CITY OF SAN ANTONIO, TX
***EX PARTE* IN FCC DN 08-165**

I. The Commission Lacks Legal Authority to Grant the Relief CTIA Seeks.

CTIA filed a petition asking the FCC to interpret 47 U.S.C. § 332(c)(7), the wireless siting/zoning provision of the Communications Act, added in 1996, to make a uniform interpretation of the supposedly "ambiguous" provisions of § 332(c)(7). CTIA's Petition is flatly contrary to Congress' language and intent in enacting § 332(c)(7). The plain language of § 332(c)(7)(A), the *1996 Conference Report*'s discussion of § 332(c)(7), and court precedent all point unequivocally to the following conclusions:

(A) Except for matters of radio frequency ("RF") emissions under § 332(c)(7)(B)(iv), the courts, *not* the FCC, have exclusive jurisdiction over § 332(c)(7)(B);

(B) What constitutes "a reasonable period of time" within the meaning of § 332(c)(7)(B)(ii) is to be measured by the amount of time each particular local zoning authority takes to act on similar non-wireless siting applications, *not* a uniform nationwide "shot clock" as CTIA proposes here;

(C) Section 332(c)(7)(A) provides that other than § 332(c)(7)(B), "nothing in this Act" – *including §§ 201(b) and 253* – "limits," or even "affects," local authority over the placement, construction and modification of wireless facilities; and

(D) The "prohibition" language in § 332(c)(7)(B)(i)(II) differs from, and is narrower than, the "prohibition" language in § 253(a).

If there were any doubt that the relief CTIA seeks is barred by § 332(c)(7), the *1996 Conference Report* dispels it. The *1996 Conference Report* is uniquely dispositive here. What is now § 332(c)(7) was crafted entirely by the Conference Committee; the Senate version of the bill had no wireless siting provision, and the wireless siting provision in the House version of the bill was radically different from – indeed, from a Commission jurisdiction standpoint, the diametric opposite of – the one in the *1996 Conference Report* which became the law.

II. The Record Proves That the Exclusive Court Remedy Provided by § 332(c)(7)(B)(v) Is More Than Adequate.

Relative to the tens of thousands of local zoning jurisdictions across the nation and the hundreds of thousands of cell sites across the nation, the isolated anecdotes of supposed zoning difficulties encountered by wireless providers in the record can only be characterized as a myopic focus on twigs rather than the forest.

(A) By CTIA's own admission, the number of operational cell sites in the nation has grown exponentially since 1996, from 30,045 in December 1996, to 242,130 by December 2008. Comments of CTIA, *Inquiry Concerning the Deployment of*

Advanced Telecommunications Capability, GN Docket 09-137 & GN Docket No. 09-51, at 15 (filed Sept. 4, 2009). Thus, the number of cell sites have increased by *more than 800%* since § 322(c)(7) was enacted. Moreover, the current total of over 240,000 cell sites "averages one cell site for every 1,116 estimated wireless subscribers in the United States." *Id.*

(B) Also by CTIA's own admission, "wireless broadband is growing exponentially faster than any other category of broadband service." *Id.* at ii. That further refutes CTIA's claim that local zoning requirements have impeded wireless growth.

(C) San Antonio is a development-friendly community. It has granted numerous wireless siting applications, while many others, in industrial, commercial and non-historic and non-residential areas, are permitted by right without the need for an application.

III. The Relief Sought by the Petition, If Granted, Would Cause Great Harm.

While there is no legal or factual justification for the relief the Petition seeks, that relief would cause great mischief for local zoning authorities. The Petition's proposed "shot clocks" and "deemed granted"/"court presumption" proposals would run a wrecking ball through municipal land use and zoning laws and, in the process, endanger public safety and effectively deprive local residents and businesses of basic notice, hearing and appeal rights concerning land use planning in their own communities. Even for a largely wireless siting-friendly city like San Antonio, the relief requested in the Petition would pose tremendous problems. San Antonio has created overlay zones design to protect historic districts and structures (including the Alamo), the Edwards Aquifer (the City's primary source of water), and development around rivers (including the River Walk) and airports (including military installations). The proposed "shot clock" provision would make it almost impossible for San Antonio to comply with public and aviation safety and historic preservation requirements built into the City's land use and zoning laws, and with public hearing and administrative appeal rights of City residents or businesses that choose to exercise their rights under Texas law to object to a wireless siting application and to pursue administrative appeals of those decisions (particularly in residential zones).