BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 SPRINT NEXTEL CORPORATION

In response to the Commission's Public Notice issued August 14, 2008,[1] Sprint Nextel Corporation ("Sprint Nextel") hereby respectfully submits its comments addressing the Petition for Declaratory Rulemaking that CTIA – The Wireless Association® ("CTIA") filed on July 11, 2008 in the above-referenced docket.[2]

I. INTRODUCTION AND SUMMARY

The ability to deploy wireless service facilities and upgrade existing wireless infrastructure in a timely manner is crucial to spur the roll-out of advanced wireless services.

[1] Public Notice, "*Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling by CTIA - The Wireless Association 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, DA 08-1913 (August 14, 2008). The Wireless Telecommunications Bureau ("WTB") initially asked for comments on the petition by September 15, 2008 with reply comments due by September 30, 2008. In response to multiple requests for extensions of time filed by various localities and associations representing state and local interests, the WTB extended the time for filing initial comments to September 29, 2008 and for reply comments to October 14, 2008. *See* Public Notice , *"Wireless Telecommunications Bureau Grants Extension of Time to File Comments on CTIA's Petition for Declaratory Ruling Regarding Wireless Facilities Siting,,"* WT Docket No. 08-165, DA 08-2070 (September 10, 2008).

[2] *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,* Petition for Declaratory Ruling, WT Docket No. 08-165, filed July 11, 2008 (CTIA Petition).

In recognition of the critical role that the siting of wireless infrastructure plays in fostering a fully competitive landscape, CTIA asks the Federal Communications Commission ("Commission") to clarify certain provisions of the Communications Act of 1934, as amended, ("Act") relating to state and local review of wireless siting applications.

Specifically, CTIA seeks an interpretation of portions of Sections 332 (c)(7) and 253 of the Act that would preclude state and local zoning authorities from imposing unreasonable restrictions on tower siting requests and from conducting unduly protracted reviews of zoning applications.[3] First, CTIA requests that the Commission specify the time period in which a state or local zoning authority must act on a wireless facility siting application or it will be deemed to have failed to act, thereby triggering certain remedies available to the tower siting applicant.[4] Second, CTIA asks the Commission to implement procedural steps to facilitate zoning approval if either of these failure-to-act benchmarks is triggered, such as having the application be deemed granted.[5] Third, CTIA requests the Commission to clarify that a zoning decision that prohibits an additional wireless entrant from offering service in a particular area violates Section 332(c)(7) of the Act.[6] Finally, CTIA urges the Commission to preempt, under Section 253 of the Act, local ordinances and state laws that impose burdensome requirements on wireless siting applications, such as those that automatically require a wireless service provider to obtain a variance before siting facilities.[7]

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[3] CTIA Petition at 1-2.
[4] Specifically, CTIA urges the Commission to declare that a state or local zoning authority will have failed to act if they do not render a final decision on an application to collocate wireless facilities within 45 days of submission or within 75 days of submission for all other tower siting applications. CTIA Petition at 24-27.
[5] Alternatively, once judicial review is triggered by the failure to act, CTIA requests that the Commission establish a presumption that the applicant is entitled to a court-ordered injunction granting the tower siting application, unless the state or local zoning authority is able to justify the delay. CTIA Petition at 29-30.
[6] CTIA Petition at 30-35 citing 47 U.S.C. § 332(c)(7)(B)(i)(II).
[7] CTIA Petition at 35-37.

Notably, Commissioner Adelstein's recent remarks at the Fifth Annual Conference on Spectrum Management on the topic of pressing wireless issues acknowledged the need for the Commission to adopt policies to promote the efficient deployment of communications infrastructure. Commissioner Adelstein stated that:

> The future success of our economy will demand that we promote the expansion of communications infrastructure, as a start. The construction of communications towers is necessary to achieve the rapid deployment so many people want. Every day, Americans are expecting wider availability of advanced communications services. Towers will not only form the backbone of the transition to digital television, they are used around the clock by public safety and are a critical component of our nation's homeland security efforts. *We need to take a close look at CTIA's petition that would set a shot clock on the amount of time local authorities spend reviewing tower applications*. Congress intended that the Commission act to prevent unreasonable delays so we need to consider all potential solutions to such delays.[8]

Clearly, the Commission must act to bring some much-needed clarity and predictability to zoning reviews of wireless siting applications if it is to achieve its long-held goals of facilitating robust and widespread broadband deployment.[9] For the reasons explained in more detail below, Sprint Nextel supports CTIA's declaratory ruling request.

II. THE COMMISSION SHOULD SET SPECIFIC BENCHMARKS THAT GOVERN ZONING REVIEWS OF TOWER SITING APPLICATIONS TO FACILITATE THE TIMELY DEPLOYMENT OF WIRELESS FACILITIES

Sprint Nextel supports establishing specific time frames to govern state and local zoning authorities' review of tower siting applications. While Section 332(c)(7) of the Act attempts to strike an appropriate balance between preserving state and local authority to

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[8] Remarks Of Commissioner Jonathan S. Adelstein, Federal Communications Commission, "A View On Today's Most Pressing Wireless Issues", The Fifth Annual Conference On Spectrum Management, Law Seminars International, Arlington, Virginia, September 18, 2008. [Emphasis added]. Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-285474A1.pdf.

[9] *See, e.g., Service Rules for the 698-746, 747-762 and 777-792 MHz Bands,* WT Docket No. 06-150, Second Report and Order, 22 FCC Rcd 15289, 15362, ¶ 196 (2007); *Service Rules for Advanced Wireless Services in the 2155-75 MHz Band,* WT Docket No. 07-195, Notice of Proposed Rulemaking, 22 FCC Rcd 17035 (2007); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks,* WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5908 ¶ 17 (2007).

regulate land uses in their communities through the zoning process with the Act's goal to promote the expansive deployment of competitive facilities, it fails to put any time parameters on their review of applications for the construction and placement of wireless infrastructure. Section 332(c)(7)(B)(ii) of the Act 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].

This provision, however, omits any definition of what a reasonable review period might be. Moreover, although subsection (v) of the statute expressly provides for expedited judicial review where the state or local authority has failed to act, the circumstances under which a failure to act can be deemed to have occurred are not defined.[10] In the absence of any firm guidance on what constitutes a failure to act, the statutory remedies are undermined and wireless carriers are left in the untenable position of having no recourse when their siting applications are indefinitely delayed or stayed.[11]

A. Definite Time Limits Are Needed to Combat Undue Delays in Reviewing and Approving Siting Applications

This lack of precision in the statute has resulted in numerous instances of delay in tower siting approval. CTIA's declaratory ruling petition highlights myriad examples of undue delay, with tower siting approval taking in excess of a year and often several years.[12] Sprint Nextel's experience in a number of jurisdictions confirms this view. Earlier this year,

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[10] Specifically, Section 332(c)(7)(B)(v) provides that "[a]ny 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 court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief." 47 U.S.C. § 332(c)(7)(B)(v) [emphasis added].

[11] CTIA Petition at 13.

[12] CTIA Petition at 14-15.

Sprint Nextel surveyed its site development managers operating in various regions of the country and asked them to recount some of the more difficult zoning problems they have encountered over the past several years. The site development managers reported facing zoning difficulties in a number of jurisdictions, especially in California and the Northeast regions. In a few California communities, Sprint Nextel has experienced typical processing times for approval of wireless siting applications ranging between 28 to 36 months. For example, Sprint Nextel submitted a zoning application in one California county in May 2005 for the construction of a new tower that is still pending before the county zoning board. The application has gone through multiple design revisions at the request of the county and the landlord, but Sprint Nextel has yet to receive final approval to start construction at the site. Similarly, in one New Jersey community, Sprint Nextel has had a tower siting application pending before the zoning board that has been subject to 41 zoning hearings and is still awaiting resolution. In one Northern California community, Sprint Nextel filed an application to construct facilities to improve in-building and in-car coverage in a residential portion of the city. Sprint's application has been pending for four years without resolution and has undergone extensive third party reviews to determine the necessity of locating wireless infrastructure at the proposed site.

Additionally, some jurisdictions frequently table wireless siting applications or deem them incomplete, often as a way to avoid making a final determination on siting the proposed facility.[13] These delay tactics add to the procedural uncertainty associated with the zoning

[13] *See, e.g.,* Deborah S. Morris and Laura Rivera, "Huntington Tables Vote on Verizon Cell Phone Tower," Newsday, September 19, 2008. The article discusses the Huntington Zoning Board of Appeal's decision to postpone a decision on Verizon's request for a special-use permit to build a 90-foot tower after deliberating more than two hours at a public hearing convened to discuss the proposal. The Board indicated it will take up the matter again at a future meeting.

review process and frustrate the ability of wireless carriers to maintain predictable timelines for the deployment of their facilities.

B. CTIA's Proposed Time Limits Are Reasonable

CTIA's declaratory ruling petition proposes that the Commission establish 45 days as the time period in which a state and local zoning authority must complete its review of applications to collocate wireless service facilities on existing infrastructure.[14] Sprint Nextel agrees that this is a reasonable time frame for a collocation approval. Collocation applications should present minimal concerns to local zoning authorities because the infrastructure is already in place and the need for new tower construction is eliminated. Indeed, many localities currently review such applications well within this timeline. As CTIA points out in its petition, over 80% of the carriers it surveyed reported having some collocation requests granted within one week[15] and Sprint Nextel can corroborate this finding based on its own internal survey of its site development managers. The zoning review process for collocations certainly does not need to take several months or even years to complete, as is often the case. In Sprint's experience, what often unduly prolongs collocation application approval is the review by third party consultants hired by localities to provide expertise that zoning board members may lack. These third party consultants are generally compensated on an hourly basis and therefore have little incentive to try to streamline or expedite their review of collocation proposals. Thus, definite time limits for zoning reviews are necessary to bring some much-needed structure to the local zoning process.

[14] CTIA Petition at 24.
[15] *Id.* at 16.

For new tower construction or major modifications to existing infrastructure, CTIA proposes that the Commission adopt a 75 day timeline for zoning approval.[16] Again, Sprint Nextel views this proposal to be a reasonable time frame in which to require local zoning authorities to act on new tower siting applications or major modifications. The additional 30 days takes into account that these types of applications may call for more extensive reviews than collocation applications and provides local zoning authorities with adequate time to evaluate the applications and conduct public hearings as necessary.[17]

It should be noted that many state and local jurisdictions have already established specific time frames to govern the review of wireless siting applications. The South Dakota Public Utilities Commission ("PUC"), for example, recently proposed a model wireless zoning ordinance for adoption by South Dakota's cities and counties. Under the model ordinance, applications for new wireless infrastructure or collocations on existing infrastructure undergo administrative review. The administrator reviewing an application has ten days to either return the application as deficient or schedule a meeting with the applicant within 30 days to discuss whether the proposed application is consistent with the zoning ordinance.[18] The administrator must issue a written decision either granting or denying the request within 15 days of the meeting unless the applicant agrees to an extension of time. If the administrator fails to issue a decision within this time period, the application is deemed denied and the applicant may appeal the denial as provided in applicable state and federal law.[19] Additionally, Florida law requires local governments to grant or deny collocation requests within 45 business days and provides for action on applications to site new wireless

[16] *Id.* at 25-26.
[17] *Id.* at 26.

[18] South Dakota Model Ordinance for the Siting of Wireless Telecommunications Facilities, § 5(5)(2)(a)-(c).
[19] *Id.*

facilities within 90 day after submission.[20] Similarly, North Carolina law mandates action on collocation requests within 45 days of submission of a completed application.[21] These examples of state and local ordinances demonstrate that imposing defined time limits on zoning board reviews is both reasonable and feasible.

C. The Commission Is Authorized To Set Parameters for Zoning Action

The Sixth Circuit's recent decision in *Alliance for Community Media v. FCC* affirming the Commission's March 2007 order modifying the video franchising framework is directly apposite to this matter. In that case, the court upheld the Commission's authority to set specific time limits on the review by local franchising authorities ("LFA") of applications for competitive cable franchises.[22] The court reasoned that the "absence of a statutory deadline in Section 621(a) leads us to conclude that Congress authorized, but did not require, the FCC to impose time limits on the issuance of new franchises."[23] Thus, the lack of definite time frame enumerated in the statute did not prohibit the FCC from acting to impose one. Additionally, the court rejected claims that the Commission's decision to set time frames to govern the cable franchising process inappropriately encroached on the court's domain, as delegated by Congress, finding that "the availability of a judicial remedy for unreasonable denials of competitive franchise applications does not foreclose the agency's rulemaking authority over Section 621(a)(1)."[24]

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[20] FLA. STAT. § 365.172(12)(d)(1)–(2) (2008).
[21] N.C. GEN. STAT. § 153A-349.52(e) (2008).
[22] 529 F.3d 763 (6th Cir. 2008). In the *Alliance for Community Media* case, the court rejected the appeal of several local franchising authorities ("LFAs") challenging the Commission's authority to interpret Section 621(a)(1) of the Act, which precludes LFAs from unreasonably refusing to award an competitive franchise in addition to that granted to the incumbent cable company.
[23] *Id.* at 2008, U.S. App. LEXIS 13628 at *42.
[24] *Id.* at *28-29.

D. The Commission Should Adopt Procedural Remedies When Local Zoning Authorities Fail To Act Within the Time Limits it Establishes

CTIA requests that the Commission impose procedural remedies to prompt state and local zoning authorities to take action on wireless siting applications by declaring such applications to be deemed granted if local officials fail to act within the prescribed time limits.[25] While Sprint Nextel agrees that there should be consequences to zoning inaction, it is wary of using the deemed granted mechanism to achieve this outcome, primarily because of concerns regarding the impact that this type of provision has had in the context of forbearance petitions.

Section 10(c) of the Act permits any telecommunications carrier to submit a petition to the Commission requesting that it exercise the authority conferred by the statute to forbear from enforcing any Commission regulations or statutory provisions applicable to the carrier provided three criteria are met.[26] A forbearance petition will be deemed granted if the Commission does not act to deny it for failure to satisfy the statutory forbearance criteria within one year after the application is filed, unless the Commission opts to extend the statutory review period by an additional 90 days.[27]

Forbearance petitions have been deemed granted in a few instances since the statute took effect.[28] This default provision had far-reaching and ill-considered effects in the case of

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[25] CTIA Petition at 27-28.

[26] 47 U.S.C. § 160(c). To grant a forbearance request, the Commission must determine that enforcement of the regulation or statutory provision is not necessary to ensure just and reasonable rates or practices, to protect consumers and that forbearance is consistent with the public interest. 47 U.S.C. § 160(a).

[27] 47 U.S.C. § 160(c).

[28] *See Ameritech Request for Forbearance from the Application of Section 272 of the Communications Act to Previously Authorized Telecommunications Relay Service Granted Through Operation of Law,* Public Notice, CC Docket No. 96-149 (released May 13, 1998); *SWBT Request for Forbearance From the Application of Section 272 of the Communications Act to Previously Authorized Telecommunications Relay Services Granted Through Operation of Law,* Public Notice, CC Docket No. 96-149 (released June 4, 1998); *Verizon Telephone Companies' Petition for Forbearance From Title II and Computer Inquiry Rules With Respect to Their Broadband Services is Granted by Operation of Law,* Public Notice, WC Docket No. 04-440 (released March 20, 2006).

Verizon's broadband services forbearance petition, leading to the elimination of important statutory and regulatory safeguards applicable to its special access and enterprise services.[29] Indeed, some members of Congress have expressed concerns with the forbearance process and have introduced legislation in both the House and Senate to remove the "deemed granted" provision from the statute.[30] Similarly, some Commissioners have taken issue with the conduct of particular forbearance proceedings and the adequacy of the decisions rendered[31] as the Commission and its resources have strained to keep pace with the plethora of forbearance petitions that have been filed over the past several years, a large number of which remain pending with the statutory clock ticking.[32]

Given the enormous controversy that the deemed granted feature of the forbearance statute has generated, Sprint Nextel hesitates to recommend adopting a comparable provision to govern the local zoning application process. Instead, Sprint Nextel favors the alternative approach that CTIA proposes, which calls for the Commission to adopt a presumption that, once a failure-to-act benchmark has been triggered, the applicant is entitled to a court-ordered

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[29] *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services,* WC Docket No. 04-440 (filed December 20, 2004) ("*Verizon Broadband Services Petition"*).

[30] Congressman Dingell introduced H.R. 3914 on October 22, 2007 while Senator Inouye introduced S. 2469 on December 13, 2007.

[31] *See, e.g., Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services; Petition of BellSouth Corporation for Forbearance Under § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services,* WC Docket No. 06-125, Joint Statement of Commissioner Michael J. Copps and Commissioner Jonathan Adelstein, Dissenting (released October 12, 2007); *In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area,* WC Docket No. 06-109, Joint Statement of Commissioner Michael J. Coops and Commissioner Jonathan Adelstein, Concurring in part, Dissenting in Part (released August 20, 2007).

[32] Sprint Nextel, along with numerous other carriers and state agencies, have documented the procedural deficiencies inherent in the forbearance process and the procedures the Commission should adopt to remedy these defects in the Commission's pending rulemaking proceeding in WC Docket No. 07-267. *See, e.g., In the Matter of Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended,* WC Docket No. 07-267, Comments of Sprint Nextel Corporation, filed March 7, 2008.

injunction granting the application unless the local zoning authority demonstrates the reasonableness of its delay.[33]

This proposal is consistent with the Commission's action in the local video franchising context.[34] The regulations the Commission adopted to prompt action on competitive franchise applications authorized the applicant to offer video services under an interim franchise if the LFA failed to grant or deny the application within the prescribed time periods.[35] The regulations directed the competitive franchise applicant to discontinue operating under the interim franchise once the LFA acted to either grant or deny the application, with a denial triggering the applicant's right of judicial review.[36] Thus, the Commission's video franchise regulations did not implement a pure deemed granted mechanism to encourage LFAs to reach a final decision on a competitive franchise application within the applicable time frames enumerated in the regulations; but it did provide an effective recourse for the applicants to operate on an interim basis until the LFA took final action.

III. THE COMMISSION SHOULD PROHIBIT ZONING ACTIONS THAT PROHIBIT MULTIPLE WIRELESS SERVICE PROVIDERS FROM OFFERING SERVICE IN A GIVEN GEOGRAPHIC AREA

CTIA asks the Commission to declare that Section 332(c)(7)(B)(i)(II) proscribes zoning decisions that effectively prohibit more than one wireless service provider from offering service at a particular location or in a specific geographic area.[37] CTIA's petition references a number of instances where state and local jurisdictions have used the presence of a single provider to deny subsequent wireless siting applications from other wireless service

[33] CTIA Petition at 27-30.
[34] *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection Act of 1992,* 22 FCC Rcd 5101, 5139, MB Docket No. 05-311 (March 5, 2007).
[35] 47 C.F.R. § 76.41(e).
[36] 47 C.F.R. § 76.41(f)-(g).
[37] CTIA Petition at 30.

providers desiring to offer competing service in the area.[38] Such restrictions are not only inconsistent with the pro-competitive intent of the 1996 Act they are directly contrary to the plain language of Section 332(c)(7)(B), which specifically precludes state or local zoning authorities from "unreasonably discriminate[ing] among providers of functionally equivalent services" in regulating the placement, construction and modification of wireless service facilities.[39] Moreover, as CTIA rightly observes, state and local zoning ordinances that adopt a "one carrier is sufficient" approach to siting wireless infrastructure fail to receive the benefits of competing technologies and are also inhibited from taking advantage of the technological improvements in wireless service, such as the next generation wireless broadband services currently being deployed by a multitude of wireless carriers.[40]

The primary objective of the 1996 Act is to foster competition in the provision of telecommunications services among differing providers. Thus, the Commission should clarify that the Act bars local zoning decisions that effectively limit multiple wireless carriers from providing wireless service in a given geographic market.

IV. THE COMMISSION SHOULD PREEMPT ZONING ORDINANCES THAT REQUIRE THE SITING OF WIRELESS FACILITIES BY VARIANCE

CTIA has asked the Commission to preempt all local ordinances or state laws that require wireless siting applicants to procure a variance in all circumstances and regardless of the proposed scope or location of the project before approval of the application will be granted.[41] Zoning law defines a variance as an official permit to use property in a manner that

[38] *Id.* at 31, fns. 76 and 77.
[39] 47 U.S.C. § 332(c)(7)(B)(i)(1).
[40] CTIA Petition at 33-34.
[41] CTIA Petition at 7.

departs from the way in which other property in the same locality can be used.[42] Essentially, a variance is an exception or waiver of applicable land use regulations. It is typically granted in very limited circumstances and only after the applicant demonstrates that unnecessary hardship will result if the variance were denied.[43] Having to automatically obtain a variance for every wireless siting application in a particular jurisdiction just adds needless delay and expense to an already time-consuming zoning review process.

Section 253 of the Act gives the Commission the authority to preempt state and local zoning ordinances that prohibit or effectively prohibit the siting of wireless facilities. Section 253(a) states: "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[44]

Two weeks ago, the United States Court of Appeals for the Ninth Circuit revisited its long-standing interpretation of Section 253(a) and its application to zoning ordinances that affect the placement of wireless infrastructure in *Sprint Telephony PCS, L.P. v. County of San Diego.*[45] In this decision, the court found that San Diego County's wireless facilities ordinance did not violate either Sections 253(a) or 332(c)(7) of the Act. In reaching this conclusion, the court reversed its precedent in *Auburn v. Qwest Corp*., 2060 F.3d 1160 (9th Cir. 2001), which held that an ordinance violates Section 253(a) if it *may* prohibit the provision of wireless services. Instead, the court ruled that any party challenging an ordinance on its face must demonstrate that it *actually* prohibits the provision of wireless services. Merely showing that the ordinance could *potentially* preclude the provision of

[42] Black's Law Dictionary (2007 Edition).
[43] *Id.*
[44] 47 U.S.C. § 253(a).
[45] Nos. 05-56076, -56435 (9th Cir., September 11, 2008).

wireless service is insufficient.[46] Applying its revised interpretation of Section 253(a) to the plain language of San Diego County's wireless ordinance, the Ninth Circuit found that Sprint did not demonstrate that any of the requirements contained in the ordinance, taken on its face, amounted to either an actual or effective prohibition to its provision of wireless service in the County. Thus, the Act did not preempt the County's wireless ordinance.[47]

The zoning ordinance at issue in *Sprint v. County of San Diego* imposed a layer of substantive and procedural requirements on wireless siting applications in addition to the general zoning requirements applicable to other land uses.[48] The court concluded that these requirements on their face did not prevent Sprint from providing wireless service in San Diego County. In contrast, a zoning variance represents a special category of land use regulation that goes well beyond requiring compliance with a variety of height, location, and aesthetic siting conditions at the heart of the zoning ordinance in the *Sprint v. County of San Diego* case. A variance requires the applicant to make a special evidentiary showing that it will suffer unnecessary hardship if the variance is not granted. The variance standard sets an extremely high evidentiary bar that magnifies the already considerable difficulties associated with the local zoning process and severely diminishes the wireless carriers' prospects of gaining board approval to site facilities.

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[46] The court based its reasoning on the 8th Circuit decision in *Level 3 Communications vs. City of St. Louis*, 477 F.3d 528 (2007).

[47] *Sprint v. San Diego County,* Nos. 05-56076 et. al at 12714-12716.

[48] For instance, the ordinance prohibits non-camouflaged poles in residential and rural zones, applies certain height and setback restrictions in residential zones, and permits no more than three facilities on any site unless the zoning board finds that the collocation of more facilities is consistent with community character. *Id.* at 12704. Additionally, an applicant is required to identify the proposed facility's geographic service area, to submit a visual impact analysis, and to describe various technical attributes, such as height, maintenance requirements and acoustical information. *Id.* The proposed facility must also meet several design requirements, mainly related to aesthetics while the applicant is required to perform regular maintenance work on the facility, including graffiti removal and landscaping. *Id.* at 12705.

Further, zoning ordinances that single out wireless infrastructure for variance treatment, but exempt other structures from this category, are unreasonably discriminatory and appear to be precisely the type of regulatory impediment that Section 253(a) was intended to prevent.

Accordingly, the Commission should use the authority that Section 253(a) confers to preempt state and local zoning ordinances that direct wireless service providers to obtain a variance in every instance before they will be permitted to construct or locate their wireless facilities.

V. CONCLUSION

Accordingly, Sprint Nextel urges the Commission to grant the relief requested in CTIA's declaratory ruling petition. In doing so, it should specify precise time limits in which local zoning authorities must take action on wireless siting applications to ensure they are resolved in a timely manner. Sprint Nextel agrees that wireless siting applicants must have recourse if the local zoning authority fails to act within the prescribed time frame, but instead of implementing the "deemed granted" approach that CTIA advocates, Sprint Nextel prefers that the Commission adopt CTIA's alternative recommendation that zoning inaction warrants a court-ordered injunction granting the application unless the locality can justify its delay. Additionally, the Commission should clarify that zoning decisions preventing multiple wireless carriers from offering service in a particular area are prohibited under the Act.

Finally, the Commission should preempt zoning ordinances that mandate a variance for all wireless siting applications under Section 253 of the Act.

Respectfully submitted,

SPRINT NEXTEL CORPORATION

/s/ Ray M. Rothermel Jr.

Anna M. Gomez
Jennifer A. Duane
Ray M. Rothermel Jr.
2001 Edmund Halley Drive
Reston, VA 20191
703 433-4000

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