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

In the Matter of	)	
	)	WT Docket No. 08-165
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	)	

To: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, NATIONAL LEAGUE OF CITIES, AND UNITED STATES CONFERENCE OF MAYORS, IN RESPONSE TO CTIA-THE WIRELESS ASSOCITION'S PETITION FOR DECLARATORY RULING

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SUMMARY

The comments overwhelmingly show that the Commission should deny the Petition for Declaratory Ruling. The majority of the comments show the importance of maintaining local control over wireless facility siting and the industry has failed to show either a legal or factual basis for its suggested action.

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The National Association of Telecommunications Officers and Advisors ("NATOA"), the National League of Cities ("NLC"), and the U.S. Conference of Mayors ("USCM") submit these reply comments in response to the opening comments filed with respect to the Petition for Declaratory Ruling.[1]

[1] *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance*, Petition for Declaratory Ruling, WT Docket No. 08-165, filed July 11, 2008.

INTRODUCTION

CTIA's Petition for Declaratory Ruling is based on the remarkable and unfounded premise that because local governments sometimes take longer to process wireless facility siting applications than the industry desires, wireless providers are unduly delayed from providing services in violation of 47 U.S.C. § 332(c)(7). Providers submit this premise despite the fact that over 80% of providers have had collocation requests granted in less than a week[2] and despite the fact that the majority of new construction requests are granted in less than 2 months.[3] Despite the fact that most applications are reviewed quickly, providers nonetheless want the Commission to issue a ruling which severely hamstrings local governments' ability to evaluate complex applications.

The vast majority of opening comments urged the Commission to deny the Petition's request for a declaratory ruling and leave zoning practices in the hands of state and local governments as Congress intended. The majority of comments were received from state and local governments, including airport authorities; pilot, aviation, and neighborhood associations, and individual citizens, and urged the Commission to deny the Petition. These comments relied not only on the text of § 332(c)(7) and § 253 for support of the proposition that state and local authorities are in the best position to make reasoned decisions about wireless facility siting, but also relied on case law, legislative intent, and general democratic principles of self-governance to urge denial of the Petition. Together, government entities, associations, and citizen presented a compelling argument

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[2] *See* CTIA Petition at 16; *Comments of Sprint Nextel Corporation* at 6 (filed September 29, 2008); *Comments of NextG Networks, Inc.* at 10 (filed September 29).

[3] *See Comments of Verizon Wireless* at 8 (filed Sept. 29); *Comments of Alltel Communications, LLC* at 4 (filed Sept. 29, 2008); *see also Comments of MetroPCS* at 7 (filed Sept. 29, 2008); *Comments of AT&T* at 2 (filed September 29, 2008)(vast majority of localities are reasonable).

for keeping wireless facility zoning matters in the hands of locally elected public officials.

On the other hand, comments from wireless services providers and their trade associations alleged ambiguities in the statutory text without engaging in any sort of textual analysis, relied largely on anonymous and one-sided anecdotes, and provided the Commission incomplete recitals of congressional intent.[4] In fact, many of the industry's comments simply restated and referenced the Petition itself. The wireless providers do not and cannot justify Commission intrusion into an area traditionally regulated by local government.

NATOA, NLC, and USCM agree that wireless deployment is vitally important to the communications infrastructure of the United States. Nonetheless, a federal agency like the Commission cannot usurp traditional local decision-making authority to further corporate interests at the expense of democratic processes. This is especially true when Congress expressly provided for the preservation of local authority.

I. THE PETITION'S TIME LIMITS ARE UNREASONABLE AND CONTRARY TO TEXT OF § 332(c)(7)

Local governments and citizens alike supplied comments to the Commission regarding the need to have an appropriate amount of time to complete the required reviews of wireless facility siting applications. Meaningful review must include the ability to review technical aspects of an application to assure compliance with public safety requirements **and** the ability to receive input from affected community members regarding issues like aesthetics and property values. Many citizens wrote to the

[4] *Comments of NextG Networks Inc.* filed September 29, 2008 at 4 (failing to cite Congress's intent to preserve local zoning authority).

Commission to stress their desire and right to influence the political process in their community with respect to land use regulation. Forcing local governments to render decisions within strict time limits will unnecessarily and improperly hinder their ability to receive input from those individuals who will be most affected by applications for wireless facility siting.

CTIA and its supporters argue that the 45 and 75 day limits for taking final action on collocation and new wireless facility applications are reasonable. In particular, Sprint Nextel Corporation ("Sprint Nextel") and NextG Networks Inc. ("NextG") argue that because North Carolina and Florida have implemented similar deadlines for local governments within their borders, the Petition's time limits are reasonable.[5] At its most basic level, this argument completely ignores the difference between a state creating zoning rules for its local governments to follow and a federal agency's imposition of zoning rules on states and local governments. While most states are empowered to provide guidelines for the functioning of their political subdivisions, the federal government is not. As explained in our opening comments, the Commission cannot become a *de facto* federal zoning board by imposing time limits on local government action when Congress intended no such result.[6]

In addition, Sprint Nextel and NextG misconstrue the North Carolina and Florida statutes they cite as support for the reasonableness of the proposed time limits. First, the 45 day time limit contained in N.C. GEN. STAT. § 153A-349.52(e) (2008) applies only to collocation requests that are entitled to streamlined processing. Streamlined processing applies only to collocation requests which do not exceed the number of facilities

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[5] *See*, *Comments of Sprint Nextel* at 8 and *Comments of NextG* at 12.
[6] *See*, *Comments filed by NATOA, et al*. at 15-17 (Sept. 29, 2008).

previously approved for a wireless support structure, the construction of which was itself approved after December 1, 2007; or if the collocation application meets the following requirements:

> (1) The collocation does not increase the overall height and width of the tower or wireless support structure to which the wireless facilities are to be attached.
>
> (2) The collocation does not increase the ground space area approved in the site plan for equipment enclosures and ancillary facilities.
>
> (3) The wireless facilities in the proposed collocation comply with applicable regulations, restrictions, or conditions, if any, applied to the initial wireless facilities placed on the tower or other wireless support structure.
>
> (4) The additional wireless facilities comply with all federal, State, and local safety requirements.
>
> (5) The collocation does not exceed the applicable weight limits for the wireless support structure. (2007-526, s. 2.)[7]

If a collocation request does not meet one of these two requirements it is not entitled to streamlined processing and the time limit does not apply.

In addition, when an application that is entitled to stream-lined processing is submitted, a county has 45 days within which to inform the applicant in writing whether the application is complete. *Only after* the application is deemed complete does the statute's requirement that a decision be made in 45 days come into play.[8] Therefore, at a minimum, a county has 90 days to approve a collocation request which is entitled to streamlined processing. This time period is lengthened if the applicant fails to submit a *properly completed* application.

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[7] *See* N.C. GEN. STAT. § 153A-349.53 (2008).
[8] *See* N.C. GEN. STAT. § 153A-349.52(d) & (e) (2008).

Applications which are not entitled to streamlined processing must be decided in a "reasonable time period," consistent with other land use permits. Therefore, North Carolina's statutory scheme provides no support for the alleged reasonableness of CTIA's time limits, and in fact is contrary to what CTIA has proposed. Instead, North Carolina's statute follows the intent of Congress by allowing its counties to act on applications within a reasonable time period given the circumstances and handling of similar land-use permit requests.

Likewise, Florida's statutory scheme does not provide support for CTIA's request. Sprint Nextel asserts that Florida's statute provides for collocation approval in 45 **business** days, therefore CTIA's 45 day limit is reasonable. However, like North Carolina's statute, Florida's statutory limit of action within 45 business days applies in very specific circumstances.[9] Further, even before the 45 business day time limit starts, a local government has 20 **business** days (at least 28 days, assuming there are no holidays) within which to notify the applicant that an application is incomplete.[10] Once the application is deemed complete, whether by expiration of the 20 business day notification period or by virtue of actually being complete, a local government **then** has an 45 **business** days (at least 63 days), to approve or deny the collocation requests that meet certain requirements and 90 **business** days (at least 126 days) to approve or deny other requests.[11] Therefore, in actuality, Florida requires its local governments to act on certain collocation requests with 91 days and other wireless facility requests within 154 days. In either case, the time limits apply only *after* the application is complete.

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[9] FLA. STAT. § 365.172(12)(a) & (d)(2008)(providing that 45 day limit applies to collocations that do not increase tower height, ground space area, and are consistent with previous antennae requirements).
[10] FLA. STAT. § 365.172(12)(d)(3.a) (2008).
[11] FLA. STAT. § 365.172(12)(d)(1)–(2) (2008).

As explained above, neither Florida nor North Carolina's statutes provide support for the time limits proposed by CTIA. Sprint Nextel and NextG's assertions to the contrary show either a critical misunderstanding of statutory construction or a deliberate attempt to mislead the Commission.[12]

While neither Florida nor North Carolina's statutes provide support for the reasonableness of CTIA's proposals, the statues are useful for exploring the consequences of ruling in CTIA's favor. Both Florida and North Carolina have enacted statutes governing the land use and zoning decisions of their political subdivisions *vis a vis* wireless facility siting. Each state has enacted provisions presumably based on a balancing of the needs of their local governments, citizens, and of wireless service providers. As explained above, both states require decisions to be made in significantly more than 45 or 75 days after a *complete* application has been received; and therefore do not support a finding the CTIA's request is reasonable. If the Commission rules in favor of CTIA's petition, it will be preempting each state's regulatory process and replacing it with a federal zoning process, in direct contravention of the congressional decision to preserve local zoning processes. The United States Supreme Court has specifically counseled against interfering in the relationship between a state and its subdivisions in an

[12] At page 7 of its Comments, Sprint Nextel mistakenly states that the South Dakota PUC recently proposed a model ordinance for wireless facility siting. Conversations with Brian Rounds of the PUC staff revealed that the model has not been released and is still being drafted. When it is complete it will simply serve as a resource for local governments. Likewise, NextG's reference at page 12 of its Comments to Kentucky's statute is misleading. Kentucky requires providers to submit a completed and extensive "uniform application," which includes requirements that providers serve affected neighboring property owners notice of their rights and respond to a number of technical requirements, before the 60 days approval process begins. *See* Ky. Rev. Stat. Ann. § 100.9865 (2008).

area such as land use absent a clear signal from Congress allowing such interference.[13] There is no such clear statement in § 332(c)(7).

As explained in our opening Comments, the text of § 332(c)(7) provides that local governments are to act on applications in a "reasonable" time period, with reference to the scope and nature of the request. Some commentators' view that Congress did not define the time period within which local governments must act is wrong. Congress did define the time period - it must be "reasonable." While it is true that the Commission recently held that the word "unreasonable" in § 621 of the Communications Act is ambiguous and the Sixth Circuit Court of Appeals upheld this interpretation,[14] the Commission must remember that it is dealing with a different statutory section and with a different legislative history. The text and legislative history for § 332(c)(7) provide ample support for the proposition that local governments are to treat wireless services providers like any other land use applicant and dispels the notion that the Commission can provide a time period of its choosing within which a local government must act on applications.[15] The Commission's Cable Franchise Order and the Sixth Circuit opinion are simply irrelevant to this proceeding.

In addition to being contrary to Congress's intent, requiring action within a specific time frame would hinder local governments' ability to comply with other portions of § 332(c)(7), making the time limits per se unreasonable. Section 332(c)(7)(B)(iii) requires that decisions to deny wireless requests be supported by substantial evidence in a written record. If local governments must act on wireless facility

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[13] *See Gregory v. Ashcroft*, 501 U.S. 452 (1991).

[14] Motions for *en banc* review are pending.

[15] *See Comments of NATOA, et al.* at 4-18.

siting applications in an expedited manner, the ability to prepare a record of "substantial evidence" will be severely compromised. Accuracy and thoroughness cannot be sacrificed for the sake of commercial interests.

The Commission should not accept the invitation to contravene congressional intent and violate federalism principles by requiring local governments act on wireless facility siting applications within a certain time period and should deny the petition for declaratory ruling.

II. NEITHER THE DEEMED GRANTED NOR THE PRESUMPTION OF VIOLATION REMEDIES ARE WITHIN THE COMMISSION'S AUTHORITY

As explained in our Comments, the Commission cannot constitutionally deem wireless facility siting applications "granted." The Supreme Court has ruled that federal agencies cannot impinge on the traditional power of states and local governments absent a clear and manifest statement of intent on the part of Congress.[16]

Just as the Commission cannot create a "deemed granted" regime, it likewise is without power to instruct the federal courts that a failure to comply with CTIA's time lines constitutes a presumption that § 332(c)(7) has been violated and entitles the applicant to an injunction absent evidence that the local government acted reasonably. First, in preemption cases, the burden of persuasion is on the party advocating preemption.[17] A wireless services provider alleging a violation of § 332(c)(7) is seeking preemption of a local government regulation. As such, the burden of persuasion is on the wireless provider to prove a violation. CTIA's proposed remedy requires shifting the

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[16] *See, NATOA, et al. Comments* at 15-17, citing *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).
[17] *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984); *Barnes ex rel. Estate of Barnes v. Koppers, Inc.*, 534 F.3d 357 (5th Cir. 2008).

burden of persuasion to the local government and turns preemption analysis on its head. The Commission lacks the power to "interpret" a statutory term so that it results in a shift in the burden of proof allocated by Congress in the Telecommunications Act.[18]

Second, the issuance of injunctions involves the courts' discretionary ability to balance equities. According to well-established principles, a party seeking an injunction must satisfy a four-factor test before a court may grant an injunction. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.[19] The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the courts;[20] as such issuing a declaratory ruling instructing courts to issue injunctions intrudes on the province of the judiciary. Such a change is far beyond the Commission's powers of "interpretation."

III. THE COMMISSION SHOULD NOT ALTER THE MEANING OF "MAY" IN § 253 AND SHOULD NOT PREEMPT ORDINANCES REQUIRING VARIANCE

Verizon requests that the Commission use the Petition for Declaratory Ruling as a vehicle for altering the definition of the word "may" in § 253(a). Verizon argues that "may" in § 253(a) means "might" and that the Commission should issue a ruling to that effect. Putting aside the fact that § 253(a) does not apply to wireless facility siting,

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[18] *See, e.g., Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich*, 512 U.S. 267 (1994)(agency could not alter burden of persuasion to conflict with Administrative Procedures Act).

[19] *See, e.g., Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-313, (1982); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987).

[20] *Id*.

Verizon is mistaken, the Eight and Ninth Circuit Courts of Appeal rejected this interpretation,[21] and the Commission itself has made rulings which cannot be squared with Verizon's request.

Sprint Nextel similarly argues that all ordinances that require variances with respect to the siting of wireless services facilities should be preempted. Without expressly pressing the definition of "may," Sprint Nextel's argument is essentially that because a variance procedure burdens wireless providers (and any other land use applicant who must seek a variance), § 253 should preempt such ordinances. This argument, like interpreting "may" as "might," also ignores the statutory text's requirement that before preemption can occur an a local government requirement must prohibit or effectively prohibit the provision of services.

First, a plain, grammatical reading of § 253(a) shows wireless telecommunications providers should not succeed on either argument outlined above. The statute provides that:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

47 U.S.C § 253(a). As explained in our opening Comments, statutory terms should be understood according to their ordinary meaning.[22] The United States Supreme Court

[21] *See Sprint Telephony PCS, L.P. v. County of San Diego*, Nos. 05-56076, 05-56435, 2008 WL 4166657 (9th Cir. 2008); *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532-33 (8th Cir. 2007).

[22] *See*, William Eskridge, Jr. Phillip Frickey & Elizabeth Garrett, Legislation and Statutory Interpretation 251-53 (2000).

utilizes the same "common English usage" standard. [23]

The subject of the sentence contained in § 253(a) (no state or local statute, regulation or other legal requirement) is modified by two clauses. The first of these clauses reads that no regulation is allowed to (as in "may") *prohibit* the ability of any entity to provide telecommunications services. The second clause reads that no regulation is allowed to have the *effect of prohibiting* telecommunications services.[24] This reading is quite logical and can be supported by the very title of the section, "Removal of barriers to entry." Until a local regulation acts as a barrier to entry, there is no barrier to remove. In no grammatical sense does the sentence read that local governments are prohibited from passing regulations which hypothetically *might someday prohibit* the provision of telecommunications services.

The Commission's guidance and decisions also support that "may" does not mean "might" in this context and that actual proof of prohibition is required to preempt local regulation. The Commission has held repeatedly that allegations should be supported by credible evidence, studies and descriptions of economic effects, and has denied petitions that failed to provide evidence of actual or effective prohibition.[25] It is important to note

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[23] *See*, *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 860 (1984); *National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479, 500, 502 (1998). *See also*, *Barnhard v. Walton*, 535 U.S. 212, 217-18 (2002) (using grammar rules concerning modifiers in conduct of *Chevron* analysis).

[24] *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 533 (8th Cir. 2007).

[25] *See*, *Suggested Guidelines for Petitions for Ruling under § 253 of the Communications Act*, 13 F.C.C.R. 22970; 22971-72 (1998) ("factual allegations should be supported by credible evidence, including affidavits, and, where appropriate, studies or other descriptions of the economic effects of the legal requirement that is the subject of the petition"); *In the Matter of TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21,396; 21,440 ¶ 101(1997) (Providers are required to "supply ... credible and probative evidence that the challenged requirement falls within the proscription of section 253(a).")*; In the Matter of American Communications Services, Inc., MCI Telecommunications Corp.,* 14

that even if the Commission's guidance and decisions were not in accord with the holdings of the Eight and Ninth Circuit Courts of Appeals, the Commission could not "interpret" § 253(a) in the manner advocated by Verizon. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982 (2005), the Supreme Court held that a court's prior judicial construction of a statute trumps an agency's construction of a term "if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." The Commission has not previously held the word "may" to be ambiguous. In *Sprint Telephony*, the Ninth Circuit specifically held that its reading of § 253 flowed from the unambiguous text of the statute,[26] and the Eight Circuit in *Level 3* stated that the text was "clear."[27]

Other opinions in addition to those of the Eight and Ninth Circuits cited by Sprint Nextel have required a showing of prohibition or effective prohibition. The Eleventh Circuit has stated that courts may only analyze whether a regulation is exempted from preemption by § 253(c) after the plaintiff has *established* a "prohibition" within the meaning of § 253(a);[28] while Third Circuit has held that the party seeking preemption

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F.C.C.R. 21,579; 21,299 ¶ 38 (1999) (". . . ACSI offers no evidence that those portions of the Arkansas Act prohibit or have the effect of prohibiting the ability of any entity to provide any telecommunications service. ACSI in effect asks us to see fire without producing any smoke."); *In The Matter Of Petition For Commission Assumption Of Jurisdiction Of Low Tech Designs, Inc.'s Petition For Arbitration With Ameritech Illinois Before The Illinois Commerce Commission*, 13 F.C.C.R. 1755, 1776 ¶ 38 (1997) (". . . LTD has not set forth adequate record evidence that demonstrates that the legal requirements . . . 'prohibit or have the effect of prohibiting the ability of [LTD] to provide any interstate or intrastate telecommunications service.'")

[26] *Sprint Telephony*, 2008 WL 4166657 at *5.

[27] *Level 3*, 477 F.3d at 533.

[28] *See*, *Bellsouth Telecom. Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1192 (11th Cir. 2001). *See also*, *Pacific Bell Tel. Co. v. Cal. Dep't of Transp.*, 365 F. Supp.2d 1085,

must *sustain its burden* of showing that a local government has violated § 253(a) before the court will reach § 253(c).[29]

The Oregon Court of Appeals similarly noted the Act preempts ordinances which expressly prohibit or are sufficiently burdensome to prohibit the provision of services.[30]. The requirements of the Eleventh Circuit that a prohibition be "established" and of the Third Circuit that a party "sustain its burden" are meaningless if they do not require the submission of actual proof.

The Commission should reject Verizon's proposed interpretation of § 253's use of the word "may" and should not preempt any local government regulation requiring a variance absent proof of an actual or effective prohibition on the provision of services.

IV. THE REMEDIES IN § 332(C)(7) ARE CLEAR AND APPROPRIATE

Sprint Nextel argues that wireless providers do not have a remedy if their applications are "indefinitely delayed or stayed."[31] This is incorrect. Section 332(c)(7) specifically provides that providers may go to court if the local government fails to act on an application for wireless facilities siting. While Congress did not define "failure to act," the courts have been willing and able to review circumstances to determine whether a failure to act has occurred.[32] While providers may occasionally face dismissal of a lawsuit because they have filed the action before it is ripe, the undersigned found no

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1089-92 (N.D. Cal. 2005) ("Courts should refrain from applying the safe harbor provisions of subsection (c) unless and until a violation of subsection (a) has been *demonstrated*.")(emphasis added).

[29] *New Jersey Payphone Association, Inc. v. Town of West New York*, 299 F.3d 235, 240 (3d Cir. 2002).

[30] *See also, AT & T Communications of the Pacific Northwest, Inc. v. City of Eugene*, 35 P.3d 1029, 1047 (Or. App. 2001).

[31] *Comments of Sprint Nextel* at 4.

[32] *See Cincinnati Bell Wireless v. Brown County*, No. 1:04-cv-773, 2005 WL 1629824, at *4 (S.D. Ohio July 6, 2005); *Cox Communications PSC v. City of San Marcos*, 204 F.Supp.2d 1272, 1277-78 (S.D. Cal. 2002).

reference to an instance where a provider was prevented from filing suit because it did not understand when its rights had accrued.

Further, because Congress intended wireless facility siting applications to be treated like other land use applications, both the providers and the courts have guidance in each community as to the length of time it takes to process applications. Should a wireless facility siting application take more time than similar land use applications, the provider has ample opportunity to demonstrate to a court that it is not being treated like other land use applicants.

V. PROVIDERS EVIDENCE FAILS TO SHOW A NEED FOR ACTION

The comments of the wireless services providers supporting the Petition attempt to create a link between local government action and the concept of delay in an effort make local government zoning processes seem unreasonable. However, this is a false connection and the Commission should carefully consider what is actually before it. For instance, Spring Nextel references an on-line Newsday article reporting that the Town of Huntington, New York tabled an application filed by Verizon to construct a new tower in the town for a future meeting.[33] The article notes that the Zoning Board conducted a two hour meeting where more than 70 people were in attendance, with at least "some" speaking out against the tower. The proposed 90 foot tower will rise 50 feet above the current tree canopy. While Verizon agreed to plant 22 evergreens to screen the tower, residents expressed concerns about the existence of the tower in a residential

[33] *See Sprint Comments* at 5, citing Deborah S. Morris and Laura Rivera, *Huntington Tables Vote on Verizon Cell Phone Tower*, Newsday, September 19, 2008, available at http://www.newsday.com/community/news/northshoresuffolk/huntington/ny-lihunt0919,0,4896078.story.

neighborhood. The concerns raised by the residents included the fact that the tower would be considered an eye sore, would drive down property values, and caused health concerns.[34] While Huntington cannot regulate the tower on the basis of health concerns related to radio frequency emissions that meet the Commission's regulations, Huntington can and should take into account its citizens concerns regarding aesthetics, property values, and other safety considerations related to the construction of a 90 foot tower in a residential neighborhood. That is the very essence of the zoning process Congress sought to preserve for local governments. There is no indication that the Zoning Board postponed consideration of the application to delay Verizon, but rather to evaluate its citizens concerns and to determine whether alternative sites might be available for a tower that will be at least 6 stories taller than surrounding single family homes.

The remainder of Sprint Nextel's statements regarding the length some of its applications have been pending fails to address the reasons for the length of processing the applications.[35] Sprint Nextel wants the Commission to accept the premise that processes which take more than 45 or 90 days are necessarily the product of delay and should be preempted and prevented by the Commission. This is a faulty premise, unrelated to reality. In reality, reviewing site and construction alternatives, seeking input from affected residents, surveying areas for coverage gaps and the best way to fill them takes time. That does not mean that the time spent is evidence of dilatory local government actions, or "delay" as the industry likes to cast is. It is simply evidence of the democratic political process at work

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[34] *Id.*

[35] *See Sprint Comments* at 5.

CONCLUSION

The Commission lacks both the authority and the factual basis to preempt local zoning ordinances as requested by CTIA. The Commission should therefore deny CTIA's Petition for Declaratory Ruling.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of October, 2008, I served a true and correct copy of the foregoing COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, NATIONAL LEAGUE OF CITIES, AND UNITED STATES CONFERENCE OF MAYORS, IN RESPONSE TO CTIA-THE WIRELESS ASSOCITION'S PETITION FOR DECLARATORY RULING addressed to the following and in the manner specified:

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