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	))))))

COMMENTS OF THE CITY OF HUNTSVILLE, ALABAMA

These Comments are filed on behalf of the City of Huntsville, Alabama to urge the Commission to deny the Petition filed by Cellular Telecommunication Industry of America (CTIA). As noted below, CTIA's Petition is without merit and without basis in law or fact. The City of Huntsville also joins in the Comments filed by the National Association of Telecommunications Officers and Advisors ("NATOA") in response to CTIA's Petition.

A. CONSIDER 47 U.S.C § 332(c)(7)

1. Section 332(c)(7) exclusively governs the zoning of wireless facilities.

It is unambiguous that 47 USC § 332(c)(7) governs the zoning of wireless facilities, both to preserve and limit, to a degree, local zoning authority. Section 332(c)(7) is sufficient for the task. Contrary to CTIA'a assertions, 47 U.S.C. § 253 does not and cannot enter into the equation.

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 the zoning of wireless service facilities, while § 253 addresses 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 siting 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's act or failure to act that is inconsistent with clause 332(c)(7)(B)(iv) may petition the Commission for relief. The specificity of these remedies shows that § 332 applies to the zoning of wireless service facilities to the exclusion of § 253.

2. Section 332(c)(7)(B) requires no clarification and demands fluidity.

CTIA wants the Commission to provide rigidity where Congress clearly intended fluidity. In recognition that all applications for wireless facility siting are not the same Section 332(c)(7)(B)(ii) provides that local governments act on requests "within a reasonable period of time after the request is duly filed . . ., taking into account the nature and scope of such request." Under the same subparagraph it is clear that should local governments fail to act within such reasonable time, then any person adversely affected may seek expedited redress. 47 U.S.C § 332(c)(7)(B)(v).

Under the guise of clarifying what is meant by the term "failure to act" CTIA wants the Commission to act contrary to the clear intent of Congress by setting rigid time limits for action by local authorities. The Commission's authority to interpret language in the Communications Act of 1934 is limited to areas of ambiguity. There is nothing ambiguous about the language or its purpose.

First, there is nothing ambiguous about the term "failure to act". 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.

Second, there is nothing ambiguous about the pragmatic intention of Congress to allow for reasonable flexibility in processing facility siting requests. 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. Should the Commission follow the rabbit trail prescribed by CTIA it would find itself acting outside its authority by legislating an unintended outcome.

Indeed, the proposed rule runs counter to clear congressional intent as outlined in Conference Report (H.R. Conf. Rep. 104-458) to accompany the Telecommunications Act of 1996. This report language clearly and unambiguously states:

> "The conference agreement creates a new section 704 which prevents 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 limited circumstances set forth in the conference agreement."

Id. at 207-08. The report language goes on to say:

> "Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities ***should be terminated***." (Emphasis added.)

Id. at 208.

To assist the Commission in its evaluation, below are details specific to the wireless facilities siting process and experiences in the City of Huntsville.

B. PRACTICAL CONSIDERATIONS FOR FACILITY SITING

There is a quote attributed to a party in a famous radio patent case to the effect: *The law reduces reality to words and then discusses the words.* In order to avoid removing this discussion from practical realties, it is important for the Commission to understand the relevant issues from the local perspective.

1. Understanding the purpose of facility siting regulations.

Nothing is more local than land use controls. They encourage economic development, control growth, accommodate infrastructure, plan for future needs, protect property values, promote aesthetics; all while balancing competing interests. With the 1996 Telecom Act, zoning, a uniquely local concern was mostly preserved. As a result, the national framework for tower siting was largely

developed at the local level. Zoning laws in existence since the 1920s were revised to accommodate the federal legislation. Boards of adjustment, which are comprised of private citizens, educated themselves on federal law. Federal courts became glorified boards of adjustment. Citizens participated, often vocally, in the dialogue. Telecommunications companies were required to accommodate local concerns without defeating deployment.

The City of Huntsville is not unique in this regard. In response to Section 332(c)(7), in 1996 the City adopted a set of zoning regulations for wireless facility siting that conformed to federal mandates, preserved constitutional rights including due process, remained true to state zoning legislation and case law, and balanced the interests of the industry and the public. The regulations remain largely unmodified since their adoption. According to the minutes of a Board of Zoning Adjustment hearing on a tower siting application it was noted by a representative of the applicant that: "*the City of Huntsville does an excellent job administering the Telecommunications Act and creating the ordinances so that it is in compliance and does protect the citizens.*"[1] A good example of how the local effort has successfully balanced the various interests is through the promotion of collocation.

2. Understanding the City's regulations.

The City's regulations, subject to typical requirements such as set back, landscaping, site security and safety issues, generally allow towers of various heights from 100 feet in residential districts up to 180 feet in non-residential districts in all zoning districts in the City; provided there are no viable existing structures that are available, provided that new towers accommodate at least one additional provider, and, in the case of residential districts, where towers are allowed as a special exception, provided the new tower cannot be feasibly located in a non-residential district.

Where the provider applies for a special exception to locate a new tower in residential districts or to obtain a variance in order to deviate from the applicable zoning regulations, then, as any other property owner, the company must make application to the Board of Zoning Adjustment.

3. Understanding the process.

Apart from situations that require Board action, the construction of a new tower or the installation of antennas and equipment on existing structures is processed through a routine permitting process. This involves not only the consideration of applicable zoning regulations, but also the application of the technical codes of

[1] Board of Zoning Adjustment Minutes November 21, 2000, Case No. 6158.

the city including building and electrical codes. Applicants are required to submit documentation relevant to the proposed installation.

In the case of applications that are made to the Board of Zoning Adjustment it is important to note that the Board of Adjustment is a quasi-judicial body that is a creature of state zoning enabling legislation. Consistence with the state legislation and federal and state constitutional due process concerns the public is given notice and an opportunity to be heard on the request for zoning relief. And, due to the quasi-judicial nature of the Board, it does not entertain evidence provided ex parte, that is, outside the public hearing. In addition, it is incumbent on the applicant to establish that its application should be granted. This necessarily involves an evidentiary hearing where the relevant parties are given the opportunity to provide testimony and evidence in support of or in opposition to the request. Such evidence can involve technical and engineering data that must be considered by the Board, with the aid of experts provided by the applicant and an expert retained by the City.

4. Statistics and timing.

Since the 1996 adoption of the wireless facilities siting regulations, it appears from available information that there are approximately 52 locations throughout the City that have received permits for new towers and/or additions, collocations or alterations to existing towers or other structures. Of those sites only about 13 of them sought special exceptions and/or variances from the Board of Adjustment.

There is no statistical information available on how long each application has taken to process. As understood by Congress and as experience has borne out, the processing of applications are largely based on the nature and scope of a particular request.[2] Generally staff makes every effort to process the applications in a timely manner and over time the process has become more efficient. Routine permitting requests for collocations or alterations for existing towers can be processed rather quickly while applications for new towers take more time. Changes in staff may require a bit of a learning curve, but this does not appear to add significantly, if at all, to the time it takes to process an application. Over time it has become apparent that there are primarily four factors that have generally influenced the time involved in permitting an application for tower siting or collocation.

The first and perhaps one of the most significant factors is the applicant's willingness and diligence in providing a completed and correct application. Considerable delay has resulted when an applicant does not provide the required

[2] This discussion is not intended to address the time involved in those few instances where judicial review was sought at the federal or state level.

information or when the information provided turns out to be incorrect. It can take weeks and even months for an applicant to duly file an application. A recent example is a routine application that has remained pending for at least six months awaiting a simple letter from the tower owner authorizing the site acquisition specialist to sign the building permit application on its behalf. Another example are applications that are incorrect. In at least one case it was determined that the propagation studies provided by the applicant for a particular site were of the wrong location; the right location being across the street. Incomplete or inaccurate submittals add both time and cost and could easily be avoided by the industry. In addition, sites may be abandoned by an applicant for reasons independent of the City or its regulations and the applicants will not inform the City that they no longer wish to pursue a permit.

The second factor is the technical nature of a particular request, which often requires an evaluation of radio frequency data by an expert hired by the City. Based on prior experience, it is necessary for the City to have its own expert to consider the data in order to confirm the accuracy and sufficiency of the technical reports and studies. Fortunately the City of Huntsville has a large engineering community and enjoys the benefit of a local expert.

The third factor that influences the amount of time required to process an application is whether the applicant is requesting a variance or special exception that requires Board action and the corresponding due process considerations that necessarily result, including the necessity of holding a permit after the Board grant's relief to afford those with standing the right to appeal within the 15-day period dictated by state law. It is important to note that a variance is required where the applicant asserts that it cannot meet the zoning regulations. A typical example is one where the applicant wants to exceed the height limitations for the given zoning district.

The final factor is the requirement of Section 332(c)(7)(B)(iii) that mandates that the decision by the Board to deny a siting request must be "in writing and supported by substantial evidence contained in a written record." In order to comply with this mandate the City started the practice of hiring a court reporter to transcribe the record before the Board and the Board is required to articulate its basis for denial on the record. If the request involves a significant amount of technical reports and generates a large amount of evidence in support of or opposition to an application, the Board must continue the matter to the next meeting or schedule a specially called meeting in order to duly consider the evidence and, in the case of denial, be able to articulate the reasons.

CONCLUSION

In conclusion, Congress did not give the Commission the authority to issue the

declaratory ruling requested by CTIA. Indeed, the proposed rule runs counter to clear and unambiguous congressional intent.

Furthermore, the declaratory ruling is a solution in search of a problem. 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. In the City of Huntsville, the system works well and there is no evidence here to suggest that the Commission, even if Congress had authorized the Commission to do so, should grant a special waiver of state and local law to the wireless industry. The same should hold true for other communities. Any perceived difficulties experienced by wireless providers can and are adequately addressed through the legislative process in each individual community and through the courts via an expedited process outlined in 47 USC § 332(c)(7)(B)(5).

Simply put, the Commission's intrusion in this matter is neither authorized nor warranted.

Respectfully submitted,

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