

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

Petition for Declaratory Ruling to Clarify	)	
Provisions of Section 332(c)(7) to Ensure	)	
Timely Siting Review and to Preempt under	)	WT Docket 08-165
Section 253 State and Local Ordinances that	)	
Classify All Wireless Siting Proposals	)	
As Requiring a Variance	)	

**OPPOSITION OF**  
**CITY OF LOS ANGELES, COUNTY OF LOS ANGELES, AND COUNTY OF SAN**  
**DIEGO, CA; TOWN OF PALM BEACH, FL; CITY OF ATLANTA, GA; CITY OF**  
**DUBUQUE, IA; ANNE ARUNDEL COUNTY AND MONTGOMERY COUNTY, MD;**  
**TOWN OF SOUTHAMPTON AND CITY OF WHITE PLAINS, NY; CITY OF**  
**PORTLAND, OR; HENRICO COUNTY AND CITY OF VIRGINIA BEACH, VA**  
**(COALITION FOR LOCAL ZONING AUTHORITY)**

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## SUMMARY

The CTIA petition must be dismissed because it fails to comply with Note 1 of Section 1.1206(a), which requires service upon state or local governments whose actions are specifically cited as a basis for requesting preemption.

If not dismissed, the petition must be denied because, as to the claims under Section 332(c)(7)(B), only the courts and not the FCC may settle disputes under (B)(i)-(iii) and (v). Subparagraph (B)(iv) is not at issue here. While CTIA attempts to characterize its petition as nothing more than a request for clarification, it is plain that the petition's chief aim is the settlement of real and present disputes between CTIA members and local zoning authorities. Even if the Commission believes it possesses the authority to grant the requested relief, there is no practical way to avoid future requests to opine on the entirety of Paragraph 7 and thus to displace the courts from the exclusive role assigned them by Congress.

The petition's request for fixed 45-day and 75-day deadlines within which local zoning authorities must rule on wireless siting applications is antithetical to the unpredictable nature of the land use review process, as to which the FCC knows little. The Commission has repeatedly declined to become a national zoning board. In any event, CTIA presents no verifiable evidence that the local zoning process has been delayed unreasonably by local governments. This absence of evidence is of a piece with petitioner's refusal to identify the governments it accuses of delay and obstruction. In the pages which follow is documentation to the contrary, indicating that most wireless siting applications are processed in timely fashion when the applicant is fully engaged in the process.

With respect to the petition's claim of error under the "prohibition" language of (B)(i)(II), the same congressional reservation of authority exclusively to the courts applies to the settlement

of these disputes. Differences of interpretation of the statutory language by these courts do not change the congressional assignment of responsibility.

In any event, the differences among the courts in reading subsection (B)(i)(II) are minor by comparison with their general agreement on the meaning of "prohibition." Almost all courts have concluded, for example, that the failure to grant a particular wireless applicant a permit must leave a "significant gap" in wireless coverage that cannot be filled by some other means. The mere fact that an applicant's first or cheapest choice of a tower or antenna site has been disapproved is not enough.

As to the claims under Section 253, that statute may not be applied in derogation of the local zoning authority preserved by Section 332(c)(7)(A). Even if Section 253 could be applied, it sets standards -- acknowledged by the FCC as well as the courts -- that CTIA has made no attempt to address or meet. The petition is utterly lacking in verifiable evidence that any zoning variance procedure anywhere has prohibited, or had the effect of prohibiting, personal wireless service.

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(COALITION FOR LOCAL ZONING AUTHORITY)**

The City of Los Angeles, County of Los Angeles, and County of San Diego, CA; Town of Palm Beach, FL; City of Atlanta, GA; City of Dubuque, IA; Anne Arundel County and Montgomery County, MD; Town of Southampton and City of White Plains, NY; City of Portland, OR; Henrico County and City of Virginia Beach, VA (“Coalition for Local Zoning Authority” or “Coalition”) hereby move to dismiss or deny the captioned petition of CTIA – The Wireless Association® (“CTIA”) seeking clarification of two sections of the Communications Act adopted twelve years ago. The petition should be dismissed because it fails to comply with Section 1.1206(a) of the FCC’s Rules.

If not dismissed, the petition must be denied because it contravenes the intent of Congress that the courts exclusively, not the Commission, interpret all but one of the provisions

of Section 332(c)(7) of the Act, 47 U.S.C. § 332(c)(7).<sup>1</sup> Even where the Congress did not wholly preclude FCC interpretation, as with Section 253 of the Communications Act, the petition should be denied because it fails to state a case for Commission intervention.

**I. PETITIONER HAS FAILED TO SERVE LOCAL AUTHORITIES WHOSE ACTIONS ARE “SPECIFICALLY CITED AS A BASIS FOR REQUESTING PREEMPTION.”**

Note 1 to Section 1.1206(a) of the Commission’s Rules reads in full:

In the case of petitions for declaratory ruling that seek Commission preemption of state or local regulatory authority and petitions for relief under 47 U.S.C. 332(c)(7)(B)(v), the petitioner must serve the original petition on any state or local government, the actions of which are specifically cited as a basis for requesting preemption. Service should be made on those bodies within the state or local governments that are legally authorized to accept service of legal documents in a civil context. Such pleadings that are not served will be dismissed without consideration as a defective pleading and treated as a violation of the ex parte rules unless the Commission determines that the matter should be entertained by making it part of the record under Sec. 1.1212(d) and the parties are so informed.

The CTIA petition seeks federal preemption of state and local regulatory authority by establishing federal deadlines for action on zoning applications and “deeming” these applications granted if the federal timetables are not met. Although CTIA later described its petition as merely seeking clarification, not preemption,<sup>2</sup> it is fatuous to imagine that setting deadlines for local zoning action will constitute anything less than preemption of statutes and ordinances allowing reasonable periods that happen to be longer than those proposed by CTIA.<sup>3</sup>

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<sup>1</sup> The one instance of jurisdiction shared between the FCC and the courts, Section 332(c)(7)(B)(iv), is not at issue in the CTIA petition.

<sup>2</sup> Opposition to Motions for Extension of Time at 3 (August 26, 2008).

<sup>3</sup> For example, Oregon’s process and timeline for review of wireless land use applications is governed by state law. ORS 227.178 provides in material part that if a city fails to take final

Moreover, the petition (at iii) specifically asks the FCC to

Preempt local ordinances and state laws that subject wireless siting applications to unique, burdensome requirements, such as those treating all wireless siting requests as requiring a variance.

Plainly, this is a request for preemption. Thus it is subject to Note 1 of Section 1.1206(a), which is not restricted to petitions seeking relief under Section 332(c)(7)(v).

The petition refers to multiple actions of local governments (Petition, 14-15, 25-27) as a basis for requesting preemption. The petition cannot evade Section 1.1206(a) by declining to identify the local governments.

Moreover, we believe that service should be made not only on those states and localities that are the subject of the petition but also on those whose actions are identified as warranting preemption. We believe that this will enhance our ability to resolve such petitions in the public interest by giving the relevant state or local governments the opportunity to respond in a timely manner to the allegations made.<sup>4</sup>

In addition, even before the enactment of Note 1 to Section 1.1206(a) with its particular mention of Section 332(c)(7), the Commission had established special notice requirements for petitions involving Section 253.<sup>5</sup> CTIA's petition invokes Section 253 as well as Section 332 as a basis for preemption. Thus, CTIA was required to serve the targeted local governments based on Section 253 as well as Section 332.

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action on a land use application within 120 days after an application is deemed complete, the applicant may apply to court for a writ of mandamus to compel approval of the application. This would presumably be preempted by CTIA's desired relief.

<sup>4</sup> Memorandum Opinion and Order, GC Docket 95-21, FCC 99-322, released November 9, 1999, ¶ 29 (emphasis added).

<sup>5</sup> *Id.* ("We believe that the ex parte rules should be amended to make this requirement [of service on local governments] applicable to all preemption petitions and not only for Section 253 petitions").

In short, CTIA's failure to serve its petition on local governments whose actions are specifically cited as a basis for requesting preemption means that the petition must be dismissed "without consideration as a defective pleading."<sup>6</sup>

**II. CONGRESS INTENDED THAT ONLY THE COURTS, NOT THE COMMISSION, INTERPRET THE SUBPARAGRAPHS OF SECTION 332(C)(7) AT ISSUE HERE.**

The language of Section 332(c)(7) was added by Section 704 of the Telecommunications Act of 1996 ("TCA").<sup>7</sup> It was fashioned in a conference of the House and Senate, which had produced differing versions of the TCA.<sup>8</sup> The conferees decided against a House proposal for an FCC-negotiated rulemaking "to develop a uniform policy . . . for the siting of wireless tower sites." Instead, Section 332(c)(7)(A) declares resoundingly that, except for four limitations at (7)(B),

nothing in this 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.<sup>9</sup>

A key passage in the Conference Report explained the alternative ultimately adopted:

It is the intent of the conferees that other than under Section 332(c)(7)(B)(iv) . . . the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the

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<sup>6</sup> Note 1 to 47 C.F.R. § 1.1206(a).

<sup>7</sup> P.L. 104-104, 110 Stat. 56, February 8, 1996.

<sup>8</sup> H.R. Report 104-458. 104<sup>th</sup> Cong. 2d Sess., 207-209.

<sup>9</sup> The declaration is reinforced by Section 601(c) of the TCA, stating that "the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided . . ."

placement, construction or modification of [commercial mobile service] facilities shall be terminated.<sup>10</sup>

Note 1 to Section 1.1206(a) acknowledges this limited role of the FCC in resolving disputes arising under Section 332(c)(7). The first clause is directed generally at petitions seeking preemption of state or local regulatory authority. The second clause refers to petitions for relief under Section 332(c)(7)(B)(v). The only petitions for relief that can be entertained by the FCC under (B)(v) are those alleging local or state governmental actions “inconsistent with clause (iv).” Clause (iv) concerns the environmental effects of radio frequency emissions and is not at issue in the CTIA petition.

The petition seeks relief under (B)(i) and (B)(ii), but Congress has left such requests solely to the courts. This exclusive assignment of responsibility is recognized on the Commission’s Web site:

Allegations that a state or local government has acted inconsistently with Section 332(c)(7) are to be resolved exclusively by the courts (with the exception of cases involving regulation based on the health effects of RF emissions, which can be resolved by the courts or the Commission). Thus, other than RF emissions cases, the Commission's role in Section 332(c)(7) issues is primarily one of information and facilitation.<sup>11</sup>

The purpose of a declaratory ruling is to terminate a controversy or remove uncertainty.<sup>12</sup> CTIA’s manifest purpose is to terminate controversies in which its members are adverse to local

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<sup>10</sup> H.R. Report No. 104-458, at 208. As noted below, the exception for subparagraph (7)(B)(iv) precludes local or state regulation of the environmental effects of radio frequency emissions from a personal wireless service antenna so long as the facility meets preemptive federal safeguards against such emissions.

<sup>11</sup> <http://wireless.fcc.gov/siting/local-state-gov.html>

<sup>12</sup> Section 1.2 of the Rules, citing Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(d).

or state governments. Removal of uncertainty is not an independent ground of the request, but is subordinate to terminating controversies by settling real disputes.

Nor is the petition circumscribed by its focus on Sections (B)(i), (ii) and (v). The vast majority of cases decided thus far in the courts have delved broadly into the meaning of unreasonable discrimination and prohibition under (B)(i)(I) and (II) and the application of (B)(iii), with its requirements of substantial evidence and decisions in writing based on a written record. Were the Commission to take up CTIA's invitation to interpret some subparagraphs of the statute, the agency could not avoid construing the rest of paragraph (c)(7) if asked to do so. Essentially, the FCC would violate the congressional instruction that the courts take an exclusive part in settling disputes. The Commission would take on the role of a "national zoning board," a role that it has long refused to play.<sup>13</sup>

**A. CTIA Has Failed to Show that Processing Times Exceeding CTIA's Proposed Standards are Unreasonable.**

It is no answer to say, as CTIA claims in its Opposition to motions for extension of time (note 3, *supra*), that it seeks only clarification to remove uncertainty, and not preemption to terminate controversy, over reasonable periods of time to reach local zoning decisions. Any clarification by the Commission setting shorter deadlines for zoning actions than those in local ordinances would amount to across-the-board preemptive resolution of disputes that Congress assigned exclusively to the courts. It is manifestly unfair to ask the Commission to determine the reasonableness of periods for zoning actions: zoning laws vary from state to state and the Commission has no experience or expertise in these processes.

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<sup>13</sup> *Preemption of Local Zoning and Other Regulation of Receive-Only Satellite Earth Stations*, 51 Fed. Reg. 5519 (Feb. 14, 1986) at ¶¶ 23, 27 and 39.

Moreover, the structure of Section 332(7)(B)(ii) does not lend itself to the pat 45-day and 75-day deadlines CTIA proposes. The plain language of the statute provides that the “reasonable period of time” for local action may take into account “the nature and scope” of the wireless service provider’s request. Thus, the reasonableness of a time for action depends on the volume, complexity and other features of the application (including its initial completeness), and these variables cannot always be fairly accommodated within the fixed intervals requested in the petition.<sup>14</sup> Even applications to co-locate on existing facilities can vary in ways that might extend the time of review.<sup>15</sup> Thus, for example, a community that normally processes applications within twenty days might reasonably find that the nature and scope of a particular request required more than 45 (or 75) days. Adopting CTIA’s deadlines for action would, in effect, rewrite Section 332(c)(7)(B)(ii) because Congress, by using the term “reasonable period,” recognized that in zoning reviews, different periods of time may be reasonable based on the facts and circumstances of each case.<sup>16</sup>

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<sup>14</sup> EIA/TIA Standard 222(G), “Structural Standards for Steel Antenna Towers and Antenna Supporting Structures,” frequently cited in municipal ordinances, discusses variables such as wind, icing, earthquakes and sheer added weight that can complicate co-locations as well as new construction.

<sup>15</sup> For example, in its recently adopted ordinance, at Section 232(j), the City of Virginia Beach, VA makes co-locations permitted rather than “conditional” uses unless the tower is extended in height or the number of antennas exceeds the approved capacity of the tower. E-mail to Rick Ellrod from Deputy City Attorney Bill Macali, September 5, 2008. Similarly, the City of Wadsworth, Ohio places on a “fast track” – waiving notifications and public hearings – co-location applications in commercial and industrial districts that do not add more than 20 feet to the height of the existing tower. E-mail to Rick Ellrod from Jeff Kaiser of the City of Wadsworth, September 5, 2008. Of course, the time required to review a request for co-location may also depend on the nature of the structures that are associated with the additions to the towers.

<sup>16</sup> The chart at Exhibit II from Arlington County, Virginia, covering 37 zoning actions August 2007-August 2008, shows but a single application that required more than 75 days to decide. Given the average processing time of 18 days for the 36 other applications, the County

Nor can a mere recitation of actual times elapsed, even if they were to be substantiated, prove that local communities are at fault. Examples of several proceedings that have been protracted by the carrier-applicants themselves are found at Exhibit I. And already present on this record are reminders from others that the length of a zoning review can be extended by federal requirements, such as those of the Federal Aviation Administration ("FAA") or the Advisory Commission on Historic Preservation. Important state environmental rules designed to protect sensitive coastal and other areas, and other state requirements, may also come into play. These requirements, which are not under the control of local governments, can add to the time required to review an application, but have nothing to do with CTIA's allegations of municipal delays.

One of the Coalition members, Los Angeles County, notes that under the CTIA proposal, neither the California Environmental Quality Act ("CEQA") nor the Permit Streamlining Act could operate with the intended neutrality toward applications of different types. Under CTIA's approach, wireless facilities would be placed in front of all other land use decisions regardless of the relative dimension or impact of such projects. Under the CTIA "shot clock," wireless applications would not be given the appropriate level of review and, in many cases, required CEQA review could not be completed. Congress did not intend to effectively eliminate any meaningful zoning and land use review to favor one given form of technology, wireless communications.<sup>17</sup>

Frequently local zoning applications must be published in newspapers of record, and abutting landowners or other neighbors to a site must be notified. In that event, some time

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would hardly deserve a penalty of "deemed granted" at 75 days for the one application that took 80 days to decide.

<sup>17</sup> Additional discussion of CEQA and the California state permitting law may be found at Exhibit V hereto.

allowances must be made for citizen response. In addition, there is ample testimony here about instances when lengthened review can produce better results than would a prescribed rush to judgment.<sup>18</sup>

Congress emphasized that it did not expect “preferential treatment” for wireless siting applications:

If 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. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests or to subject their requests to any but the generally applicable time frames for zoning decision.<sup>19</sup>

Even if the Commission were empowered to settle disputes over delays in zoning decisions – which is not the case – the FCC could not require that the most complex actions must be resolved in no more than 30 days from the deadline for action on simpler applications without creating exactly the sort of “generally applicable time frame” that Congress precluded.

Instead, Congress chose to match the flexibility in (B)(ii) with a parallel latitude in (B)(v). At any time the wireless provider comes to believe that delay in action on its application constitutes a “failure to act,” it need only mark that point – presumably by written warning to the

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<sup>18</sup> See, e.g., Letter of Mayor Steven M. Berman, Mayor of Gilbert, AZ, September 15, 2008 (“A one-size-fits-all approach will undermine the positive outcomes that can be achieved through zoning processes administered at the local level.”). See also Comments of the Cable and Telecommunications Committee of the New Orleans City Council, 12 (“The proposed ‘shot clock’ rules are backwards . . . if the applicant holds the ball too long, then the applicant may be rewarded with automatic site approval.”)

<sup>19</sup> Report No. 104-458, at 208. At the same page, the conferees allowed for local flexibility “to treat facilities that create different visual, aesthetic or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services.”

zoning authority – and file for judicial relief within 30 days. The wireless provider does not face, as CTIA claims (Petition, 13), a “Hobson’s choice” without viable alternatives.

As will be shown below, the courts have offered ample guidance on both “reasonable period” under (B)(ii) and “failure to act” under (B)(v). In most cases, the local zoning authority will also have created a record through its pace of action on applications of varying degrees of complexity in its community. That record becomes a set of benchmarks the wireless provider can use to measure its own treatment. There is little chance that the 30-day clock for appeal in (B)(v) will run out on the wireless provider because the statute, in effect, allows it to start the clock when it chooses.<sup>20</sup>

**B. The Exclusive Jurisdiction of the Courts Extends to Disputes Arising Under the “Prohibition of Service” Clause.**

CTIA asks the Commission to declare 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.” (Petition, 31) The Commission is no more empowered to resolve this dispute over the meaning of (B)(i) than to settle controversies arising from (B)(ii) and (v). Rather, the issue has been left to the courts. As CTIA acknowledges, there is yet no final judicial answer. However, the disagreement among U.S. Courts of Appeal does not mean that the FCC may step in to resolve the issue; it is simply the normal consequence when Congress chooses to rely upon

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<sup>20</sup> However, a disappointed applicant cannot have it both ways by appealing a denial as an unreasonable delay. *New York SMSA Ltd. Partnership v. Town of Clarkstown*, 99 F.Supp.2d 381, 395 (S.D.N.Y. 2000) (“By waiting until after the final decision was rendered, Plaintiffs forewent a claim of ‘unreasonable delay.’”)

judicial remedies. Ultimately, any significant disputes can be resolved through a petition for certiorari to the Supreme Court.<sup>21</sup>

In any event, the judicial differences over the “one-provider” rule are distinctly secondary to the courts’ agreement that prohibitions of service can only be measured in terms of “significant gaps” in service or by the absence of feasible alternatives. For example, relatively confined “dead spots” do not qualify as significant.<sup>22</sup> The courts agree that the mere fact that a community denies a permit for a provider’s first or cheapest site choice does not amount to a prohibition; courts have required some showing that alternatives are not available. And the provider’s search for alternative sites must be thorough.<sup>23</sup>

Thus, for CTIA to say (Petition, 30) that any “given area,” no matter its size, must be declared open to multiple wireless service providers conflicts with the courts’ agreement that the concept of prohibition must have some boundaries. These judicial interpretations have rarely, if ever, arisen in the context of bans on service in entire “markets.” Thus, CTIA’s interchangeable use of “area” and “market” (Petition, 30-35) inflates the alleged problem beyond all recognition.

### **III. THE FCC IS NOT FREE TO INTERPRET A STATUTE TO RESOLVE DISPUTES WHERE CONGRESS HAS REFUSED IT THAT AUTHORITY.**

The CTIA petition is not helped by its reference (21-22) to the recent decision of the U.S. Court of Appeals for the Sixth Circuit upholding the Commission’s authority to interpret Section

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<sup>21</sup> Sup. Ct. R. 10(a).

<sup>22</sup> *Second Generation Props., LP v. Town of Pelham*, 313 F.3d 620, 631 (1st Cir. 2002); *Voicestream PCS I, LLC v. City of Hillsboro*, 301 F. Supp. 2d 1251, 1261 (D. Or. 2004).

<sup>23</sup> *USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines*, 465 F.3d 817, 825 (8th Cir. 2006). See also *Voicestream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 835 (7th Cir. 2003).

621(a) of the Communications Act, 47 U.S.C. §541(a).<sup>24</sup> There, it might have been argued that Congress was silent on what might constitute an “unreasonable refusal to award” a competitive cable TV franchise. Here, however, Congress was never silent on interpreting subsections 332(c)(7)(B)(i)-(iii) and (v). In no uncertain terms, the national legislature said that the courts, not the FCC, were to have exclusive jurisdiction over all disputes arising under Section 332(c)(7)(B) – with the single specified exception of (B)(iv), where jurisdiction could be shared with the FCC.

Whatever the degree of freedom allowed the Commission to interpret the Communications Act as a general matter, it cannot extend to sections specifically ruled off-limits by Congress.<sup>25</sup> Because the CTIA petition is fundamentally a request that the FCC resolve disputes arising under (B)(i) and (ii) and (B)(v), it must be dismissed or denied because the agency lacks the authority to hear the case.

**IV. EVEN IF THE COMMISSION COULD ENTERTAIN THE PETITION AS TO SECTION 332(C)(7), THE ALLEGATIONS PRESENTED DO NOT COMPEL FCC ACTION.**

At page 10, the petition recites a remarkable history of growth in personal wireless services since the adoption of the Telecommunications Act of 1996 – subscribership up nearly 700%, penetration increasing from 13 to 84% of the U.S. population. The number of cell sites has expanded by tenfold. (Petition, 10) According to CTIA, the same story is beginning to be written in so-called wireless broadband services. It is difficult to divine from these statistics any

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<sup>24</sup> *Alliance for Community Media v. FCC*, 529 F.3d 763 (6<sup>th</sup> Cir. 2008).

<sup>25</sup> *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374-375 (1986) (“An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do”).

obstruction of personal wireless service by local zoning authorities. CTIA's own success story conflicts with its claim of widespread obstruction. This is why some of the parties seeking more time to comment (*see* n.28) have asked CTIA (under FCC order if necessary) to identify the zoning authorities its petition accuses of obstruction and delay.

CTIA claims to be concerned for three reasons: (1) growth has been uneven across the country; (2) rigorous build-out requirements for broadband deployment put an additional premium on speed of local approvals; and (3) public safety services, including enhanced 9-1-1 access, increasingly depend on the density and capacity of antenna placements. (Petition, 10-13)

We focus below on the first of these points, because the last two can be disposed of at once. The claim at (2) that local zoning authorities cannot match their schedules to the 5-year and 10-year build-out requirements of wireless broadband licensees is sheer speculation at this stage, and the record of narrowband cellular deployment is to the contrary. The claim at (3) provides no evidence of public safety hardship arising from zoning delays. Indeed, it is counter-intuitive that local governments would jeopardize their own public safety systems and services by failing to act on essential wireless applications.

**A. There Is No Credible Support for CTIA's Claim of "Egregious Delays."<sup>26</sup>**

The petition's assertion of uneven growth in personal wireless services attributable to unreasonable behavior by local zoning officials remains almost entirely undocumented. CTIA has not supplied the "compiled data on siting from multiple members" to which the petition refers at page 15 and elsewhere. Of the "more than 3,300 wireless siting applications pending

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<sup>26</sup> Petition, 14. In contrast, Exhibit III hereto provides in question-and-answer form information on the experience of one Coalition member, the City of Portland, with wireless tower siting and antenna placement. The exhibit reflects, at minimum, a conscientious effort to avoid delays in application processing.

before local jurisdictions,” we know nothing. We do not know how this information was gathered or how the details were verified, how many jurisdictions are included, how long applications have been pending, how many are relatively simple co-locations and how many are more complex, or how vigorously the applications have been prosecuted or how often amended.<sup>27</sup>

Local government representatives seeking more time to respond in this proceeding than the 30 and 15 days initially allotted for comment and reply have observed that the instances cited at 14-15 and 25-27 of the petition are unidentified. This deprives the local governments involved of a fair opportunity to rebut CTIA’s claims (arguably a violation of due process), and deprives the Commission of an opportunity to have CTIA’s unsupported claims critically examined. Without specific details from CTIA, neither the accused local governments nor any other potential commenters – nor the Commission – are able to evaluate CTIA’s claims of delay or refusal to act.<sup>28</sup>

**B. There Is No Indication that the Courts to Which Congress Assigned Dispute Resolution Under Section 332(C)(7)(B) Have Been Unfair or Derelict in Their Duties.**

The remarkable fact about the judicial record on these wireless siting cases is how few of them involve unreasonable delay pursuant to (B)(ii).<sup>29</sup> After a handful of decisions in the early

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<sup>27</sup> Indeed, the CTIA petition contains no declarations to support any of the facts alleged, other than a one-sentence *pro forma* statement by a CTIA attorney.

<sup>28</sup> Motion of Montgomery County, Maryland, August 22, 2008; Motion of National Association of Telecommunications Officers and Advisors, August 25, 2008. Not even in its *ex parte* visits with Commissioners’ Offices has CTIA deigned to identify the local authorities it accuses. *See, e.g.*, Presentation to Renee Crittendon, September 5, 2008, slide 5 of 5.

<sup>29</sup> At Exhibit IV hereto is an annotated list of federal court orders where at least one of the issues alleged was local zoning delay. On average, that is just one decision per year since 1996.

years (1996-99) on the question of “moratoria,”<sup>30</sup> the focus of such challenges shifted to prohibition of service, unreasonable discrimination pursuant to (B)(i), and absence of substantial evidence under (B)(iii).

In the *Masterpage* case cited by the petition (n. 70, 28-29), the ruling court was appalled by a greater than two-year delay in accepting the wireless siting application – owing to an over-extended moratorium – and a further two years in which the lack of a decision prompted Masterpage to seek judicial relief. Such cases are precisely the reason for Congress’ inclusion of subparagraph (B)(v) as a remedy for “failure to act.” However, this one example, or even a few, does not suggest a need for Commission intervention against the intent of Congress. The list of cases decided under (B)(i) is lengthy, but the petition provides no indication that the courts are overwhelmed or unable to decide cases promptly.<sup>31</sup>

## **V. LOCAL ZONING VARIANCES ARE NOT, PER SE, PROHIBITIONS UNDER SECTION 253.**

### **A. Section 253 Does Not Apply to Local Authority Over Wireless Facility Siting.**

Congress intended that only Section 332, and not Section 253, would affect local government authority over tower siting. Section 332(c)(7) makes this clear: “Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a . . . local

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<sup>30</sup> See, e.g., *Sprint Spectrum v. City of Medina*, 924 F.Supp.1036 (W.D.Wash. 1996). See also information about the earlier CTIA petition at <http://wireless.fcc.gov/siting/local-state-gov.html> and <http://www.fcc.gov/statelocal/agreement.html>.

<sup>31</sup> A rough indicator may be found in the annotations for Section 332 in the United States Code Annotated. Even there, however, the decisions involving Paragraph (c)(7) are not compiled under “prohibition of service,” as such, but under other key headings such as “unreasonable discrimination” and “alternative sites.” (Thomson/WestGroup, 2001, cumulative annual pocket part 2008.

government . . . over decisions regarding the placement, construction, and modification of personal wireless facilities.” 47 U.S.C. § 332(c)(7).<sup>32</sup>

This language makes Section 332 the sole provision of the Act affecting local authority over zoning, and expressly prohibits the application of other provisions of the Chapter, which includes Section 253. CTIA tries to distinguish between zoning decisions and zoning ordinances, and seems to claim that only the latter are subject to Section 253. Petition at 35. That argument makes no sense textually: the plain language of Section 332(c)(7) protects not just decisions, but anything that could “limit or affect” the “authority” to make decisions. The authority to make decisions derives from ordinances and regulations (and state statutes). To preempt such requirements, as CTIA asks the Commission to do under Section 253, is to directly “limit or affect” local authority to make decisions. As a result, the FCC may not interpret or apply Section 253(a) to zoning in this proceeding, or any other.<sup>33</sup>

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<sup>32</sup> When it wanted to carve out Section 253 from such a preservation clause, Congress demonstrated that it knew how to do so. *See* 47 U.S.C. § 252(e)(3) (“Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit . . .”); 47 U.S.C. § 252(f)(2) (“Except as provided in section 253, nothing in this section shall prohibit . . .”). The fact that Section 253 itself contains an exemption for Section 332(c)(3) does not imply that Section 253 does apply to Section 332(c)(7). Section 332(c)(3) was adopted prior to Section 253, and Congress simply chose to include the exemption as part of the addition of Section 253, rather than as an amendment to Section 332(c)(3). Because Section 332(c)(7) contains its own language that makes *all* provisions of Title II of the Act inapplicable, a comparable exemption in Section 253 was unnecessary and would not have accomplished Congressional goals, as Congress meant for the preservation clause to protect broadly against application of Section 253 and other provisions of the Act to zoning authority.

<sup>33</sup> The statute-at-large uses the terminology “nothing in this Act,” a reference to the Communications Act of 1934, as amended. 110 Stat. 56, 151 (1996). Of course, both Section 253 and Section 332 are sections of that Act.

CTIA's reliance on *Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700, 713 (9th Cir. 2007),<sup>34</sup> as contrary authority was misleading at best. By the time the CTIA petition had been filed, the Ninth Circuit had already issued an order stating that it would rehear the case *en banc* and prohibiting citation of the decision cited by CTIA "to any court of the Ninth Circuit." *Sprint Telephony PCS, L.P. v. County of San Diego*, 527 F.3d 791 (9th Cir. 2008). Of course, the effect of that order was to render the initial decision a legal nullity, and to give the appeal to the *en banc* panel. The *en banc* decision issued by the Ninth Circuit found it unnecessary to decide whether Section 253 applied to zoning challenges, because it found the Sprint challenge failed under either standard. The *en banc* decision, in other words, came to conclusions that are the opposite of those reached in the decision cited by CTIA. *Sprint Tel. PCS v. County of San Diego*, 2008 WL 4166657 (9th Cir. 2008).<sup>35</sup>

**B. Even If Section 253 Were Applicable, the FCC May Not Declare That All Local Zoning Variances that Automatically Require a Carrier to Seek a Variance Run Afoul of Section 253.**

Even if Section 253 could be read to affect local zoning decisions regarding the placement of personal wireless facilities (which, as shown, it may not), Section 253 cannot be

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<sup>34</sup> *T-Mobile USA v. City of Anacortes*, 2008 U.S. Dist. LEXIS 37481, \*8-9 (W.D. Wash. 2008), cited by CTIA at n.89, simply relied on the earlier three-judge panel decision in *Sprint Telephony*, and thus provides no additional support for the CTIA position.

<sup>35</sup> Congress provided further evidence that Section 253 should not apply to tower siting disputes in Section 253(d), which contemplates preemption by the FCC. In contrast, Section 332(c)(7) plainly contemplates that, aside from RF emissions issues, any preemption would arise exclusively via judicial action.

applied to bar all local ordinances that would require a carrier to seek a variance, as CTIA requests.<sup>36</sup>

**1. The Plain Language of Section 253(a) Requires a Challenger to Demonstrate that a Local Requirement Prohibits, or Has the Effect of Prohibiting, its Ability to Provide Service.**

CTIA's argument is rooted in a misreading of the plain language of Section 253(a). CTIA relies exclusively on decisions that can be traced back to that Circuit's decision in *City of Auburn v. Qwest Corporation*, 260 F.3d 1160 (9th Cir. 2001). See Petition at nn.88, 89, 91, 92, 94. However, on September 11, 2008, an *en banc* panel for the Ninth Circuit overturned *Auburn* and its progeny, concluding that those decisions were based on an erroneous reading of the plain language of Section 253. *Sprint*, 2008 WL 4166657, at \*6. In *Sprint*, the Ninth Circuit noted that *Auburn* had previously interpreted Section 253(a) to bar any local regulation that "may" (*i.e.*, "might") prohibit the ability to provide a service. *Id.* at \*4. If that were a correct interpretation, the court explained, Section 253(a) would preempt any local regulation that placed a burden on a provider, whether the burden arose to the level of a prohibition or not, and it would also preempt local laws that leave a locality discretion to bar provision of services under certain circumstances, even if the local laws had been applied in a manner completely consistent with Section 253. *Id.* (quoting *Auburn*, 260 F.3d at 1176). Indeed, the mere existence of discretion had been read by some courts to violate the test in *Auburn*.

It is this *Auburn* test on which the CTIA petition relies. As we show below, CTIA does not show any instance or any particular ordinance that actually or effectively prohibits entry, nor

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<sup>36</sup> CTIA's is an odd request, since an ordinance that allows for a variance, by definition, creates a circumstance under which there is no "prohibition" (and therefore, no violation of the federal statute). CTIA's argument might have been more plausible had it been aimed at ordinances that *forbid* variances, not at those that require (and allow for) them.

does it suggest anything more than that the variance process involves costs (which, of course, was obvious to Congress when it endorsed the local zoning process).

As the Ninth Circuit pointed out, however, the *Auburn* test on which CTIA relies cannot be squared with a proper reading of the plain language of Section 253(a). A plaintiff “must establish either an outright prohibition or an effective prohibition on the provision of telecommunications services; a plaintiff’s showing that a locality could *potentially* prohibit the provision of telecommunications services is insufficient.” *Id.* at \*6 (9th Cir. 2008) (emphasis in original). In so holding, *Sprint* followed the Eighth Circuit’s decision adopted last year in *Level 3 Communications v. City of St. Louis*, 477 F.3d 528, 533 (8th Cir. 2007).

The FCC has long adopted the proper reading of Section 253’s plain language, as the Ninth Circuit noted. *Sprint*, 2008 WL 4166657 at \*5. In a 1997 decision, the FCC explicitly rejected an argument that Section 253 preempts on a *per se* basis, and correctly ruled that the statute requires a factual showing:

We cannot agree that the City’s exercise of its contracting authority as a location provider constitutes, *per se*, a situation proscribed by section 253(a). The City’s contracting conduct would implicate section 253(a) only if it materially inhibited or limited the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment in the market for payphone services in the Central Business District. In other words, the City’s contracting conduct would have to *actually prohibit or effectively prohibit* the ability of a payphone service provider to provide service outdoors on the public rights-of-way in the Central Business District. As described above, the present record does not permit us to conclude that the City’s contracting conduct has caused such results. If we are presented in the future with additional record evidence indicating that the City may be exercising its contracting authority in a manner that arguably “prohibits or has the effect of prohibiting” the ability of payphone service providers other than Pacific Bell to install payphones outdoors on the public rights-of-way in the Central Business District, we will revisit the issue at that time.

*In re Cal. Payphone Ass'n*, 12 F.C.C.R. 14191, 14209 at ¶ 38 (emphasis added). The Commission later reinforced the point:

With respect to a particular ordinance or other legal requirement, it is up to those seeking preemption to demonstrate to the Commission that the challenged ordinance or legal requirement prohibits or has the effect of prohibiting potential providers ability to provide an interstate or intrastate telecommunications service under section 253(a). Parties seeking preemption of a local legal requirement such as the Troy Telecommunications Ordinance must supply us with *credible and probative evidence* that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c).

*In the Matter of TCI Cablevision of Oakland County, Inc., Memorandum Opinion and Order*, FCC 97-331, 12 F.C.C.R. 21,396 (September 19, 1997). The Commission instructed that petitioners making challenges under Section 253 should describe, among other things: "specific telecommunications service or services [that] petitioner [is] prohibited or effectively prohibited from providing," "what group or groups of actual or potential customers are being denied access to the service or services," and "what are the factual circumstances that cause the petitioner to be denied the ability to offer the relevant telecommunications service or services." *Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act*, FCC 98-295, 13 F.C.C.R. 22970, 22,971-72 (November 17, 1998).<sup>37</sup>

**2. CTIA Fails to Show that the Requirements in Question "Prohibit or Have the Effect of Prohibiting" a Carrier's Ability to Provide Service.**

CTIA's petition falls far short of demonstrating that ordinances requiring a variance "prohibit or have the effect of prohibiting" a carrier's ability to provide service. The petition

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<sup>37</sup> A rule preempting ordinances that require variances on a *per se* basis would be plainly inconsistent with Congress's intent. H.R. Conf. Rep. 104-458, 208 (1996) ("If 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").

does not challenge any particular community's requirement *as applied* to a particular provider. Instead, the petition challenges *all* ordinances that require a variance *on their face*. Petition at 36 (“The FCC should declare that any ordinance that automatically requires a wireless carrier to seek a variance, regardless of the type and location of the proposal, is preempted”). As the Supreme Court has explained, “A facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Sprint*, 2008 WL 4166657 at \*7.

CTIA's petition falls woefully short of meeting this burden. CTIA argues, without citation, that “[a]pplicants seeking variance of zoning ordinances *generally* face a much more onerous application process as well as mandatory public hearings.” Petition 36 (emphasis added). CTIA speculates, without any evidence or citation, that the height requirement of an unnamed New Hampshire community “could” effectively preclude a provider from serving an entire community. *Id.* It points out that an unnamed Vermont community's setback requirement “effectively requires a variance,” but then CTIA fails to offer any evidence whatsoever about the “effect” of such a requirement.

In sum, CTIA never even attempts to show, as it must, that variance processes *always* impose a demonstrated “prohibitory” burden. As the Ninth Circuit explained in rejecting a similar argument:

Although a zoning board could conceivably use these procedural requirements to stall applications and thus effectively prohibit the provision of wireless services, the zoning board equally could use these tools to evaluate fully and promptly the merits of an application. *Sprint* has pointed to no requirement that, on its face, demonstrates that *Sprint* is effectively prohibited from providing services.