

**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 Siting Review and to)	
Preempt under Section 253 State and Local)	
Ordinances that Classify All Wireless Siting)	
Proposals as Requiring a Variance)	

Reply Comments of the Rural Telecommunications Group, Inc.

The Rural Telecommunications Group, Inc. (“RTG”), by its attorneys, hereby submits its reply comments in connection with the above-referenced petition. As providers of commercial mobile radio service (“CMRS”) in rural areas, RTG’s members have firsthand experience with the difficulties of obtaining timely tower siting approvals from local zoning authorities, and RTG appreciates the opportunity to advise the Federal Communications Commission (“FCC” or “Commission”) of its view on the important issues raised by the Petition for Declaratory Ruling filed by CTIA – The Wireless Association (“CTIA”).¹ As discussed more extensively below, RTG fully supports grant of the relief requested in the Petition.

I. Statement of Interest

RTG is a Section 501(c)(6) trade association dedicated to promoting wireless opportunities for rural telecommunications companies through advocacy and education in a manner that best represents the interests of its membership. RTG’s members have

¹ 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 (filed July 11, 2008) (“Petition”).

joined together to speed delivery of new, efficient, and innovative telecommunications technologies to the populations of remote and underserved sections of the country. RTG's members are small, rural businesses serving or seeking to serve secondary, tertiary and rural markets. RTG's members are comprised of both independent wireless carriers and wireless carriers that are affiliated with rural telephone companies. As wireless carriers, RTG members have extensive experience with the construction of antenna towers and transmission facilities, including the process of obtaining local governmental approval for the construction of such facilities.

II. Discussion

A. Congressional Intent Has Been Frustrated by Local Zoning Decisions

In enacting the Telecommunications Act of 1996 ("Act"), Congress intended to facilitate the provision of broadband service to rural areas and to ensure that local zoning decisions to not delay or interfere with the process. *See, e.g.*, 47 U.S.C. §706 (directing the FCC and state commissions to "encourage the deployment on a reasonable and *timely* basis of advanced telecommunications capability to *all* Americans") (emphasis added); 47 U.S.C. §332(c)(7)(B)(prohibiting local governmental entities from effectively prohibiting the provision of personal wireless services and unreasonably delaying action on requests for tower siting approval); 47 U.S.C. §309(j)(3)(citing as an objective in awarding wireless licenses "the development and *rapid deployment* of new technologies, products, and services for the benefit of the public, *including those residing in rural areas, without administrative or judicial delays*") (emphasis added). Unfortunately, the actions of many local zoning authorities have frustrated this Congressional intent by

preventing or delaying the approvals necessary for carriers to rapidly deploy advanced wireless telecommunications services to the public.

In its petition and in supporting comments, CTIA and many commenters cite numerous examples of unreasonably long delays in acting on requests for local tower siting approval and other impediments to obtaining such approval. RTG members have experienced similar frustrations, delays and impediments. For example, one RTG member in Mapleton, Iowa experienced a delay of approximately one year in acting on its application, as the city repeatedly asked for more and different information after the application was submitted. RTG members have also encountered various municipalities in Iowa and Minnesota that impose a waiting period ranging from six months to one year after an application is denied before the applicant may reapply for siting approval.

Zoning authority mandated delays often occur prior to the submission of the application. An extreme example of the type of problems faced by RTG members in obtaining tower siting approvals can be found in various municipalities in New Mexico which have purchased zoning ordinances from a company called Center for Municipal Solutions (“CMS”). In exchange for a free draft zoning ordinance crafted by CMS, these municipalities have agreed to grant CMS the exclusive right to review and evaluate wireless applications *and to get paid by the applicant for doing so*. In Lincoln County, New Mexico, for example, the ordinance requires that an applicant, in order to file an application for siting approval, pay a \$5,000² non refundable application fee, place an initial \$8,500 in escrow to cover CMS’s engineering/consulting fees, and continue to replenish the funds in this “evergreen” escrow fund to ensure that the fund never dips

² The application fee for a collocation is approximately \$2,500.

below \$2,500. There is no cap on what CMS may charge and its services are typically billed to the applicant at a rate of several hundred dollars per man hour. In addition to these expenses, the tower applicant must typically spend several thousand dollars more in engineering fees, coverage proofs, traffic study proofs, view shed analysis, balloon tests³, camouflage options analysis, and multiple pre and post construction meetings and inspections, none of which are necessary to determine the grantability of the application, and all of which typically add many months to the application process. Moreover, in the event an applicant can afford the expense of undergoing this application process, and somehow survives the gauntlet, it must then file a bond or other form of security with the county for \$75,000 for the full term of the permit until the tower is removed.⁴

For small rural wireless carriers such as RTG members, the expense involved with such an application process are typically cost prohibitive, effectively barring deployment. Indeed, CMS and city zoning officials in Roswell, New Mexico have been heard to boast of using the CMS ordinance to prevent the construction of *any* new towers in Roswell.

Accordingly, the actions of these New Mexico zoning authorities as well as many zoning authorities throughout the nation are clearly frustrating the intent of Congress that zoning authorities not act as an obstacle to timely deployment of advanced wireless services to rural America. Such actions also frustrate the Commission's goals in adopting strict spectrum buildout requirements and the longstanding Commission and Congressional emphasis on ensuring that the public safety benefits of enhanced 911 ("E911") service reach rural America. The benefits of E911 service extend only as far as

³ Balloon tests are not required for a collocation.

⁴ The bond/security requirement does not apply to collocations.

there are towers on which to triangulate an emergency caller's location. The public interest clearly demands Commission action.

B. The Commission Should Take the Four Actions Requested by CTIA

RTG strongly supports adoption of the four actions requested by CTIA in its petition for declaratory ruling.

First, the Commission should clarify the time periods in which a state or locality must act on wireless facility siting requests pursuant to Section 332(c)(7)(B) of the Act. That section requires state or local zoning authorities to act on any tower siting or collocation request "within a reasonable period of time" after the request is filed, and allows one adversely affected by a "failure to act" on such request within 30 days of such failure to act to petition a court for relief. Because the Act does not define when a failure to act occurs or what constitutes a failure to act, the intent of the Act to prevent local zoning authorities from unreasonably delaying to act on siting and collocation requests is easily subverted by local authorities who take the position that *any* period of time is a reasonable period of time and that, absent a statutorily specific period of time, a "failure to act" may never actually occur.⁵ Congress could not possibly have intended its language to be interpreted such that no time limit on wireless siting applications applies. Accordingly, it is up to the Commission to clarify when a failure to act occurs.⁶ Absent such a determination, applicants for siting authority face what CTIA and other parties correctly characterize as a Hobson's choice: "seek judicial review based on the locality's

⁵ Numerous municipal commenters argue that "failure to act" is unambiguous. RTG fails to comprehend how the timing of a non-action can be "unambiguous". If a "failure to act" is unambiguous, when does it occur? After 45 days? 75 days? 90 days? Three months? Six months? One year? Five years?

⁶ The Commission's authority to issue such a declaratory ruling has been clearly established. *See* Petition at pp. 20-24.

failure to act with the risk that the court will determine that the appeal was filed too soon, or continue working with the local government in the hope that a decision ultimately will be reached in less time than judicial review would take and at the risk of waiting more than 30 days past the date on which the zoning authority's inaction is deemed to have accrued.”⁷

CTIA has requested that the Commission issue a declaratory ruling that (1) a failure to act on a wireless facility siting application only involving collocation occurs if there is no final action within 45 days from submission of the request to the local zoning authority; and (2) a failure to act on any other wireless siting facility application occurs if there is no final action within 75 days from submission of the request to the local zoning authority. As noted by many other commenters, the 45 and 75 day time periods suggested by CTIA are eminently reasonable and should be adopted.⁸

Numerous municipal commenters state that their particular zoning process is working well, citing average application processing times or statutory limits that range roughly from 18 to 120 days.⁹ Apart from the fact that the processing times in most of

⁷ Petition at p. 13.

⁸ The comments of Auburn, Washington state that CTIA's proposed timeframe for action on an application “will encourage applicants to intentionally provide inadequate or incomplete applications with the intent of triggering the approval process.” What Auburn fails to recognize is that there is absolutely no incentive for applicants to engage in such behavior. An applicant's incentive is always to gain approval of their application as soon as possible. Intentionally delaying the provisions of required information is not only irrational, it is completely contrary to an applicant's interest. Moreover, a zoning authority would under any circumstances have the opportunity to demonstrate to a reviewing court that the delay was the carriers' fault, thereby rendering the zoning authority's action inherently reasonable.

⁹ *See, e.g.*, Comments of Bellingham, Washington (120 days), Arlington, Texas (18 days), Grove City, Ohio (180 days), North Oaks, Minnesota (60 days), Fairfax County, Virginia (80 days); Burien, Washington at 6 (stating that the current system, with a statutory 120 day limit with certain exceptions, “works well”).

these municipalities are not in fact working well from a carrier perspective, the mere fact that certain zoning authorities do not need regulatory incentive to process applications in a timely manner does mean that they are representative of other communities.

The Commission should declare that when a zoning authority has failed to act within the 45 and 75 day periods for collocation and new siting facility applications respectively, the authority did not act within a reasonable period of time and the application will be deemed granted. At a minimum, the FCC should establish a presumption that, once judicial review is triggered by a zoning authority's failure to act, a wireless carrier is entitled to an injunction ordering the authority to grant the siting application unless it can demonstrate the reasonableness of the delay. Because the 45 and 75 day periods are reasonable, a zoning authority should not be entitled to deference when it has been unable to render a timely decision. Requiring a zoning authority to demonstrate to a court the reasonableness of its delay should ensure that siting applicants are treated fairly.

CTIA requests that the Commission clarify that Section 332(c)(7) of the Act prohibits zoning decisions that have the effect of prohibiting an additional entrant from offering service in a given area. While RTG supports this request, RTG notes that the prohibition of Section 332(c)(7)(B) is not limited to zoning decisions. Section 332(c)(7)(B)(i)(II) provides that “[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services.” Accordingly, RTG also urges the Commission to clarify that Section 332(c)(7) of the Act prohibits any zoning *requirements* that have

the effect of prohibiting an additional entrant from offering service in a given area. As CTIA and other commenters have noted, such a clarification is consistent with the precompetitive purposes of the Act, prior interpretations rendered by various courts, and the broader prohibitions set forth in Section 253. While it should seem self evident that an ordinance that effectively prohibits *any* new entrant from obtaining tower siting approval is in violation of the Act, localities such as Roswell, New Mexico make it clear that such ordinances will continue to be adopted and implemented absent an affirmative clarification from this Commission.

RTG also supports CTIA's request that the Commission preempt local ordinances and state laws that subject wireless siting applications to unique, burdensome requirements, such as those treating all wireless siting requests as requiring a variance. Section 253 bars laws or ordinances that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." As CTIA noted in its Petition, courts have determined that

Section 253(a)'s preemption applies not only to general prohibitions on telecommunications services, but . . . [also when] a combination of certain conditions imposed by local ordinances amounts to a prohibition for purposes of Section 253(a). The following features of a local ordinance have caused courts to find preemption: (1) an onerous permit application process, (2) a franchise requirement, (3) penalties for failure to comply with ordinance requirements, (4) subjective aesthetic design requirements, and (5) regulations granting unfettered discretion to the zoning authority to deny permits.¹⁰

Not only should the Commission clarify that ordinances that effectively require a variance for every siting application violate Section 253, it should also clarify that a combination of burdensome requirements such as the various studies and tests required

¹⁰ Petition at p. 35 (*citing T-Mobile USA v. City of Anacortes*, 2008 U.S. Dist. LEXIS 37481, *8-9 (W.D. Wash. 2008)).

by the City of Roswell constitute “an onerous permit application process” subject to preemption under Section 253. The Commission should make clear that any application requirements that require several months to complete and at considerable expense should be deemed to constitute an onerous permit application process that effectively bars competitive entry in contravention of Section 253. The FCC should also clarify that waiting periods such as those discussed in Section II.A *supra* also violate Section 253.

III. Conclusion

For the foregoing reasons, RTG respectfully requests that the Commission act in accordance with the views expressed herein.

Respectfully submitted,

**RURAL TELECOMMUNICATIONS
GROUP, INC.**

By: _____/s/_____

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