

November 9, 2009

***Electronic Filing***

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

**Re: *Ex Parte Presentation, WT Docket No. 08-165***

Dear Ms. Dortch:

On November 9, 2009, Christopher Guttman-McCabe, Vice President, Regulatory Affairs, Brian Josef, Director, Regulatory Affairs, Michael Altschul, General Counsel, and Andrea Williams, Assistant General Counsel, CTIA-The Wireless Association® (“CTIA”), spoke with Austin Schlick, Federal Communications Commission General Counsel, Jane Jackson, Associate Bureau Chief, and Jeffrey Steinberg, Deputy Chief, Infrastructure Policy, both of the Wireless Telecommunication Bureau, to express support for the Commission moving forward with CTIA’s Petition for Declaratory Ruling to Ensure Timely Siting Review.<sup>1</sup> CTIA argued that in order to continue to deliver wireless broadband to America, CMRS providers need the Commission to define the phrase “failure to act.” As it has stated previously, CTIA also argued that wireless facility applications are being treated differently than other zoning applications.

Also on November 9, 2009, Christopher Guttman-McCabe, Vice President, Regulatory Affairs, Brian Josef, Director, Regulatory Affairs, CTIA-The Wireless Association® (“CTIA”), and Jeanine Poltronieri, Assistant Vice President of Federal Regulatory, AT&T, met with Louis Peraertz, Acting Legal Advisor for Wireless, International, and Public Safety, Office of Commissioner Mignon Clyburn. During the meeting with Mr. Peraertz, the parties discussed CTIA’s Petition, the growing delays carriers are experiencing in local zoning action on applications, and the importance of Commission relief to address the bottleneck of pending tower siting applications. CTIA outlined its request for a “shot clock” on local zoning authorities’ consideration of tower siting applications in recognition that timely deployment of wireless facilities is critical to ensuring consumers’ access to wireless broadband services.

Specifically, CTIA observed that Congress enacted Section 332(c)(7) of the Communications Act to ensure that the wireless siting process involves a balance of

<sup>1</sup> CTIA 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 (filed July 11, 2008) (“CTIA Petition”).

local review and federal goals.<sup>2</sup> Section 332(c)(7)(B)(v) provides that “[a]ny person adversely affected by any final action or failure to act by a State or local government” that is inconsistent with the terms of Section 332(c)(7)(B) may bring suit in court “within 30 days after such action or *failure to act*.”<sup>3</sup> But the Act does not explain when a “failure to act” accrues, and such a failure – unlike an “action” – has thus been impossible to pinpoint. By withholding action on siting requests, states and localities have been able to evade the judicial oversight contemplated by 332(c)(7), and disturb the balance of state, local and federal power envisioned by Congress. Thus, CTIA asked the Commission to establish timeframes within which local zoning authorities must act on tower siting and wireless facility applications – 45 days for collocation and 75 days for other facilities.

CTIA also took the opportunity to respond to a claim by the National Association of Telecommunications Officers and Advisors (“NATOA”) that FCC interpretation of Section 332(c)(7) is inappropriate because “Congress left disputes arising under § 332(c)(7) to the courts.”<sup>4</sup> As CTIA already has argued in this proceeding, adoption of a shot clock in no way intrudes on decisions left by Congress to the courts.<sup>5</sup> The Commission is entitled to issue determinations interpreting the meaning of terms set forth in the Communications Act, and adoption of a shot clock would clear up the ambiguity in Section 332(c)(7) regarding when “a failure to act” occurs. The Sixth Circuit recently affirmed a Commission decision involving a case that is directly on point with the request here. In *Alliance for Community Media v. FCC*, the court upheld the Commission’s decision to establish time limits for local franchising authorities’ review of competitive video franchising applications under Section 621 of the Act. The court addressed and rejected the same arguments raised by NATOA in this proceeding, saying that the Commission’s action did not improperly intrude on decisions left to the courts: “the availability of a judicial remedy for unreasonable denials of competitive franchise applications” did not circumscribe the agency’s authority to interpret relevant statutory provisions, and the imposition of timelines did not deprive courts of “their Congressionally-granted jurisdiction to hear appeals” or “in any way impede the courts’ fact-finding or legal analysis during actual judicial proceedings.”<sup>6</sup> Commission action here would be fully consistent with the judicial role contemplated by Section 332(c)(7) – just as in the video franchising order.

---

<sup>2</sup> As the Supreme Court has emphasized, Section 332(c)(7)(B)’s main purpose was to “reduc[e] ... 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, 128 (2005).

<sup>3</sup> 47 U.S.C. § 332(c)(7)(B)(v) (emphasis added).

<sup>4</sup> See, e.g., Ex Parte Letter from NATOA to FCC, WT Docket No. 08-165, at 2 (Nov. 5, 2009).

<sup>5</sup> CTIA Petition at 22-23.

<sup>6</sup> *Alliance for Community Media v. FCC*, 529 F.3d 763, 775 (6<sup>th</sup> Cir. 2008).

Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed via ECFS with your office. Should you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

*/s/ Christopher Guttman-McCabe*  
Christopher Guttman-McCabe

cc: Louis Peraertz  
Austin Schlick  
Jane Jackson  
Jeffrey Steinberg