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 SCAN NATOA, INC.
IN OPPOSITION TO THE CTIA PETITION

William M. Marticorena, Esq.
President
SCAN NATOA, Inc.
c/o CityTV
525 Broadway Avenue
Santa Monica, CA 90401
(714) 641-5100

by

Jonathan L. Kramer, Esq. (SBN 244074)
Kramer Telecom Law Firm, P.C.
2001 S. Barrington Avenue, Suite 306
Los Angeles, California 90025
(310) 312-9900

Its Counsel

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

To: The Commission

COMMENTS OF SCAN NATOA, INC.
IN OPPOSITION TO THE CTIA PETITION

I.
INTRODUCTION AND SUMMARY

These Comments are filed by SCAN NATOA, Inc. ("SCAN NATOA"), which is the California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors ("NATOA"). SCAN NATOA is an organization representing the telecommunications interests of nearly 400 members primarily consisting of government telecommunications officials and advisors within the states of California and Nevada, and several additional states, who urge the Commission to deny the Petition filed by CTIA (hereinafter, the "Petition") dated July 11, 2008.

SCAN NATOA also joins in the Comments filed by the National Association of Telecommunications Officers and Advisors, Inc. (NATOA) which also opposes the CTIA's Petition.

As discussed below, CTIA's Petition is without merit and without basis in law or fact.

The CTIA's call for the Commission to mandate "shot clocks" of 45 days for collocation applications, and 75 days for other wireless siting applications is completely unrealistic.

There is no "uncertainty" in the existing siting process, which is specifically set out by Congress in a manner which respects local zoning controls and at the same time sharply limits Commission authority, which justifies the Commission to invoke 47 C.F.R. § 1.2 as a basis to issue the declaratory ruling sought by the CTIA.

Finally, if the Commission grants the Petition and issues the declaratory ruling sought by the CTIA, a likely result is the denial of many more cell sites than would be the case under the present regulatory system specifically established by Congress in the Telecommunications Act of 1996.

II.
CONGRESS HAS NO AUTHORITY TO PREEMPT LOCAL AND STATE LAND USE DECISIONS REGARDING WIRELESS SITING MATTERS

When Congress passed the 1996 Act, it spoke clearly and unambiguously that state and local governments, and the courts for review

purposes (and not the Commission) are the proper places to deal with wireless zoning issues unrelated to limited RF safety matters.

> "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 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." [1]

With the Congressional intent and limitations well defined, we turn to specific points raised in the CTIA's Petition.

A.
Section 332(c)(7)(B)(i) Controls Judicial Review of Final Actions on Wireless Facilities

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

Section 704(a) of the 1996 Act, addressing the "NATIONAL WIRELESS TELECOMMUNICATIONS POLICY", clearly and

[1] 154 Cong. Rec. H1134 (1996).

unambiguously sets out Congressional intent with regard to the preservation of local zoning authority, subject to reasonable limitations, with regard to wireless siting zoning considerations.

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 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. To that end, Congress intended that all a wireless provider must do before seeking judicial review is to obtain a final decision by the state or local agency. *See Sprint Spectrum, L.P. v. City of Carmel*, 361 F.3d 998, 1002-1004 (7th Cir. 2004) (concluding ripeness for review under § 332 is identical to

traditional standard for determining ripeness of land use disputes). 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 a local government act or failure to act that is inconsistent with clause (c)(7)(B)(iv)[2] may petition the Commission for relief. The specificity of these remedies shows that § 332 applies to wireless service facilities to the exclusion of § 253.

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." "Failure to act" is not an ambiguous phrase so the Commission lacks authority to interpret the phrase here. If the intent of Congress is clear (as it is here), the Commission "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). "Failure" means the "omission of an expected action, occurrence, or performance;"[3] the word "act" means "the

[2] Section 332(c)(7)(B)(iv) says, "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." This is an extremely narrow exclusion to the unambiguous direction from Congress that the FCC plays no role in zoning decisions.
[3] Black's Law Dictionary (8th ed. 2004).

process of doing or performing."[4] 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 siting issues 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."

Once more, Congressional intent is clear and unambiguous. Specifically:

> "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." [5] (Emphasis added)

There is no reasonable doubt that that Congress intended that the normal, locally-based zoning process control for wireless siting. The lack of ambiguity in Congress's intent makes it clear that the Commission has no legal authority to usurp the local process, and the timing associated with that local process.

---

[4] Id.
[5] 154 Cong. Rec. H1134 (1996).

Instituting the 'shot clocks' sought by the CTIA would clearly contravene Congressional intent, which specifically included reference to the local processes and also specifically excluded any mention of hard time frames for approval. Therefore, even if ambiguity existed in the statute, which is not the case here, 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 and respect for the local zoning process.

The Commission should deny the Petition as the CTIA asks the Commission to determine what sections of the 1996 Act applies (i.e., Section 253 versus Section 332), and in what order which takes precedence. Here, the CTIA requests that the Commission, an agency created by Congress, should interpret the 1996 Act by reading in requirements that do not appear in the text or the Congressional intent of that law. The courts, rather than the Commission are the proper and sole venue where Congressional legislative meaning and intent are adjudicated. Recently, the U.S. Court of Appeals for the 8th Circuit has tacked the question of the applicability of Section 253(a) [6] as have other circuits in various cases.[7]

---

[6] *Level 3 Communications, L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528, 531 (8th Cir. 2007). *Sprint Telephony PCS, L.P. v. County of San Diego*, --- F.3d ----, 2008 WL 4166657 C.A.9 (Cal.),2008.

[7] *Qwest Commc'ns Inc. v. City of Berkeley*, 433 F.3d 1253, 1256 (9th Cir.2006); *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1239 (9th Cir.2004), *cert. denied*, 544 U.S. 1049, 125 S.Ct. 2300, 161 L.Ed.2d 1089 (2005); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 n. 9 (10th Cir.2004); *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175 (9th Cir.2001); *see also Puerto Rico v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir.2006); *533 *Puerto Rico Tel. Co. v. Telecomms. Regulatory Bd.*, 189 F.3d 1, 9 (1st Cir.1999)

On September 11, 2008, the U.S. Court of Appeals for the 9th Circuit released a clear and unambiguous 11-0 *en banc* decision regarding the applicability of Section 253 and Section 332 in a wireless siting context.[8] Other circuits have addressed the same issue, and there is now a consensus in the federal courts that Section 332 applies to individual wireless siting decisions. There is no question for the Commission to answer here; no guidance it needs to provide to the courts, which have already spoken consistent with their judicial authority conferred by Congress through § 332.

In light of unambiguous legislation and clear Congressional intent, and given that the courts are the sole forum designated by Congress[9] and already widely utilized by the wireless industry for adjudicating siting challenges, the Commission preemption that the CTIA seeks in its petition is completely inappropriate and impermissible.

III.
THE COMMISSION LACKS THE AUTHORITY TO "DEEM GRANTED" ZONING APPLICATIONS EXCEPT IN A SINGLE NARROW AREA

A.

The Petition also seeks that the Commission declare that a zoning authority's failure to act within the relevant time frame will result in the application being "deemed granted" or in the alternative will warrant a court-

[8] *Sprint Telephony PCS, L.P. v. County of San Diego*, --- F.3d ----, 2008 WL 4166657 C.A.9 (Cal.),2008.
[9] Other than whatever authority the Commission may have under section 332(c)(7)(B)(iv).

ordered injunction granting the application unless the zoning authority can justify the delay. [10]

The CTIA Petition asks the Commission to declare that if a local government violates the 'shot clock' (or some other time frame, including a locally-adopted law or rule such as a zoning ordinance) then the application is deemed granted. Creating a federal rule that deems an application granted based on lapse of a time period is plainly a land use decision which Congress has specifically prohibited the Commission from making.

Once more, it is useful to review exactly what Congress intended the Commission's limited role to be in zoning issues:

> "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 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*." [11]
> (Emphasis added)

[10] Petition @ Pg. 1.
[11] 154 Cong. Rec. H1134 (1996).

Congress has made it crystal-clear that the FCC has no role directly or indirectly in land use decisions and that all other disputes under Section 704 are to be resolved in the courts other than the Commission's limited authority solely related to Section 332(c)(7)(b)(iv) (regulating radio frequency emissions of wireless facilities through 47 C.F.R. §§ 1.1307(b) and 1.1310). Consistently, at the time that Section 704 was adopted, Congress directed the Commission to terminate any pending rulemaking regarding "the placement, construction or modification of CMS facilities".[12]

Congressional intent is clear and unambiguous that the Commission has no role in land use decisions beyond that narrowly granted in Section 704 regarding RF safety matters. The Commission cannot now take upon itself the zoning approval role as the CITA would have it.

B.

In the alternative to a 'deemed approved' rule from the Commission, the Petition requests that the FCC determine and opine that zoning applications that are not acted upon by a local zoning authority within some time period will justify a court-order granting the application unless the zoning authority can justify the delay. Specifically, the CTIA requests the Commission find that there is "a presumption that the applicant is entitled to a court-ordered injunction granting the application, unless the zoning authority can justify the

[12] Id.

delay".[13] This is the same attempt by the CTIA clothed in a different costume to have the Commission impermissibly intervene in zoning issues unrelated to RF safety.

Given that the Commission is explicitly prohibited by Congress from granting zoning applications[14] then it certainly does not have the authority to guide the courts to determine that some local zoning action or, here, some perception of lack of local zoning action will warrant injunctive relief resulting in the granting of a zoning application. The tacked-on suggested authority of the Commission to act as a 'safety valve' to prevent a local government from escaping such an injunction if it can "justify the delay" is contrary to the limited authority granted to the Commission. The courts, and not the Commission, are properly and solely charged by Congress to adjudicate individual wireless siting decisions under § 332.[15] The courts must look to defenses (justifications) offered by a local government challenged in litigation over a wireless siting decision, therefore the Commission must leave the fact finding to the courts.

Once more, Congress, through the 1996 Act, could have empowered the Commission in this specific area and it could have provided guidance for the courts regarding local zoning issues related to wireless communications.

[13] Petition @ Pg. 7.
[14] Other than whatever authority the Commission may have under section 332(c)(7)(B)(iv).
[15] Other than whatever authority the Commission may have under section 332(c)(7)(B)(iv).

Rather, Congress wisely recognized that whether to grant injunctive relief is a local fact-driven question best left to the courts, rather than to the Commission.

The FCC, as the agency charged with implementing federal communications policy, has the option to offer amicus curiae briefs in any appellate court action pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure; it does not, however, have Congressional authority to direct courts to a specific outcome, here, the granting of a zoning application by passage of time or inaction.

The actions requested in the CITA's Petition on this point must be denied by the Commission.

IV.
A "SHOT CLOCK" APPROACH THAT DEEMS GRANTED WIRELESS APPLICATIONS EXHAUSTING THE "SHOT CLOCK" WILL RESULT IN DENIAL OF GREATER NUMBERS OF WIRELESS SITE APPLICATIONS

A.

Even if Congress had granted the Commission zoning authority, and for the reasons set out above it is clear that no such authority exists, the "shot clock" approach is fatally flawed since many governments receiving applications would be hard-pressed to act with the required deadlines of 45 days for collocation, and 75 days for other wireless applications. As a general rule, local government planning and zoning departments accept applications over the counter and act on them in the order received. However, wireless siting applications are often much more complicated than, for example, an

application to install a swimming pool, or build a utility building on an undeveloped property. New wireless siting applications will often involve reviewing tower engineering considerations, such as wind and dead loading, and foundation requirements. Collocation applications will usually require a review of the same types of engineering considerations to ensure the safety of the proposed additions. These engineering reviews are for public safety purposes, and are not trivial reviews performed by lower-level staff or outside engineers.

In the case of collocation applications, if the original site was constructed subject to a conditional use permit or special use permit, governments normally will require a noticed public hearing to consider modifications to the original permit. Noticed public hearings by their very nature require published (and often mailed) notice to the community. Depending on the body that first considers a permit modification request for a collocation application, there may be a due process appeal by right that must be respected.

The CTIA Petition is geared on having the local government act within a fixed time. The Petition, however, is utterly silent about tolling the shot clocks where the wireless carrier fails to timely respond to legitimate information requests from the local government. Under the CTIA's Petition, a wireless carrier will have an incentive to file a threadbare application, and then ignore

legitimate information requests from the local government intending to let the shot clock play out, presumably to secure an automatic approval.[16]

The result of the Commission interfering with the locally established zoning process specifically recognized by Congress will be denials, or at best tolling agreements between the applicant and the local government to undue the unrealistic shot clocks sought by the CTIA.[17] The subsequent result is that more law suits will be filed by wireless carriers against governments who cannot meet the unrealistic shot clocks.

<Balance of page intentionally left blank>

[16] Or ignore the request until the 44th day or the 74th day, depending on the permit being sought.
[17] It is not clear whether a tolling agreement would be legally effective and enforceable, so this is yet another reason why more project denials may result.

B.

Wireless sites are not fungible. There are many variations of even the most basic site designs.

For example, wireless sites may be:

- Free-standing self-supporting towers

Figure 1: Self supporting wireless tower site in Bird-in-Hand, Pennsylvania.[18]

<Balance of page intentionally left blank>

[18] The photographs in this section are all from http://www.CellularPCS.com/gallery (last visited September 29, 2008). All photographs are printed here with permission. That web site illustrates hundreds of different wireless site designs, in locations in various parts of the United States, as well as in other countries.

- Roof-top Guyed towers

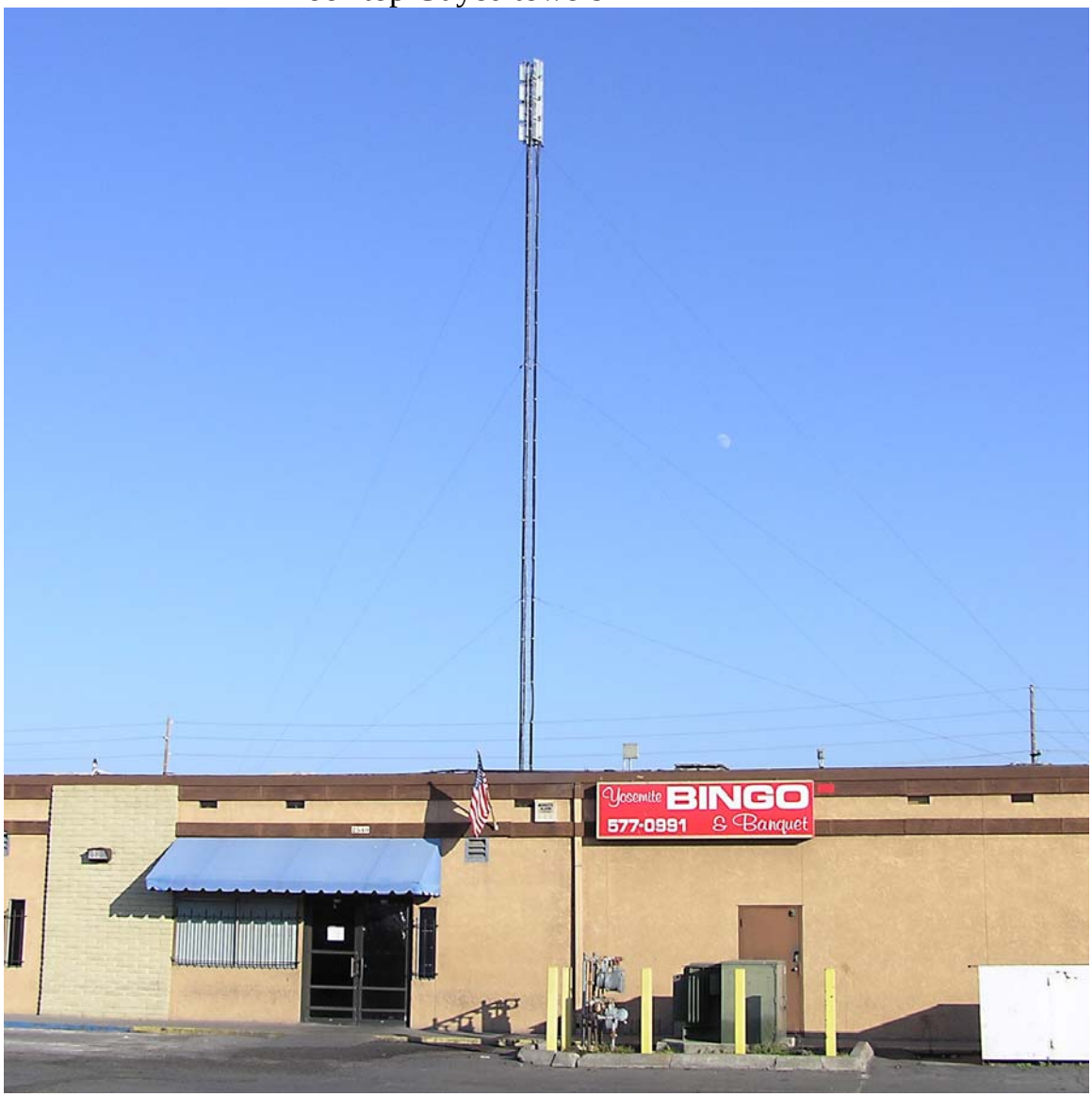

Figure 2: Guyed roof-top wireless tower site in Modesto, California.

<Balance of page intentionally left blank>

- Uncamouflaged Monopoles

Figure 3: Uncamouflaged Monopole wireless site in Fairfax, Virginia.

- Semi-camouflaged Monopoles

Figure 4: Semi-camouflaged Monopole/advertising billboard wireless site in Henderson, Arizona.

Figure 5: Semi-camouflaged Monopole wireless site in Phoenix, Arizona.

- Monopines

Figure 6: Inferior Monopine wireless site in Los Angeles, California.

Figure 7: Superior Monopine wireless site in Lake Elsinore, California.

- Monopalms

Figure 8: Superior Monopalm wireless site in Palm Desert, California.

- On Buildings

Figure 9: Exposed wireless site on roof in Los Angeles, California.

Figure 10: Wireless site hidden behind roof parapet in El Segundo, California.

- Unusual Designs

Figure 11: Faux water tank/advertising sign wireless site in Barstow, California

Figure 12: Faux bison wireless site on mountain peak near Carr, Colorado

Figure 13: Faux water tank wireless site in Littlerock, California

What is plainly apparent from the previous set of photographs is that there is no single or standard design for wireless sites. Each wireless site is designed for a specific location and to meet a specific need, both from a RF transmission stand point and from a physical design perspective. Congress wisely recognized these fundamental facts when it left zoning decisions (including design criteria and placement criteria) to those who were best suited to make those decisions; the zoning boards and agencies. Indeed, many of the more attractive and creative wireless site designs, and wireless sites that are less visible or invisible to the public, are the direct result of the collaborative zoning process which involves the wireless provider, the zoning board or agency, and members of the public. Such a process takes varying periods of time, as Congress contemplated, when allowing governments a "reasonable period of time" to process and application, "taking into account the nature and scope of such request" through § 332(c)(7)(B)(ii). Establishing an artificial and arbitrary "shot clock" for permit approvals will result in a roll-back of creativity since wireless carriers will have no incentive to propose more than the mere minimum design, and will wait out the shot clock for the automatic approval, or to open the doors to litigation.

V.
THE COMMISSION SHOULD DENY THE CTIA'S PETITION

In conclusion, there is no requirement in the 1996 Act, Congressional intent, or in settled federal case law that requires that wireless siting must occur without any delay whatsoever. A court, rather than the Commission, is properly situated to determine when a delay by a permitting or zoning agency takes an unreasonable time and contravenes the intent of Congress, taking into account for example delays which are attributable to wireless carriers and others outside the control of the local permitting or zoning agency.

The Commission is explicitly excluded by Congress from interceding in local zoning issues[19] and that is exactly what the CTIA's Petition would have the Commission now do. Congress, in legislation and legislative record, has clearly excluded the Commission from making zoning determinations. There is no "uncertainty" that gives rise to the Commission now issuing the declaratory ruling sought by the CTIA under 47 C.F.R. § 1.2, or any other Commission rule, because to do so would clearly be contrary to Congress's clear and unambiguous intent.

Further, current local land use processes assure the rights of citizens to govern themselves and determine appropriate development in the communities, and properly balanced with the interests of all applicants, including wireless

[19] Absent the very limited authority reserved to review claims regarding RF safety as discussed above.

applicants. The existing system established by Congress works, and there is no evidence provided by the CTIA to suggest that the Commission grant a special waiver or process to the wireless industry, much less the national policy preemptions sought by the CTIA. Where local process doesn't work, Congress has designated the courts (not the Commission except in RF safety matters) to look at the facts and resolve the challenges.

Any perceived difficulties experienced by wireless providers can and are adequately addressed through the electoral process in each individual community and the courts.

Federal agency intrusion, as sought by the CTIA in its Petition, is neither warranted nor authorized.

Respectfully submitted,

William M. Marticorena, Esq.,
President
SCAN NATOA, Inc.
c/o CityTV
525 Broadway Avenue
Santa Monica, CA 90401
(714) 641-5100

September 29, 2008