October 31, 2008

VIA ELECTRONIC COMMENT FILING SYSTEM (ECFS)

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

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

Dear Ms. Dortch:

This *ex parte* notice is filed on behalf of the National Association of Telecommunications Officers and Advisors ("NATOA"). On October 29, 2008, NATOA, represented by Libby Beaty, NATOA Executive Director, John D. Russell, NATOA Government Relations Advisor and Lani Williams, Local Government Lawyer's Roundtable, Counsel to NATOA, met with Commissioner Adelstein and Renee Roland Crittendon, Legal Advisor to Commissioner Adelstein, to discuss the issues raised by the *Petition*, including the *Petition's* request for preemption of variance requirements. We also discussed the text of, and congressional intent behind, § 332(c)(7)(B), as well as the factual context surrounding CTIA's *Petition*, as described in the attached presentation.

Pursuant to Commission rules, please include a copy of this notice in the record for the proceeding noted above.

Sincerely,
/s/ Lani Williams
Lani Williams
Local Government Lawyer's Roundtable
Counsel to NATOA

cc: Commisssioner Adelstein
Renee Crittendon, Legal Advisor to Commissioner Adelstein

PETITION FOR DECLARATORY RULING TO "CLARIFY" SECTIONS 332(c)(7) AND 253(a)

Presentation to Commissioner Adelstein and Renee Crittendon

National Association of Telecommunications Officers and Advisors

October 29, 2008

Background

- The text of 47 U.S.C. § 332(c)(7) clearly preserves local government authority over wireless facility placement, to the exclusion of other code sections.

- 47 U.S.C. § 253 was designed to address other aspects of local government authority over telecommunications services.

- The Conference Report for Section 332(c)(7) anticipated that local governments be able to use their **usual** land use planning procedures and time frames in reviewing wireless facility placement applications.

- The Conference Report states that the intention of Section 332(c)(7)(B)(i)(II) is that *bans or policies*, as opposed to individual decisions, that have the effect of prohibiting personal wireless services or facilities not be allowed.

- The Conference Report specifically contemplated the use of variances, public hearings and other comment processes, stating that "the time period for rendering a decision [in such cases] will be *the usual period* under such circumstances."

- The Conference Report states that Congress did not intend "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 decisions*."

Section 332(c)(7)'s Clear Language Shows the Petition Should be Denied

- Section 332(c)(7), titled "Preservation of Local Authority," preserves local government authority "over decisions regarding the placement, construction, and modification of personal wireless service facilities, except to the extent *specifically provided for in § 332(c)(7)."*
- Section 332(c)(7) precludes application of Section 253.
- Section 332 provides that *regulations* cannot prohibit or have the effect of prohibiting the provision of personal wireless services
- Section 332 requires local governments to act on requests for authorization to place, construct, or modify personal wireless service facilities within a *reasonable period of time* after the application is duly filed, *taking into account the nature and scope of such request.*
- Local governments can only deny requests on the basis of *substantial evidence.*
- Denials must be placed in writing.
- Section 332 (c)(7) requires that anyone aggrieved by an action or failure to act to file a court action within 30 days of the event.

No “Delay” in Processing Applications Exists

- Some wireless facility siting applications can be dealt with quickly, while others require more extensive review and input from the affected community.
- Processing applications methodically so that everyone’s rights are protected does not equate with “delay.”
- True “delay,” a factual rarity, can be and has been ably handled by the courts, as Congress envisioned.
- Congress recognized that “one size” does not fit all and legislated accordingly.
- CTIA and its supporters rely on one-sided anecdotes, rarely identifying local governments and using “fear of retribution” as a screen to prevent full investigation of their allegations.
- CTIA claims to understand what a “failure to act” is, but not when it occurs. The two are mutually exclusive positions.

The Effects of the Proposed "Clarifications" Cannot Be Justified

- Many zoning codes require notice and hearings on land use applications to protect the due process rights of both the applicant and nearby property owners.
- In addition, planning and zoning boards are charged with ensuring that development is consistent with neighborhood character and aesthetics, thereby protecting property values and citizens' investments in their property.
- The time limits and "deemed granted" and judicial inference remedies proposed by CTIA violate the due process considerations at the heart of local zoning processes.
- The consequence of the time limits and remedies is that citizens will not be able to have their voices heard regarding the impact of wireless facilities on their property.
- Public property will also be affected and the proposed remedies may well work a taking of public property when applications are "deemed granted."
- To suggest that local zoning bodies can avoid the "deemed granted" or judicial inference remedies is no answer, as 332(c)(7) requires "substantial evidence" to support denials, which local governments may not be able to gather in the 45/75 day time limits.

CTIA's Own Petition Shows There Is No Need for FCC Action

- In 1996, there were approximately **22,600** cell sites.
- At the end of 2007, there were **over 213,000.**
- There are approximately 39,000 cities, counties, towns, and villages in the United States, giving each local government in the United States on average 5 wireless facilities.
- CTIA asserts that its members have 760 applications that have been pending for over a year.
- These 760 applications represent at most **.4 percent** of the applications that have been filed since Sec. 332 was enacted.
- CTIA itself terms the growth wireless services and sites "exponential" and recognizes that many local governments act "promptly."
- There is no need for FCC "clarification" of unambiguous terms.

JOURNAL

PROMOTING COMMUNITY INTERESTS IN COMMUNICATIONS SPRING 2007 VOLUME 15, ISSUE 1

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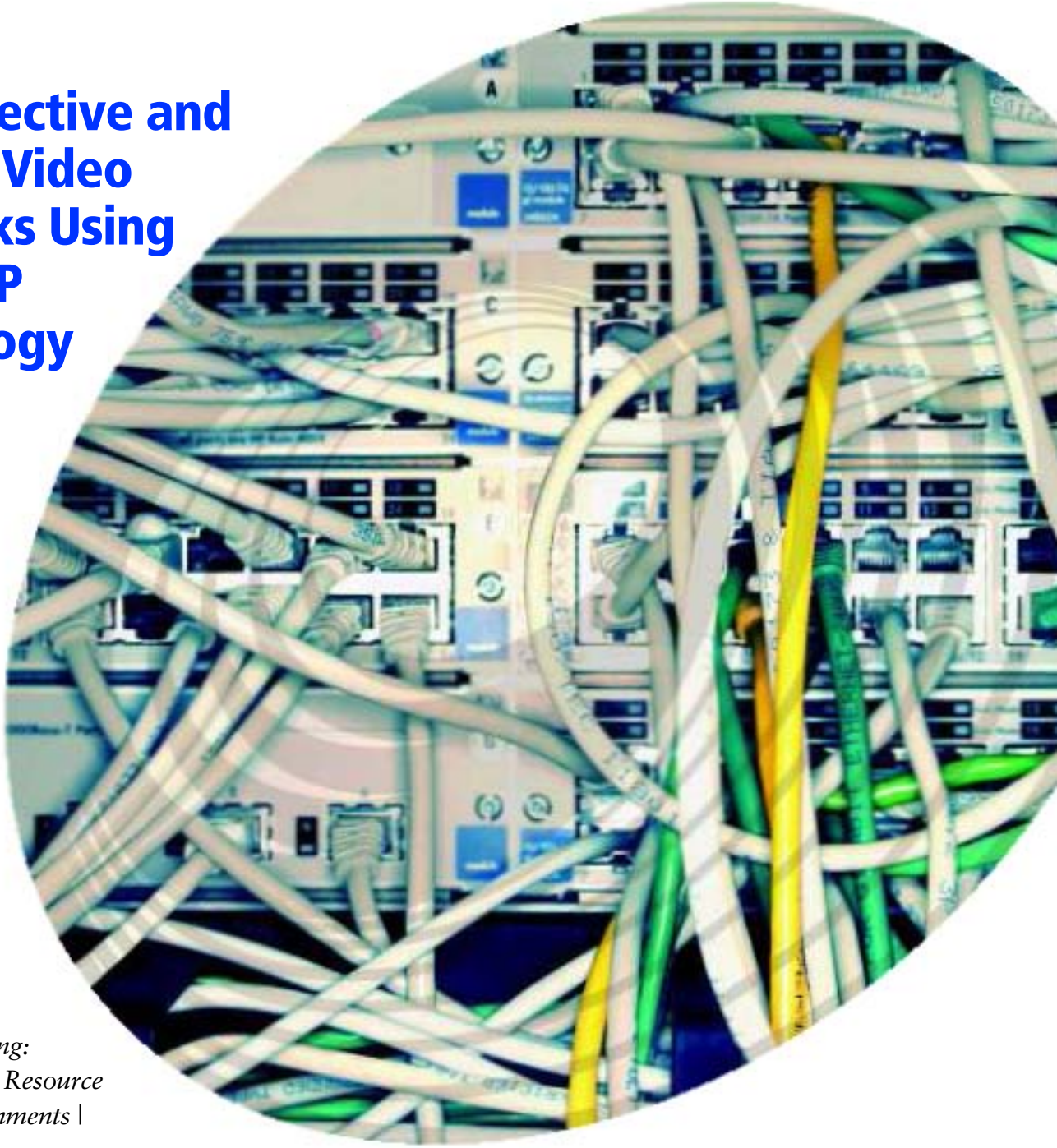

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Being Heard - Not Seen: A Case Study On Locating Cellular Antennas on Public Property

By Margaret Somereve

"Can you hear me now?" The slogan of a new mobile unplugged generation. With over 200 million subscribers of wireless services in the U.S., the need for locating more cell sites is growing as well. The CTIA, the international association for the wireless telecommunication industry, cites there were over 197,000 cell sites across the country as of December 2006. As towers become overloaded with calls or underserved areas need to be served, cellular companies are looking for new locations to site their antennas.

What should a local government do if a cell company comes calling and wants on city-owned property? Put out the welcome mat. If you haven't been approached by a company and are hesitant that the company's installation will interfere with city operations, you have the ability to protect your city property. You also can protect your operations, receive monthly rent payments and minimize the number of monopoles that might locate in your city.

In Farmers Branch, Texas[1] aesthetics are very important to the City Council. The Council takes pride in being a Tree City USA and in its beautifully landscaped medians, rights of way and parks. When the City of Farmers Branch was first approached with the idea of putting cellular antennas on a water tower back in 1996, it was with mixed feelings. The City Manager liked the idea of monthly rentals, however, the Public Works department believed that the purpose

of a water tower is for water storage and not for attaching superfluous items to it. The City Manager's office, along with the Public Works department, reviewed the site and determined what would be needed. It was determined that criteria should be developed for not only the tower that was being considered, but for all of the water towers in the city since each tower and site were very different. One of the important requirements was to make the antennas "disappear."

General criteria for any placement of cellular antennas on city property include:

- The equipment facility shall be of the same material, color, and character of other city owned structures on site.
- The equipment facility shall meet all building requirements.
- All zoning regulations must be followed.
- A structural engineering analysis must be performed and sealed by a professional engineer. Site plans and construction plans shall be approved before any permits or leases are issued.
- All wires, cables, etc. must be underground from the equipment facility to the storage tank. On the tank they must be attached to the interior. No antenna system shall be placed on the bowl of the storage tank.
- If operation of the antenna system interferes with city operations including the transmission of public safety, the lessee will cease transmitting immediately and not resume until the interference is remedied.
- The appearance and/or design of the antenna or equipment facility shall not harm city facilities or aesthetics.
- All antennas are flush-mounted and painted to match.

Also, specific criteria were developed for each water tower to fit each one's characteristics. One of our water towers has multiple legs, one has a metal cylinder base and two have a concrete base. When the city was approached to place antennas on the multi-legged tower, the company submitted plans that would have had an array of three antennas panels on each of three legs. We were concerned that the configuration would be very noticeable to the surrounding businesses, and apartment and single family residents in the area. The city requested that each individual antenna panel be flush-mounted on its respective leg. The company's first response was "We can't do that." The city asked the company to go back and talk to their engineers to see if it would be possible to flush mount the antenna panels. The company came back and flush-mounted each antenna panel on individual legs. The result has been a very minimal visual impact.

Antennas are easy to hide when they are flush-mounted, painted to match and one hundred feet in the air. However, the two hundred square foot associated equipment building becomes harder to hide. At the city's justice center, which has a wrap-around limestone wall, the wall and water tower itself were used to hide the three equipment buildings associated with the three different antenna installations. Not only did we use the tower and the wall to block the buildings from the traveling public, we required that the buildings look similar to the limestone wall. However, when company number four asked to be on this tower, the site had no more suitable ground space behind the tower to locate the equipment building. The company was asked to install landscaping on the site to help soften the appearance of their building that was proposed to be located south of the tower. The landscaping was designed to be added to the site in a way that would look natural, blend in with other features on the sites, and not just be added immediately surrounding the equipment building.

A recently approved installation of a fifth company will be located to the north of the tower. This equipment building will be constructed to match the adjacent Justice Center instead of the site's decorative limestone wall. It was determined that since the Justice Center itself was the backdrop for this equipment building, that painting it the Justice Center's color could minimize its appearance by blending into the Justice Center exterior located behind the equipment building on its horizon.

The three different types of water towers in Farmers Branch.

[1] Farmers Branch, Texas is a northern suburb of Dallas with a residential population of 27,000 and a daytime population of 75,000.

Water towers are just one option for siting antennas inconspicuously, especially in residential areas where it's hard to locate monopoles. Light standards on ball fields are another option.

Justice Center with water tower

Monopole on the right, new installed tree to the left

Water towers are just one option for siting antennas inconspicuously, especially in residential areas where it's hard to locate monopoles. Light standards on ball fields are another option. By the time the city was approached about putting antennas in a park, we were very comfortable about installations on water towers. In a city that touts itself as the "City in the Park" with 28 neighborhood parks covering over 180 acres in a city with only 12 square miles, parks are very important and monopole antennas didn't lend themselves to the park landscape.

However, the city agreed to listen to the company's design for the site. A new taller light pole would be installed with the antenna array above the ball field lights. The park in question was used for fields and a walking track. The park is situated with residential homes to the south and commercial strip centers to the north. Due to the nature of this park and the commercial strip center immediately behind the cellular location, the city opted to allow a monopole on a piece of the park that was only used for storage of soccer goals. It was located in the back of the park, blending in with the horizon. What was required of the company was to install 25 trees along the front of the park that faces the residential neighborhood to help conceal the visual clutter. With this monopole, the city required that the panels be flush-mounted to the pole to also reduce the visual clutter.

Not only is it important that a city keep the lines of communication open when the cellular company comes knocking, but the city can take proactive steps as well. The city recently built a fourth water tower. When designing this tower, the city knew that companies would be interested in locating here due to the location of the tower near two major highways. The idea of drilling through the concrete column made the Public Works Department nervous. The city engineered the tower for a "drop in" design for antennas. Two rings were attached at the 100 foot height with portals located at the common azimuths to allow the cables to be pulled through and attached on the rings with no drilling. Panels were installed inside to allow for the cables to be attached and there are portals at the bottom of the tower to allow the cables to be pulled through the tower. There is no need to drill or bore holes in the tower. The additional design work and construction was a minimal cost in the overall project. The company that is located there currently said it was the easiest, fastest installation they had ever done on a water tower.

Hiding antennas in equipment buildings shouldn't be the only concern the city has when leasing out its property. Security of water systems has always been important, but even more so since 2001. The security measures that were implemented in Farmers Branch have worked and were accepted with no questions by every cell company that located on city property. At any time a company needs to be inside a tower or on a secured gated site, the company is responsible for paying a City of Farmers Branch off-duty police officer to be onsite. The city requires names of all

New tower designed with antennas in mind.

persons working onsite in advance and company issued photo ids must be present. Finally, keeping all antenna installations below the water tower's bowl keeps the companies equipment and workers away from the water source.

The city learned very quickly through this process that it can be done if you ask. This is the city's property and the city has a responsibility to the residents to keep its property in good condition, both physically and visually. Don't be afraid to ask a company to rework the design or add additional landscaping. The companies would rather be on water towers or light standards in parks than to construct a new monopole. However, a good working relationship between you and a company will benefit both parties. It does no one any good if you hold your water towers hostage for excessive rents or landscaping requirements.

At the City Council meeting when the second installation was being considered for the Justice Center water tower, a resident got up to protest the placement of antennas on the water tower. Her backyard looks out and she can see the tower and didn't want to look out to see the "ugly" antennas. The Mayor listened as she explained her concerns. When she was done, the Mayor asked her what she thought of the antennas that were already on the tower. She replied that she didn't realize that there were antennas on the tower. The Mayor replied that the new antennas will look just like the existing ones.

It's only through open dialogue that a plan can be reached that is both beneficial to a city, protects the city's assets and allows antennas to be located in the city in a non-obtrusive way so that residents can be heard but the antennas aren't seen.

A copy of the City of Farmers Branch standard water tower lease agreement can be found at www.tatoa.org. ■

Margaret Somereve *has been the Assistant to the Director of Public Works for the City of Farmers Branch since February 2005. Prior to her current position, she was the Assistant to the City Manager for Farmers Branch for 9 years. Margaret is responsible for cable, telephone, gas and electric regulations, franchises and legislative issues. She is also responsible for negotiating contracts with cellular companies for locations on city facilities. Margaret has been a member of NATOA and TATOA for the past 10 years and is currently serving as President of TATOA.*