

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling to Clarify)	WT Docket No. 08-165
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 OF VERIZON WIRELESS TO PETITION FOR
RECONSIDERATION OR CLARIFICATION**

Verizon Wireless hereby opposes the Petition for Reconsideration or Clarification (“Petition”) filed by 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 (“Petitioners”) seeking to amend part of the Commission’s Declaratory Ruling in the above-captioned proceeding.¹

Petitioners ask the Commission to reconsider or clarify a provision in the Declaratory Ruling that provides that when a State or local government notifies a facilities siting applicant within 30 days of the date the application is filed that the application is incomplete, the time it

¹ 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, *Declaratory Ruling*, FCC 09-99 (November 18, 2009) (“Declaratory Ruling”); Wireless Telecommunications Bureau Seeks Comment on Petition for Reconsideration or Clarification of the Commission’s Declaratory Ruling Clarifying Provisions in Section 332(c)(7) of the Communications Act, *Public Notice*, WT Docket No. 08-165, DA 09-2629 (released December 23, 2009).

takes the applicant to respond to the request for more information will not count toward the 90 or 150 day “shot-clock” adopted in the Declaratory Ruling (“30-day Review Period”).²

Specifically, Petitioners ask the Commission to either (1) expand the 30-day Review Period to provide (a) whenever a delay in reviewing an application is not caused by the government entity, that delay 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 (2) eliminate the 30-day Review Period provision entirely.³

Verizon Wireless opposes Petitioners’ request to amend or eliminate the 30-day Review Period. Contrary to Petitioners’ arguments, the Commission has authority to establish the provision, there was sufficient notice that such a provision was being considered, and the provision is a reasonable component of the shot-clock process.

I. BACKGROUND

In the Declaratory Ruling, the Commission granted in part and denied in part a Petition filed by CTIA – the Wireless Association.⁴ CTIA asked the Commission to declare time periods within which state or local zoning authorities must take action on wireless facilities requests under Section 332(c)(7)(B) of the Communications Act; to clarify that Section 332(c)(7)(B)(i) of the Act bars zoning decisions that have the effect of prohibiting an additional entrant from

² See Declaratory Ruling at 21-22 (¶¶ 52-53).

³ Petition at 10-11.

⁴ In the Matter of 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, *Petition for Declaratory Ruling* (filed July 11, 2008) (“CTIA Petition”).

offering service in a given area; and to preempt, under Section 253 of the Act, local zoning ordinances and state laws that treat every wireless siting application as requiring a variance. The Declaratory Ruling granted CTIA's request to define periods for State and local action on wireless facilities siting requests – the so-called “shot-clock,” and to find that it is a violation of Section 332(c)(7)(B)(i)(II) of the Act for a State or local government to deny a personal wireless service facility siting application because service is available from another provider. The Declaratory Ruling denied CTIA's request for preemption under Section 253 of the Act of zoning ordinances that require variances or waivers for every wireless facility.⁵

With respect to the shot-clock, the Commission found that the record demonstrated that unreasonable delays in the facilities siting applications process had obstructed the provision of wireless services.⁶ Accordingly, the Commission declared that “a reasonable period of time,” as that term is used in Section 332(c)(7)(B)(ii) of the Act, is presumptively 90 days to process applications requesting collocations and 150 days to process all other applications. If the State or local government does not act on the application within those timeframes, then the Commission ruled that a “failure to act” has occurred giving rise to a personal wireless services provider's ability to seek redress in a court of competent jurisdiction pursuant to Section 332(c)(7)(B)(v).⁷ Finally, in response to several comments arguing that the timeframes adopted should take into account that some applications are not complete when they are filed and that applicants do not

⁵ See Declaratory Ruling at 2-3 (¶¶ 4-5).

⁶ *Id.*, at 13 (¶ 34).

⁷ *Id.*, at 11-12 (¶ 32).

always cure the application defects in a timely manner, the Commission established the 30-day Review Period.⁸

II. DISCUSSION

In opposing the 30-day Review Period, Petitioners argue that (1) the Commission lacked the necessary authority to adopt this provision; (2) the provision was adopted without adequate notice to and discussion with interested parties; and (3) the provision is bad policy because it does not consider other valid reasons to toll the shot-clock and places undue burdens on zoning authorities. As discussed below, none of these arguments has merit.

A. The Commission Had Authority to Establish the 30-Day Review Period.

Petitioners contend that the 30-Day Review Period constitutes an entirely new requirement placed upon State and local zoning authorities. Thus, even if Petitioners were to accept that the Commission had the authority to adopt the shot-clock on the theory that the Commission was exercising its authority to interpret a statutory provision to resolve an ambiguity – something they do not concede but also fail to challenge – they argue that the 30-day Review Period is beyond any such authority because it is “in no way anticipated, required, or referenced in any portion of the Act or its legislative history.”⁹

Contrary to these arguments, the 30-day Review Period is not a new requirement. Rather, it merely helps determine when the shot-clock time periods begin. Indeed, the 30-day Review Period is not a requirement at all. The FCC does not direct State and local governments to adopt

⁸ *Id.*, at 21-22 (¶¶ 52-53).

⁹ Petition at 4-6 (quoted passage appears at page 5).

any rules or take any action. The 30-day Review Period simply clarifies, to the benefit of applicants and zoning authorities, how the shot-clock time periods will be calculated in the event a government authority determines that more information is needed to process an application.¹⁰

Since the 30-day Review Period is a procedural provision for calculating and applying the shot-clock time periods, the Commission's authority for adopting the provision rests in its authority to interpret Section 332(c)(7)(B) to adopt the shot-clock. Yet Petitioners fail to offer any arguments challenging the shot-clock itself. Since the 30-day Review Period is merely a mechanism for determining when the clock begins to run, Petitioners failure to challenge the shot-clock itself is fatal to their authority argument.

The Commission is authorized to provide reasonable interpretations of the Communications Act, and those interpretations are generally entitled to deference when the language in the provisions being interpreted is ambiguous.¹¹ In adopting the shot-clock, the Commission interpreted language in the statute, "reasonable period of time," that is ambiguous. The Commission interpreted this language in a manner entirely consistent with the guidance provided by Congress.¹² The Commission's Declaratory Ruling – both in terms of the shot-clock and the 30-day Review Period, is supported by substantial record evidence that these mechanisms

¹⁰ Even if the zoning authority takes longer than the presumptive time periods set forth in the Declaratory Ruling and a court action is brought, the zoning authority can present evidence in the court proceeding that the additional time was reasonable. Declaratory Ruling at 7 (¶ 19). The Commission also makes clear that applicants and government entities are free to extend the shot-clock time periods by mutual consent. *Id.*, at 20 (¶ 49).

¹¹ *Chevron U.S.A Inc. v. NRDC*, 467 U.S. 837, 863-864 (1984); *NCTA v. Brand X Internet Services*, 545 U.S. 967, 980-82 (2005).

¹² Declaratory Ruling at 8-10 (¶¶ 23-26). *See* Reply Comments of Verizon Wireless, WT Docket No. 08-165 (filed October 14, 2008) at 7-9.

will help to achieve the goals of Section 332(c)(7)(B).¹³ Accordingly, it is clear that the Commission's actions in this proceeding were authorized.

B. Petitioners Had Ample Notice that a Review Period for Application Completeness Was Being Considered.

Petitioners argue that proper notice of the 30-day Review Period was not provided to commenters in that the rule was not requested in CTIA's original petition and comment on the rule was not sought by the FCC. Petitioners contend that if the provision had been vetted with local governments, the Commission would have discovered the legal and practical problems with the rule.¹⁴

Contrary to these assertions, the record clearly demonstrates that the need for some period of review for application completeness was an explicit issue in the proceeding. In establishing the 30-day Review Period, the Commission cited to the comments filed by five entities representing State and local zoning authorities. These commenters argued that applications are not always complete when filed and that any timeframes imposed must account for the need to seek additional information.¹⁵ MetroPCS, in its comments, proposed that the Commission adopt a 3-business day completeness review period.¹⁶ CTIA supported the MetroPCS proposal.¹⁷ Finally, as the Commission noted, five State statutes that were discussed in comments and reply

¹³ *Id.*, at 11-15 (¶¶ 32-36) and 21-22 (¶¶ 52-53).

¹⁴ Petition at 10.

¹⁵ Declaratory Ruling at 21 (¶ 52).

¹⁶ MetroPCS Comments at 12; Declaratory Ruling at 21 (¶ 52).

¹⁷ CTIA Reply Comments at 18.

comments each contain some provision for review of application completeness.¹⁸ Petitioners therefore had ample opportunity to raise any concerns they had with this provision before it was established.

C. The 30-Day Review Period Is a Reasonable Response to a Legitimate Policy Concern.

Petitioners argue that the 30-day Review Period should be either reconsidered or eliminated because (1) it does not allow the shot-clock to be tolled for other legitimate purposes beyond the control of the zoning authority; and (2) it does not consider the realities of the zoning process and will result in unintended consequences. Petitioners argue, further, that in response to the 30-day Review Period, zoning authorities may have to make the application process more formal (to avoid the potential for incomplete information) and increase application fees.¹⁹

Petitioners mischaracterize both the nature of the review period and its likely consequences. As discussed above, it does not establish a hard deadline that cannot be exceeded. Zoning authorities are free to conduct their reviews – including their reviews for application completeness – in any manner they choose. If a zoning authority takes longer than the applicable presumptive period to act on a wireless facilities application and the applicant brings a court action alleging a “failure to act,” the zoning authority will have the opportunity to demonstrate that its review time was reasonable.

The Commission established the 30-day Review Period in response to concerns raised in the record both by zoning authorities and applicants. The Commission sought to create a

¹⁸ Declaratory Ruling at 21-22 (¶53).

¹⁹ Petition at 7-10.

provision for calculating the shot-clock time periods that protected zoning authorities (which might run out time if the proper information is not submitted by applicants in a timely manner) and applicants (from zoning authorities that might seek to circumvent the shot-clock time periods by waiting until near the end of the shot-clock time periods to demand additional information).²⁰ In deciding that 30 days was a reasonable amount of time to review applications for completeness, the Commission took notice of five State statutes that were discussed in the record, each of which contained a completeness review period. Those periods ranged from a low of 20 business days to a high of 45 days. In light of this evidence, the Commission's decision to establish a 30-day Review Period was clearly grounded in the record.

The possibility that the review period established does not provide for tolling of the presumptive time periods for every possible type of delay that is beyond the control of the zoning authority does not have any bearing on its reasonableness or lawfulness. Rather, if Petitioners can demonstrate that the public interest is served by tolling the shot-clock for other types of delays, these delays might form the basis of a further petition asking the FCC to allow tolling of the shot-clock for other events.

Finally, with regard to the consequences of the 30-day Review Period, Petitioners should not be surprised that the Commission's interpretive rulings in this proceeding will have consequences on the wireless facilities siting approval process. In adopting Section 332(c)(7), Congress placed limits on State and local government wireless facilities siting decisions by requiring, *inter alia*, that such decisions be made within a reasonable period of time. Unfortunately, because the statute was ambiguous in terms of what amount of time was

²⁰ Declaratory Ruling at 21-22 (¶ 52-53).

reasonable and when a zoning authority had failed to act, a significant number of wireless facility siting decisions were delayed.²¹ The Declaratory Ruling was intended to have consequences on State and local zoning authorities to give effect to Congress' intent and speed the wireless facilities siting process to benefit the public by increasing access to wireless communications networks. If those consequences result in more timely and reasonable decisions being made by State and local zoning authorities, the public will benefit.

²¹ See Declaratory Ruling at 11-13 (¶¶ 32-34); CTIA Petition at 13-16; Comments of Verizon Wireless, WT Docket No. 08-165 (filed September 29, 2008) at 6-8.

III. CONCLUSION

The Commission should retain the provision for tolling the presumptive shot-clock periods when State and local zoning authorities notify applicants within 30 days that an application is not complete. By clarifying how shot-clock periods will be calculated, the provision is a reasonable and lawful exercise of Commission authority and provides benefits both to zoning authorities and to applicants.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 22nd day of January, 2010, copies of the foregoing
"Opposition of Verizon Wireless to Petition for Reconsideration or Clarification" in WT
Docket No. 08-165 were sent by US Mail to the following party:

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