

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

COMMENTS OF THE OHIO TOWNSHIP ASSOCIATION OPPOSING CTIA PETITION FOR FCC RULING

These Comments are filed by the Ohio Township Association, a statewide organization dedicated to promoting and protecting township government in Ohio. The Ohio Township Association represents 1,308 townships, which are units of general purpose, local government in the state of Ohio. We urge the Federal Communications Commission to deny the Petition filed by the Cellular Telecommunications and Internet Association (CTIA). As noted below, CTIA's Petition is without merit and without basis in law or fact. The Ohio Township Association also joins in the Comments filed by the National Association of Towns and Townships (NATaT) and the National Association of Telecommunications Officers and Advisors (NATOA) in response to CTIA's Petition.

Section 253 of Title 47 of the United States Code does not apply to wireless tower sitings. Rather, 47 U.S.C. § 332(c)(7)(B) governs wireless tower sitings to the exclusion of § 253. Section 332(c)(7)(B)(i) provides:

- (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof-
- (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
- (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

Section 253 on the other hand provides that no local government may prohibit or effectively prohibit the provision of telecommunications services. The language in § 332 is specific to wireless service facilities, while § 253 address telecommunications generally. Congress does not enact redundant code provisions. Further, the Supreme Court's ruling in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992), establishes that specific code sections supersede general code sections.

Section 332 is very specific as to the remedies and procedures to be followed with respect to wireless facility applications.

Section 332 (c)(7)(B)(v) provides that any person adversely affected by a local government's final action or failure to act may, within 30 days, file suit in any court of competent jurisdiction. The court must hear and decide the suit on an expedited basis. Further, any person adversely affected by local government act or failure to act that is inconsistent with clause 32(c)(7)(B)(iv) may petition the Commission for relief. The specificity of these remedies shows that § 332 applies to wireless service facilities to the exclusion of § 253.

Townships in Ohio, pursuant to Ohio Revised Code Chapter 519, have the right to regulate the placement of cellular towers only in residentially zoned areas. Ohio townships may not regulate or prohibit the placement of cellular towers in commercially, industrially or agriculturally zoned areas in Ohio. This law was established to protect the cellular companies and township property owners and property values. Pursuant to current federal and state laws, Ohio townships must act within a reasonable time period when deciding on cellular tower placement requests in residential areas.

Unlike large county and city governments, many townships in Ohio meet only once a month. The 30 day time frame requested in Section 332 (c)(7)(B)(v) of CTIA's petition is unreasonable with respect to many township governments in Ohio and could result in higher government costs due to additional meetings and staff time and potential attorney and court costs. The Ohio Township Association respectfully asks that the Commission deny CTIA's Petition with respect to this issue.

The Commission should also deny CTIA's Petition with respect to the request that the Commission should supply meaning to the phrase "failure to act." The Commission's authority to interpret language in the Communications Act of 1934 is limited to areas of ambiguity. "Failure to act" is not an ambiguous phrase. The word "failure" means the "omission of an occurrence or performance;" the word "act" means "to carry out or perform an activity." Taken together, the phrase "failure to act" means to omit the performance of an activity. Contrary to CTIA's assertion, there is nothing vague or ambiguous about this statutory language which would entitle the Commission to issue a declaratory ruling on this topic.

In addition, Congress made it perfectly clear that the time frame for responding to applications for wireless facility sitings is determined by reference to the nature of the application. Section 332(c)(7)(B)(ii) provides that local governments act on requests "within a reasonable time period, taking into account the nature of the request." Therefore, even if ambiguity existed in the statute, the FCC would be acting outside its authority by mandating a fixed time period and imposing a remedy for violating that mandate, where Congress clearly intended fluidity.

The Ohio Township Association is a strong advocate for local control over land use decisions. No one knows the people better or the issues better than the local, elected officials. They live and work within the community and are the first to be called when a problem within the community arises. Township zoning codes in Ohio are created by a committee of township residents and are voted on by all residents of the township. What is good for one township may not be good for the neighboring township but the decision regarding those choices is left to the residents of each township.

Congress recognized the importance of maintaining a degree of local control over land use decisions that vary among jurisdictions and on a case-by-case basis. The FCC should not undermine this congressional intent with an inflexible federal mandate upon townships and other units of local government.

In conclusion, the Commission does not have the authority to issue the declaratory ruling requested by CTIA because it would be contrary to Congress's intentions. Further, the current process for addressing land use applications ensures that the rights of citizens in our community to govern themselves and ensure the appropriate development of the community are properly balanced with the interests of all applicants. The system works well and there is no evidence to suggest that the Commission should grant a special waiver of state and local law to the wireless industry. Any perceived difficulties experienced by wireless providers can and are adequately addressed through existing safeguards provided in law and the courts, as well as the electoral process in each individual community. Federal agency intrusion is neither warranted nor authorized.

Respectfully submitted,

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