

CTIA PETITION FOR DECLARATORY RULING TO ENSURE TIMELY TOWER SITING REVIEW

Presentation to
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The Time is Ripe for a Grant of CTIA's Petition

- The FCC should act to fulfill federal policy goals and foster private sector investment in the current economic climate.
 - The record in this proceeding demonstrates a clear problem.
 - Of 3,300 tower and antenna applications pending in the Spring of 2008, 760 were pending for more than one year, and 180 were pending for more than 3 years. 135 of the 180 applications pending for more than 3 years are collocation applications.
 - CTIA and other commenters have provided numerous *specific* examples of abuse and foot-dragging, which undermine the aims of Section 332(c)(7). See, e.g., CTIA Reply Comments at 4-8.
- Eliminating unreasonable delays in processing zoning applications would remove a significant barrier to wireless infrastructure investment and accelerate investment in these backlogged facilities.
 - A grant of CTIA's Petition would result in extensive "shovel ready" new construction and contribute to the realization of additional wireless broadband investments of \$17.4 billion and further direct and indirect economic benefits.

Section 332(c)(7) Places Federal Limits on State and Local Zoning Authorities

- Section 332(c)(7) limits the role of state and local zoning authorities in the tower-siting process to ensure that the zoning process is not a barrier to reasonable deployment of, and competition among, diverse wireless networks.
 - If Congress had intended to preserve the absolute sovereignty of state and local zoning authorities in the siting context, it need not have enacted Section 332(c)(7) at all.
 - In the Supreme Court’s words, these provisions were adopted to reduce “the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers.” *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005).
- Among other things, Congress prohibited state and local authorities from taking unreasonably long periods of time to act on tower applications, and barred decisions that would “prohibit or have the effect of prohibiting the provision of personal wireless services.”
 - With regard to these requirements and others, Congress permitted applicants to seek judicial review within 30 days of a zoning authority’s “action or failure to act.”

The FCC Can and Should Set Meaningful Timing Benchmarks for Local Tower Siting

- Section 332(c)(7)(B)(v) contains a critical ambiguity in need of interpretation and the FCC has ample authority to interpret Section 332(c)(7).
 - Section 332(c)(7)(b)(v) requires wireless siting applicants to take action within 30 days of a “failure to act,” but never defines just when such a failure to act occurs.
- Section 332(c)(7)(A) does not limit the FCC’s interpretive authority.
 - Nothing in Section 332(c)(7)(A) limits the FCC’s inherent authority to interpret terms set forth in Section 332(c)(7)(B).
 - CTIA is not asking the Commission to hold that another provision trumps Section 332(c)(7). Rather, CTIA is asking the Commission to interpret ambiguous provisions found in *Section 332(c)(7) itself*.
 - Section 332(c)(7)(B) sets forth specific limitations on state and local authority, including the “failure to act” provision addressed here. The relevant question, therefore, is what is “provided in [Section 332(c)(7)].”
 - Section 332(c)(7)(B) *does* expressly impair and/or supersede state and local prerogatives with respect to tower siting; the only question is to what extent. Therefore, claims that Section 601(c) of the Telecommunications Act of 1996 precludes the interpretation CTIA seeks are misplaced.

The FCC Can and Should Set Meaningful Timing Benchmarks for Local Tower Siting (cont'd)

- Section 332(c)(7)(B)(v) also does not limit the Commission’s interpretive authority.
 - Opponents argue the FCC may not grant the Petition because Section 332(c)(7)(B)(v) directs all controversies regarding siting decisions to the courts, other than those involving RF emissions. Section 332(c)(7)(B)(v)’s reference to specific disputes does not speak to the FCC’s authority to interpret statutory ambiguities.
 - Detractors’ references to the Conference Report do not overcome this distinction.
 - The Report’s statement that “the courts shall have exclusive jurisdiction over all [non-RF] disputes arising under [Section 332(c)(7)(B)],” merely confirms that the provision involves jurisdiction over “disputes,” not the FCC’s interpretive authority.
 - Likewise, language directing the Commission to terminate pending rulemakings “concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities,” referred to “pending” matters at that time and efforts to *supplant* such authority (as was contemplated by one draft of the Act), not to efforts to interpret terms.
 - In *Alliance for Community Media v. FCC*, the Sixth Circuit rejected the argument that the FCC is barred from interpreting a statute that directs disputes to court. “[T]he availability of a judicial remedy for unreasonable denials of competitive franchise applications” did not limit the agency’s authority to interpret relevant provisions.

The Commission Has Authority to Establish a “Deemed Grant” Remedy

- Judicial precedent strongly indicates that the proper remedy for a Section 332(c)(7) violation is an injunction ordering the zoning authority to grant application.
 - The 1st, 2nd, 3rd, 6th and 11th Circuits have issued injunctions ordering grant of underlying application. *See, e.g., New Par v. City of Saginaw*, 301 F.3d 390, 399-400 (6th Cir. 2002); *National Tower, LLC v. Plainville Zoning Board of Appeals*, 297 F.3d 14, 24-25 (1st Cir. 2002); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1222 (11th Cir. 2002); *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp.*, 181 F.3d 403, 410 (3d Cir. 1999); *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2d Cir. 1999).
 - Among these decisions are several ruling that a mandatory grant is the appropriate response to a zoning authority’s failure to act. *See, e.g., Tennessee ex rel. Wireless Income Properties, LLC v. Chattanooga*, 403 F.3d 392 (6th Cir. 2005); *Cellco P’Ship v. Franklin County*, 553 F. Supp. 2d 838 (E.D.Ky 2008).
- A similar FCC “deemed grant” decision has recently been upheld by *Alliance for Community Media*.
 - That decision involved an interim deemed grant, but here – where courts have already explained the propriety of injunctive relief granting the underlying application – permanent deemed grant is appropriate.

The FCC Can and Should Bar State and Local “Single Provider” Rules

- The FCC should exercise its interpretive authority to make clear 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.
- Specifically, the FCC should clarify that Section 332(c)(7)(B)(i)(II) is not satisfied by the existence of a single provider.
 - NATOA acknowledges that “if in fact ... there are local governments that deny applications solely *because* of coverage by another provider,” such denials would give rise to Section 332(c)(7)(B) claims. NATOA Comments at 20.
- Uncertainty frustrates deployment.
 - Verizon Wireless, for example, cites eight instances (three in California and five in New Jersey) in which applications were denied simply because another service provider already served the area. Verizon Wireless Comments at 11.

The FCC Can and Should Preempt Blanket Wireless Variance Ordinances Upon Challenge

- CTIA requests only a declaration “that zoning ordinances requiring variances for all wireless siting requests are unlawful and will be struck down if challenged in the context of a Section 253 preemption action.” CTIA Reply Comments at 30.
- Federal courts have made clear that Section 253(a) applies to wireless siting requests.
 - See, e.g., *Cox Commc’ns PCS, L.P. v. City of San Marcos*, 204 F.Supp.2d 1272, 1278 (S.D.Ca. 2002); *Verizon Wireless LLC v. City of Rio Rancho*, 476 F.Supp. 2d 1325 (D.N.M. 2007); *Newpath Networks LLC v. City of Irvine*, No. SACV 06-550-JVS, 2008 U.S. Dist. LEXIS 72833 (C.D. Cal. Mar. 10, 2008); *Omnipoint Communications Inc. v. Port Authority of New York and New Jersey*, No. 99-Civ.-0060, 1999 U.S. Dist. LEXIS 10534 (S.D.N.Y. July 13, 1999).
- Variances are often unnecessary. Ordinances that require variances in all cases “prohibit or have the effect of prohibiting” service and run afoul of Section 253(a).
 - Nothing in the 9th Circuit’s *en banc Sprint Telephony* decision suggests otherwise. That decision merely held that Section 253(a) did not bar actions on the basis that they “might possibly” prohibit service.

The FCC Must See Through the Objections of the Petition's Detractors

- The Petition does *not* condition or limit the scope of a zoning authority's review of an application.
- The Petition does *not* prevent or preempt a zoning authority's review of an application.
- The Petition does *not* seek a ruling requiring that providers be accorded their first choice in the siting process in areas where another provider is making service available.
- Likewise, the Petition does *not* seek a ruling that zoning authorities are prohibited from favoring collocation over new facilities where collocation is appropriate.
- To the extent other factors warrant denial of a particular application, the declaration CTIA seeks would not prevent such a denial.