

November 10, 2009

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: Written Ex Parte Presentation, WT Docket No. 08-165, 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 Proposals as Requiring a Variance

Dear Ms. Dortch:

Davis Wright Tremaine LLP submits this ex parte letter in support of CTIA – The Wireless Association’s Petition for Declaratory Ruling¹ on timeframes in which local zoning authorities must act on wireless facility siting requests (“CTIA’s Shot Clock Petition”).

Davis Wright Tremaine is a bi-coastal,² full-service law firm with a substantial communications practice. Much of our communications practice is focused on network deployment issues. We have assisted many clients – both wireline and wireless – with obtaining permits from local jurisdictions and in challenging denial of permits needed to construct networks. In the Pacific Northwest and California, we also assist a wide range of clients with obtaining land use permits needed for other types of commercial construction – e.g. office buildings, hotels, etc.

Each day, across all types of urban and rural landscapes and throughout all geographic regions, we encounter the type of unreasonable delays and arbitrary local zoning decisions described in CTIA’s Petition.³ These unreasonable delays and subjective decisions have a very real and significant impact on wireless carriers’ ability to construct efficient forward-looking networks capable of providing reliable, state-of-the-art communications services to businesses, residents and public safety personnel.

¹ WT Docket No. 08-165 (DA 08-1913).

² Davis Wright Tremaine’s roots are in the Pacific Northwest and the firm’s largest offices are in Seattle, Washington and Portland, Oregon. The firm also has offices in Bellevue (Washington), San Francisco, Los Angeles, New York, Washington D.C., Anchorage and Shanghai.

³ CTIA’s Petition at 14-16.

One of the most obvious and objective measures of the difficulty that wireless carriers currently experience in deploying reliable and advanced communications networks is the unreasonable and significant delay typically associated with siting wireless facilities. In many jurisdictions, final action on wireless siting applications often takes more than a year. A few examples include:

- In one jurisdiction in the state of Washington, a wireless carrier's application has been *pending for ten months without the local jurisdiction scheduling an initial hearing*. In this jurisdiction, the local code requires that the jurisdiction process land use applications within 120 days of being deemed complete. However, numerous requests for additional information by Planning Department staff (much of which was provided in the carrier's original application and some of which is not required under the local code) continue to stop the jurisdiction's "120-day clock," significantly delaying resolution of the application. Importantly, the local jurisdiction expressly acknowledges that submittal of this information does not guarantee that it will finally process the application. As a result, the applicant is subjected to an open-ended and endless process of receiving and complying with requests for additional information and requested concessions. In the end, despite the applicant's responsiveness, the jurisdiction has failed to schedule an initial hearing ten months after the carrier submitted its application.
- In Oregon, state law requires that cities process land use applications within 120 days and that counties process land use applications within 150 days, including all local appeals, unless the applicant agrees to extend or waive the deadline. In one case, a carrier submitted an application to an Oregon city seeking a land use permit for a new wireless facility in April 2007. While not required by the local code, the carrier submitted alternative site analysis for a number of potential alternative sites proposed by Planning Commission staff. At the first public hearing in July, the city advised the carrier that it needed additional information about the reasons for ruling out the alternative sites and also identified new alternative sites to consider (both inside and outside the city). The city indicated that it could not approve the application without more information about these alternative sites. At three subsequent public hearings in August, September and November, the city identified new alternative sites and indicated that it would not approve the application without more information about why these alternative sites were incompatible. Eight months after submitting its application, the carrier elected not to further extend the deadline for resolving land use applications and the city denied the application.
- In another Oregon jurisdiction, a carrier filed a land use application in September 2008. While the County's publicized timelines state that it will

process applications for new wireless communications facilities within 50 days (or 80 days if the decision is appealed), the County informed the carrier in December 2008 that its application lacked adequate information on alternative sites and that the County would deny the application unless the carrier agreed to extend the state's 150-day processing deadline and subsequently supply additional information on alternative sites. This was the first time the County raised any concerns about the application. The carrier performed additional alternative site analysis and discovered that one of the alternative sites might be viable. The carrier promptly conducted a pre-application meeting with the Planning staff to further explore utilizing the alternative site. However, in May 2009—nine months after the carrier submitted its initial application and in the midst of developing additional alternative site analysis—the County informed the carrier that it was required to either proceed with the original application or withdraw it no later than June 2009. The carrier was not able to complete its analysis of the alternative site within that timeframe and thus elected to withdraw the original application. The carrier is now processing the new application for the alternative site.

- In California, the state Permit Streamlining Act requires public agencies to notify applicants about whether an application is complete within 30 days of submission. If rejected as incomplete, the agency must identify where deficiencies exist and how they can be remedied. In the case of typical wireless communications facility applications, the agency must issue a final decision on the project within 120 days of the application being deemed complete. In our experience, many cities do not comply with the Permit Streamlining Act. Some miss the initial 30-day deadline outright. Others, like the Washington jurisdiction referenced above, send multiple unnecessary requests for additional information as a way to “stop the clock,” and still other jurisdictions do not issue final decisions within the requisite time period. For example, in Rancho Palos Verdes, California, a carrier submitted an application in May 2007 for a conditional use permit requesting approval for the construction of a 29’ slimline pole to accommodate three flush-mounted antennas. After deeming the project incomplete several times and making numerous requests for additional information, the city deemed the application complete in October 2008 — *18 months after the carrier submitted its application*. The carrier’s application was finally approved in December 2008. By way of comparison, in 2008, the Rancho Palos Verdes Planning Commission took only two months and ten days to evaluate and approve an application for a conditional use permit to remodel the Palos Verdes Art Center, including relocating the entrance of the facility, constructing a new 1,720 square foot storage area and other expansions of the building.

- Planning staff in California are also often non-responsive to inquiries and updates from carriers regarding pending applications. For example, in San Marcos, California, many emails regarding pending applications take as long as a month to receive a response. Phone calls are sometimes never returned at all.
- Moreover, many California cities take considerably longer to issue permits for wireless facilities than for wireline facilities. For example, in San Francisco a landline carrier can construct facilities anywhere in the city in the public right of way ("ROW") with a simple Utility Conditions Permit, which is a ministerial permit issued by the Department of Public Works. In contrast, before a *wireless* facility can be installed in the ROW, the provider must obtain a Utility Conditions Permit *and* an additional "Wireless Permit." In most parts of the City, this latter permit requires discretionary approval by the Planning Department or Recreation and Parks Department. The decision by these Departments of whether to issue approval for the facility is discretionary and appealable to the Board of Permit Appeals. Needless to say, as a result of these requirements, the timeline for a wireless carrier to obtain a permit to construct in the ROW is substantially longer than a wireline carrier.

The examples outlined above typify the types of delays and other issues that Davis Wright Tremaine attorneys have encountered in representing their wireless provider clients. These types of delays create very real impediments to the deployment of reliable and advanced wireless communications service. Although the relief sought in CTIA's Shot Clock Petition will not solve all of the siting problems presently faced by the wireless industry, it is our hope that it will provide some much needed relief. Davis Wright Tremaine urges the Commission to grant the relief requested by CTIA's Shot Clock Petition.

Very truly yours,

Davis Wright Tremaine LLP


Suzanne Toller

cc: Federal Communications Commission, Office of the General Counsel

ST/ys