadline by which the locality must act on a PWSF does not create an ambiguity as suggested in the Petition. A statute is ambiguous if it can be understood in more than one way. *Virginia-Am. Water Co. v. Prince William Service Authority*, 246 Va. 509 (1993). An ambiguity also exists when the language is difficult to comprehend, is of doubtful import, or lacks clearness and definiteness. *Brown v. Lukhard*, 229 Va. 316 (1985). The fact that parties may disagree as to the meaning of a statute does not necessarily mean that the statute is ambiguous. The term “reasonable” cannot be understood in more than one way, is easy to comprehend by common understanding or resort to a dictionary, and contains the requisite clearness and definiteness for the purpose it serves, particularly when the term is used in the context of 47 U.S.C. § 332(c)(7)(B)(ii) as a whole, *i.e.*, within a reasonable period of time “. . . *taking into account the nature and scope of such request.*” In this language, Congress clearly recognized that requests for approval of PWSFs would come in numerous forms under various circumstances, and that specific deadlines would impinge on the circumstantial flexibility that may be required.

Based on the foregoing, it is apparent that the Petition is asking the FCC to rewrite 47 U.S.C. § 332(c)(7)(B)(ii), not to interpret it. Given that Congress reserved in the states and their localities the authority to act within a reasonable period of time, the FCC can do no more than determine that a “reasonable period of time” is a period of time that is “within the bounds of reason: not extreme: not

excessive.” However, the FCC cannot, as the Petition requests, determine that a “reasonable period of time” means 45 days or 75 days under its authority to interpret a statute.

B. Whether a decision prohibits or has the effect of prohibiting wireless service

The Declaratory Ruling sought by the Petition would bar localities from making zoning decisions that have the effect of prohibiting a particular provider from offering service in a given geographic area.

47 U.S.C. § 332(c)(7)(B)(i)(II) forbids regulations that prohibit or have the effect of prohibiting the provision of personal wireless services:

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.

The minimum requirements of this clause have been discussed and explained in numerous cases. Its plain language does not compel a locality to guarantee that each *provider* be able to provide service in *every geographic area* within the locality. This interpretation is consistent with the legislative history of 47 U.S.C. § 332(c)(7)(B)(i)(II), wherein Congress explained that “[i]t is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-case basis.” *H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 208 (1996)*. The Declaratory Ruling sought by the Petition would strip localities of the case-by-case decision making that Congress intended to preserve.

The prohibition clause does not divest the locality of its discretion, under its site-specific review, to determine whether certain uses are detrimental to a zoning area. *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Board of Adjustment*, 172 F.3d 307 (4th Cir. 1999) (denial of tower in residential area on lot on which a historic building was located was supported by substantial evidence). The FCC cannot, as the Petition requests, determine that the “prohibition of service” means any decision that prevents a particular provider from offering service in a given geographic area.

6. Alliance for Community Media v. Federal Communications Commission is not controlling authority for the Declaratory Ruling sought by the Petition pertaining to the time within which a PWSF request must be acted on.

The Petition relies on *Alliance for Community Media v. Federal Communications Commission*, 529 F.3d 763 (6th Cir. 2008) as authority for the FCC to issue the Declaratory Ruling sought by the Petition pertaining to the time within which a PWSF request must be acted on. The Petition frames the issues as the court did in *Alliance*. However, *Alliance* is easily distinguishable because it is based on a statutory scheme that is significantly and materially different from 47 U.S.C. § 332(c)(7), and it pertains to an issue – the local franchising of cable television – that does not remotely approach the historical and significant role of state and local control over land use matters at issue in this case.

Following is a summary of some of the key differences between the relevant legal and factual issues under consideration in *Alliance* and in this case that make *Alliance* distinguishable. Most of these differences are also discussed elsewhere in these comments.

First, unlike the statute at issue in *Alliance*, the two-part test for deference to administrative

interpretations established in *Chevron USA v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which was heavily relied on by the Sixth Circuit Court of Appeals in its decision in *Alliance*, does not apply in this case. The principle of deference to administrative interpretations afforded under a *Chevron* analysis is inappropriate in this case because it is based on giving “considerable weight” to “an executive department’s construction of a statutory scheme *it is entrusted to administer.*” *Chevron USA*, 467 U.S. at 844. The FCC is not entrusted to administer 47 U.S.C. § 332(c)(7). *See also, Comment 7, ¶ 2 for additional comments on this issue.* Moreover, assuming for the sake of argument that the FCC was so entrusted, 47 U.S.C. § 332(c)(7) is neither silent nor ambiguous on the subject and, in light of the plain and unambiguous language of the statute and its clear and unequivocal legislative history, the interpretation sought by the Petition would not be a permissible construction of the law. Accordingly, there is no ambiguity from which the FCC may conclude that Congress has implicitly delegated to the FCC the authority to fill in any perceived statutory gaps.

Second, unlike the statute at issue in *Alliance*, the legislative history of the Telecommunications Act evidences a clear intent to limit the FCC’s intrusion into local zoning authority: “The conference agreement creates a new section 704 which prevents [Federal Communications] Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement.” *H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 207-208 (1996)*. The deadlines upheld in the rulemaking at issue in *Alliance* go beyond the conference agreement and what was finally adopted by Congress in 47 U.S.C. § 332(c)(7).

Third, unlike the statute at issue in *Alliance*, Congress has expressed a clear intent to limit federal intrusion in local zoning authority on the specific issue of the timing of local action. The Declaratory Ruling sought by the Petition is directly contrary to 47 U.S.C. § 332(c)(7)(B)(ii)’s language and legislative history.

Fourth, there is a strong presumption against preemption of state police power, and express preemption provisions should be narrowly construed. *See, Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517-518 (1992). Therefore, except when the facts fall squarely within one of the limitations set forth in 47 U.S.C. § 332(c)(7), a locality’s zoning power, including the procedure by which it exercises that power, remains intact and unaffected by the Telecommunications Act. *See, Section 601(c)(1) of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 601, 110 Stat. 143 (1996), reprinted in 47 U.S.C. § 152, historical and statutory notes.* The historical deference of the federal government to state and local governments on zoning matters was not at issue in *Alliance*.

Lastly, unlike the statute at issue in *Alliance*, presumably most if not all states have established extensive substantive and procedural requirements, including deadlines for action and remedies, for the various types of local land use decisions to which a PWSF would be subject.

7. *Chevron USA v. Natural Resources Defense Council, Inc.* is not controlling authority for the Declaratory Ruling sought by the Petition pertaining to the prohibition of services.

The Petition relies on *Chevron USA v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) in support of its request for a Declaratory Ruling that would bar localities from making zoning decisions that have the effect of prohibiting a particular provider from providing service in a given geographic area.

As noted in Comment 6, the principle of deference to administrative interpretations afforded

under a *Chevron* analysis is inappropriate in this case because it is based on giving “considerable weight” to “an executive department’s construction of a statutory scheme *it is entrusted to administer.*” *Chevron USA*, 467 U.S. at 844. The FCC is not entrusted to administer 47 U.S.C. § 332(c)(7). In fact, Congress did not want the FCC to have any role in the area of state and local zoning authority pertaining to the siting of PWSFs. Instead, Congress wanted the courts to “have exclusive jurisdiction over all other disputes arising” under 47 U.S.C. § 332(c)(7), and directed that any “pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities should be terminated.” *H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 207-208 (1996)*. Congress explained that the “limitations on the role and powers of the Commission under [47 U.S.C. § 332(c)(7)] relate to local land use regulations and 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.” *H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 207-208 (1996)*.

Assuming, for the sake of argument, that a *Chevron* analysis is appropriate, the Petition fails to satisfy either parts of the two-part test in *Chevron*. 47 U.S.C. § 332(c)(7)(B)(i) is neither silent nor ambiguous on the subject. As explained at greater length in Comment 5(B), the plain and unambiguous language of 47 U.S.C. § 332(c)(7)(B)(i) does not assure that every provider will be allowed to establish a PWSF in every geographic area as the Petition requests. The numerous courts that have considered the issue have not interpreted 47 U.S.C. § 332(c)(7)(B)(i) as requested in the Petition. The Declaratory Ruling sought by the Petition would strip localities of the case-by-case decision making authority that Congress intended to preserve. The FCC cannot, as the Petition requests, determine that the “prohibition of service” means any decision that prevents a particular provider from offering service in a given geographic area.

In light of the plain and unambiguous language of 47 U.S.C. § 332(c)(7)(B)(i) (*See, Sprint Telephony PCS, L.P. v. County of San Diego*, 2008 U.S. App. LEXIS 19316 (9th Cir. 2008) (holding that similar language in 47 U.S.C. § 253 is unambiguous)) and its clear and unequivocal legislative history, the interpretation sought by the Petition would not be a permissible construction of the law. Accordingly, there is no ambiguity from which the FCC may conclude that Congress has implicitly delegated to the FCC the authority to fill in any perceived statutory gaps.

8. The Declaratory Ruling sought by the Petition pertaining to 47 U.S.C. § 253 is contrary to the plain and unambiguous language of the statute and asks the FCC to intrude into the siting of PWSFs, a matter reserved to localities under state and local zoning laws; *Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700 (9th Cir. 2006), the primary authority supporting the expansive interpretation of 47 U.S.C. § 253 sought by the Petition, was vacated on May 14, 2008 and a new decision, effectively reversing the prior decision, was issued on September 11, 2008 at 2008 U.S. App. LEXIS 19316 (9th Cir. 2008).

The Declaratory Ruling sought by the Petition asks that the FCC preempt state and local laws that require a variance for every PWSF request under 47 U.S.C. § 253.

The primary case regarding the interpretation of 47 U.S.C. § 253 cited in the Petition, *Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700 (9th Cir. 2006), was vacated by the Ninth Circuit Court of Appeals on May 14, 2008 and a rehearing was granted at 527 F.3d 791 (9th Cir. 2008). On September 11, 2008, the Ninth Circuit issued its decision at 2008 U.S. App. LEXIS 19316. Regarding the meaning of 47 U.S.C. § 253, the court reached a different conclusion than the one it

reached at 490 F.3d 700. The expansive preemptive effect of 47 U.S.C. § 253 endorsed by the court in its decision at 490 F.3d 700 was rejected and the barrier to entry provisions of 47 U.S.C. § 253 were interpreted by the court the same way the prohibition clause in 47 U.S.C. § 332(c)(7)(B)(i) is interpreted. Thus, the Ninth Circuit has joined other federal appellate courts to require that “a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.” The type of sweeping preemption sought by the Petition no longer finds persuasive case law interpreting 47 U.S.C. § 253, and a case-by-case analysis is required.

Although the FCC has interpreted 47 U.S.C. § 253 in a different context (*See In re Cal. Payphone Association*, 12 F.C.C.R. 14191 (1997)), it may not do so here. 47 U.S.C. § 253 and 47 U.S.C. § 332(c)(7) are part of the same law and they must be interpreted with reference to one another. Comments 1 through 7 explain why Congress preserved state and local zoning laws pertaining to the siting of PWSFs and excluded the FCC from intruding into that area. The same comments and analysis apply to any analysis under 47 U.S.C. § 253.

9. **The anecdotal examples of unreasonable delays in action by localities do not justify the Declaratory Ruling sought by the Petition.**

The Petition provides several anecdotal examples of unreasonable delays in action by localities scattered across the country. The purpose of these examples is to demonstrate how delays in action by localities are prohibiting service under 47 U.S.C. § 332(c)(7)(B).

The examples are limited in scope and are not presented in any meaningful context to support nationwide rules. Although the Petition complains of “egregious delays” (Petition, page 14) and states that “some jurisdictions drag out the process” (Petition, page 26), the Petition omits the critical details for any particular delay, such as the extent to which the delay was caused by the applicant, that delay was the result of the height being controversial, that the proposed location of the facility required special review (*e.g.*, because the proposed PWSF would be located in or near a historic district), that the delay violated state law, or that the delay was caused by innocent mistakes in, for example, providing public notice. Examination of the sole footnoted example on page 15 and repeated on pages 26 and 27 of the Petition reveals that the Mississippi mayor who was quoted saying that “We don’t want cell towers” was the mayor of a town having a population of approximately 4,750 (2000 Census) and the proposed PWSF he was referring to was a 180-foot tall facility which, in a town that size, may be out of character with the district in the town in which it would be located. When that mayor is also quoted as boasting that his town has not approved a “cell phone tower” since he has been mayor, the reader does not know whether he is referring to any PWSFs, including antennas mounted on existing structures, or only structures that are “towers” under the town’s regulations.

In light of the Petition’s acknowledgement of the rapid and extensive buildout of the wireless infrastructure since 1996, and the reasonable time in which the vast majority of PWSF actions are taken (Petition, pages 10-12, 24-26), the Declaratory Ruling sought by the Petition is unnecessary. Even assuming, for the sake of argument, that a Declaratory Ruling was appropriate in this case, the record evidence consisting of several anecdotal examples is unpersuasive under any legal standard to support the Declaratory Ruling sought by the Petition.

Respectfully submitted,



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