

**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)(2)(B))	
To Ensure Timely Siting Review and to)	
Preempt Under Section 253 State)	
And local Ordinances that Classify All)	
Wireless Proposals as Requiring a Variance)	

Reply Comments of United States Cellular Corporation

United States Cellular Corporation ("USCC") hereby files its Reply Comments in the above-captioned proceeding.

INTRODUCTION

In our Comments, USCC agreed with CTIA that unreasonable delays have developed in the process by which local zoning authorities approve collocations and new antenna towers proposed by wireless carriers. We further noted that it is important to address this issue now, in light of the unprecedented demands on wireless carriers for new tower construction to improve public safety communications, increase broadband penetration and meet the buildout requirements of the new 700 MHz and AWS wireless allocations.

In light of this situation, USCC gave full support to CTIA's proposals that the FCC should declare that: (1) a failure by a local zoning authority to render a final decision on an application within 45 days for collocations and 75 days for all other applications would be deemed a "failure to act" within the meaning of Section 332(c)(7)(B)(v) of the Communications Act; (2) applications not acted upon within those time frames would either be deemed granted or should provide the basis for an injunction against the zoning authority by a reviewing court; (3) the FCC should clarify that zoning decisions violate Section 332(c)(7)(B)(i) if they prohibit a

particular wireless carrier from providing service in a given area; and (4) the FCC should preempt zoning ordinances that require a variance for wireless siting applications.

II. Wireless Carrier Comments Provide Solid Support for CTIA's Empirical and Legal Case

The comments of wireless carriers demonstrate, in detail, the extent of the problem of inordinate delay in the zoning process.¹ Such delays in siting wireless towers run counter to the statutory mandates discussed above, and do not represent a legitimate use of cities' zoning authority.² USCC also notes the strong support that all of CTIA's arguments received in the filings of other wireless carriers.³ However, we wish in these Reply Comments to stress two central points.

First, there is a need, above all else, to establish a time limit, pursuant to Section 332(c)(7)(B)(v) of the Communications Act, after which a failure of the relevant zoning authority to act on a validly filed application for tower construction will be deemed a "failure to act" pursuant to that section. It has been argued by various city commenters⁴ that the proposed CTIA deadlines fail to deal adequately with the differing "nature and scope" of wireless zoning requests. That point may have some merit and thus the Commission may perhaps wish to lengthen the proposed time periods, perhaps by doubling their length. But we would still maintain that after, say, 90 or 150 days respectively, carriers which have filed complete

¹ See, e.g., Comments of Verizon Wireless, pp. 6-7; NextG Networks, Inc. ("NextG"), pp. 4-8; MetroPCS Communications, Inc. ("MetroPCS"), pp. 7-12; T-Mobile USA, Inc. ("T-Mobile"), pp. 5-9 (and Declarations).

² In USCC's Comments (p. 2) we stated that "obtaining the necessary permits to erect a tower in the City of Chicago now typically takes approximately one year." At the request of the City of Chicago, we have reviewed that assertion and now make the following correction. While there have been certain instances where it took a year or longer to secure approval to build an antenna tower at a given location in the City, usually owing to required design changes resulting from neighborhood opposition to the original proposal or to landscaping issues, we can confirm that for most of our antenna locations in the City of Chicago, the zoning process has taken less than a year, often considerably less.

³ See, e.g., T-Mobile Comments, pp. 9-14; MetroPCS Comments, pp. 4-6; NextG Comments, pp. 8-16; and Verizon Wireless Comments, pp. 4-16.

⁴ See, e.g., Comments of League of California Cities et al., pp. 8-16.

applications should be entitled to an up or down zoning decision, which at least would enable them to seek judicial review of what would be deemed a negative decision. The concerns of the cities about the integrity of their zoning processes are valid. But carrier interests are equally valid and the FCC should chiefly have in mind the national interest in wireless system development. The FCC can and must act to re-establish the necessary balance in cases where the zoning process has been abused. Wireless carriers would of course be free to continue the zoning process past any deadline if they believed that they were making progress and no doubt many would do so, but cities and counties ought to understand that they cannot string the process out ad infinitum without at least facing the judicial review process.

Second, the FCC should make clear that Section 332(c)(7)(B)(i)(II) of the Act prohibits localities from denying wireless carriers the ability to provide service because that locality is already being served by another wireless provider. Section 332(c)(7)(B)(i)(II) prohibits zoning decisions that "prohibit or have the effect of prohibiting the provision of personal wireless services." As USCC pointed out in our comments, to allow cities to interpret this provision in a manner which would allow them to impose a wireless ban after only one carrier was providing service would be to deny those communities the benefits of different types of wireless services as wireless service become more differentiated through the use of competing technologies and successive "generations" of service capabilities.

Other wireless carriers point out additional valid reasons to support CTIA's request. NextG, for example, points out that the one of the central purposes of the 1996 Telecom Act was to promote investment in competing wireless facilities.⁵ NextG also notes that such bans on local wireless competition violate Section 253(a) of the Communications Act, which forbids state and local policies that "prohibit or have the effect of prohibiting the ability of any entity to provide

⁵ NextG Comments, p. 15.

any interstate or intrastate telecommunications service." It is entirely reasonable to apply that prohibition to "one carrier only" policies. Moreover, such an action would not harm any legitimate local zoning interest. It would only implement the statutory prohibition on local service bans.

As shown in wireless carrier comments, the FCC should act to break the existing zoning logjam and preserve local wireless competition, while respecting legitimate local control over the zoning process. This can be done and continuing inaction is not a sufficient policy.

III. The Cities' Arguments Deny the Existence of the Problem CTIA Is Attempting To Solve

The comments by representatives of local zoning authorities offer two main arguments. First, they maintain that there is really no problem, that wireless zoning applications are always processed promptly or at least as promptly as their inherent complexity will allow, and thus there is no reason to do anything to disrupt these smoothly functioning local arrangements.⁶ Second, they argue that the FCC is legally powerless to act.⁷

The first argument is definitively refuted by the wealth of examples of unreasonable delay in the zoning process furnished in the comments of wireless carriers.⁸ One cannot read those comments and review the documented instances of bureaucratic delays they cite without concluding that this is a real and growing problem. Not in all cities, obviously, or in all instances but in enough localities and enough instances that pre-emptive FCC action is warranted.

The cities' second argument, concerning the FCC's power to act, is difficult to make, since the 1996 Telecom Act included two provisions, Sections 332(c) and 253(a), which were expressly intended to promote the establishment of wireless services in the face of local

⁶ See, e.g., Comments of League of California Cities, et al.

⁷ See Comments of League of California Cities, pp. 1-8, 21-27; Comments of City of St. Paul, pp.1-8.

⁸ See Footnote 1 above.

opposition.⁹ But the cities manage it. Their arguments are often intricate and obscure, and reflect a consistent intention to read remedial legislation as conferring only the narrowest of procedural rights on wireless carriers.¹⁰ They are not convincing.

For example, representatives of the cities argue that Section 332(c)(7)(B)(v), with its grant of carriers' rights to seek judicial review in the event of a zoning authority's "failure to act," actually gives the FCC no power at all in this context to define "failure to act," since that phrase only refers to court jurisdiction after such a failure.¹¹ We are also advised that the preemptive authority granted by Section 253(a) of the Act cannot be applied here because the sole provisions giving the FCC power to act concerning "the placement, construction, and modification" of wireless facilities are Sections 332(c)(7)(A) and (B).¹² Then, by reasoning which is difficult to summarize or understand, it is argued that Sections 332(c)(7)(A) and (B), despite their many restrictions on state authority in favor of wireless carriers, really reflect an intention on the part of Congress "to preserve state and local authority over broad land use regulation and individual decisions with respect to wireless facilities."¹³ Thus, no action may be taken by the FCC.

We would suggest a more appropriate reading of Sections 332(c)(7) and 253(a) is that these sections complement each other, strengthening the FCC's power to act pre-emptively in appropriate circumstances. It is thus reasonable for the FCC to provide the requested interpretive ruling giving meaning to the concept of "failure to act." And, Section 332(c)(7)(B)(i)'s bans on: (1) state or local government discrimination among the providers of wireless or other telecom services; and (2) state prohibitions of any wireless services, combined with Section 253(a)'s ban

⁹ See, e.g. MetroPCS Comments, pp. 4-7.

¹⁰ See, e.g. Comments of National Association of Telecommunications Officers ("NATOA"), pp. 6-18; League of California Cities Comments, pp. 4-17.

¹¹ League of California Cities Comments, p. 5.

¹² NATOA Comments, p. 8.

¹³ Ibid., pp. 8-9.

on state or local prohibitions on the ability of any entity to provide a telecommunications service, give the FCC ample authority to act on CTIA's requests.

Section 332 obviously reflects legislative compromises and it is not free from ambiguity. However, the cities' cramped reading of that section, to the effect that it precludes FCC action to achieve that section's actual objectives, surely cannot be correct. The FCC ought to use the power which it determines that it has to protect the rights of carriers to build their networks and provide local wireless competition.

CONCLUSION

For the foregoing reasons and those previously given, USCC asks that the FCC take such actions in accordance with CTIA's petition as it determines are reasonable and appropriate.

Respectfully submitted,

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