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**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

**PCIA—THE WIRELESS INFRASTRUCTURE ASSOCIATION OPPOSITION TO THE  
NATIONAL TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE UNITED  
STATES CONFERENCE OF MAYORS, THE NATIONAL LEAGUE OF CITIES, THE  
NATIONAL ASSOCIATION COUNTIES, AND THE AMERICAN PLANNING  
ASSOCIATION MOTION FOR EMERGENCY STAY**

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## I. INTRODUCTION

PCIA—The Wireless Infrastructure Association (“PCIA”)<sup>1</sup> hereby submits this *Opposition* in response to the *Motion for Stay* (“*Motion*”) filed by NATOA et al. (“Petitioners”).<sup>2</sup> Petitioners seek a stay of the Federal Communications Commission’s (“Commission”) recent declaratory ruling in which it clarified that zoning authorities must act on applications for siting wireless facilities within an established timeframe that begins upon submission of an application (referred to as a “shot clock”) (“*Declaratory Ruling*”).<sup>3</sup> Alternatively, Petitioners seek a stay of the *Declaratory Ruling* until 30 days after publication in the Federal Register, or that the Commission adopt a new rule that would allow zoning authorities to toll the shot clock to seek additional information from applicants at anytime.<sup>4</sup>

As an initial matter, the Commission should reject Petitioners’ requests in the alternative. Petitioners do not put forward any arguments to support their request for a stay of the *Declaratory Ruling* until 30 days after publication in the Federal Register, and the *Declaratory Ruling* was published in the Federal Register on Monday, December 21, 2009.<sup>5</sup> Further, Petitioners cannot request a new rule in a motion for a stay—requests for a stay must be filed

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<sup>1</sup> PCIA is a non-profit national trade association representing the wireless infrastructure industry. PCIA’s members develop, own, manage, and operate over 125,000 towers, rooftop wireless sites, and other facilities for the provision of all types of wireless services.

<sup>2</sup> *In 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, *Emergency Motion for Stay of National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the national Association of Counties, and the American Planning Association*, WT Docket No. 08-165 (filed Dec. 17, 2009) (“*Motion*”).

<sup>3</sup> *In 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, *Declaratory Ruling*, WT Docket No. 08-165, FCC 09-99 (rel. Nov. 18, 2009) (“*Declaratory Ruling*”); *Motion* at 3.

<sup>4</sup> *Motion* at 3–4.

<sup>5</sup> Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) To Ensure timely Siting Review, 74 Fed. Reg. 67871 (Dec. 21, 2009).

separate from other pleadings.<sup>6</sup> As such, the Commission should reject Petitioners' request to adopt a new rule allowing zoning authorities to toll the shot clock at any time.

In the *Declaratory Ruling*, the Commission clarifies what constitutes a reasonable period of time, under the Telecommunications Act of 1996 ("Act"), for a zoning authority to review a wireless facility siting application.<sup>7</sup> The *Declaratory Ruling* provides needed certainty to wireless infrastructure providers, who routinely experience unnecessarily long delays in the siting process as demonstrated in the record in this proceeding, and will help speed the deployment of new and advanced wireless networks and the services they enable. The problem is well established, and the Commission's decision well crafted.

The Petitioners seek to stay the effectiveness of this decision, thereby further delaying action on wireless facility siting applications and exacerbating the problem that the *Declaratory Ruling* aims to remedy. The Commission should deny the *Motion* due to the negative policy implications of such an action and the Petitioners' failure to establish any element of the Commission's standard required for it to issue a stay.

## **II. PETITIONER FAILS TO MEET THE COMMISSION'S STANDARD FOR STAY**

The Commission generally follows the standard adopted by federal courts when considering a stay petition.<sup>8</sup> Under *Virginia Petroleum Jobbers Association v. Federal Power Commission*,<sup>9</sup> courts and the Commission evaluate requests for injunctive relief under four criteria: (1) the likelihood of petitioners success on the merits; (2) the threat of irreparable harm to petitioner absent the grant of preliminary relief; (3) the degree of injury to other parties if

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<sup>6</sup> 47 C.F.R. § 1.44 (e) (2008).

<sup>7</sup> 47 U.S.C. § 332(c)(7)(B)(ii) requires localities to act on requests to "place, construct, or modify personal wireless service facilities within a reasonable period of time . . . ."

<sup>8</sup> *In re AT&T Corp., et al., Complainants, v. Ameritech Corporation, Defendant, and Qwest Communications Corporation, Defendant/Intervenor, Memorandum Opinion and Order*, 13 FCC Rcd 14508, ¶ 13 (rel. June 30, 1998) ("*AT&T Stay MO&O*").

<sup>9</sup> 259 F.2d 921 (D.C. Cir. 1958).

relief is granted; and (4) that granting the relief serves the public interest.<sup>10</sup> The Commission balances these factors to craft a response.<sup>11</sup> While no single factor is dispositive, the Commission must find a “particularly overwhelming showing in at least one of the factors” to issue a stay notwithstanding the absence of another factor.<sup>12</sup> Petitioners fail to establish any of these factors, and do not establish an overwhelming showing in any one factor to outweigh the deficient showing in the other factors. The Commission should therefore deny the *Motion*.

**A. Petitioners are not Likely to Prevail on Their Petition for Reconsideration and Clarification**

Concurrent with the above captioned *Motion*, Petitioners also filed a *Petition for Reconsideration and Clarification* (“*Petition*”) of the *Declaratory Ruling*.<sup>13</sup> As an element of the necessary showing for a stay, Petitioners must demonstrate that the Commission is likely to grant their *Petition*. As PCIA explains more fully in its Opposition to the *Petition*,<sup>14</sup> the Commission should deny the *Petition*.

In their *Petition* and *Motion*, Petitioners incorrectly argue that the Commission lacks authority to clarify that zoning authorities must review an application for completeness and seek additional information within 30 days in order to have the shot clock tolled while the applicant

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<sup>10</sup> *AT&T Stay MO&O* ¶ 13; *Virginia Petroleum Jobbers*, 259 F.2d 925.

<sup>11</sup> *AT&T Stay MO&O* ¶ 13; *In re* Biennial Regulatory Review—Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission’s Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, Amendment of the Amateur Service Rules to Authorize Visiting Foreign Amateur Operators to Operate Stations in the United States, *Memorandum Opinion and Order*, 14 FCC Rcd 9305, ¶ 4 (rel. June 9, 1999) (“*Biennial Review MO&O*”).

<sup>12</sup> *Biennial Review MO&O* ¶ 4.

<sup>13</sup> *In 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, *Petition for Reconsideration or Clarification of the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the national Association of Counties, and the American Planning Association*, WT Docket No. 08-165 (filed Dec. 17, 2009) (“*Petition*”).

<sup>14</sup> *In 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, *Opposition to Petition for Reconsideration of PCIA—The Wireless Infrastructure Association*, WT Docket No. 08-165 (filed Dec. 28, 2009).

responds to the request.<sup>15</sup> In the *Declaratory Ruling* the Commission accurately established its authority to interpret section 332(c)(7).<sup>16</sup> As the Commission explains, it has the authority to take actions to carry out provisions of the Act<sup>17</sup> and to perform acts “necessary in the execution of its functions.”<sup>18</sup>

Under this authority, the Commission clarified what constitutes a reasonable time for a zoning authority to take final action on an application for wireless facility siting under section 332(c)(7)(B)(ii).<sup>19</sup> As detailed by several commenters in this proceeding, without some set period within which a zoning authority must determine whether an application is complete, any set deadline for action by a zoning authority is ineffective.<sup>20</sup> The zoning authority could continually request additional information and continually deem an application incomplete in order to defer final action.

To remedy this problem, the Commission clarified that when zoning authorities seek additional information within 30 days, the shot clock is tolled while applicants provide any additional information. This allows zoning authorities to seek additional information without any loss to the time they have to review the completed application. Additionally, it encourages localities to review applications for completeness and request additional information within a reasonable time. This clarification serves to close a substantial potential loophole in the definition of a “reasonable period of time.” Without the authority to dictate the 30-day time period for review, the authority to interpret section 332(c)(7)(B)(ii) is superficial. Because the 30-day time period is necessary for the Commission to effectively interpret section 332, the

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<sup>15</sup> *Motion* at 8–9.

<sup>16</sup> *Declaratory Ruling* ¶¶ 23–26.

<sup>17</sup> *Id.* ¶ 23; 47 U.S.C. §§ 151, 201(b), 303(r).

<sup>18</sup> *Declaratory Ruling* ¶ 23; 47 U.S.C. § 154(i).

<sup>19</sup> *Declaratory Ruling* ¶¶ 43–48.

<sup>20</sup> PCIA Ex Parte, WT Docket 08-165 (filed Oct. 23, 2009); MetroPCS Communications Comments, WT Docket No. 08-165, at 12 (filed Sept. 29, 2008) (“*MetroPCS Comments*”); CTIA Reply Comments, WT Docket No. 08-165, at 18 (filed Oct. 14, 2008).

Commission acted within its authority, and the Petitioners will not prevail on their *Petition*.

Petitioners, furthermore, do not establish that they will suffer any harm absent a stay.

**B. Petitioners Will Not Suffer Irreparable Harm Absent a Stay of the *Declaratory Ruling***

For a finding of irreparable harm to petitioner, the petitioner must first establish that without a stay, it will suffer some harm. Petitioner must then establish that the harm is irreparable, and that it is actual and not merely theoretical.<sup>21</sup> The harm must be imminent and certain.<sup>22</sup> Petitioners fail to meet this standard.

Petitioners' primary claim of harm is that without a stay of the *Declaratory Ruling* some zoning authorities with applications pending at the time of adoption of the *Declaratory Ruling* will lose the opportunity to take advantage of the 30-day timeframe for reviewing applications.<sup>23</sup> The apparent harm, then, is that a zoning authority may have to seek additional material without having the shot clock tolled. To the extent that this apparent harm arises out of the operation of the *Declaratory Ruling* as it is intended, Petitioners have failed to establish harm. However, even assuming Petitioners established a harm, they have failed to show that it is certain and imminent. Petitioners claim is based on two theoretical, and mistaken, factual scenarios.

First, Petitioners claim that many communities without extensive legal resources have not received notice of the *Declaratory Ruling* and its provisions because it has not yet been published in the Federal Register. While the *Declaratory Ruling* was only recently published in the Federal Register,<sup>24</sup> it did appear in the Commissions Daily Digest on November 19, 2009,

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<sup>21</sup> *In re* APCC Services, Inc., Data Net Systems, LLC, Davel Communications, Inc., Jaroth, Inc. d/b/a Pacific Telemanagement Services, and Intra Communications Corp., Complainants, v. NetworkIP, LLC, and Network enhanced Telecom, LLP, Defendants, *Order*, 22 FCC Rcd 9080, ¶ 5 & n.15 (rel. May 21, 2007) (under delegated authority by the Chief, Market Disputes Resolution Division, Enforcement Bureau).

<sup>22</sup> *Id.*

<sup>23</sup> *Motion* at 9.

<sup>24</sup> *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) To Ensure timely Siting Review*, 74 Fed. Reg. 67871 (Dec. 21, 2009).

and has been posted on the Commission's Website since its adoption.<sup>25</sup> Furthermore, the Petitioners membership is comprised of local governments, local planners, and mayors. The Petitioners have alerted their members to the effects of the *Declaratory Ruling*.<sup>26</sup> Regardless, this is a hypothetical claim at best—the Petitioners provide no factual evidence of irreparable harm as required by the Commission's standard.

Second, Petitioners claim that for those communities that do not have notice of the *Declaratory Ruling*, the problem is compounded by the theoretical misrepresentations of siting applicants. Applicants will apparently “keep quiet” about the *Declaratory Ruling* in order to avoid requests for additional information while still having their applications acted on by the locality within the shot clock. Petitioners cite no examples to support this claim. Applicants make every attempt to submit full and complete applications, and timely respond to additional requests for information on a good-faith basis.

Petitioners attempt a secondary claim of harm, also based on inaccurate assumptions. Petitioners theorize that localities will have to draft new ordinances, forms, and fee schedules to comply with the *Declaratory Ruling*, and that once the Commission grants its *Petition for Reconsideration* these localities will then have to revise the newly adopted ordinance, fee schedule, and forms. A locality does not have to revise its ordinance to comply with the *Declaratory Ruling*—it is effective regardless of local incorporation. Additionally, while new

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<sup>25</sup> Daily Digest, Volume 28, No. 228 (Nov. 19, 2009), [http://www.fcc.gov/Daily\\_Releases/Daily\\_Digest/2009/dd091119.html](http://www.fcc.gov/Daily_Releases/Daily_Digest/2009/dd091119.html); FCC Headlines 2009, <http://www.fcc.gov/headlines.html>.

<sup>26</sup> For instance, NATOA posted a news item on its homepage at the time of adoption of the *Declaratory Ruling* (which still appears on the homepage), and held a two part workshop on the effects of the *Declaratory Ruling*. NATOA Home, <http://natoa.org/>. The National League of Cities included an item on the adoption of the *Declaratory Ruling* in its November and December Federal Relations Updates. NLC, Federal Relations Update, Period Ending November 20, 2009, <http://content.nlc.org/he/vo.aspx?FileID=834b7265-39ef-43c7-91a0-6b85909fcc57&m=26cb9bb9b65d7140807755d91fe52671&MailID=10809201>; NLS, Federal Relations Update, Period Ending December 4, 2009, <http://content.nlc.org/he/vo.aspx?FileID=cf76d2c0-ffd1-48e1-9572-e5c2778c741c&m=26cb9bb9b65d7140807755d91fe52671&MailID=10943190>. Additionally, the American Planning Association included an item on the *Declaratory Ruling* in its APA Advocate online newsletter. APA, APA Advocate, December 16, 2009, <http://www.planning.org/apaadvocate/2009/dec16.htm>.

fee schedules and forms may be developed in light of the *Declaratory Ruling*, they will not have to be revised because the Petitioners have failed to meet the standards necessary for reconsideration.

Petitioners' theoretical claims of harm are hypothetical, assume bad-faith efforts on the part of applicants, and are unlikely to occur. As such, these "harms" fall far short of the required showing of imminent and certain harm. Other parties, however, including wireless infrastructure providers, will be harmed if the *Declaratory Ruling* is stayed.

### **C. Wireless Infrastructure Providers and Wireless Service Providers Will Suffer Proven Harm if the *Declaratory Ruling* is Stayed**

The record in this docket is replete with evidence of the harms of delays in reviewing applications for wireless facilities.<sup>27</sup> As the Commission notes "the record shows that unreasonable delays are occurring in a significant number of cases."<sup>28</sup> The harm, as explained by the Commission, is that "such delays [are] impeding the deployment of advanced and emergency services."<sup>29</sup>

Without a firm deadline to issue a final decision on wireless facility applications, localities can continue to unreasonably delay these applications. Petitioners argue that a stay of the *Declaratory Ruling* would maintain the status quo, and that the status quo results in "no harm to other parties."<sup>30</sup> However, the status quo and the harm it causes was the impetus for the issuance of the *Declaratory Ruling*.

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<sup>27</sup> See *Declaratory Ruling* ¶ 33; CTIA Petition for Declaratory Ruling, WT Docket 08-165, at 15 (filed July 11, 2008); Sprint Nextel Comments, WT Docket 08-165, at 5 (filed Sept. 29, 2008); CalWA Comments, WT Docket 08-165, at 2-3 (filed Sept. 29, 2008); Verizon Wireless Comments, WT Docket 08-165, at 7-9 (filed Sept. 29, 2008); *MetroPCS Comments* at 8-12; NextG Networks Comments, WT Docket 08-165, at 5-8 (filed Sept. 29, 2008); T-Mobile Comments, WT Docket 08-165, at 6 (filed Sept. 29, 2008); PCIA Comments, WT Docket 08-165, at 5 (filed Sept. 29, 2008).

<sup>28</sup> *Declaratory Ruling* ¶ 33.

<sup>29</sup> *Declaratory Ruling* ¶ 32.

<sup>30</sup> *Motion* at 11.

Petitioners also claim that there will be no harm if the 30-day time period for review is stayed. However, they are not simply requesting a stay of the 30-day time period—they request the ability to toll the shot clock at anytime. Absent the 30-day time period for review, the shot-clock itself is meaningless. If the shot clock is continually tolled, applicants lose the certainty of a final action, thereby losing the remedy to seek action in court as provided by Congress in section 332(c)(7)(B)(v).<sup>31</sup> The harm caused by such delay is well demonstrated.

**D. The Public Interest is Served by Enforcement of the *Declaratory Ruling***

The public is well served by quality wireless connectivity and well functioning public safety communications. The delays caused by the pre-*Declaratory Ruling* wireless facility application review process negatively impeded the deployment of wireless networks, including for public safety. Petitioners mistakenly claim that “[s]taying and amending or discarding the rule . . . would increase . . . efficient deployment.”<sup>32</sup> As demonstrated, with the ability to continually toll the shot clock or without any firm deadline, localities can continue to delay action on applications for wireless facility siting, to the detriment of network deployment. The public is best served by the maintenance of the *Declaratory Ruling* and all of its provisions.

**III. CONCLUSION**

Petitioners fail to establish the necessary showing of any of the elements required for the Commission to issue a stay. For the foregoing reasons, the Commission should deny the *Motion*.

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<sup>31</sup> 47 U.S.C. § 332(c)(7)(B)(v).

<sup>32</sup> *Motion* at 12.

Respectfully submitted,

PCIA—THE WIRELESS INFRASTRUCTURE ASSOCIATION

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**Certificate of Service**

I, Brian Regan, hereby certified that on December 24, 2009, the foregoing “Opposition of PCIA—The Wireless Infrastructure Association” was served on the parties listed below via first class mail to the following:

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\_\_\_\_\_/s/\_\_\_\_\_  
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