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

In the Matter of )  
)  
Petition for Declaratory Ruling to Clarify )  
Provisions of Section 332(c)(7)(B) to Ensure ) WT Docket No. 08-165  
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 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 PETITION FOR  
RECONSIDERATION OR CLARIFICATION OF  
PCIA—THE WIRELESS INFRASTRUCTURE ASSOCIATION**

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## SUMMARY

The Federal Communications Commission should dismiss NATOA *et al.*'s Petition for Reconsideration or Clarification of the 30-day application completeness review portion of the Commission's *Declaratory Ruling* because Petitioners fail to provide a legal or public interest justification necessary to meet the Commission's standards for reconsideration. A petition for reconsideration is "warranted only if the petitioner cites material error of fact or law or presents new or previously unknown facts and circumstances which raise substantial or material questions of fact that were not considered and that otherwise warrant Commission review of its prior action." Petitioners have not made this showing.

Petitioners claim that the Commission exceeded its legal authority when it required that timelines on wireless infrastructure siting applications should not be tolled if an application is deemed incomplete after the 30-day time period elapses. However the 30-day time period is an instrumental part of the overall interpretation of what constitutes a "reasonable period of time" for local wireless infrastructure siting decisions under the Communications Act. Without the inclusion of such a time period the overall timeframes the Commission sets forth in its *Declaratory Ruling* would be rendered meaningless because the timeframes could be repeatedly tolled for extended periods of time. The 30-day time period, therefore, is a reasonable use of the Commission's power of statutory interpretation.

Petitioners also err in claiming that the record in this proceeding does not support Commission action. The record belies Petitioners' claims that they were not afforded ample opportunity for comment on the completeness review time period. Numerous commenters over a 13-month-span documented the need for such a time period—Petitioners should have been aware of this issue through the exercise of ordinary diligence. Further, Petitioners present no new facts for the Commission to consider, instead retreading arguments that the Commission has already considered.

Finally, Petitioners do not advance new or accurate rationales for why elimination the completeness review period is in the public interest. Where Petitioners do raise public interest claims they are not directly related to the completeness review, the subject of their Petition. Regardless, the public interest claims raised are without merit given that the Commission has already decided that the public will benefit from the rapid deployment of wireless infrastructure that has for too long been needlessly delayed in the local siting process.

## I. INTRODUCTION

PCIA—The Wireless Infrastructure Association (“PCIA”)<sup>1</sup> hereby submits this *Opposition* in response to the *Petition for Reconsideration* (“*Petition*”) filed by NATOA et al. (“Petitioners”).<sup>2</sup> The *Petition* contains alternative requests asking the Federal Communications Commission (“Commission”) to reconsider the 30-day completeness review portion of the *Declaratory Ruling*.<sup>3</sup> Specifically, Petitioners ask the Commission to amend the *Declaratory Ruling* to (a) provide that any time period, other than a delay caused by the local government, in which additional information is required will not count against the shot clock; and (b) clarify that applicants cannot refuse to provide supplemental information required by the local government more than 30 days after an application is filed, or in the alternative, eliminate the 30-day completeness review provision in its entirety.

The Commission should deny Petitioners’ requests because Petitioners fail to provide a legal or public interest justification necessary to meet the Commission’s standards for reconsideration. The Commission, in issuing its *Declaratory Ruling*, acted within its legal authority when it determined that timelines on wireless infrastructure siting applications could be tolled if an application is deemed incomplete within 30 days from filing. Further, the Commission recognized that the 30-day completeness review is a critical component of its overall rule designed to remove barriers that “imped[e] the deployment of advanced and

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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, *Petition for Reconsideration or Clarification of National Association of Telecommunications and Advisors* (“NATOA”) et al., WT Docket No. 08-165 (filed Dec. 17, 2009) (“*Petition*”).

<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*”).

emergency services.”<sup>4</sup> Removing the completeness review period would also eliminate the certainty that advanced and emergency services can be deployed in a timely fashion, thereby also eliminating the *Declaratory Ruling*’s benefits to the public.

## **II. PETITIONERS FAIL TO MEET THE LEGAL STANDARDS NECESSARY FOR RECONSIDERATION**

The Commission has a high standard for reconsideration, “warranted only if the petitioner cites material error of fact or law or presents new or previously unknown facts and circumstances which raise substantial or material questions of fact that were not considered and that otherwise warrant Commission review of its prior action.”<sup>5</sup> Under the Commission’s rules, a petition for reconsideration will be granted only when:

- (1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission;
- (2) The facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or
- (3) The Commission determines that consideration of the facts relied on is required in the public interest.<sup>6</sup>

Neither the legal arguments nor facts presented in the *Petition* warrant reconsideration under this standard.

### **A. The Commission Acted Within its Legal Authority in Implementing a Completeness Review Period**

The Petitioners’ arguments for reconsideration on the basis that the Commission created new limitations in the *Declaratory Ruling* that exceed its legal authority are unfounded and should be rejected. Petitioners state that the “completeness deadline violates the Commission’s

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<sup>4</sup> *Declaratory Ruling* ¶ 32.

<sup>5</sup> *In re* Petitions for Reconsideration of the Second Report and Order; Implementation of Section 207 of the Telecommunications Act of 1996, et al., *Order on Reconsideration*, 14 FCC Rcd 19924, ¶ 7 (1999).

<sup>6</sup> 47 C.F.R. § 1.429(b) (2009).

interpretation of its own authority as expressed in the Order because it creates a ‘new limitation’ on State and local governments.”<sup>7</sup> Petitioners further argue that the Commission does not have “the authority to create entirely new requirements for local government processes.”<sup>8</sup> This argument fails because the *Declaratory Ruling* does not create a new process or limitation, but instead further clarifies the “reasonable” timeframes that the Commission seeks to define under its authority. Further, without certainty as to when the timeframes for review begin or end, the Commission’s interpretation lacks meaning.

Reviewing an application for completeness is a fundamental component of the wireless infrastructure siting process. In fact, the application completeness-review is an area fraught with delays, as PCIA has noted in the record on this proceeding on numerous occasions.<sup>9</sup> In acting to interpret what constitutes a “reasonable period of time” under the Telecommunications Act of 1996 (“Act”)<sup>10</sup> the Commission correctly realized that in order to define what constitutes a “reasonable period of time,” it must also define when a “reasonable period of time” begins. The submission of the application is the logical start to a review period.

The Commission noted that “timeframes should take into account whether applications are complete.”<sup>11</sup> As such, the Commission carefully considered the issue of incomplete applications, deciding that “when applications are incomplete as filed, the timeframes do not include the time that applicants take to respond to State and local governments’ requests for

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<sup>7</sup> *Petition* at 5.

<sup>8</sup> *Id.*

<sup>9</sup> *See* PCIA Ex Parte, WT Docket 08-165 at 2 (filed Oct. 23, 2009) (“PCIA members have experienced significant difficulties in having a local jurisdiction accept an application as “complete” despite the applicant’s best efforts to supply all documentation and information required by the local regulations.”); PCIA Comments, WT Docket 08-165 at 13 (filed Sept. 29, 2008) (“Delays occur while infrastructure providers wait for a final decision on submitted applications. In some jurisdictions, applications are repeatedly ‘tabled’ or deemed “incomplete” in an attempt to avoid final decision on proposed facilities.”).

<sup>10</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>11</sup> *Declaratory Ruling* ¶ 52.

information.”<sup>12</sup> Yet the Commission also correctly realized that the timeframes it defined could not begin with any certainty if there were no reasonable standard for the reviewing jurisdiction to assess whether the application is complete. As such the Commission found “that reviewing authorities should be bound to notify applicants within a reasonable period of time that their applications are incomplete.”<sup>13</sup> Thus, the Commission has provided a balanced system for ensuring that a jurisdiction is not forced to make a decision based upon an incomplete application, while also ensuring that the timelines for review begin in a timely fashion.

As noted, the Commission’s timeframes for review must include a starting point in order for the timeframes to have any objective applicability, and the application submission is the logical starting point. Without this starting point the timeframes are useless. A system that would allow for unlimited tolling based upon new requests for information would also be useless as it would be rife for abuse in order to delay the effectiveness of the timelines. Unlimited tolling would allow a jurisdiction to “pause” the timelines on numerous occasions by requesting new information thereby forestalling the actual effect of the timeline.

The Commission correctly determined that it has the authority to “interpret the limits Congress already imposed on State and local governments”<sup>14</sup> and therefore can create timeframes for local infrastructure siting decisions. As described above, a timeframe that cannot be applied with any certainty is not a timeframe at all. Setting a reasonable beginning point and ensuring that a review period cannot be procedurally extended indefinitely, as represented by the 30-day completeness review, is part and parcel of the entire timeframe. The Commission’s authority to interpret the statute to create the timeframe logically necessitates that it also has the authority to take steps to provide certainty in the timeline’s implementation. The 30-day

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* ¶ 25.

completeness review period, though not explicitly mentioned in the statute, provides this certainty.

The Supreme Court has stated that “ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in *reasonable fashion*.”<sup>15</sup> Petitioners themselves note that courts have held that “the Commission has the power to ‘interpret the contours of [the section at issue.]’”<sup>16</sup> A “contour” is defined as “the outline of a figure or body; the edge or line that defines or bounds a shape or object.”<sup>17</sup> The Commission’s 30-day completeness review is a perfect example of interpreting a “contour,” because without such a policy the timeframes it establishes would be of widely varying applicability and thus have no boundary or shape. Thus, the Commission’s decision to implement a completeness review procedure is a reasonable and justifiable use of its interpretive authority.

Further, the argument that the completeness review creates a “new limitation” on local governments is also incorrect. The *Petition* states that the completeness review “create[s] intermediate, internal procedures and deadlines” beyond the scope of the Act.<sup>18</sup> The Commission’s action places no limit on the ability of a State or local government to review an application for completeness, nor does it mandate internal procedures. Instead, this element of the Commission’s action merely provides a mechanism by which the locality can extend its timeframe for review. Certainly this incents local governments to review an application for completeness within 30 days, but there is no limit on its ability to do so afterwards. Therefore any argument that this is a “new limitation” in contravention of the statute should also be

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<sup>15</sup> Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (emphasis added).

<sup>16</sup> *Petition* at 6.

<sup>17</sup> Dictionary.com, Contour, <http://dictionary.reference.com/browse/contour> (last visited Dec. 23, 2009).

<sup>18</sup> *Petition* at 5.

rejected. The Commission’s inclusion of the completeness review timeframe is a reasonable method of interpreting the statute as it is authorized to do.

**B. The Record Is Replete With Calls for a Completeness Review Timeframe and Associated Facts Establishing its Necessity**

Petitioners state that the Commission should reconsider the application completeness review timeframe because it “was not outlined in CTIA’s original petition” and “was never the subject of any ex parte filing or comment in this proceeding.”<sup>19</sup> Under the Commission’s rules, reconsideration is warranted where “[t]he facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity.”<sup>20</sup> Petitioners argument must fail because the record contains numerous calls for an application completeness review timeframe, which any exercise of ordinary diligence would have uncovered.

PCIA, in its initial comments in this docket, noted that “[d]elays occur while infrastructure providers wait for a final decision on submitted applications. In some jurisdictions, applications are repeatedly ‘tabled’ or deemed ‘incomplete’ in an attempt to avoid final decision on proposed facilities.”<sup>21</sup> In order to remedy this problem, PCIA suggested in its reply comments that the Commission adopt a procedure from PCIA’s model ordinance *specifically to address the issue of application completeness review*, advocating for a 10-day completeness review period.<sup>22</sup> Further, PCIA submitted an ex parte filing *devoted entirely to this issue* where it asked the Commission to “ensure that any action it takes to provide timeframes for regulatory approvals also ensures that the timeframe begins on an efficient and predictable basis. A simple

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<sup>19</sup> *Petition* at 10.

<sup>20</sup> 47 C.F.R. § 1.429(b)(2).

<sup>21</sup> PCIA Comments at 13.

<sup>22</sup> PCIA Reply Comments, WT Docket 08-165 at 13 (filed Oct. 14, 2008) at 5-6.

solution to this problem would be an interim timeframe within which a local jurisdiction must review an application for its completeness . . . .”<sup>23</sup>

These comments were placed in the record at intervals that spanned more than a year, allowing the Petitioners ample time to contemplate that the Commission would take such an action. Further, PCIA was not alone in suggesting—on the record—that a completeness review period was necessary for an effective ruling. A discussion of this subject also appears in comments filed on the record by MetroPCS and CTIA.<sup>24</sup> The existence of these comments flies in the face of repeated assertions by the Petitioners that the completeness review was not “the subject of any comment or ex parte communication on record”<sup>25</sup> or was “created, without request by CTIA (in its original petition or based on any public comment cited in the record from any party) . . . .”<sup>26</sup> Accordingly, the Petitioners’ claims in this regard should be dismissed summarily as without merit because any exercise of due diligence would have uncovered these comments.

Similarly, the Petitioners cannot claim that their *Petition* is “relate[d] to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission.”<sup>27</sup> As the *Declaratory Ruling* demonstrates, other parties with interests similar to those of the Petitioners have already indicated concerns associated with application completeness review, which the Commission factored into its decision.<sup>28</sup> For example, Petitioners claim that the Commission’s decision does not take into account that things such as “incomplete structural or environmental analyses” may cause delays.<sup>29</sup> Yet the Commission

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<sup>23</sup> PCIA ex parte at 3.

<sup>24</sup> MetroPCS Communications Comments, WT Docket No. 08-165, at 12 (filed Sept. 29, 2008); CTIA Reply Comments, WT Docket No. 08-165, at 18 (filed Oct. 14, 2008).

<sup>25</sup> *Petition* at 3.

<sup>26</sup> *Id.* at 4.

<sup>27</sup> 47 C.F.R. § 1.429(b)(1).

<sup>28</sup> *Declaratory Ruling* ¶ 52 n. 155 (citing concerns of local jurisdictions about the completeness of an application as part of the overall review).

<sup>29</sup> *Petition* at 8.

itself cited to the comments of Fairfax County, VA that identified this exact issue.<sup>30</sup> The fact that Petitioners themselves did not make these arguments in advance of the *Declaratory Ruling* is not evidence that the facts are new or have not been presented to the Commission. Accordingly, Petitioners “new” facts fail to meet the Commission’s standards for reconsideration and should be rejected.

### **C. The 30-Day Completeness Review Period is in the Public Interest**

Petitioners make numerous specious arguments as to why the 30-day timeframe is not in the public interest, which it presents as new facts,<sup>31</sup> as well as threats about the consequences if the completeness review timeframe is maintained. As an initial matter, the facts presented in the *Petition* should be rejected without consideration because they do not meet the Commission’s standards for new facts which are allowed in reconsideration, as discussed above. However, even if the Commission did consider the “new” facts that the Petitioners present, the public interest demands that the Commission deny the requests set forth in the *Petition*.

Petitioners assert that “[t]he Commission’s 90/150 day shot clock will not work unless local authorities can toll the time for legitimate purposes” such as when it must wait for third parties to act.<sup>32</sup> Petitioners assert that in these scenarios “[t]he applications are neither ‘incomplete’ nor is the local authority at fault for the delay.”<sup>33</sup> In this situation the Petitioners are not taking exception to the application completeness review timeline that is the sole subject of the *Petition*; indeed they admit the application is not incomplete so the timeline for which they

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<sup>30</sup> *Declaratory Ruling* ¶ 52 n. 155 (citing Fairfax County, VA Comments at 13 (“Current processing times necessarily depend on the amount of time required to obtain complete and accurate application information and are greatly influenced by many issues that are identified after an application has been received. Unless these issues are resolved, approval or construction of the facility may not proceed. Examples of such issues include environmental restrictions such as resource protection areas and wetlands, historic district impacts, a review of all applicable zoning conditions that may affect the proposed telecommunication facility use, leasing restrictions, yard and other zoning requirements, and community concerns frequently involving visual compatibility.”)).

<sup>31</sup> See *Petition* at 6.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

seek reconsideration is irrelevant. Instead, the Petitioners attempt to undermine the entire timeframe scheme through a backdoor manner—they insist not that the completeness review is problematic but that the “shot clock will not work unless local authorities can toll the [timelines].”<sup>34</sup> In essence, Petitioners argue that the timeframes cannot work unless they can be stopped. Adopting the Petitioners’ rationale and allowing the timeframes to be tolled at the jurisdiction’s discretion would affect the entire timeframe mechanism and defeat the purpose of the timeframes: avoiding delays “impeding the deployment of advanced and emergency services.”<sup>35</sup>

Further, this argument is unnecessary because the Commission already implemented numerous procedures in the event that the jurisdiction takes longer than the timeframes set out in the *Declaratory Ruling*. The Commission encourages applicants and reviewing jurisdictions to work in harmony to complete the review process by removing the rigid framework under which an applicant must seek judicial action within 30 days of the timeframe expiration.<sup>36</sup> As such, the *Declaratory Ruling* clearly states that “[o]f course, the option is also available [in cases where the review timeframe has expired] to toll the period under Section 332(c)(7) by mutual consent.”<sup>37</sup> Yet even if mutual consent for tolling a time period is not possible, a reviewing jurisdiction has ample opportunity to explain why it could not provide a decision within the

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<sup>34</sup> *Id.*

<sup>35</sup> *Declaratory Ruling* ¶ 32.

<sup>36</sup> *Id.* ¶ 49 (“We conclude that a rigid application of this cutoff to cases where the parties are working cooperatively toward a consensual resolution would be contrary to both the public interest and Congressional intent. Accordingly, we clarify that a ‘reasonable period of time’ may be extended beyond 90 or 150 days by mutual consent of the personal wireless service provider and the State or local government, and that in such instances, the commencement of the 30-day period for filing suit will be tolled.”).

<sup>37</sup> *Id.* ¶ 50.

timeframes established, including facts related to the need for supplemental information, before a court.<sup>38</sup>

*Petitioners* argue that these safeguards, which again are not directly related to the 30-day completeness review at issue but instead the entire timeframes, are insufficient because “an applicant that recognizes it is not likely to be approved [after the deadlines have expired] may game the system by threatening litigation against local governments with limited resources to try to gain by threat what could not be won on the merits.”<sup>39</sup> The *Petitioners’* argument should be rejected.

First, the argument presupposes an element of bad faith on the part of the applicants. This presupposition is evident in the *Petition’s* request that the Commission clarify that applicants cannot refuse to provide supplemental information required by the local government more than 30 days after an application is filed. There is no evidence or support for the idea that an applicant would purposefully deny a reviewing-jurisdiction supplemental information beyond the 30-day completeness review.<sup>40</sup> Second, a reviewing jurisdiction always has the option to deny an application within the established timeframes. Indeed the entire purpose of establishing timeframes is to provide an applicant with certainty of process to know whether it should proceed with a site; if a site is not an appropriate fit for the community the jurisdiction should deny the permit so the applicant can propose one that is. *Petitioners’* argument actually supports the rationale for the establishment of timeframes: too many jurisdictions utilize unreasonable delay as a “decision” on applications for sites that they do not want yet have no basis to reject.

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<sup>38</sup> *Id.* ¶ 42 (“[T]he State or local authority will have the opportunity, in any given case that comes before a court, to rebut the presumption that the established timeframes are reasonable.”).

<sup>39</sup> *Petition* at 7.

<sup>40</sup> This presupposition is not only hypothetical but illogical. *Petitioners’* argument, if true, would mean that applicants view the entire siting application review process as a farce; a formality that could be overcome simply by biding time until a court appeal. Wireless providers are committed to resolving siting applications in the most expeditious manner possible which requires that they work closely and cooperatively with the reviewing jurisdiction to avoid the costs and delays associated with litigation.

The *Declaratory Ruling* correctly recognizes that prompt decisions are the keystone of the rapid deployment of infrastructure necessary to benefit the public.

Petitioners also argue that the safeguards are ineffective because “[m]erely having to explain oneself to the court is expensive.”<sup>41</sup> PCIA agrees completely with this statement and for this reason our members pursue litigation only as a last resort. Litigation is costly for both parties, and a wireless provider that may have thousands of applications pending nationwide cannot bear the costs constant litigation—and certainly not for litigating applications in which there is a high probability that the delay was reasonable in light of the circumstances. The goal of the timeframes is to set parameters establishing the responsibilities of both parties in order to avoid litigation. This is in the public interest because it conserves resources for both jurisdictions and applicants and also prevents a clogged judicial system.

Finally, Petitioners assert that “[t]hose that will be hurt most by the Order in general, and the 30 day review period in particular, will be the citizens of our nation’s towns, cities, and counties.” Petitioners are once again arguing policy points beyond the scope of the *Petition*, and beyond mentioning it, fail to show why the 30-day completeness review specifically should be reconsidered. The Commission has already decided that the *Declaratory Ruling* is in the public interest in order to ensure that wireless meets its full potential for advanced and emergency services and the *Petition* does not meet the standard for the Commission to revisit its public interest determination.

### **III. CONCLUSION**

Petitioners have been unable to demonstrate that the completeness review process warrants review under the Commission’s standards. For the foregoing reasons the Commission should deny the *Petition* in its entirety.

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<sup>41</sup> *Id.*

Respectfully submitted,

PCIA—THE WIRELESS INFRASTRUCTURE ASSOCIATION

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**Certificate of Service**

I, Brian Regan, hereby certified that on December 28, 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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