

**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)	WT Docket No. 08-165
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 CTIA – THE WIRELESS ASSOCIATION®

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SUMMARY

The record in response to CTIA's Petition demonstrates a problem of far too many zoning authorities failing to render tower siting decisions on a timely basis, impeding federal policies favoring the deployment of competitive telecommunications networks. While many zoning authorities acknowledge that they generally act on applications within the time frames proposed by CTIA, commenters have shown that many other authorities systemically take far longer than is necessary to achieve their legitimate zoning goals. The evidence, moreover, suggests that the problem is getting worse, not better.

These failures – and related policies that block timely wireless deployment – can and should be addressed by the Commission. Consistent with Sections 332(c)(7) and 253 of the Communications Act, the Commission should:

- Establish timeframes within which local zoning authorities must act on tower siting and wireless facility applications (45 days for collocation; 75 days for other facilities);
- Hold that if a zoning authority does not act on an application, it will be deemed granted, or in the alternative, establish a presumption that a reviewing court should issue an injunction granting the application unless the zoning authority justifies the delay;
- Clarify that a zoning authority may not deny an application filed by one provider based on the presence of another wireless provider in the area; and
- Announce that, in the case of a Section 253 preemption challenge, it will invalidate zoning ordinances that require all applicants for wireless facilities to obtain variances, regardless of the proposed facility's location or scope.

It is important to dispel up front several misrepresentations made by the Petition's opponents. In particular:

- The Petition does *not* ask the FCC to condition or limit the scope of a zoning authority's review of a tower siting application.
- The Petition does *not* ask the FCC to preempt a zoning authority's review of an application or to otherwise usurp state or local power.
- The Petition does *not* ask the FCC to prohibit all ordinances requiring a variance.

Rather, the Petition preserves states' and localities' appropriate zoning responsibilities and only seeks to rid the siting process of the unnecessary delay and opportunistic foot-dragging that are undermining important federal policy objectives. As Commissioner Adelstein noted last month, "[t]he construction of communications towers is necessary to achieve the rapid deployment so many people want," and "Congress intended that the Commission act to prevent unreasonable delays so we need to consider all potential solutions to such delays." Wireless deployment also plays a key role in expanding access to broadband, which Chairman Martin has termed the Commission's "number one priority." Just two weeks ago, Congress reaffirmed that "[c]ontinued 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." Grant of the Petition is especially crucial in view of the aggressive build-out requirements associated with recently auctioned 700 MHz spectrum. Further, as NENA has noted, the

Petition's approval would benefit the public safety community, which frequently collocates its antennas and equipment on commercial facilities, enhancing commercial and public safety wireless service and potentially improving E911 location accuracy.

Parties opposing the Petition rely on a misunderstanding of Section 332(c)(7) of the Act. Specifically, they contend that this provision did nothing to limit state and local sovereignty in the realm of wireless facility siting. However, if Congress had intended to preserve absolute sovereignty of state and local zoning authorities in the wireless facility siting context, it need not have enacted Section 332(c)(7) at all. As the Supreme Court has noted, Section 332(c)(7) was designed to reduce "the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers," and hence "imposes specific limitations on the traditional authority of state and local authorities to regulate the location, construction, and modification" of the facilities necessary for wireless communications. Among other things, Congress made clear that wireless siting applications should be resolved expeditiously, and that failures to act quickly were subject to redress. Section 332(c)(7) balances state and local prerogatives against federal policy favoring deployment. Zoning authorities, however, have disrupted this balance, precluding judicial review by failing to take timely action on applications. CTIA's Petition seeks only to restore the framework envisioned by Congress.

Specifically, the Commission should establish 45- and 75-day deadlines to govern requests for collocation and new facilities, respectively. These time limits are consistent with the law. First, the statutory language is ambiguous: Section 332(c)(7)(b)(v) requires parties to take action within 30 days of a "failure to act," but never defines just when such a failure to act occurs. Likewise, Section 332(c)(7)(B)(ii) requires action "within a reasonable period of time," but does not specify what constitutes such a "reasonable" period. Second, in light of these ambiguities, the Commission is authorized to issue a declaratory ruling interpreting the statute, and its interpretation is entitled to judicial deference. Third, nothing in Section 332(c)(7)(b)(v) bars the FCC from fulfilling its responsibility to interpret statutory terms outside the context of a specific dispute.

The Commission has authority to rule that an application will be "deemed granted" in the event a zoning authority fails to act within the requisite time frame. This approach will serve principally to enforce the failure-to-act benchmarks, prompting zoning authorities to respond, yes *or* no, within those benchmarks. In the rare cases in which applications are "deemed granted," the grant would only implement the outcome that courts have already found to be appropriate in the event of a Section 332(c)(7) violation. The approach urged here would closely resemble the one that the Commission adopted in its *Video Franchising Order*, which the Sixth Circuit recently affirmed. In the alternative, the Commission at the very least should establish a presumption that when a zoning authority cannot justify a failure to act within the time frames described above, a reviewing court should issue an injunction granting the underlying application.

The Commission should also make clear that Section 332(c)(7)(B)(i)(II) bars siting denials based solely on the presence of an alternative provider in a given area. Some jurisdictions have succeeded in persuading courts that even flat-out bans on siting do not "prohibit or have the effect of prohibiting the provision of personal wireless service" so long as customers have access to a single wireless provider. This conclusion is inconsistent with the

Act's language, which bars the provision of wireless "services" in the plural, and prohibits discrimination amongst providers, in both cases presuming multiple providers. It also contradicts the purpose of the Act: to promote competition among multiple providers and technologies. Despite contentions to the contrary, the Petition does *not* seek a ruling requiring that providers be accorded their first choice in the siting process, but rather that the law's procompetitive mandate be carried out. For this provision as well, the Commission – as the expert agency – is entitled to interpret the Act, even in ways that contradict existing judicial precedent.

Further, the Commission should declare that zoning ordinances requiring variances for all wireless siting requests are unlawful and will be struck down if challenged in the context of a Section 253 preemption action. This section, which bars state and local requirements that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," applies to wireless siting ordinances. Blanket variance requirements "may prohibit" or do in fact "have the effect of prohibiting" the provision of service, driving capital to other endeavors and deterring deployment.

Finally, the Commission should reject other miscellaneous arguments raised in the docket. First, nothing in the Petition affects or implicates federal laws and processes involving air safety, or prevents a locality from considering air-safety issues in rendering siting decisions. Second, Section 332(c)(7)(B)(iv) expressly forbids zoning authorities from basing siting decisions on the environmental effects of radio-frequency emissions; thus, to the extent commenters argue that the Petition's grant would undermine local review of such issues, those arguments are misplaced.

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REPLY COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

CTIA – The Wireless Association® (“CTIA”) hereby responds to comments filed in connection with its Petition for Declaratory Ruling (the “Petition”). For the reasons described below, the comments filed in opposition fail to refute the Petition’s key points: Across the nation, many states and localities are systemically failing to make tower siting decisions on a timely basis, thereby impeding federal policies favoring the rapid deployment of wireless networks and the spread of competition. Consistent with the federal role defined by Congress in the statute, these failures can and should be addressed through specific and enforceable timeframes in which zoning authorities must act on different types of siting applications. Moreover, the Commission should take this opportunity to clarify that the Act does not permit zoning authorities to deny a siting request based exclusively on the presence of another provider, or to require all wireless facility applicants to obtain variances before constructing any new facility.

INTRODUCTION

In this proceeding, CTIA requests Commission action to ensure that the federal goals favoring the timely deployment of wireless networks and continued expansion of competition are not undermined by the state and local authorities that control wireless facility siting decisions.

Specifically, the Petition asked the Commission to issue a declaratory ruling that does the following:

- Establish timeframes within which local zoning authorities must act on tower siting and wireless facility applications (45 days for collocation; 75 days for other facilities).
- Hold that where a zoning authority does not act on an application within the benchmarks set out above, the application will be deemed granted, or, in the alternative, establish a presumption that a reviewing court should issue an injunction granting the application unless the zoning authority justifies the delay.
- Clarify that a zoning authority may not deny an application filed by one provider based on the presence of another wireless provider in the area.
- Announce that, in the case of a Section 253 preemption challenge, it will invalidate zoning ordinances that require all applicants for wireless facilities to obtain variances, regardless of the proposed facility's location or scope.

It is important to dispel up front several misrepresentations made by the Petition's opponents. In particular:

- The Petition does *not* ask the FCC to condition or limit the scope of a zoning authority's review of a tower siting application.
- The Petition does *not* ask the FCC to preempt a zoning authority's review of an application or to otherwise usurp state or local power.
- The Petition does *not* ask the FCC to prohibit all ordinances requiring a variance.

Once these canards are set aside, granting the Petition undeniably serves the public interest. Granting the Petition helps fulfill national policy goals favoring accelerated broadband deployment. Just two weeks ago, as part of the broadband mapping legislation, Congress again emphasized the importance of broadband deployment to our nation's economic health. Wireless providers are increasingly playing a significant, central role in bringing broadband to American communities. Similarly, the Commission has recently imposed significant buildout requirements on new wireless licensees – requirements that can only be met through timely deployment of

facilities. Moreover, additional wireless facilities enhance coverage and capacity, which advances the public safety goals of E911 and public safety communications.

As CTIA's Petition explained – and as numerous comments demonstrate – a significant number of states and localities subject wireless facility siting applications to unreasonably long delays, impeding consumers' access to the wireless offerings they demand. Further, some zoning authorities are hampering deployment by refusing applications based solely on the presence of a single alternative provider, or by requiring all applicants to obtain variances before placing facilities. The Commission should take action to end these practices, which are contrary to federal law and policy.

The Petition is fully consonant with the text and history of Sections 332(c)(7) and 253 of the Communications Act and related judicial precedent. Notwithstanding the assertions of the Petition's critics, Section 332(c)(7) placed explicit limits on state and local zoning authorities in the context of tower siting. Indeed, if Congress had intended to preserve the absolute sovereignty of state and local zoning authorities in the siting context, it need not have enacted Section 332(c)(7) at all. Among other things, Congress forbade siting denials that have the effect of prohibiting the provision of service and required zoning authorities to resolve applications on a timely basis. In seeking enforceable timeframes for zoning decisions, CTIA aims only to ensure that the balance established by Congress is respected. The Commission took nearly identical action in the local video franchising proceeding, and the United States Court of Appeals for the Sixth Circuit affirmed its authority to do so.

DISCUSSION

I. THE RECORD DEMONSTRATES A SYSTEMIC PROBLEM, WITH MANY ZONING AUTHORITIES UNREASONABLY DELAYING ACTION ON WIRELESS FACILITY APPLICATIONS.

The record clearly demonstrates that the problems identified by the Petition are real and require prompt action. As CTIA and many commenters have explained, some states and localities are abusing the zoning process to delay or prevent the placement of personal wireless service facilities. The record confirms the widespread incidence of abuse:

- In Chicago, Illinois, it takes approximately one year to obtain the necessary permits to erect a tower.¹
- A large Southern California county routinely takes six to nine months to review collocation applications.²
- One town in Florida takes 120 days to process collocation permits.³
- In Kirkland, Washington, over the last five years, the average time to process collocations on existing facilities has been 100 days.⁴
- One Texas jurisdiction requires a full zoning process, including a planning and zoning review and two city council meetings, for all wireless facilities, including collocations.⁵
- In California, one carrier typically faces processing times ranging between 28 to 36 months.⁶
- Approximately one in five of a carrier's wireless siting applications require it to obtain a zoning variance, and, of those applications, one-fifth have been pending for more than a year.⁷

¹ See Comments of United States Cellular Corporation at 2 (“USCC Comments”).

² Comments of PCIA – The Wireless Infrastructure Association and the DAS Forum at 8 (“PCIA Comments”).

³ See *id.*

⁴ See Comments of the City of Kirkland, Washington at 3 (“Kirkland Comments”).

⁵ See PCIA Comments at 8.

⁶ See Comments of Sprint Nextel Corporation at 5 (“Sprint Nextel Comments”).

Moreover, the record is replete with specific examples of abuse, including (but not limited to) the following:

- In San Diego, a tower company waited more than two years for action on a permit renewal application.⁸
- A carrier seeking a renewal in Berkeley, California was not granted a hearing for more than a year after it filed its application, and then waited another year for a decision.⁹
- In January 2007, a carrier filed an application to renew a conditional use permit in the City of Carlsbad, which was deemed complete two months later. However, Carlsbad did not reach a decision on the application until May 2008.¹⁰
- In Los Angeles, a DAS provider was advised that an application to install nodes on utility poles would take from 12 to 18 months.¹¹
- Over the last five years in Northern New Jersey, 45 of one carrier's 48 zoning applications took more than 6 months to approve. Of those, 19 took more than a year, and seven took more than two years. In Northern California, 27 of the carrier's 30 applications took more than 6 months, 12 took more than a year, and six took more than two years. In Southern California, 93 applications took more than six months, 52 took more than a year and 25 took more than two years to get approved.¹²
- In one California county, an application that was filed in May 2005 for the construction of a new tower is still pending before the county zoning board.¹³ In another California community, the same carrier filed a separate application to construct facilities that has been pending for four years despite undergoing extensive third party review to determine the necessity of locating wireless facilities at the proposed site.¹⁴

⁷ See USCC Comments at 3.

⁸ See Comments of the California Wireless Association at 2.

⁹ See *id.*

¹⁰ See *id.* at 3.

¹¹ See Comments of NextG Networks, Inc. at 6 ("NextG Comments").

¹² See Comments of Verizon Wireless, at 6-7 ("Verizon Wireless Comments").

¹³ Sprint Nextel Comments at 5.

¹⁴ See *id.*

- One carrier in New Jersey has a tower siting application pending before a zoning board that has been the subject of 41 zoning hearings.¹⁵
- In 2000, one carrier began working with a Northern California county public safety communications authority to propose to a local municipality a wireless site to replace an obsolete public safety communication network. After the local planning commission endorsed the proposal, the county's application for construction was rejected. Two years later, the county concluded a study of 17 alternative sites only to find that the original site was the only acceptable one. However, the local planning commission passed a resolution siting the facility in another location, which in turn, led to litigation. Only after five years of ultimate delay did the California Court of Appeals finally allow the public safety authority to construct on the original proposed site.¹⁶
- It took nearly three years for a Mid-Atlantic city to resolve one DAS provider's request to deploy, and even then the city only granted an interim authorization.¹⁷
- One carrier experienced two years of delay, including numerous requests for additional information and long periods with no feedback from the zoning authority, before finally being told that no approval was even necessary for the proposed project.¹⁸
- One carrier experienced a delay of four years and seven months for a collocation decision, and in the process was forced to file and re-file several variance requests.¹⁹
- One carrier filed its zoning approval in September 2007 and, in February 2008, was advised that the approval of the Fire Marshall was necessary. However, repeated efforts to secure a meeting with the Fire Marshall were unsuccessful and the carrier was forced to seek a waiver of that requirement in July 2008. That waiver request is still outstanding.²⁰

¹⁵ *See id.*

¹⁶ Comments of Telecommunications Industry Association at 6-7.

¹⁷ *See* NextG Comments at 8.

¹⁸ *See* Comments of MetroPCS Communications, Inc. at 8-9 ("MetroPCS Comments").

¹⁹ *See* Comments of Alltel Communications, LLC at 3-4 ("Alltel Comments").

²⁰ *See* MetroPCS Comments at 9-10.

- One county has taken from 18 to over 24 months to process zoning requests filed by a carrier for 15 sites even though the county has requested no additional information.²¹
- In a proceeding to collocate equipment, a carrier filed a zoning application in 2006. That request remains pending as the city obtains measurements of radio-frequency emissions.²²
- One carrier's tower was delayed for three years and 11 months while awaiting action by a zoning authority; that same carrier has more than 20 pending applications that are more than a year old.²³

Indeed, some localities continue to employ outright moratoria:

- In August 2008, a Maryland county enacted a 10-month moratorium on wireless facility siting "despite having one of the most comprehensive wireless facility ordinances in the state."²⁴
- In September 2008, a Southern California county enacted a one-year moratorium on wireless facility siting.²⁵
- One city imposed a moratorium on all wireless facilities siting applications in the wake of judicial invalidation of its siting ordinance.²⁶

Finally, the record strongly suggests that the problem is getting worse, not better:

- In Washington, DC, the average time to gain approval for new towers increased from six to nine months in 2003 to more than a year in 2008. Collocation approval time frames in the same region have increased from 15-30 days in 2003 to more than 90 days at present.²⁷
- In San Diego, time frames to gain approval for new towers have increased from six months to more than two years.²⁸

²¹ *See id.* at 11

²² *See id.*

²³ *See* Alltel Comments at 4.

²⁴ PCIA Comments at 11.

²⁵ *See id.*

²⁶ *See* MetroPCS Comments at 13.

²⁷ *See* Verizon Wireless Comments at 6.

²⁸ *See id.*

The record demonstrates that delays of the magnitude described above are wholly unnecessary. Whatever else they may or may not show, the pleadings filed by localities in this docket make one point perfectly clear: Action within the time frames proposed by CTIA is not only *possible*, but in fact *commonplace*. For example:

- On average since 2000, the City of St. Paul, Minnesota has processed wireless facility applications within 13 days.²⁹
- Over the past ten years in LaGrande, Oregon, the average time to process an application for communications structures has been 45 days.³⁰
- Over the past five years, the City of Gahanna, Ohio has processed applications for approval of wireless facilities within 30 days.³¹
- The City of Prior Lake, Minnesota has maintained an average time between filing an application for wireless telecommunications facilities and final decision of “less than 60 days”.³²
- Over the last two years, Skokie, Illinois has generally acted on siting applications within one month of an applicant’s filing.³³

These submissions demonstrate that CTIA’s proposed benchmarks are perfectly appropriate. Federal policy objectives counsel in favor of granting the Petition to ensure prompt action by those states and localities that currently fail to respond in a timeframe consistent with federal law.

²⁹ See Comments of the City of Saint Paul, Minnesota and the City’s Board of Water Commissioners at 10.

³⁰ Comments of the City of LaGrande, Oregon at 3.

³¹ Comments of the City of Gahanna, Ohio at 3.

³² Comments of the City of Prior Lake, Minnesota at 3

³³ Comments of the Village of Skokie, Illinois at 3.

II. THE PETITION MUST BE GRANTED TO SAFEGUARD AND FURTHER NATIONAL POLICY GOALS.

The record and recent events amply describe the importance of timely wireless deployment to critical federal policy goals. First, such deployment is imperative to the nation's ability to meet growing consumer demand for both mobile voice and data services. As Commissioner Adelstein properly noted last month:

The construction of communications towers is necessary to achieve the rapid deployment so many people want..... 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.... Congress intended that the Commission act to prevent unreasonable delays so we need to consider all potential solutions to such delays.³⁴

The clear solution is Commission action to clarify the time frames in which zoning authorities must act.

Grant of the Petition is especially critical to broadband deployment. Such deployment is the Commission's "number one priority."³⁵ Moreover, Congress just weeks ago confirmed that such deployment remains a paramount federal goal by enacting the Broadband Data Improvement Act. That Act finds that "[t]he deployment and adoption of broadband technology has resulted in enhanced economic development and public safety for communities across the

³⁴ Jonathan S. Adelstein, *A View on Today's Most Pressing Wireless Issues*, Fifth Annual Conference on Spectrum Management, at 3 (Sept. 18, 2008) ("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.... 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.").

³⁵ See Paul Krill, *FCC chairman champions wireless broadband access*, InfoWorld (May 3, 2007), available at <http://www.infoworld.com/article/07/05/03/martin-fcc_1.html> ("I think broadband is the number one priority for the commission and the additional deployment of it," said Martin.").

Nation, improved health care and educational opportunities, and a better quality of life for all Americans,” and that “[c]ontinued 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.”³⁶ To that end, the Act aims “to establish and sustain an environment ripe for broadband services and information technology investment” and “to ensure that all citizens and businesses in a State have access to affordable and reliable broadband service.”³⁷

Of course, wireless service is playing a key role in bringing broadband service to American consumers³⁸ – but continued growth depends on the ability to deploy the necessary infrastructure. As the Petition notes, the number of subscribers with wireless broadband capability grew by more than 300 percent between June 2006 and June 2007,³⁹ with nearly 25 million new lines in that year alone.⁴⁰ New facilities are especially critical in light of the aggressive build-out requirements associated with recently auctioned 700 MHz spectrum; these requirements are “the most stringent ever imposed by the Commission”⁴¹ and are meant to “ensure that this spectrum is put to use quickly in both urban and rural areas.”⁴² As

³⁶ Broadband Data Improvement Act, S. 1492, at § 102.

³⁷ *Id.* § 106.

³⁸ *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) (stating “we expect that wireless broadband will play a critical role in ensuring that broadband reaches rural and underserved areas, where it may be the most efficient means of delivering these services”); *see also* Krill, *FCC chairman champions wireless broadband access*, *supra* note 35.

³⁹ *See* High-Speed Services for Internet Access: Status as of June 30, 2007, prepared by FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, Table 1 (March 2008).

⁴⁰ *See id.*

⁴¹ *See Applications for License and Authority to Operate in the 2155-2175 MHz Band*, Order, 22 FCC Rcd 16563, 16573 n.52 (2007).

⁴² *Service Rules for the 698-746, 747-762, and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15289, 15558 (2007) (Statement of Chairman Kevin J. Martin).

Commissioner Copps has observed, these requirements “are among the strongest and most innovative that [the Commission] ever adopted.”⁴³

Additional wireless deployment also benefits the public safety community. As NENA explains, the presence of wireless towers is essential to the provision of reliable commercial *and* public safety wireless service, as well as improved 911 location accuracy.⁴⁴ “Public Safety frequently collocates antennas and associated equipment on commercial towers to cut costs and increase coverage, and unnecessary delays associated with receiving local zoning approval can potentially hinder Public Safety’s ability to provide critical emergency services.”⁴⁵ In addition, as the Commission seeks to craft an interoperable commercial/public safety solution in the 700 MHz band, timely deployment for new wireless facilities will be critical. Moreover, as NENA states, E911 location accuracy can be adversely affected by “deterrents to appropriate additional tower siting [that] unnecessarily delay continued improvement in wireless coverage and base station density – an outcome that is not in the public interest.”⁴⁶

Finally, CTIA notes that recent developments in the economy have rendered the need for the relief it seeks here even more pressing. Commission reports indicate that commercial mobile radio service providers made approximately \$21 billion in capital expenditures in 2004, \$25 billion in 2005, and another \$25 billion in 2006.⁴⁷ As credit markets contract, excessive delay is

⁴³ *Id.* at 15563 (Statement of Commissioner Michael J. Copps, Approving in Part, Concurring in Part).

⁴⁴ *See* Comments of NENA at 1-2.

⁴⁵ *Id.* at 3-4.

⁴⁶ *Id.* at 5.

⁴⁷ *See Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Twelfth Report, 23 FCC Rcd 2241, 2307 ¶ 154 (2008).

even more likely than usual to direct currently available capital away from such projects and toward other uses not as susceptible to uncertainty and delay.

III. CONGRESS ADOPTED SECTION 332(C)(7) TO LIMIT STATE AND LOCAL ZONING AUTHORITIES AND ENSURE THAT FEDERAL GOALS FAVORING TIMELY WIRELESS DEPLOYMENT ARE MET.

Parties opposing the Petition ignore the central issue in this proceeding: Congress in 1996 could have left in place the complete autonomy of states and localities with respect to zoning, but it chose not to. Rather, Congress placed express limits on that authority to ensure that federal policies favoring deployment were satisfied. As described above, some zoning authorities have disrupted the balance struck by Congress, precluding judicial review by failing to take timely action on applications. Moreover, in at least some cases, the delay is specifically intended to disrupt the statutory framework and shield zoning authority activity from judicial review. As one former California Assemblyman recently revealed:

Cities deliberately don't tell you no because they understand that that's when you go to court. And so since they usually lose in court, they preserve the right not to go for as long as they can. I mean, the people in cities aren't stupid.⁴⁸

CTIA's Petition seeks to right the balance and to restore the framework envisioned by Congress.

Various commenters argue that CTIA's Petition must be rejected, because it seeks to insert federal interests into an area over which state and local governments enjoy exclusive control.⁴⁹ In fact, it is *Congress* that expressly inserted such federal concerns into the tower siting process, limiting traditional local authority, when it promulgated Section 332(c)(7). As the

⁴⁸ TR DAILY, *Adelstein Expresses Support for Action on Antenna-Siting Delays* (Sept 11, 2008).

⁴⁹ See, e.g., Comments of the Greater Metro Telecommunications Consortium *et al.* at 9-10; Comments of SCAN NATOA at 2-8 ("SCAN NATOA Comments"); Comments of Fairfax County, Virginia at 16 ("Fairfax County Comments"); Comments of Michigan Municipalities and Other Concerned Communities at 2-4 ("Michigan Municipalities Comments").

Supreme Court has noted, Section 332(c)(7) was designed to reduce “the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers,”⁵⁰ and hence “imposes specific limitations on the traditional authority of state and local authorities to regulate the location, construction, and modification” of the facilities necessary for wireless communications.⁵¹ Thus, Section 332(c)(7) created a system in which states and localities would make zoning decisions “subject to minimum federal standards – both substantive and procedural – as well as federal judicial review.”⁵² The provision “reflects Congress’s intent to expand wireless services and increase competition among those providers,” a goal Congress sought to accomplish “by reducing the regulation and bureaucracy that stood in the way of steady and rapid expansion of personal wireless services.”⁵³

Among the requirements established by Congress were limits on the time frames in which decisionmakers addressing siting decisions should act. To that end, Congress enacted language permitting applicants to challenge a “failure to act” in court, and requiring that courts hear and decide any action grounded in a violation of Section 332(c)(7)(B) “on an expedited

⁵⁰ *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005).

⁵¹ *Id.*

⁵² *Id.* at 128 (Breyer, J., concurring).

⁵³ *Southwestern Bell Mobile Systems Inc. v. Todd*, 244 F.3d 51, 57 (1st Cir. 2001). Although the House of Representatives’s original version of the provision that became Section 332(c)(7) was substantially amended, the House’s report on the legislation provides relevant insight into the concerns that motivated Congress to circumscribe state and local powers over tower siting. According to that report, the provision was fueled by a belief that “current State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services (PCS) as well as the rebuilding of a digital technology-based cellular telecommunications network.” H.R. Rep. No. 104-204(I) at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61. In light of this fear, the House sought a framework that would “speed deployment and the availability of competitive wireless telecommunications services which ultimately w[ould] provide consumers with lower costs as well as with a greater range and options for such services.” *Id.*

basis.”⁵⁴ As several courts have noted, this provision demands speedy action on wireless facility siting requests: “Congress made clear [in § 332(c)(7)(B)(v)] that it expected expeditious resolution both by the local [zoning] authorities and by courts called upon to enforce the federal limitations [under Section 332(c)(7)(B)].”⁵⁵ Moreover, just last month the Ninth Circuit recognized that Section 332(c)(7) was designed to ensure a remedy in cases where “the zoning board is ... using its procedural rules to delay unreasonably an application.”⁵⁶ In short, “[t]he Telecommunications Act has an explicit goal of expediting resolution of tower disputes,”⁵⁷ and circumscribes state and local authority to the extent necessary to effectuate this goal. In this area, as elsewhere, Section 332(c)(7) “represents a congressional judgment that local zoning decisions harmless to the FCC’s greater regulatory scheme – and *only those proven to be harmless* – should be allowed to stand.”⁵⁸

Given the above, the stray passage from Section 332(c)(7)’s legislative history stating that it was “not the intent of [Section 332(c)(7)] to give preferential treatment to the personal wireless service industry in the processing of requests,”⁵⁹ fails to make the point suggested by

⁵⁴ 47 U.S.C. § 332(c)(7)(B)(v).

⁵⁵ *Town of Amherst v. Omnipoint Communs. Enters., Inc.*, 173 F.3d 9, 17 n.8 (1st Cir. 1999). *See also ATC Realty, LLC v. Town of Kingston*, 303 F.3d 91, 100 (1st Cir. 2002) (citing “clear aim of the [1996 Act] ... of expediting resolution of litigation over placement of wireless telecommunication facilities.”).

⁵⁶ *Sprint Telephony PCS v. County of San Diego*, 2008 U.S. App. LEXIS 19316 at *21-*22 (9th Cir. Sept. 11, 2008) (“[I]f a telecommunications provider believes that the zoning board is ... using its procedural rules to delay unreasonably an application, ... the Act provides an expedited judicial review process in federal or state court. *See* 47 U.S.C. § 332(c)(7)(B)(ii) & (v).”).

⁵⁷ *USOC of Greater Iowa, Inc. v. City of Bellevue*, 279 F. Supp. 2d 1080, 1088 (D. Neb. 2003).

⁵⁸ *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 736 (9th Cir. 2005) (emphasis added).

⁵⁹ H.R. Conf. Rep. No. 104-458, at 208.

some localities.⁶⁰ Whatever this language may mean, the statutory text makes clear that it does *not* mean what the state and local commenters imply – namely, that Section 332(c)(7) left in place their absolute autonomy over wireless siting. Again, if that interpretation were correct, why would Congress have enacted the statute at all? The statute itself, and the judicial decisions implementing it, make clear that Congress established for wireless siting applications a pro-deployment regime not applicable to other applications before zoning authorities. Put simply, Congress has enacted a federal policy favoring deployment of wireless telecommunications networks; it has not enacted a similar policy favoring the proliferation of industrial lots, landfills, or other sites commonly found on a zoning authority’s docket. In any event, the Act’s legislative history cannot trump the actual statutory language.⁶¹ That language clearly imposes requirements on zoning authorities’ tower siting decisions that do not apply to other applications – including requirements relating to the speed with which applications are resolved.

IV. THE RECORD DEMONSTRATES THAT THE COMMISSION SHOULD ADOPT REASONABLE TIME LIMITS FOR SITING ACTION UNDER SECTION 332(C)(7)(B).

A. The Commission Can and Should Adopt The Timing Benchmarks Proposed in the Petition.

The record demonstrates a compelling need for action clarifying the tower-siting time frames contemplated by Section 332(c)(7)(B). Congress permitted applicants to bring suit “within 30 days after ... [a zoning authority’s] failure to act.”⁶² However, nothing in the Act

⁶⁰ See, e.g., Comments of the City of Arlington, Texas at 5 (“City of Arlington Comments”); Michigan Municipalities Comments at 3; SCAN NATOA Comments at 6; Comments of National Association of Telecommunications Officers and Advisors, *et al.* at 14 (“NATOA Comments”).

⁶¹ See, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992).

⁶² 47 U.S.C. § 332(c)(7)(B)(v).

makes clear just when such a failure occurs. Likewise, Congress required zoning action “within a reasonable period of time after [a] request is duly filed,” but was silent on the appropriate parameters for evaluating the reasonableness of this time period.⁶³ While many localities acknowledge that they can or do take action within the time frames set forth in the Petition, the record makes clear that in far too many cases, zoning authorities have failed to do so. Contrary to the suggestion of some commenters, the harms associated with these failures to act are not limited to wireless providers themselves, but extend to their actual and would-be voice customers, to individuals demanding access to mobile broadband data services, and to the public safety community.

The Commission should adopt the benchmarks set forth in the Petition, which require action within 45 days for collocation requests and 75 days for other requests.⁶⁴ Zoning authorities have been able to use their own failure to effectively delay or block deployment, contrary to federal law and policy. As explained previously, Congress enacted Section 332(c)(7) precisely to ensure that deployment was not hampered by sluggish or otherwise deficient zoning processes. Moreover, Congress made clear that it understood a “failure to act” to accrue at some date certain, permitting appeal “within 30 days after” such event. Under these circumstances, the

⁶³ *Id.* § 332(c)(7)(B)(ii).

⁶⁴ To ensure that zoning authorities do not abuse these benchmarks by characterizing collocation requests as falling under the 75-day benchmark, CTIA supports T-Mobile’s proposal to define “collocation” to include proposals not involving a substantial increase in size, as that term is used in the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas. *See* Comments of T-Mobile USA, Inc. at 10-11 (“T-Mobile Comments”).

Commission can and must establish clear time frames meant to ensure that federal policies favoring deployment are satisfied.⁶⁵

The record similarly demonstrates that many zoning authorities are failing to render decisions “within a reasonable period of time after [a] request is duly filed,” in violation of Section 332(c)(7)(b)(ii). To address this problem, the Commission should also declare that the 45- and 75-day time frames described in the Petition define the outer boundaries of the “reasonable” periods of time for action on collocation and other siting requests, respectively. Notably, this ruling would be perfectly consistent with Section 332(c)(7)(b)(ii)’s legislative history, which states that “[i]f a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances.”⁶⁶ As described herein and detailed at length in the record, the 45- and 75-day periods proposed by the Petition *are* “the usual period[s]” under the circumstances to which each period applies; indeed, many zoning

⁶⁵ The League of California Cities (“League”) argues disingenuously that the Commission has already considered and rejected arguments akin to those presented here, declining to impose time frames for wireless siting applications. *See* Comments of the League of California Cities, *et al.* at 8-10 (“League Comments”). The proceeding cited by the League did not address time limits for state and local zoning authorities, but rather for the Commission itself, and the Commission declined to adopt specific limitations only in connection with an explicit affirmation of “the need for carriers to have fast resolution of siting disputes.” *Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, Report and Order, 15 FCC Rcd 22821, 22827 ¶ 14 (2000) (“*2000 RF Order*”). In any event, the decision cited was issued eight years ago, without the benefit of the record compiled here – a record that demonstrates a clear and compelling need for action to expedite the tower siting process.

⁶⁶ H.R. Conf. Rep. No. 104-458, at 208.

authorities work well *within* those period.⁶⁷ Agencies are routinely afforded broad deference in interpreting the meaning of the term “reasonable,” and the Commission would be entitled to the same degree of deference in interpreting the specific meaning of Section 332(c)(7)(B)(ii)’s “reasonable period of time” language.⁶⁸

Various parties argue that firm deadlines are unworkable because applicants often file incomplete applications.⁶⁹ To that end, CTIA believes MetroPCS’s proposal to “require a zoning authority to notify an applicant within 3 business days whether an application is complete and what else needs to be submitted, if anything,” makes sense. Under this proposal, “the zoning authority [w]ould be conclusively deemed to have accepted the filing as complete if it does not respond within 3 days.”⁷⁰ This approach would eliminate any concern about incompleteness.

Ultimately, of course, the localities’ “incompleteness” argument is a red herring. The time frames CTIA proposes do not require the grant of an application, but rather only a final action. If the application is in fact deficient, the authority may deny it, and would have nothing

⁶⁷ Further, as discussed above, this language cannot be read to suggest that wireless siting requests are to be treated no differently from other requests. If that were Congress’s intent, there would have been no reason to enact Section 332(c)(7) in the first place. *See supra* Part III.

⁶⁸ *See, e.g., Capital Network System, Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) (“Because ‘just,’ ‘unjust,’ ‘reasonable,’ and ‘unreasonable’ are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them.”). *See also Alliance for Community Media v. FCC*, 529 F.3d 763, 777 (6th Cir. 2008) (“[C]ourts called upon to ascertain the ambiguity of descriptors such as ‘reasonable’ and ‘unreasonable’ have found these words subject to multiple constructions.”); *Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003) (“[T]he generality of these terms – unjust, unreasonable – opens a rather large area for the free play of agency discretion....”).

⁶⁹ *See, e.g., City of Arlington Comments* at 4 (“CTIA’s proposed timelines will presumably circumvent a city’s zoning process even if the application is incomplete or clearly violates state and local law.”); *Michigan Municipalities Comments* at 19-20; *Comments of the City of Auburn, Washington* at 2 (“City of Auburn Comments”).

⁷⁰ *MetroPCS Comments* at 12.

to fear from subsequent judicial review.⁷¹ The only actions placed at risk would be denials based on faulty reasoning. Those applications would be granted, just as Congress intended – whether by zoning authority action, court order, or (if the authority simply fails to act) default.⁷²

B. The Petition’s Timing Benchmarks and Deemed Grant Proposal Are Legally Sound.

1. Commenters’ Objections to the Petition’s Timing Benchmarks Fail.

Opponents make three principal legal arguments regarding the proposed benchmarks. Each of these arguments is fatally flawed and must be rejected.

First, various commenters contend that there is nothing ambiguous about the term “failure to act” as that term is used in Section 332(c)(7)(B)(v), because the terms “failure” and “act” are both well understood.⁷³ This argument should be dismissed. CTIA and its members understand what it means for a zoning authority to “fail” to “act.” However, Section 332(c)(7)(B)(v) envisions a “failure to act” as an event that occurs at an identifiable point in time

⁷¹ For the same reason, the City of Philadelphia’s argument that applicants who were approaching the prescribed deadline “may decide to stall and hope for a deemed granted application irrespective of the merits of the application” is specious: There is no reason to doubt that the zoning authority in such a case would deny the application. Under those circumstances, carriers have every incentive to work with the relevant zoning authority. *See* Comments of the City of Philadelphia at 5.

⁷² Thus, the Petition’s proposals would help ensure that applications are “duly” (*i.e.*, properly) filed by making clear that incomplete applications are likely to be denied within the temporal benchmarks described herein. *See, e.g.*, League Comments at 6.

⁷³ *See, e.g.*, City of Arlington Comments at 1; Comments of the City of Tyler (“‘Failure to act’ is not an ambiguous phrase. The word ‘failure’ means the ‘omission of an occurrence or performance;’ the word ‘act’ means ‘to carry out or perform an activity.’”); Comments of The Colony at 2; SCAN NATOA Comments at 5.

– a point that triggers a 30-day appeals period. What is ambiguous is just *when* this event transpires.⁷⁴ The FCC should clarify the statutory ambiguity as to when a failure to act occurs.

Second, the Petition’s opponents cite repeatedly to Section 332(c)(7)(A) of the Act, which provides that “[e]xcept as provided in [Section 332(c)(7)], nothing in [the Act] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.”⁷⁵ These commenters assert that this section precludes the relief sought here.⁷⁶ This argument, however, overlooks the fact that CTIA is not asking the Commission to hold that another provision trumps Section 332(c)(7); rather, it is asking the Commission to correctly interpret ambiguous provisions in *Section 332(c)(7) itself*. Put differently, the question here is just what *is* “provided in [Section 332(c)(7)].” For the reasons discussed in the Petition and in the record, that section itself limits the time frames in which zoning authorities must act on applications; CTIA is simply asking the Commission to interpret that provision with greater specificity.

Moreover, the Commission is indisputably authorized to interpret Section 332(c)(7), and to do so in the context of a declaratory ruling. Agencies “are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer.”⁷⁷ In its 2005 *Brand X* decision, for example, the Supreme Court held that an FCC declaratory ruling interpreting the Communications Act would trump even a previous judicial decision, so long as the

⁷⁴ Thus, whether or not the meaning of “final action” is clear, *see, e.g.*, Comments of the Cable and Telecommunications Committee of the New Orleans City Council at 10, is irrelevant. The question presented here is not what constitutes a “final action,” but *when* a “failure to act” accrues for purposes of the statute.

⁷⁵ 47 U.S.C. § 332(c)(7)(A).

⁷⁶ *See, e.g.*, City of Arlington Comments at 6; Michigan Municipalities Comments at 2.

⁷⁷ *Rapanos v. United States*, 547 U.S. 715, 758 (2006) (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-845 (1984)).

Commission’s approach was reasonable. In 2000, the Ninth Circuit had determined in *AT&T Corp. v. City of Portland* that cable modem service (which had not yet been classified by the FCC) included both a telecommunications service component and an information service component.⁷⁸ In 2002, the Commission released the *Cable Modem Declaratory Ruling*, holding that cable modem service was an integrated information service with no separate telecommunications service component.⁷⁹ The Ninth Circuit disagreed on review, holding that its *Portland* precedent governed notwithstanding the *Chevron* deference to which the FCC would have been entitled if it had acted first. But the Supreme Court reversed. “[A]mbiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps ... involves difficult policy choices that agencies are better equipped to make than courts.”⁸⁰

Opponents argue that the Commission may not grant the Petition because Section 332(c)(7)(B)(v) directs all controversies regarding siting decisions, other than those involving RF emissions, to the courts.⁸¹ The Petition, however, is not a challenge to a specific siting decision. Rather, CTIA is asking the FCC to interpret a provision of the Act, and the FCC clearly has the authority to interpret Section 332(c)(7)(B). As discussed previously, the Commission, as the

⁷⁸ *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).

⁷⁹ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002).

⁸⁰ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (U.S. 2005) (internal citations omitted). *See also Nat’l Cable & Telecomms. Ass’n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (“[A]s a general rule, agencies have authority to fill gaps where the statutes are silent.”).

⁸¹ *See, e.g.*, Fairfax County Comments at 15-16; SCAN NATOA Comments at 7 (“The courts, rather than the Commission[,] are the proper and sole venue where Congressional legislative meaning and intent are adjudicated”).

agency charged with administering the Communications Act, is duly authorized to fill in the statutory gap.

The Sixth Circuit's recent decision in *Alliance for Community Media v. FCC*⁸² specifically upheld the Commission's authority to establish time limits for other state or local entities' actions in areas within the Communications Act's ambit. There, the court upheld the Commission's imposition of binding time frames for decisions made by local franchising authorities. The court found that the Commission was entitled to render such decisions because (as here) they were governed by a provision of the Communications Act.⁸³ In the court's view, the fact that the relevant statutory provision⁸⁴ included no specific mention of the FCC "d[id] not divest the agency of its express authority"⁸⁵ to establish binding deadlines. Moreover, the court rejected arguments that the Commission's action improperly intruded on decisions left by Congress to the courts. "[T]he availability of a judicial remedy for unreasonable denials of competitive franchise applications" did not circumscribe the agency's authority to interpret relevant provisions, and the imposition of timelines did not deprive courts of "their Congressionally-granted authority to make factual determinations and provide relief to aggrieved cable operators."⁸⁶

⁸² *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

⁸³ *Id.* at 772-76.

⁸⁴ 47 U.S.C. § 541(a)(1) (stating that "a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise").

⁸⁵ *Alliance for Community Media*, 529 F.3d at 774.

⁸⁶ *Id.* at 775-76.

2. Commenters' Objections to the Petition's "Deemed Grant" Proposal Fail.

There is no persuasive merit to arguments raised against the Petition's proposal that applications be "deemed granted" upon a zoning authority's failure to act within the periods outlined in the Petition.

First, the "deemed grant" aspect of CTIA's Petition would *not*, as some commenters claim, preempt state and local jurisdiction over the siting process. The "deemed grant" regime would serve principally as a means of enforcing the timing benchmarks set forth in the Petition. It is intended not to override the local and state zoning process, but only to ensure that authorities complete that process in time frames consistent with the letter and spirit of Section 332(c)(7).⁸⁷ With the exception of the "one provider" issue discussed *infra* Section V, nothing in the Petition affects *at all* the substantive criteria zoning authorities may employ in reaching their decisions. As noted above in the context of incomplete applications, a zoning authority is always free to deny, or approve, an application before it is granted by default.⁸⁸

In those rare cases where an application is granted by virtue of a locality's failure to act within the statutory timeframes, this result would be substantively identical to the result most

⁸⁷ Thus, citations to court decisions barring federal entities from making decisions entrusted to the states are inapposite. *See, e.g.*, NATOA Comments at 15-17. Nothing in the Petition seeks to wrest siting decisions from state and local zoning authorities.

⁸⁸ The relief sought here does not preclude continued application of state and local laws that establish time frames incompatible with those proposed here, and CTIA therefore does not ask the Commission to preempt such laws. Of course, the result of a grant here would be that affected applications might be granted by default (or, in the alternative, be brought to court) during the state or local review. *See, e.g.*, Fairfax Comments at 8 (citing Virginia law); Comments of the City of SeaTac, Washington at 8 (citing Washington law); Opposition of Coalition for Local Zoning Authority at 8 (citing California law). Thus, states and localities may wish to revise such laws to ensure that review can and will conclude within the timeframe prescribed by Section 332(c)(7).

courts, including the First, Second, Third, Sixth and Eleventh Circuit Courts of Appeal, have imposed themselves in similar circumstances. These courts have routinely recognized that where a zoning authority violates Section 332(c)(7), the proper remedy is an injunction ordering the authority to grant the underlying application.⁸⁹ In the Second Circuit’s words, “the majority of district courts that have heard these cases have held that the appropriate remedy is injunctive relief in the form of an order to issue the relevant permits.”⁹⁰ Among these decisions are several that rule that a mandatory grant is the appropriate response to a zoning authority’s failure to act.⁹¹ In the cases at issue here, the Commission’s established timing benchmarks would resolve the only factual question otherwise requiring a court’s attention – namely, whether the zoning authority has in fact failed to act within the required time frame. In these rare circumstances, a deemed grant would merely expedite the necessary outcome of any judicial review.

Thus, the result sought here is consonant with the result courts have regularly imposed on their own: a zoning authority’s failure to comply with Section 332(c)(7)(B) warrants grant of the underlying application. Absent the deemed grant, an applicant will be forced to wait months or years following a failure to act as its case moves through the courts, to the detriment of both

⁸⁹ See, e.g., *New Par v. City of Saginaw*, 301 F.3d 390, 399-400 (6th Cir. 2002); *Nat’l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 24-26 (1st Cir. 2002); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1222 (11th Cir. 2002); *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp.*, 181 F.3d 403, 409-10 (3d Cir. 1999); *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2d Cir. 1999).

⁹⁰ *Id.*

⁹¹ See, e.g., *Tennessee ex rel. Wireless Income Props., LLC v. Chattanooga*, 403 F.3d 392 (6th Cir. 2005) (finding that zoning authority’s failure to timely issue final order on siting application constituted “functional denial” and ordering district court to issue injunction granting application); *Cellco P’ship v. Franklin County*, 553 F. Supp. 2d 838 (E.D.Ky 2008) (holding that where zoning authority voted to deny application but failed to put denial in writing, it had failed to act for Section 332(c)(7) purposes, and issuing injunction requiring grant of underlying petitions).

providers and consumers. In contrast, a deemed grant would simultaneously prompt timely zoning authority action and – in those cases where such action is not forthcoming – enable deployment soon after the “failure to act” rather than following extensive litigation. “Congress did not intend multiple rounds of decisions and litigation, in which a court rejects one reason and then gives the board the opportunity, if it chooses, to proffer another.”⁹² As one court has precisely ruled, “[a]llowing state or local zoning authorities to create a ‘moving target’ by repeatedly shifting the grounds for their decision in this manner would make the Telecommunications Act more ‘susceptible to procedural thickets that ... make local parochialism impervious to challenge.’”⁹³

To the extent the Commission is unwilling to implement a “deemed grant” approach, it should at the very least establish a presumption that a reviewing court should issue an injunction granting the underlying application when a zoning authority cannot explain a failure to act within the time frames described above. The purpose of the 1996 Act is to expedite the deployment of advanced services to consumers, and Section 332(c)(7) was enacted to limit the ability of state and local authorities to prohibit or delay such deployment. A state or locality responsible for acting on a wireless siting application should not be entitled to deference when a decision has not been rendered within the relevant period of time often associated with such applications. In such cases, barring a compelling explanation justifying delay in a particular case, courts should order a grant of the application.

⁹² *National Tower*, 297 F.3d at 21.

⁹³ *Nextel W. Corp. v. Town of Edgewood*, 479 F.Supp.2d 1219, 1232 (D.N.M. 2006) (quoting Steven J. Eagle, *Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem*, 54 Cath. U. L. Rev. 445, 445 (2005)).

Adoption of the “deemed granted” remedy sought here is even more defensible than the similar remedy adopted in the *Video Franchising Order*.⁹⁴ In that *Order*, the Commission found that the “deemed grant” approach was warranted by the need for “meaningful consequences” to “encourage franchising authorities to reach a final decision on a competitive application within the applicable time frame set forth in [the] *Order*.”⁹⁵ So too here. In the *Video Franchising Order*, the Commission explained that further process following a failure to act would only “result in even further delay.”⁹⁶ So too here. In the *Video Franchising Order*, the Commission “anticipate[d] that a deemed grant will be the exception rather than the rule because [franchising authorities] will generally comply with the Commission’s rules and either accept or reject applications within the applicable time frame.”⁹⁷ So too here. But Section 621 and Section 332(c)(7) differ in one key respect: While the former is silent as to timing, the latter is clear that a failure to act within established time frames is unlawful. Courts have held that automatic grant of the application is the appropriate remedy for such failure.⁹⁸ Thus, once a zoning authority has taken more time than Section 332(c)(7) permits, there is simply no need to continue an impervious process, and a deemed grant is warranted.

⁹⁴ *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007) (“*Video Franchising Order*”), *aff’d Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

⁹⁵ *Id.* at 5139 ¶ 77.

⁹⁶ *Id.*

⁹⁷ *Id.* at 5140 ¶ 81.

⁹⁸ *See supra* notes 89-90 and associated text.

V. THE ACT PROHIBITS SITING DENIALS BASED ON THE PRESENCE OF ONE PROVIDER IN A GIVEN AREA.

As the Petition explains in greater depth, Section 332(c)(7)(B)(i)(II) limits state and local zoning authority decisions that “prohibit or have the effect of prohibiting the provision of personal wireless services.” Some localities have successfully argued in court, that so long as a single wireless provider is already serving the area in question, a zoning authority’s decision to deny a new siting request cannot be understood to violate this provision, even if there is no other basis for the denial.⁹⁹ These jurisdictions ruled that even flat-out bans on siting do not “prohibit or have the effect of prohibiting the provision of personal wireless service” so long as customers have access to a single wireless provider.

Other courts, however, have found that the presence of one provider cannot justify the denial of another provider’s application. As the First Circuit precisely stated:

A flat “any service equals no effective prohibition” rule would say a town could refuse permits to build the towers necessary to solve any number of different coverage problems. It is highly unlikely that Congress intended the many qualitatively different and complex problems to be lumped together and solved by a rule for all seasons that any coverage in a gap area automatically defeats an effective prohibition claim. Such a rule would be highly problematic because it does not further the interests of the individual consumer. To use an example from this case, it is of little comfort to the customer who uses AT&T Wireless (or Voicestream, Verizon, Sprint, or Nextel) who cannot get service along the significant geographic gap which may exist along Route 128 that a Cingular Wireless customer does get some service in that gap. Of course, that AT&T customer could switch to Cingular Wireless. But were the rule adopted, the same customer might

⁹⁹ *APT Pittsburgh Ltd. Pshp. V. Penn. Twp. Butler County*, 196 F.3d 469, 480 (3d Cir. 1999); see also *Nextel W. Corp. v. Unity Twp.*, 282 F.3d 257, 265-66 (3d Cir. 2002) (citing same); *AT&T Wireless PCS v. City Council of Va. Beach*, 155 F.3d 423, 428-29 (4th Cir. 1998); *USCOC of Va. RSA No. 3 v. Montgomery County Bd. of Supervisors*, 343 F.3d 262, 268 (4th Cir. 2003) (citing same).

well find that she has a significant gap in coverage a few towns over, where AT&T Wireless, her former provider, offers service but Cingular Wireless does not. The result would be a crazy patchwork quilt of intermittent coverage. That quilt might have the effect of driving the industry toward a single carrier. When Congress enacted legislation to promote the construction of a nationwide cellular network, such a consequence was not, we think, the intended result. The fact that some carrier provides some service to some consumers does not in itself mean that the town has not effectively prohibited services to other consumers.¹⁰⁰

The Ninth Circuit has agreed that “a significant gap in service (and thus an effective prohibition of service) exists whenever a provider is prevented from filling a significant gap in *its own* service coverage.”¹⁰¹

Division among the courts on this issue has promoted uncertainty, with some localities continuing to deny applications on the basis of an existing provider. Verizon Wireless, for example, cites eight instances (three in California and five in New Jersey) in which applications were denied simply because another service provider already served the area.¹⁰² The Commission should resolve the issue, clarifying that Section 332(c)(7)(B)(i)(II) preserves a carrier’s right to make reasonable deployments, even if the area in question is already served by another provider, and that Section 332(c)(7)(B)(i)(II) is not satisfied by the existence of a single provider.

As explained in the Petition, the “one provider is enough” approach to Section 332(c)(7)(B)(i)(II) is inconsistent with Section 332(c)(7)’s text and purpose. Section 332(c)(7)(B)(i)(II) is framed in the plural: “The regulation of the placement, construction, and

¹⁰⁰ *Second Generation Props, L.P. v. Town of Pelham*, 313 F.3d 620, 633-34 (1st Cir. 2002) (internal citation omitted).

¹⁰¹ *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715, 733 (9th Cir. 2005) (emphasis in original).

¹⁰² Verizon Wireless Comments at 11.

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*.”¹⁰³ Had Congress meant only to ensure that an area was served by a single provider, it would have proscribed only actions that prohibited the provision of “service.” Likewise, Section 332(c)(7)(B)(i)(I) bars zoning authorities from “unreasonably discriminat[ing] among providers of functionally equivalent services,” and thus clearly contemplates competition between or among multiple providers.¹⁰⁴ The declaration sought is also most consistent with the Act’s pro-competitive and pro-deployment aims. Tellingly, one of the Petition’s staunchest detractors, NATOA, itself acknowledges “if in fact ... there are local governments that deny applications solely *because* of coverage by another provider,” such denials would give rise to Section 332(c)(7)(B) claims.¹⁰⁵

Commenters opposing this request generally appear to have misunderstood the Petition, the Commission’s authority to interpret Section 332(c)(7), or both. CTIA takes this opportunity to respond to these misunderstandings. First, the Petition does *not* seek a ruling requiring that providers be accorded their first choice in the siting process in areas where another provider is making service available.¹⁰⁶ Approval of CTIA’s request with regard to Section 332(c)(7)(B)(i)(II) would not eliminate the role played by any of the valid parameters that inform all other siting decisions. For example, the Petition does *not* seek a ruling that zoning authorities

¹⁰³ 47 U.S.C. § 332(c)(7)(B)(i) (emphasis added).

¹⁰⁴ *Id.* § 47 U.S.C. § 332(c)(7)(B)(i)(I).

¹⁰⁵ NATOA Comments at 20. In NATOA’s view, this approach would violate Section 332(c)(7)(B)(i)(I)’s bar on unreasonable discrimination.

¹⁰⁶ *See, e.g.,* City of Auburn Comments at 3 (claiming that Petition “could be interpreted in a manner that undermines the zoning authority’s ability to require co-location of different provider’s [sic] facilities on existing towers or proposed towers”).

are prohibited from favoring collocation over new facilities where collocation is appropriate. Rather, the Petition asks only for a declaration that Section 332(c)(7)(B)(i)(II) bars zoning decisions based solely on existing coverage by another provider. To the extent other factors warrant denial of a particular application, the declaration sought here would not prevent such a denial.

Second, the Commission is authorized to issue declarations interpreting the Communications Act, and these declarations are entitled to deference from the courts.¹⁰⁷ As *Brand X* makes clear, this deference is due even where the agency's declaratory ruling interprets the statute in a manner that contradicts a prior judicial interpretation. "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."¹⁰⁸ Thus, the Commission may enunciate the proper meaning of the statute it is charged with implementing even if its conclusion contradicts the only court to have addressed the issue. Here, where several courts have already issued determinations consistent with CTIA's, the Commission undeniably has such authority.

VI. THE ACT PROHIBITS USE OF ORDINANCES THAT IMPOSE BLANKET VARIANCE REQUIREMENTS.

The Commission should also take this opportunity to declare that zoning ordinances requiring variances for all wireless siting requests are unlawful and will be struck down if challenged in the context of a Section 253 preemption action. Section 253(a) bars any "state or local statute or regulation, or other state or local legal requirement" that "may prohibit or have

¹⁰⁷ See *supra* notes 77-80 and associated text.

¹⁰⁸ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (U.S. 2005).

the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”¹⁰⁹ To the extent localities impose procedural hurdles that block timely deployment, those hurdles either “may prohibit” or “have the effect of prohibiting” providers from offering service. Indeed, in many cases “the standard for obtaining a variance creates an insurmountable problem.”¹¹⁰ Thus, the Commission should clarify that blanket variance requirements are unlawful, and that particular ordinances shown to require time-consuming variances will be struck down if challenged.

Several parties contend that Section 253 does not apply to wireless siting policies.¹¹¹ These claims, however, ignore the fact that courts faced with this very issue have held that it does. As the courts have clearly ruled, Section 332(c)(7)(B) permits challenges to individual siting decisions, while Section 253 remains available for challenges to the underlying ordinances or other laws, in the wireless context as elsewhere.¹¹² Last year, a federal court evaluating this very issue found that Section 253 applies to wireless siting ordinances, and in the course of so finding rejected the principal arguments raised by commenters here.¹¹³ For example, the court repudiated arguments that Section 253 challenges were blocked by Section 332(c)(7)(A)’s claim that “except as provided in [Section 332], nothing in [the Act]” would limit a state or locality’s control over “decisions regarding the placement, construction, and modification of personal

¹⁰⁹ 47 U.S.C. § 253(a).

¹¹⁰ Comments of Michael C. Seamands at 6.

¹¹¹ See, e.g., City of Arlington Comments at 8; Comments of the Town of Alton, New Hampshire at 7; Comments of the City of Philadelphia at 6-7.

¹¹² See, e.g., *Cox Commc’ns PCS, L.P. v. City of San Marcos*, 204 F.Supp.2d 1272, 1278 (S.D.Ca. 2002).

¹¹³ *Verizon Wireless LLC v. City of Rio Rancho*, 476 F.Supp. 2d 1325 (D.N.M. 2007).

wireless service facilities.”¹¹⁴ This claim, the court observed, relied on the argument that the word “decisions” could be read to include ordinances rather than actions taken on individual applications.¹¹⁵ This reading, however, conflicted with the common legal understanding of the term “decision,” which was properly construed to refer only to individualized decisions.¹¹⁶ Moreover, other language in Section 332(c)(7) indicated “that the word ‘decision’ was used in the case-specific sense.”¹¹⁷ Thus, nothing in Section 332(c)(7) precludes Section 253’s application to wireless siting requests.¹¹⁸ Other courts have similarly evaluated wireless zoning ordinances under Section 253.¹¹⁹

Nothing in the Ninth Circuit’s recent *en banc* decision in *Sprint Telephony PCS, L.P. v. County of San Diego*¹²⁰ in any way undermines this analysis. That decision effected one (and only one) change in the law: A previous Ninth Circuit decision held that Section 253(a)’s prohibition on any policy that “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service” barred any policy that either (1) “may prohibit” or (2) “may ... have the effect of prohibiting” the provision of service.¹²¹ The *Sprint Telephony* decision held that the term “may” was not, in fact, meant to

¹¹⁴ 47 U.S.C. 332(c)(7)(A). *See supra* note 111 (citing comments making same argument here).

¹¹⁵ *See Verizon Wireless*, 476 F.Supp. 2d at 1335.

¹¹⁶ *See id.* at 1336.

¹¹⁷ *Id.*

¹¹⁸ *See id.* at 1339.

¹¹⁹ *See, e.g., Newpath Networks LLC v. City of Irvine*, No. SACV 06-550-JVS, 2008 U.S. Dist. LEXIS 72833 (C.D. Cal. Mar. 10, 2008) (striking wireless siting ordinance under Section 253); *Omnipoint Communications Inc. v. Port Authority of New York and New Jersey*, No. 99-Civ.-0060, 1999 U.S. Dist. LEXIS 10534 (S.D.N.Y. July 13, 1999) (finding that wireless siting ordinance complied with Section 253).

¹²⁰ 2008 U.S. App. LEXIS 19316.

¹²¹ *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001).

modify the “have the effect of prohibiting” prong, and that Section 253(a) therefore only barred policies that (1) “may prohibit” or (2) *actually* “have the effect of prohibiting” the provision of service.¹²² The decision did not resolve any other issue, and in fact explicitly did not address the scope (as opposed to the requirements) of Section 253.¹²³

Nor does the *Sprint Telephony* decision proscribe the declaration CTIA seeks here. For all the discussion of this decision in the record, one key point is repeatedly overlooked: Section 253 by all accounts precludes policies that “may prohibit” or that “have the effect of prohibiting” service. The Commission is at liberty to determine that blanket variance requirements violate either or both of these prongs. These requirements impose unnecessary delays – a point proven by the fact that most localities represented in the record do *not* require variance in all cases. Thus, ordinances requiring such variances will needlessly delay deployment, and may often push new deployment away from affected jurisdictions. Thus, in affected areas, universal variance requirements either “may prohibit” or will “have the effect of prohibiting” the provision of service. The Commission can and should declare these policies to be unlawful, and make clear its willingness to preempt specific policies if and when they are challenged under Section 253.¹²⁴

¹²² *Sprint Telephony* at *14-*18.

¹²³ *See id.* at *18 (noting that “[b]ecause Sprint’s suit hinges on [language appearing in both Section 253 and Section 332(c)(7)],” the court “need not decide” which provision governed the case).

¹²⁴ Because CTIA does not seek actual preemption of any ordinance here, the notice-related arguments raised by several commenters are moot. *See, e.g.,* City of Arlington Comments at 2; Opposition of City of Los Angeles et al. at 2-4. In any event, CTIA did serve localities referenced in the Section 253 discussion of the Petition. *See* Letter from Adam D. Krinsky, Counsel to CTIA (Aug. 26, 2008) (filed in WT Docket No. 08-165 Aug. 29, 2008).

VII. OTHER MISCELLANEOUS ARGUMENTS RAISED BY OPPONENTS ARE READILY ADDRESSED OR NOT GERMANE.

A. Commenters' Aviation Issues Are Readily Addressed.

Some comments raised air safety issues, including the need to: (1) maintain Federal Aviation Administration (“FAA”) rules or procedures governing the review of structures for air safety;¹²⁵ (2) preserve the ability of local zoning officials to review structures for air safety because the FAA lacks enforcement authority to prevent hazardous construction;¹²⁶ and (3) ensure that states and localities retain the ability to protect areas and airspace around airports.¹²⁷ Each of these aviation issues is readily addressed.

First, nothing in the Petition affects or implicates federal laws and processes, including rules of the FAA which protect air safety. Notably, the FAA – the federal agency charged with protecting the nation’s airspace – did not oppose the Petition. Rather, it wrote to ensure that action on the Petition will not “alter or amend the FAA’s regulatory requirements and process specified in Title 14 of the Code of Federal Regulations.”¹²⁸ CTIA seeks no such alteration or amendment. The Petition applies only to the time periods in which a *state or locality* must act on wireless facility siting requests, *state and local policies* that prohibit or have the effect of barring a wireless provider from offering service in a given location, and *state and local* ordinances

¹²⁵ See Comments of Federal Aviation Administration at 1 (“FAA Comments”); see also Comments of Air Line Pilots Association, International at 1 (“ALPA Comments”); Comments of Florida Airports Council at 1 (“FAC Comments”); Comments of Lee County Port Authority at 1-2 (“Lee County Comments”); Comments of Missouri Aviation Council at 1-2.

¹²⁶ See ALPA Comments at 1, 2; Comments of North Carolina Department of Transportation, Division of Aviation at 1 (“NCDOT Comments”).

¹²⁷ See, e.g., Comments of Aircraft Owners and Pilots Association at 1-2; ALPA Comments at 1; FAC Comments at 1; Comments of National Association of State Aviation Officials at 1-2; Florida Department of Transportation at 1-2; NCDOT Comments at 2; Lee County Comments at 1-2; Comments of California Department of Transportation, Division of Aeronautics at 1.

¹²⁸ FAA Comments at 1.

requiring wireless providers to obtain variances before siting any facilities. The federal requirement that applicants must clear specified structures with the FAA to ensure they do not constitute a hazard to air navigation is not in any way affected by the Petition.¹²⁹

Second, the concern that construction of hazardous structures will occur in the absence of state/local oversight because the FAA lacks enforcement authority is unfounded. If an antenna structure may be a potential hazard to air navigation as defined in the rules of the FAA and FCC, the FCC's rules obligate antenna structure owners not only to obtain an FAA "no hazard" determination, but also to register their structures with the FCC, *prior to construction*.¹³⁰ Only upon registration of the structure with the FCC and after clearance by the FAA can construction commence.¹³¹ Failure to comply with these rules can subject an antenna structure owner to substantial penalties,¹³² and the FCC can order a structure to be dismantled if advised by the FAA that it "may constitute a menace to air navigation."¹³³ Thus, the FAA sets the standards for what constitutes a hazard to air navigation, and those standards are enforced by the FCC.

Third, concerns that grant of the Petition will undermine state and local laws enacted to protect areas and airspace around airports are similarly misplaced. As a threshold matter, to the extent these state and local requirements seek to prohibit construction which the FAA would deem to be a hazard, the FCC/FAA rules already account for these situations and are not impacted by the Petition. Moreover, to the extent the state and local rules go further and/or seek to protect the capacity and viability of airports, these issues are also faced by the entities that

¹²⁹ See 47 C.F.R. Part 17, 14 C.F.R. Part 77.

¹³⁰ See 47 C.F.R. §§ 17.4(a)-(b), (d), 17.7; 14 C.F.R. § 77.13.

¹³¹ See 47 C.F.R. § 17.4(a)(1).

¹³² See 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

¹³³ See 47 U.S.C. § 303(q).

have routinely acted within the time frames CTIA has proposed. If a zoning authority is unable to resolve these issues within the prescribed time frames, it may reject the application. Finally, as clarified above, the Petition is not seeking preemption but rather direction that ordinances requiring blanket variances “regardless of the type and location of the proposal” are prohibited under Section 253.¹³⁴ Grant of the Petition thus would not affect the ability of authorities to show, in response to any future Petition seeking to preempt a particular ordinance, that the ordinance is narrowly tailored.

B. Commenters’ RF-Related Arguments Fail.

Finally, commenters’ claims involving the potential effects of RF emissions relating to the new deployment are misguided and should be rejected. Many commenters focus their attention on the role of RF emissions in siting decisions. Several of the claims raised have nothing to do with the local siting process, and thus are not germane to this proceeding.¹³⁵ To the extent commenters are asking for a new federal approach to RF issues, this is simply not the proper forum for such arguments.

Others commenters either suggest or state outright that the local zoning process is the appropriate venue for debate over RF emissions.¹³⁶ This position is directly contrary to Section

¹³⁴ See Petition at 36-37.

¹³⁵ See, e.g., Comments of EMR Policy Institute at 3-4 (asking Commission to declare that its RF safety guidelines and regulations do not cover non-thermal, long-term cumulative environmental and biological effects of RF emissions, and do not prevent states and municipalities from adopting and enforcing setbacks or buffer zones to place cell towers and other wireless transmission facilities a safe distance away from schools and residences); Comments of Miranda R. Taylor at 2 (arguing that “RF-emitting installations should be in plain sight, and marked with clear signage”).

¹³⁶ See, e.g., Comments of E. Stanton Maxy at 1 (asking Commission to deny Petition “pending sufficient research to prove that the involved radio frequency electromagnetic fields are not harmful to human beings.”); Comments of Maria S. Sanchez at 2 (arguing that local ordinances
(continued on next page)

332(c)(7)(b)(iv). That provision states that “[n]o state or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.” Following this provision’s passage, the Commission noted that Congress had “amend[ed] the Communications Act by providing for federal preemption of state and local regulation of personal wireless service facilities on the basis of RF environmental effects.”¹³⁷ Several years later it explained that, “[p]ursuant to Section 332(c)(7), and consistent with the Commission’s general authority to regulate the operation of radio facilities, State and local governments are broadly preempted from regulating the operation of personal wireless service facilities based on RF emission considerations.”¹³⁸ In short, to the extent commenters seek to “preserve” a state role in evaluating RF-related considerations during the tower siting process, their arguments are misguided, as the Act forecloses this role.

and state laws end up serving the purpose of protecting the public’s health, and that local siting ordinances must be applied to protect against potential hazards resulting from microwave exposure); Comments of Miranda R. Taylor; Comments of Catherine Cleiber.

¹³⁷ *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, Report and Order, 11 FCC Rcd 15123, 15183 ¶ 166 (1996)

¹³⁸ *2000 Report and Order*, 15 FCC Rcd at 22828 ¶ 17.

CONCLUSION

For the reasons described above, the Commission should grant the Petition.

Respectfully submitted,

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