

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling to Clarify)	WT Docket No. 08-165
Provisions of Section 332(c)(7)(B) to Ensure Timely)	DA 08-1913
Siting Review and to Preempt Under Section 253)	
State and Local Ordinances that Classify All)	
Wireless Proposals as Requiring a Variance)	

REPLY COMMENTS OF VERIZON WIRELESS

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SUMMARY

Verizon Wireless supports CTIA's request asking the Commission to declare time periods within which state or local zoning authorities must render a final decision on wireless facilities requests under Section 332(c)(7)(B) of the Act; to clarify that Section 332(c)(7)(B)(i) of the Act bars zoning decisions that have the effect of prohibiting an additional entrant from offering service in a given area; and to preempt, under Section 253 of the Act, local zoning ordinances and state laws that treat every wireless siting application as requiring a variance.

It is clear that the timely deployment of wireless facilities is in the public interest and would further federal policy goals. For example, Congress recently adopted the Broadband Data Improvement Act, which makes clear that the deployment of broadband service technologies is vital to economic development and public safety. In addition, the association representing the nation's 911 emergency responders filed comments noting the importance of rapid siting to public safety and encouraging the FCC to facilitate the deployment of both commercial wireless and public safety networks by acting on CTIA's Petition.

The record in this proceeding documents the delays that carriers have faced in some jurisdictions obtaining timely action on wireless facilities applications. In addition to the specific examples of siting delays provided in the Petition, Verizon Wireless, T-Mobile, the California Wireless Association, MetroPCS, Sprint Nextel, US Cellular, PCIA and NextG Networks all provided either company-wide data, specific examples, or both, detailing the type of lengthy and unwarranted delays that have become all too commonplace for carriers. The need for Commission action is clear.

Evidence submitted by a number of zoning authorities demonstrates that the benchmark time frames proposed by CTIA are reasonable. The record contains dozens of comments from

zoning authorities setting forth the number of applications each has considered in the last five years and the number of days each application took to approve. The majority of the applications reported by these entities were approved within CTIA's proposed time frames.

The Petition does not, as some parties assert, alter the balance between federal and state authority established in Section 332(c)(7)(B)(ii) of the Act. This section was intended to preserve state or local zoning authorities' right to render decisions regarding the placement of wireless facilities, but put bounds on the time such authorities can take to render their decisions. The Petition seeks to give effect to Congress' language and intent by defining when a zoning authority has failed to act. The time frames and remedies proposed by CTIA are both consistent with the statutory division of powers created by Congress and necessary to achieve Congress' intent.

The Commission has authority to deem applications granted or adopt the alternative presumption. Neither action will intrude on any court's Congressionally-granted jurisdiction to adjudicate specific disputes brought before the court. Similar to the Commission's action at issue in *Alliance for Community Media v. FCC*, the language in Section 332(c)(7)(b)(v) granting jurisdiction to the courts to resolve zoning disputes does not override the Commission's authority to impose time limits on zoning authority decisions and deem applications granted that are not decided within those time limits.

Only one party opposed CTIA's request that the Commission clarify that a zoning authority may not defend itself in a suit brought under Section 332(c)(7)(B)(i)(II) by arguing that one or more other service providers already serve the area in question. That party implied, however, that its reading of this section is inconsistent with Section 332(c)(7)(B)(i)(I), prohibiting unreasonable discrimination among providers of functionally equivalent services.

The interpretation CTIA requests is the only interpretation consistent with other provisions in the Act and should be granted by the Commission.

Contrary to claims of some parties, the actions requested by CTIA will not impact air safety in any way. Part 17 of the Commission's rules place requirements on tower owners and licensees that ensure pre-construction review, and post-construction auditing of towers for compliance with FAA and FCC air safety rules. These reviews and compliance procedures exist outside the state and local zoning process and are not compromised by any of the measures CTIA proposes.

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REPLY COMMENTS OF VERIZON WIRELESS

Verizon Wireless hereby submits reply comments in support of the above-referenced Petition for Declaratory Ruling (“Petition”) filed by CTIA – the Wireless Association. In the Petition, CTIA asks the Commission to declare time periods within which state or local zoning authorities must take action on wireless facilities requests under Section 332(c)(7)(B) of the Act; to clarify that Section 332(c)(7)(B)(i) of the Act bars zoning decisions that have the effect of prohibiting an additional entrant from offering service in a given area; and to preempt, under Section 253 of the Act, local zoning ordinances and state laws that treat every wireless siting application as requiring a variance.

Comments filed in response to the Petition clearly demonstrate that (1) there are strong public interest and safety benefits to adopting measures to speed the state and local zoning process; (2) the state and local zoning process often imposes unnecessary delays in the deployment of wireless services; and (3) the time frames for zoning decisions and other actions requested by CTIA are reasonable. Those opposed to the Petition

mischaracterize the nature of CTIA's request and misread federal laws and court decisions in an effort to block CTIA's request and maintain the unacceptable status quo.

I. DISCUSSION

A. Adopting Measures to Speed the State and Local Zoning Process Would Serve the Public Interest and Provide Consumer and Public Safety Benefits.

It is clear from the record in this proceeding, recent legislative initiatives and current events that the timely deployment of wireless facilities is in the public interest and would further federal policy goals. As noted in Verizon Wireless' initial comments, Commissioner Adelstein recently linked timely wireless facilities' siting to the future success of the economy and meeting many the Commission's policy objectives.¹

On September 30, 2008, Congress adopted the Broadband Data Improvement Act.² Among the provisions of this legislation are findings which state that "The deployment and adoption of broadband technology has resulted in enhanced economic development and public safety for communities across the Nation, improved health care and educational opportunities, and a better quality of life for all Americans," and that "Continued progress in the deployment and adoption of broadband technology is vital to ensuring that our Nation remains competitive and continues to create business and job growth." The legislation also adopts a Broadband Data and Development Grant Program whereby grant recipients are required to use the grants, *inter alia*, "to identify barriers to

¹ Remarks of Jonathan S. Adelstein, Commissioner, Federal Communications Commission "A View on Today's Most Pressing Wireless Issues," delivered at the Fifth Annual Conference on Spectrum Management Law Seminars International, Arlington, VA, September 18, 2008.

² S. 1492, 110th Cong., 2nd Sess. (2008). President Bush signed the legislation on October 10, 2008.

the adoption by individuals and businesses of broadband service and related information technology services,” and

to work collaboratively with broadband service providers and information technology companies to encourage deployment and use, especially in unserved areas and areas in which broadband penetration is significantly below the national average, through the use of local demand aggregation, mapping analysis, and the creation of market intelligence to improve the business case for providers to deploy.³

These provisions make clear that the deployment of broadband service technologies is vital to economic development and public safety and that removing barriers to that deployment is a key federal policy goal. Granting the CTIA petition is an important and necessary step to removing barriers to deploying wireless broadband technology.

The nation’s ongoing financial crisis underscores the need for Commission action to remove barriers to deploying wireless facilities. These barriers impose additional costs on carriers at a time when raising capital to fund deployment is increasingly difficult. FCC action to speed wireless facilities siting will reduce carrier costs and facilitate investment and deployment of wireless technologies.

Eliminating unnecessary delays in the wireless facilities siting process is also an important policy objective for public safety. The National Emergency Number Association (“NENA”) stated in its comments supporting the Petition, that

The importance of wireless communications for Public Safety and the increasing reliance of consumers on wireless communications services as their primary method of communication makes it more important than ever that steps are taken to ensure the availability and reliability of wireless service. [Citation omitted] Calls must be able to be made from as many locations as possible and dropped calls must be prevented. This is especially true for wireless 9-1-1 calls which must get through to the right Public Safety Answering Point (“PSAP”) and must be as accurate as technically possible to ensure an effective response. Increased availability

³ S. 1492, 110th Cong., 2nd Sess. §§ 102, 106.

and reliability of commercial and public safety wireless service, along with improved 9-1-1 location accuracy, all depend on the presence of sufficient wireless towers. NENA agrees with CTIA that it is important for wireless facility siting to occur in a timely manner without any unnecessary and unreasonable delay by zoning authorities, which can be detrimental to Public Safety. We encourage the Commission to consider CTIA's proposed process to the extent that it will facilitate the deployment of both commercial wireless and public safety networks and improve wireless Enhanced 9-1-1 ("E9-1-1") location accuracy, both of which are common policy goals of the Commission and NENA.⁴

As these remarks, legislative initiatives, events and comments demonstrate, the rapid deployment of wireless infrastructure will clearly serve the public interest by expanding broadband services and improving public safety. Granting the CTIA petition is an important step that the Commission should take to eliminate barriers to wireless infrastructure deployment and thereby advance each of these public policy goals.

B. The Need for FCC Action is Well-Documented.

Several commenters affiliated with the state or local zoning process argued that CTIA has failed to demonstrate that zoning applications are not being approved in a timely manner. They contended that CTIA has only cited to a handful of examples of sites that have taken a long time to be approved, and that CTIA's own data reflect that the vast majority of sites are being approved in a reasonable period of time.⁵

⁴ NENA Comments at 1-2.

⁵ *See, e.g.*, National Association of Telecommunications Officers and Advisors (NATOA), National League of Cities (NLC), and United States Conference of Mayors Comments ("NATOA Comments") at 22 (arguing that the Petition fails to provide any evidence that any local government is engaged in delay with respect to processing wireless siting applications); City of Philadelphia Comments at 3 (arguing that CTIA's data show that 213,299 sites have been approved and that CTIA provides only anecdotal information); County of Sonoma Comments at 1 (arguing that CTIA's data show that 77 percent of applications have been pending for less than a year, and 95 percent have been acted on within 3 years).

Verizon Wireless disagrees with commenters that argued there is no evidence of a problem. It is neither reasonable nor acceptable, as Sonoma County suggested, for nearly one quarter of wireless facility applications, half of which are for collocations, to take more than a year to approve. Moreover, contrary to the assertions of some commenters, there is a wealth of evidence that clearly demonstrates the delays carriers too often experience in getting sites approved.

The Petition provided both aggregate data and specific examples demonstrating excessive delays in the wireless siting process.⁶ In addition, commenters provided a wealth of evidence demonstrating unreasonable delays in the zoning process. Verizon Wireless stated that

of the over 400 collocation requests reported as pending before local zoning authorities, over 30 percent of the requests had been pending for more than 6 months. Of the over 350 non-collocation requests reported as pending, more than half of those applications had been pending for more than 6 months, and nearly 100 of those applications had been pending for more than one year. Looking at applications approved within the last 5 years, in Northern New Jersey, 45 of the 48 zoning applications processed took more than 6 months to approve, 19 of those took more than a year, and 7 took more than two years. Similarly, in Northern California, 27 of 30 applications took more than 6 months, with 12 applications taking more than a year, and 6 taking more than two years to be approved. In Southern California, 25 applications took more than two years to be approved, with 52 taking more than a year, and 93 taking more than 6 months.⁷

Similarly, T-Mobile commented that nearly one third of its 706 collocation requests have been pending for more than a year, and 114 of those requests have been pending for more than 3 years. Among new facilities requests, it reported that over 30 percent of its 571 pending applications have been pending for more than a year, and 25

⁶ Petition at 14-15. *See also* California Wireless Association Comments at 2-3.

⁷ Verizon Wireless Comments at 6-7.

have been pending more than 3 years.⁸ MetroPCS and ALLTEL provided several examples of sites delayed for years by the zoning process.⁹ Sprint Nextel commented that in some California communities, zoning applications take between 28 and 36 months to approve.¹⁰ US Cellular commented that new towers in the City of Chicago take approximately one year to approve. It also stated that approximately one fifth of its applications require a variance and that one fifth of those sites have been pending over a year.¹¹ PCIA cited examples of communities that take excessively long periods of time to approve distributed antenna systems (DAS) applications.¹² Likewise, NextG Networks provided numerous examples of DAS zoning applications that took excessive periods of time to approve, even though many of those applications sought to attach facilities to existing poles in public rights-of-way.¹³

The data and evidence provided by CTIA, Verizon Wireless and others clearly demonstrate both that some zoning authorities take far too long to approve wireless facilities siting applications, and that a much shorter period is achievable. In order to curb these delays, the Commission should act quickly to adopt the declaratory rulings requested by CTIA in the Petition.

⁸ T-Mobile Comments at 6-7. T-Mobile also gives specific examples of sites that have experienced excessive delays. T-Mobile Comments at 7-9.

⁹ MetroPCS Comments at 8-11; ALLTEL Comments at 3-4.

¹⁰ Sprint Nextel Comments at 5.

¹¹ US Cellular Comments at 2-3.

¹² PCIA Comments at 8.

¹³ NextG Networks Comments at 5-8.

C. The FCC Has the Authority to Eliminate Ambiguities in the Act as to When a Zoning Authority Has “Failed to Act.”

CTIA asks the Commission to eliminate the ambiguity in Section 332(c)(7)(B)(v) of the Act by declaring that a failure to act has occurred if a zoning authority fails to render a final decision within 45 days on a wireless facilities siting application proposing to collocate on an existing structure or within 75 days for all other wireless facilities siting applications. Several parties, however, challenged this request arguing that there is no ambiguity in the Act and that the Commission therefore lacks the authority to impose “failure to act” timeframes. They argued that language in section 332(c)(7)(B)(ii) qualifying the duty to act within a reasonable period time with the phrase “taking into account the nature and scope of such request,” clearly indicates that Congress intended the determination of whether a state or local government has acted within a reasonable period of time to be made on a case-by-case basis. They contended that any FCC action to impose strict deadlines would contravene this intent and is, therefore, beyond the Commission’s authority.¹⁴

Contrary to these assertions, the Act is ambiguous and the FCC is well within its authority to clarify when a zoning authority has “failed to act.” The Act does not define when a zoning authority has failed to render a decision on a zoning application. As a result, applicants do not know when it is appropriate to seek judicial relief and are more likely to wait to commence any court action until the zoning process has been completed, which can be years after the application was filed. As CTIA pointed out in the Petition, Section 201(b) of the Act provides that “the Commission may prescribe such rules and

¹⁴ See, e.g., NATOA Comments at 12-18; City of Philadelphia Comments at 3-4; FCC Intergovernmental Advisory Committee Comments at 2.

regulations as may be necessary in the public interest to carry out the provisions of the Act.”¹⁵ In *AT&T v. Iowa Utilities Board*, the United States Supreme Court held that this provision authorizes the Commission to interpret and implement all provisions contained in the 1996 Act.¹⁶ More recently, the United States Court of Appeals for the Sixth Circuit upheld the Commission’s implementation of time frames for local franchising authorities to render final decisions based on language in Section 621(a) of the Act prohibiting local franchising authorities from “unreasonably refus[ing] to award an additional competitive franchise.” Like the Supreme Court, the Sixth Circuit held that Section 201(b) of the Act authorized the FCC’s action.¹⁷

It is clear from these cases and from the plain language of Section 201(b) that the Commission has the authority to interpret provisions of the Act and provide clarification where necessary. In this case, the interpretation requested is entirely consistent with the language in the Act stating that a “failure to act” must “tak[e] into account the nature and scope of such request.” In proposing time frames for determining when a zoning authority has failed to render a final decision on a zoning application, CTIA proposed different time frames for different types of zoning approvals. Because collocation applications do not typically require the same level of scrutiny as new facility applications and therefore tend to be approved more quickly, CTIA proposed a shorter time frame (45 days) for determining when a zoning authority has failed to render a decision on a collocation application as compared to an application for a new facility (75

¹⁵ 47 U.S.C. § 201(b).

¹⁶ Petition at 20-21, *citing AT&T v. Iowa Utilities Board*, 525 U.S. 366, 378 (1999).

¹⁷ Petition at 21-22, *citing Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

days). As such, CTIA's proposal is entirely consistent with the statutory language stating that "failure to act" determinations should take into account the nature and scope of the request.

D. The Proposed Time Frames for Determining When a Zoning Authority Has Failed to Render a Final Decision Are Reasonable.

Several parties argued that the time frames proposed by CTIA for determining when a local authority has failed to render a final decision are not reasonable and do not account for the myriad processes and requirements that zoning authorities must abide by in conducting their review of wireless facilities siting applications. They argued further that imposing the proposed deadlines on zoning authorities will favor wireless facilities applications above other applications.¹⁸

Contrary to these assertions, however, evidence submitted by a number of zoning authorities demonstrates that the benchmark time frames proposed by CTIA are reasonable. St. Paul, Minnesota, for example, reported that on average it processes and approves applications for wireless facilities within 13 days.¹⁹ The City of Philadelphia stated that many applicants obtain approval within 25 business days.²⁰ New Albany, Ohio, commented that the 2 new tower applications it processed in the past five years were approved within 90 days, and the 3 collocation requests it received were approved

¹⁸ See, e.g., City of Philadelphia Comments at 4-5; Broadcast Signal Lab Comments at 7-14; Comments of The League of California Cities, The California State Association of Counties, and the City and County of San Francisco (California Cities Comments) at 10-16.

¹⁹ Saint Paul Comments at 10.

²⁰ City of Philadelphia Comments at 2.

within 30 days.²¹ The City of Arlington, Texas submitted data showing that 13 of its 14 collocation applications were approved within 24 days (the other took 96 days), while its lone new tower request took 82 days for approval.²² The City of Red Wing, Minnesota, reported that the average processing time for the applications it has reviewed within the last five years, all of which were collocations, was 15-30 days.²³ Prince William County Virginia reported that 5 of 6 new tower applications received in the last 5 years took between 30 and 173 days for approval.²⁴ The Village of Alden, New York commented that both applications it processed took less than six months.²⁵

These data, and the evidence submitted by other zoning authorities on the record, clearly demonstrate that CTIA's proposed 45-day (for collocation applications) and 75-day (for new tower applications) time frames for determining when a zoning authority has "failed to act" are entirely reasonable. Adopting these time frames would not lead to preferential treatment for wireless facilities applications. The Commission has ample record data in order to declare that a failure to act has occurred if a zoning authority fails to render a final decision within 45 days on a wireless facilities siting application proposing to collocate on an existing structure and 75 days for all other wireless facilities siting applications.

²¹ New Albany Comments at 3.

²² City of Arlington Comments at 11-12.

²³ City of Red Wing Comments at 10.

²⁴ Prince William County Comments at 3.

²⁵ Village of Alden Comments at 4.

E. CTIA's Petition Does Not Alter the Statutory Balance Between Federal and State Authority.

A number of parties argued that the Petition should be denied because it proposes impermissibly to alter the balance between federal and state authority established in Section 332(c)(7)(B) of the Act.²⁶ Verizon Wireless disagrees.

In adopting amendments to the Act in 1996, Congress chose to limit the authority of state and local zoning authorities in several ways to protect the federal policy interest in ensuring the rapid deployment of wireless facilities. Chief among those provisions is Section 332(c)(7)(B)(ii), which 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.”²⁷

This section was intended to preserve a state or local zoning authority's right to render decisions regarding the placement of wireless facilities, but put bounds on the time such authorities can take to render their decisions. Because the Act fails to define when a zoning authority has “failed to act,” however, this limitation on state and local authority has failed to have its intended effect of requiring zoning authorities to act within a reasonable period of time. The evidence submitted by CTIA, Verizon Wireless and others, clearly demonstrates this failure.

²⁶ See, e.g., NATOA Comments at 2-6; FCC Intergovernmental Advisory Committee Comments at 1; California Cities Comments at 2.

²⁷ 47 U.S.C. § 332(c)(7)(B)(ii).

The Petition does not preempt or alter in any way the powers reserved to state and local zoning authorities. Rather, it seeks to give effect to Congress' language and intent by defining when a zoning authority has failed to act. The time frames and remedies proposed by CTIA, therefore, are both consistent with the statutory division of powers created by Congress and necessary to achieve Congress' intent.

F. The Commission Should Declare that Zoning Applications Not Acted Upon within the Benchmark Time Frames Are Deemed Granted, or at Minimum, Adopt a Presumption that A Reviewing Court Should Order the Zoning Authority to Grant the Siting Request.

The Petition asks the Commission to prompt zoning authorities to act within the prescribed time frames by declaring that when a zoning authority fails to render a final decision within the benchmark timeframes set forth above, the application will be deemed granted. At minimum, the Commission should establish a presumption that when a zoning authority cannot explain a failure to act within these time frames, a reviewing court should find a violation of Section 332(c)(7)(B)(ii) and issue an injunction granting the underlying application.²⁸

In support of this request, CTIA cites to a number of cases brought under Section 332(c)(7)(B)(v) finding that the appropriate remedy when a zoning authority fails to act is to grant an order issuing the relevant permits.²⁹ CTIA argues further that the FCC has authority to act under Section 201(b) of the Act, and that its request is consistent with the *Alliance for Community Media* decision and authorities cited by the FCC in that appeal.³⁰

²⁸ Petition at 27.

²⁹ *Id.* at 28-29.

³⁰ *Id.* at 29.

Some commenters challenged the Commission’s authority to deem applications granted or adopt the alternative presumption. Citing the legislative history of the 1996 amendments to the Act, which states that “the courts shall have exclusive jurisdiction over all other [excluding decisions concerning radiofrequency emissions] disputes arising under this section,”³¹ they contended that because Congress intended that the courts have exclusive jurisdiction to adjudicate disputes regarding whether a zoning authority has failed to act, the FCC lacks authority to deem applications granted or even to adopt a presumption that they should be granted. They argued, further, that Congress intended to deprive the Commission of any preemptive authority over local zoning decisions. In support of this claim, they cited to language in the House Report stating “Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction, or modification of CMS facilities should be terminated.”³²

The proposal in the Petition to deem applications granted in no way intrudes upon any court’s Congressionally-granted jurisdiction to adjudicate specific disputes brought before the court alleging that a zoning authority has failed to act or otherwise challenging the zoning authority’s action.³³ In this regard, commenters’ arguments are analogous to the arguments made by Petitioners in the *Alliance for Community Media* case. There, the court stated,

³¹ H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess., at 208 (1996).

³² NATOA Comments at 9-11; California Cities Comments at 18-21, both *citing* H.R. Conf. Rep. No. 104-458, at 208.

³³ Similarly, CTIA’s alternate proposal asking the FCC to adopt a presumption that a court should grant the underlying application if a final decision is not rendered by the applicable time frames also does not tread on any court’s jurisdiction to resolve disputes.

In effect, petitioners' argument calls upon us to determine whether the judicial review provisions in the second part of 621(a)(1) are exclusive and thereby override the FCC's exertion of rulemaking authority. Our inquiry leads us to a negative answer: 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). While the Order equips [local franchising authorities] with guidance on reasonable versus unreasonable distribution of franchises, the courts ultimately retain their Congressionally-granted jurisdiction to hear appeals involving denials of competitive franchises. Although the courts may have to give deference to the Order, this does not in any way impede the courts' fact-finding or legal analysis during actual judicial proceedings.³⁴

The Sixth Circuit thus found that the availability of a judicial remedy in the *Alliance for Community Media* case did not override FCC authority to impose time limits on local franchise authority decisions and deem granted applications not decided within those limits. Similarly, the language in Section 332(c)(7)(b)(v) granting jurisdiction to the courts to resolve zoning disputes does not override the Commission's authority to impose time limits on zoning authority decisions and deem applications granted that are not decided within those time limits.

Commenters' arguments are not saved by the language in the legislative history stating that any pending FCC rulemakings concerning the preemption of local zoning authorities over the placement, construction or modification of wireless facilities should be terminated. That language was directed at FCC action pending at the time of enactment and does not apply to this proceeding. Moreover, as discussed above, the

³⁴ *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), citing *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 385 (upholding FCC rules guiding states' resolution of interconnection disputes although the Act provided for judicial review of state commission decisions), and *U.S. v. Haggart Apparel Co.*, 526 U.S. 380 (1999) (upholding U.S. Customs Service rules guiding Court of International Trade decisions).

declaratory ruling sought by CTIA is not seeking to preempt any authority zoning bodies have over the placement, construction or modification of wireless facilities. Rather, the Petition is asking CTIA to interpret ambiguous terms in the statute in order to give effect to limitations already imposed on zoning authorities under the statute. Accordingly, the request action does not run afoul of Congress' intent in any way.

G. The Commission Should Clarify that a Zoning Decision Violates Section 332(c)(7)(B)(i) if It Prohibits the Applicant from Providing Wireless Service in a Given Area.

Verizon Wireless is aware of only one party, NATOA, that opposed CTIA's request that the Commission clarify that a zoning authority may not defend itself in a suit brought under Section 332(c)(7)(B)(i)(II) by arguing that one or more other service providers already serve the area in question. NATOA argued that the statute only clearly prohibits decisions that have the effect of banning wireless service. It argued, further, that even if a zoning authority denied an application based on the presence of another provider in the area, the provider would still have a cause of action under Section 332(c)(7)(B)(i)(I), which prohibits unreasonable discrimination among providers.³⁵

NATOA's second point is precisely why Congress could not have intended NATOA's interpretation of 332(c)(7)(B)(i)(II). Interpreting this section to require that only one provider be allowed to serve an area runs contrary to the language in Section 332(c)(7)(B)(i)(I), which prohibits zoning authorities from unreasonably discriminating among providers of functionally equivalent services.³⁶ Congress could not have intended that one provision in the Act be interpreted in a manner that is inconsistent with another

³⁵ NATOA Comments at 19-20.

³⁶ Petition at 32.

provision in the same paragraph and with the Act's pro-competitive goals. Rather, Verizon Wireless agrees with CTIA that the interpretation CTIA asks the FCC to endorse is consistent with the language in the Section 332(c)(7)(B)(i)(II), which states that zoning authorities "shall not prohibit or have the effect of prohibiting the provision of personal wireless *services*," rather than proscribing actions that prohibit the provision of any wireless service. By using the plural "services," Congress clearly did not intend to allow zoning authorities to prohibit competing service providers from gaining zoning approval for wireless facilities in any area.³⁷

Given that CTIA's requested interpretation is the only interpretation consistent with other provisions in the Act, and given the lack of any serious opposition to CTIA's request, the Commission should grant CTIA's request to clarify that a zoning authority may not defend itself in a suit brought under Section 332(c)(7)(B)(i)(II) by arguing that one or more other service providers already serve the area in question.

H. The Requested Actions in the Petition Do Not Present Any Risk to Aviation Safety.

Some commenters opposed the Petition by asserting that shortened zoning review times may reduce or eliminate consideration of FAA obstacle evaluation findings in the decision to approve or deny a zoning application.³⁸ Although Verizon Wireless understands the importance of air safety, the processes for FAA and FCC review and approval of structures for air safety concerns are distinct from the zoning approval process and will not be affected by grant of the CTIA Petition. Indeed, the FAA, which

³⁷ *Id.*, citing 47 U.S.C. § 332(c)(7)(B)(i)(II) (emphasis added).

³⁸ Airline Pilots Association, International Comments at 1; Aircraft Owners and Pilots Association Comments at 1-2.

has responsibility for air safety issues related to tower siting, disagreed with opposing commenters regarding the effect of CTIA's proposals on air safety. It commented that the measures proposed by CTIA do not "in any manner alter or amend the FAA's regulatory requirements and process specified in Title 14 of the Code of Federal Regulations to require notice of structures that may affect aeronautical operations and facilities, evaluate the aeronautical effect of those structures, issue determinations regarding the impact of those structures and recommendations for the marking and lighting of those structures."³⁹

Part 17 of the FCC's rules imposes a comprehensive set of procedures and requirements on structure owners and licensees that is designed to ensure air safety. These rules require registration prior to construction for new or modified structures that will be used as part of stations licensed by the FCC. This registration must be filed with the FCC by the structure owner or licensee (if the owner cannot or does not file) and will not be approved by the FCC unless the registrant provides the Commission with a valid FAA "no hazard" determination, where required.⁴⁰ FCC rules specify which towers require notice to the FAA. In general, towers that are over 200 feet above ground level in height or that are below that height but in close proximity to a runway, or that are in an instrument approach area (and notification is requested by the FAA) require FAA notification and approval prior to construction or modification, unless exempt due to being shielded by other taller structures or being 20 feet in height or lower.⁴¹ Antenna

³⁹ FAA Comments at 1.

⁴⁰ 47 C.F.R. § 17.4.

⁴¹ 47 C.F.R. §§ 17.7, 17.14.

structures are also required to be painted and lighted, in accordance with FAA Advisory Circulars and the FAA “no hazard” recommendations, if the structure is over 200 feet above ground level in height or requires special aeronautical study.⁴² In addition, structure owners and licensees must take measures either to inspect required lighting systems every 24 hours or otherwise maintain alarm systems to detect light failure, provide prompt notification of any lighting system failure, and maintain structure painting to assure visibility. Structures requiring painting and/or lighting are subject to FCC and FAA compliance inspection, with penalties for failure to comply.⁴³

These comprehensive FCC and FAA pre-construction review and post-construction maintenance requirements ensure that the placement of wireless facilities does not impact the safety of the nation’s air space. Nonetheless, some zoning authorities consider air-safety issues in their review of applications for wireless facilities. That review, however, does not in any way supplant the required FAA and FCC review discussed above.

II. CONCLUSION

The Commission should grant CTIA’s request for declaratory ruling. The FCC has the authority to adopt the measures in the Petition. Commenters alleging that the FCC lacks the authority to take the proposed actions mischaracterize the nature of CTIA’s requests and misread the relevant statutory provisions and legislative history. In order to speed the wireless facilities siting process, the Commission should (1) declare time periods within which state or local zoning authorities must take action on wireless

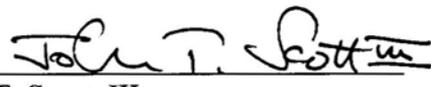
⁴² 47 C.F.R. §§ 17.21-17.23.

⁴³ 47 C.F.R. §§ 17.47-17.58.

facilities requests under Section 332(c)(7)(B) of the Act; (2) clarify that Section 332(c)(7)(B)(i) of the Act bars zoning decisions that have the effect of prohibiting an additional entrant from offering service in a given area; and (3) preempt zoning ordinances and state laws that treat every wireless siting application as requiring a variance.

Respectfully submitted,

VERIZON WIRELESS

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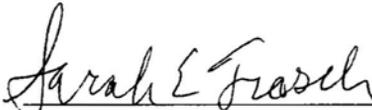
Dated: October 14, 2008

Certificate of Service

I hereby certify that on this 15th day of October, a copy of the foregoing "Comments of Verizon Wireless" in WT Docket 08-165 were sent by US mail or electronic mail to the following parties:

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