CITY OF HOUSTON

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Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

RE: 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 CITY OF HOUSTON, TEXAS

The City of Houston respectfully submits the following comments on WT Docket No. 08-165, in opposition to the petition by CTIA-The Wireless Association ® ("CTIA") for the Federal Communications Commission ("Commission") to involve itself in the inherently local land use decision making process. First, the City thanks the Commission for the extension of time granted for the filing of comments. Hurricane Ike tore through the Galveston-Houston area on September 12-13, inflicting serious damage to the area. Many of our residents remain without homes or electricity, and cleanup efforts will continue for a long time to come. Nevertheless, the issues raised by the CTIA petition are significant enough that we must divert our attention away from cleanup to address them. But for the Commission's courtesy in extending the time for filing comments, we would not be able to participate at all. Our comments necessarily are more limited than they might otherwise have been, so we beg the Commission's indulgence in allowing us to supplement these brief statements in the future if necessary.

The City of Houston has much in common with the local governments who individually and collectively oppose the CTIA petition in WT Docket No. 08-165. Houston does not regulate the location of telecommunications towers through a comprehensive zoning ordinance, however, as do many other local governments. Instead, the City has an ordinance regulating the location of tower structures, which is codified in Article III of Chapter 41 of the City of Houston Code of Ordinances (the "Tower Ordinance"). The Tower Ordinance:

1. requires a permit for certain tower structures (the Tower Ordinance does not regulate the antenna arrays, only tower structures);

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2. provides a number of exemptions from the requirement for a permit;

3. establishes objective standards for the location of tower structures that allow a provider to identify sites that meet these standards;

4. provides an opportunity for a provider to obtain a waiver from these standards through a Tower Commission created for that purpose; and

5. provides for public notice to be given of an application for a tower permit;

6. allows affected persons to protest a permit application to the Tower Commission, which reviews the protest under a limited set of grounds.

The City of Houston is the fourth-largest city in the United States with a population of 2.2 million and covers 644 square miles (the combined area of New York, Washington DC, Boston, San Francisco, Seattle, Minneapolis and Miami). With its location on a flat coastal plain, Houston gives telecommunications providers no advantage from topography. Yet in 2007, the City received just 21 applications under the Tower Ordinance for tower structures in its vast area. The first six months of 2008 were at about the same pace - 10 applications. None of these applications is still pending with the City. Houston's experience refutes the urgency with which CTIA seeks to compel the Commission's intercession into essentially local issues.

The City of Houston also owns and operates three airports: Bush Intercontinental Airport, Hobby Airport and Ellington Field. Under Texas law, the City has specific authority to adopt regulations governing height hazards around airports. These regulations may require a permit for certain activities, but a permit cannot allow the establishment of an airport hazard[1]. Several commenters associated with airports have opposed the CTIA petition because of the significant adverse impact the proposals would have on local governments' ability to protect the interest of the public from the creation of airport hazards. The City endorses those comments and shares those concerns. Under federal law, as a recipient of Federal Aviation Administration (FAA) airport development grants, the City of Houston is required to assure that "appropriate actions have been taken to restrict the use of land adjacent to or near the airport"... and "to protect the airport and any future Federal investment to meet the air travel needs of the citizens and businesses in the Houston metropolitan area." Compliance is both a

[1] An "airport hazard" is "a structure of object of natural growth that obstructs the air space required for the taking off, landing, and flight of aircraft or that interferes with visual, radar, radio, or other systems for tracking, acquiring data related to, monitoring, or controlling aircraft." TEX. LOC. GOV'T CODE § 241.003((2) (Vernon 2005).

matter of federal law and necessary to protect the Houston Airports from incompatible land uses including penetrations into the airport's flight surfaces which would affect safety, reduce capacity or hinder future growth and federal funding. Due to the height of tower structures and the potential for the radio frequencies that they emit to interfere with airport operations, they are a key concern for protection of the airspace surrounding the City of Houston's airports.

The City concurs in the arguments of those who assert that the Commission lacks authority for rulemaking and "clarification" of any provisions of Section 332(c)(7)(B) of the Telecommunications Act of 1996. While we urge those arguments, we will not restate them here.

The City of Houston opposes the imposition of the "deemed granted" rule that CTIA seeks. Houston's Tower Ordinance has objective standards for location of tower structures. An application that does not meet these rules may take a longer period for processing as City staff work with the applicant to explore alternatives. Thus, there is a direct relationship between the length of time an application takes to process and the degree to which it deviates from the standards in the Tower Ordinance. The result of the "deemed granted" rule would be to give approval to the tower structures that do not meet the rules and would not be entitled to approval under the ordinance, and to punish the City for cooperating with applicants. No permit should be "deemed granted" if it does not comply with the requirements of the ordinance under which it is required. CTIA's proposal is the same as requiring a city to approve a building permit for construction of a high rise building that does not provide the fire escapes required by law while the applicant "runs out the clock" and refuses to amend its plans to provide the necessary fire escapes. Moreover, "deemed approval" is in direct conflict with state law relating to airport hazards that prohibits the issuance of a permit that creates an airport hazard. The federal interest in telecommunications cannot be paramount to the protection of the physical safety of the public implemented in state law. Because the "deemed granted" proposal effectively says that cell tower location is more important than the physical safety of the public using and living near airports, it is also directly contrary to federal policy implemented through the FAA.

The City of Houston also opposes the CTIA proposal that the Commission apply Section 253 of the Communications Act to preempt "ordinances that require, *or effectively require,* a variance for every wireless siting application." CTIA Petition at 35. What does "effectively require" mean? Under the Tower Ordinance, the applicant for a proposed tower structure that does not meet the locational standards may choose a

new site, modify the proposed structure,[2] or seek a waiver from the requirements. Seeking a waiver is purely the option of the applicant, and is not a "requirement." Under the broad language of the CTIA proposal, however, the mere fact that the Tower Ordinance contains a waiver provision could subject it to preemption. What would be the effect of preemption? CTIA asks the Commission to "declare that any ordinance that automatically requires a wireless carrier to seek a variance . . . is preempted". CTIA Petition at 36. This remedy is far too overbroad to address the "problem" about which CTIA complains. Its application would eliminate *any* local regulation of towers, contrary to the clear intent of Congress.

In conclusion, the City of Houston respectfully requests that the Commission deny the CTIA petition and preserve local authority over fundamentally local decisions, as intended by Congress.

We appreciate the opportunity to make these comments.

/S/ *Marlene L. Gafrick*

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Director

[2] The Tower Ordinance relates the height of a tower to the surrounding existing land use. Changing the height of a tower or its location on a tract of land may produce a proposal that meets the locational requirements.