

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

In the Matter of)	
)	
)	
Petition for Declaratory Ruling by CTIA – The)	
Wireless Association to Clarify Provisions of)	WT Docket No. 08-165
Section 332(C)(7)(B) to Ensure Timely Siting)	
Review and to Preempt under Section 253 State)	
and Local Ordinances That Classify All Wireless)	
Citing Proposals as Requiring a Variance)	
)	

**COMMENTS OF SETH COOPER
DIRECTOR,
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AMERICAN LEGISLATIVE EXCHANGE COUNCIL (ALEC)**

Open and vigorous competition in a free marketplace is the most efficient means of providing improved service, expanded coverage and lower prices to consumers of wireless services. The Commission should bring needed clarity to existing federal law concerning wireless services by adopting specific timeframes for state or local governing authorities to act on permit applications for collocation and new siting of towers and antennas. This action should be accompanied by a rule providing that the failure of such a governing authority to act within those timeframes will result in such applications being deemed automatically approved. In addition, the Commission should issue a clarifying ruling that existing federal law disallows zoning decisions by state or local governing authorities that prohibit deployment of advanced wireless services simply because one or more other carriers already provide services to a particular geographic market.

STATEMENT OF INTEREST

The American Legislative Exchange Council (ALEC) is the nation's largest nonpartisan, individual membership organization of state legislators. ALEC's mission is to promote the Jeffersonian principles of individual liberty, limited government, federalism, and free markets.

To guide policymakers through the uncharted waters of the 21st Century economy, ALEC's Telecommunications and Information Technology Task Force brings together state legislators, industry representatives, and public policy experts. Working together, the Task Force seeks to develop state public policy that will preserve free-market principles, promote competitive federalism, uphold deregulation efforts, and keep the communications and technology industries free from new burdensome regulations.

ALEC's Telecommunications and Information Technology Task Force has consistently supported efforts to improve processes for collocation and new tower siting. ALEC's *Collocation & Streamlined Tower Siting Act* (2003) is a model bill that encourages collocation of wireless facilities "to enhance the deployment of advanced wireless telecommunications services, while streamlining the approval processes employed by state and local units of government regarding wireless communication infrastructure within their jurisdiction." The *Act's* main section—concerning streamlined statewide tower siting permitting and application—provides for specific timeframes within which governing authorities must grant or deny applications for collocation or the siting of new wireless towers or antenna. In addition, the *Act's* main section also provides

that when governing authorities fail to grant or deny completed applications within the set timeframes such applications are deemed automatically approved.

ALEC's Telecommunications and Information Technology Task Force has consistently promoted increased availability of wireless services through competition and elimination of barriers to entry. ALEC's *Resolution Regarding the Regulation of Intrastate Telecommunications Services in Healthy and Sustainable Competitive Environments* (2004) recognizes that "the rise of varied competition among numerous competing technologies has brought increased consumer choice in many marketplaces." The *Resolution* declares that "full and open competition, not multiple layers of regulation, should drive healthy and sustainable competitive marketplaces." ALEC's *Wireless Competition Act* (2004)—a model bill for deregulation of wireless telecommunications—similarly declares that "effective competition and the free marketplace has resulted in increased usage, growing employment, improved public safety, expanded coverage, and declining prices." The *Act* concludes that "open and vigorous competition is the most efficient way to continue these improvements." Likewise, ALEC's *Wireless Communications Tower Citing Act* (2007)—a model bill for safe integration and ready availability of advanced wireless services—provides that governing authorities may not "Discriminate on the basis of the ownership of any property, structure or tower when promulgating rules or procedures for siting wireless facilities or for evaluating applications for collocations or new wireless facilities or support structures."

ANALYSIS

In the Telecommunications Act of 1996, Congress declared its intent to promote competition and reduce regulation, securing lower prices, higher quality services and rapid deployment of new technologies for consumers. The Act includes the “National Wireless Telecommunications Siting Policy.” Codified at 47 U.S.C. 332(c)(7), the Siting Policy provides standards by which state and local authorities regulate the placement, construction and modification of wireless services. The Siting Policy is an attempt to respect the authority of state and local authority over land use and simultaneously further the acceleration of competitive, private sector deployment of wireless services.

The Petitioner CTIA – The Wireless Association® requests three declaratory rulings by the Commission based on Section 332(c)(7), analyzed below. Those requested rulings concern the permit application process for collocation and new siting of cell towers and antennas. Petitioner also requests the Commission preempt certain local zoning regulations affecting the permit application process concerning wireless services pursuant to Section 253(a). For reasons that follow, the Commission is urged to take action consistent with the requests made in the Petition for Declaratory Ruling.

NOTE: Comments provided here assume (but do not address) the Commission’s authority to clarify the terms of Section 332(c)(7) according to the proposals contained in the Petition. Rather, Comments provided here are limited to the merits of those proposals. Furthermore, these Comments do not address the Petition’s request that the Commission preempt ordinances that treat every wireless request as a variance from zoning requirements under 47 U.S.C. 253(a).

I. THE COMMISSION SHOULD ADOPT DATE-SPECIFIC DEADLINES FOR GOVERNING AUTHORITY ACTION ON WIRELESS SERVICES PERMIT APPLICATIONS

Section 332(c)(7)(B)(ii) of the National Wireless Telecommunications Siting

Policy provides that:

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.

(Emphasis added.) “A reasonable period of time” is not defined in the statute.

Section 332(c)(7)(B)(v) goes on to provide:

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 Petition requests that timeframes be established by the Commission requiring final action by a state or local authority within 45 days of the filing of a collocation application and within 75 days of the filing of other wireless siting applications.¹ The Commission is strongly urged to adopt date-specific deadlines for authority action on such applications.

Date-specific deadlines for state and local government authority action embodies a sense of fair play. They give both the applicants seeking collocation or new sites as and the relevant authorities considering such applications a clearer understanding of procedural requirements.

¹ See Petition of CTIA – The Wireless Association®, WT Docket No. 08-165, (July 11, 2008), at 24-27. available: http://files.ctia.org/pdf/filings/080711_Shot_Clock_Petition.pdf.

Permit applicants benefit from the certainty of timeframes within which to expect a decision. Date-specific deadlines allow wireless service providers to better assess the costs of regulation—i.e., the risk of lengthy delays, lengthier processing, and having collocation or new siting applications rejected. Setting clear timeframes for action on applications reduces costly unknown variables for applicants. Through the form of lower prices, consumers also benefit from reduced uncertainty costs to wireless service providers.

To the extent date-specific deadlines hasten authority approval, consumers benefit from a more rapid deployment of advanced wireless services. And to the extent that date-specific deadlines hasten rejection of such applications, wireless service providers are better able to make important, contingent decisions based on adverse rulings. To wit, wireless service providers can more readily decide whether to take a modified approach through future, resubmitted applications, to assert their rights under the statute to appeal adverse rulings in federal court, or to direct their resources elsewhere.

In addition, date-specific deadlines for action on applications respect state and local government. Time limits do not dictate the decision to be made by such authorities. Date-specific deadlines are readily understood and easy to apply for authorities considering applications. Under such timeframes, authorities are able to clearly assess the ramifications of their action or inaction on applications with respect to time.

Being bright-line rules capable of straightforward application, date-specific deadlines offer a significant upshot in facilitating the application process and judicial review. Such timeframes can be straightforwardly enforced by federal courts without undue interference with the discretionary powers of state and local authorities.

The discretionary powers of those authorities are far more likely to be diminished by rules establishing a set of multiple factors to be weighed against one another by courts reviewing application decisions. But the date-specific deadlines contemplated here do not involve any such judicial balancing of public policy imperatives.

Ironically, the date-specific deadlines called for in this instance would more likely ensure that state and local authority decisions rendered within the set timeframes will receive greater respect from courts considering whether such authorities acted “within a reasonable time.” Absent such deadlines courts must engage in a more open-ended and subjective inquiry based on particular factual circumstances to decide whether or not actions on applications were made “within a reasonable time.”

II. THE COMMISSION SHOULD ADOPT A DEEMED GRANTED RULE FOR PERMIT APPLICATIONS WHEN AUTHORITIES FAIL TO ACT WITHIN REQUIRED TIME

The Petition requests the Commission declare that when a state or local government authority fails to act within 45 days of the filing of a collocation application and within 75 days of the filing of other wireless siting applications, such authority does not act within a reasonable time and any such application shall be deemed granted.² The Commission is strongly urged to adopt a rule specifying that any failure of a state or local governing authority to act within those time limits is a failure to act within a reasonable period of time, requiring that such applications shall be deemed automatically granted by operation of federal law.

² See Petition at 27-29.

Adoption of a “deemed granted” rule is a natural corollary to date-specific deadlines for state and local authority action on collocation and new site permit applications. Where a permit applicant has a right to government authority action on an application within a set timeframe, a “deemed granted” rule would serve as a simple process for obtaining a remedy for the deprivation of that right. Instituting a “deemed granted” rule will also reduce the costly delays associated with the litigation that typically follows the failure of authorities to act on applications.

Moreover, the Petitioners correctly point out that a “deemed granted” rule would be consistent with several courts that have issued injunctions ordering the issue of permits where local authorities failed to act.³ Under such injunctions, applicants have the option of beginning construction immediately, while further litigation is pending. By virtue of the clarity of a formal rule, a “deemed granted” provision would constitute a streamlined procedure for applicants seeking a rightful remedy that will also reduce expensive delays.

In the alternative, the Petition requests the Commission adopt a rule that failure to act within the specified time frames creates a presumption of violation of Section 332(c)(7)(B)(ii) requiring a court issue an injunction granting the application.⁴ Should the Commission decline to adopt a “deemed granted” rule, it should consider adoption of a rule that failure to act within the specified time frames creates a presumption of a violation of federal law requiring a court injunction granting the application.

A rule of presumption is likewise consistent with the aforementioned court precedents for injunctions ordering issuances of application permits for failure to act

³ See Petition at 28 fns 67-70 (cites omitted).

⁴ See Petition at 29-30.

within a reasonable period. Under such a rule, state or local authorities would have the opportunity to overcome the presumption by presenting to a court compelling evidence for why it could not reasonably act within the set timeframe.

Given that a rule of presumption would still require a discretionary decision by a court reviewing an authority's failure to act within a reasonable period of time, such a rule would not provide as much certainty and promptness of process as a "deemed granted" rule. Nonetheless, adoption of a presumption would still improve upon the existing swath of failure-to-act/injunction jurisprudence through the clarity and reduced delays attendant to a formal rule by this Commission.

III. THE COMMISSION SHOULD RULE THAT DENIAL OF APPLICATIONS BECAUSE SERVICE ALREADY EXISTS IN A GEOGRAPHIC LOCATION VIOLATES FEDERAL LAW (47 U.S.C. § 332(c)(7)(B)(i))

The National Wireless Telecommunications Siting Policy provides in Section 332(c)(7)(B)(i)(II) that regulation of the placement, construction, and modification of personal wireless service facilities by state and local governing authorities "shall not prohibit or have the effect of prohibiting the provision of personal wireless services."

The Petition requests the Commission declare that Section 332(c)(7)(B)(i)(II) prohibits state and local authority zoning decisions that prohibit or have the effect of prohibiting a particular wireless services provider from offering service in a given geographic area simply because that area is already served by one or more providers.⁵ The Commission should make such a declaration by rulemaking.

⁵ See Petition at 30-35.

Open and vigorous competition in a free marketplace is the best way to further increased usage, growing employment, improved public safety, and lower prices. The Telecommunication Act of 1996 has precisely these pro-competition goals in mind. On the other hand, monopolies bolstered through denial of permit applications for new and improved services harm consumers by reducing consumer choice of services and prices.

Declaring that states and local authorities may not deny permit applications simply because a geographic area already receives service would bring resolution in the face of conflicting court rulings on the issue.⁶

Lingering uncertainties from adverse court rulings reduce the incentives for wireless services providers to file collocation and new siting permit applications, to the ultimate detriment of consumers whose potential choices are diminished.

Full and open competition in a free marketplace is best for consumers and is fully consistent with the ultimate aims of the Telecommunications Act. Such competition would be bolstered by a declaration that authorities cannot deny applications simply because wireless services are already provide in a given geographic area.

⁶ See Petition at 31 fns 76-77 (cites omitted); *Id.* at 33 fns 81-84 (cites omitted).

CONCLUSION

Consumers of wireless services are best served by open and vigorous competition between wireless service providers in a free marketplace. A market characterized by competition is the most efficient means of giving consumers more choices. Improved service, expanded coverage and lower prices can be better attained through a clarified permitting process for collocation and new tower siting. The Commission should adopt specific timeframes for state or local governing authorities to act on applications for collocation and citing of new towers and antennas. This action should be accompanied by a rule providing that any failure of a state or local governing authority to act within those time limits will result in such applications being deemed granted by operation of federal law. In addition, the Commission should issue a clarifying ruling that existing federal law disallows zoning decisions by state or local governing authorities that prohibit deployment of advanced wireless services simply because one or more other carriers already provide services to a particular geographic market.

Respectfully submitted,

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