
**Before the
Federal Communications Commission
Washington, DC 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)

To: The Commission

**OPPOSITION OF CTIA–THE WIRELESS ASSOCIATION®
TO PETITION FOR RECONSIDERATION OR CLARIFICATION**

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TABLE OF CONTENTS

SUMMARY ii

I. INTRODUCTION AND BACKGROUND 3

 A. The Commission Found Record Evidence that the Zoning Review Process for Wireless Facility Siting Results Is Unreasonable Delay in Many Cases 3

 B. The Commission Clarified Ambiguous Provisions in Section 332(c)(7) by Setting Presumptively Reasonable Timelines for Zoning Authorities to Act in Response to Wireless Facility Siting Applications..... 4

 C. The Commission Provided for an Initial 30-Day Review Period During Which Zoning Authorities May Automatically Toll the Timelines in the Event Applications Are Incomplete..... 6

II. THE PETITION FOR RECONSIDERATION SHOULD BE DENIED BECAUSE THE COMMISSION INTERPRETED SECTION 332(C)(7) CONSISTENT WITH THE LAW 8

 A. The Commission Reasonably Interpreted Section 332(c)(7) to Include a Period to Review the Completeness of Applications and Automatically Toll Applicable Timeframes if Necessary 8

 B. The Period for Review Does Not Violate the Commission’s Own Interpretation or Legislative History..... 10

 C. The Commission Provided Ample Opportunity for Public Input, but Petitioners Refrained from Commenting on Proposals in the Record Regarding an Appropriate Review Period for Automatically Tolling an Application for Incompleteness 12

III. THE REVIEW PERIOD FOR AUTOMATIC TOLLING IS SOUND POLICY THAT BALANCES THE IMPORTANT OBJECTIVES – STATE, LOCAL AND FEDERAL – SET FORTH IN SECTION 332(C)(7) 15

 A. Thirty Days Is a Reasonable Period for *Automatic* Tolling Based on Prompt Initial Review for Completeness, and *Consensual* Tolling Encourages Both the Applicant and the Zoning Board to Act Reasonably and in Good Faith..... 15

 B. The Timeframes and 30-Day Review Period for Automatic Tolling Will Not Cause, Encourage or Pre-Determine the Outcome of Litigation, and Any Judicial Review Will Still Occur on a Case-by-Case Basis..... 18

CONCLUSION..... 20

SUMMARY

CTIA–The Wireless Association® (“CTIA”) hereby opposes the Petition for Reconsideration or Clarification (“Petition”) filed December 17, 2009 in response to the Commission’s Wireless Facility “Shot Clock” Declaratory Ruling. The Petition seeks to overturn the 30-day review period during which a zoning authority can automatically toll the applicable 90- or 150 day shot clock timeframe if it deems an application to be incomplete (“review period for automatic tolling”) – but the Petition fails on every count:

First, the Commission lawfully interpreted ambiguous provisions in 47 U.S.C. § 332(c)(7) concerning what is “a reasonable period of time” for a zoning authority to act on a wireless siting application and what lapse of time constitutes a “failure to act.” The authority to interpret those provisions clearly includes the authority to interpret how that time is computed, because the method of computing and tolling the time is an integral part of the time period deemed “reasonable.”

The Commission acted in the Declaratory Ruling based on substantial evidence in the record that “unreasonable delays are occurring in a significant number of cases,” and delays are getting worse in many areas to the detriment of wireless services and associated public safety concerns such as 911. The 30-day review period for automatic tolling, as the Commission stated, “protect[s] applicants from a last minute decision” that an application is incomplete. If, as Petitioners maintain, there were no limit on automatic tolling, then an authority would be able to toll the applicable shot clock on the 89th or 149th day by declaring an application “incomplete” – effectively nullifying the Commission’s interpretation of the statute and the federal goal of fostering wireless facility buildout.

Second, contrary to Petitioners’ claims, the review period for automatic tolling is not a new “deadline” but merely interprets the limits Congress already imposed on State and local

governments. The Commission’s actions will not preempt zoning authorities from reviewing and deciding the outcome of wireless facility siting applications, consistent with the authority reserved to them in Section 332.

Third, the Commission followed appropriate procedures for reaching its decision – its action pursuant to declaratory ruling did not trigger APA notice-and-comment rulemaking requirements but, in any event, the Commission sought comment and several parties (including the constituencies NATOA et al. represent) commented on the need to review applications for completeness. In fact, the issue was addressed in comments, reply comments, and ex parte submissions. The Petitioners simply chose not to address the issue.

Fourth, the Commission’s approach provides a flexible framework that balances the interests of both zoning authorities and applicants alike. In response to comments by municipalities regarding the risk of timelines for action in the event of incomplete applications, the Commission incorporated a period for review and automatic tolling in the case of an incomplete application. At the same time, in response to comments by the wireless industry expressing concern that zoning authorities could engage in last-minute gamesmanship by deeming an application incomplete, the Commission limited the right to automatically toll an application to the first 30 days after filing.

The Commission observed there would be situations where both the applicant and the zoning authority recognize that additional time is needed to process an application. That is why the Commission allowed applicants and zoning boards to work together toward a zoning decision on a schedule that takes all of the relevant factors into account. To encourage parties to “work[] cooperatively toward a consensual resolution,” the Commission clarified that the “reasonable period of time” for reaching a decision “may be extended beyond 90 or 150 days by mutual consent.”

Eliminating the 30-day window for automatic tolling of an application would re-institute opportunities for continued “unreasonable delay” in resolving applications, would undermine the very purpose of the Declaratory Ruling, and would perpetuate the practices the Commission has found harm the public interest.

In short, the Petition fails to provide any valid basis for reconsideration of the Declaratory Ruling and should be denied.

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**OPPOSITION OF CTIA–THE WIRELESS ASSOCIATION®
TO PETITION FOR RECONSIDERATION OR CLARIFICATION**

CTIA–The Wireless Association® (“CTIA”) hereby opposes the Petition for Reconsideration or Clarification (“Petition”) filed December 17, 2009 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 (“NATOA *et al.*” or “Petitioners”)¹ in response to the Commission’s Wireless Facility “Shot Clock” *Declaratory Ruling*.² The Petition seeks to overturn the 30-day review period during which a zoning authority can automatically toll the applicable 90- or 150-day shot clock timeframe if it deems an application to be incomplete (“review period for automatic tolling”) – but the Petition fails on every count:

¹ Petition 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 for Reconsideration or Clarification, WT Docket No. 08-165 (filed Dec. 17, 2009) (“Petition”).

² 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*, 24 FCC Rcd 13994 (2009) (“*Declaratory Ruling*”).

- First, the Commission lawfully interpreted ambiguous provisions in 47 U.S.C. § 332(c)(7) concerning what is “a reasonable period of time” for a zoning authority to act on a wireless siting application and what lapse of time constitutes a “failure to act.” The authority to interpret those provisions clearly includes the authority to interpret how that time is computed, because the method of computing and tolling the time is an integral part of the time period deemed “reasonable.”
- Second, contrary to Petitioners’ claims, the review period for automatic tolling is not a new “deadline” but merely interprets the limits Congress already imposed on State and local governments.
- Third, the Commission followed appropriate procedures for reaching its decision. Its action pursuant to declaratory ruling did not trigger APA notice-and-comment rulemaking requirements but, in any event, the Commission sought comment and several parties (including the constituencies NATOA *et al.* represent) commented on the need to review applications for completeness.
- Fourth, the Commission’s approach – incorporating a 30-day period for review and automatic tolling in the case of an incomplete application, along with consensual tolling thereafter – provides a flexible framework that balances the interests of both zoning authorities and applicants alike.

In short, the Petition fails to provide any valid basis for reconsideration of the *Declaratory Ruling*.

Finally, CTIA notes Petitioners’ statement informing the Commission and any appellate court “in which the Declaratory Order might be subject to a petition for review” that Petitioners reject but do not challenge the Commission’s authority to interpret Section 332.³ This transparent effort to avoid a court finding that petition(s) for review must be held in abeyance pending reconsideration is doomed to fail. The review period for automatic tolling is inextricably intertwined with the Commission’s interpretation of Section 332(c)(7), as discussed below.

³ Petition at 2.

I. INTRODUCTION AND BACKGROUND

A. The Commission Found Record Evidence that the Zoning Review Process for Wireless Facility Siting Results Is Unreasonable Delay in Many Cases

In July 2008, CTIA filed a petition asking the Commission “to resolve open questions regarding the time frames in which zoning authorities must act on siting requests” in light of substantial impediments that some zoning authorities have imposed on wireless facility siting and the provision of wireless services.⁴ The Commission issued a public notice seeking comment on the petition, and numerous parties – including Petitioners – filed comments and replies.⁵

In the *Declaratory Ruling*, the Commission concluded that “unreasonable delays are occurring in a significant number of cases,” and delays are getting worse in many areas.⁶ The record showed that these unreasonable delays “have obstructed the provision of wireless services.”⁷ Such delays, the Commission found, thwart the deployment of advanced wireless services, threaten to undermine the Commission’s wireless service coverage goals and impede the advanced services and competition that Congress has deemed critical.⁸ It also found that the delays hinder public safety, citing the need for widely available wireless 911 service.⁹

⁴ Petition of CTIA–The Wireless Association[®] for Declaratory Ruling, WT Docket No. 08-165, at ii (filed July 11, 2008).

⁵ Wireless Telecommunications Bureau Seeks Comment On Petition For Declaratory Ruling By CTIA – The Wireless Association 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, *Public Notice*, 23 FCC Rcd 12198 (WTB 2008).

⁶ *Declaratory Ruling*, 24 FCC Rcd at 14005 ¶ 33.

⁷ *Id.* at 14006 ¶ 34.

⁸ *See id.* at 14007-08 ¶ 35.

⁹ *See id.* at 14008 ¶ 36.

B. The Commission Clarified Ambiguous Provisions in Section 332(c)(7) by Setting Presumptively Reasonable Timelines for Zoning Authorities to Act in Response to Wireless Facility Siting Applications

In response to the record evidence of “lengthy and unreasonable delays,”¹⁰ the Commission issued its *Declaratory Ruling* interpreting the provisions of Section 332(c)(7) of the Communications Act. As the Supreme Court has noted, Section 332(c)(7) “imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification” of the facilities necessary for wireless communications.¹¹ Among these limits are: (1) Section 332(c)(7)(B)(ii), which requires a state or local zoning authority to act on a wireless facility application “within a *reasonable period of time*”¹²; and (2) Section 332(c)(7)(B)(v), which provides that, after “any final action or *failure to act*” by a state or local zoning authority, an aggrieved party may seek judicial review within 30 days.¹³ The statute does not supply definitions of these terms, and the Commission issued the *Declaratory Ruling* to fill in the gaps. In taking action here, the Commission was careful to “protect[] core local and State government zoning functions while fostering infrastructure build out.”¹⁴

First, as part of the *Declaratory Ruling*, the Commission affirmed its authority to interpret Section 332(c)(7), citing, *inter alia*, the 2008 U.S. Court of Appeals for the Sixth Circuit *Alliance for Community Media v. FCC* decision, which confirmed the Commission’s

¹⁰ *Id.* at 14004 ¶ 32.

¹¹ *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005).

¹² 47 U.S.C. § 332(c)(7)(B)(ii) (emphasis added).

¹³ 47 U.S.C. § 332(c)(7)(B)(v) (emphasis added).

¹⁴ *Declaratory Ruling*, 24 FCC Rcd at 13995 ¶ 3.

“clear jurisdictional authority” with respect to “interpreting the contours” of provisions of the Communications Act.¹⁵ The Commission thus found:

Given the evidence of unreasonable delays and the public interest in avoiding such delays, we conclude that the Commission should define the statutory terms “reasonable period of time” and “failure to act” in order to clarify when an adversely affected service provider may take a dilatory State or local government to court. Specifically, we find that when a State or local government does not act within a “reasonable period of time” under Section 332(c)(7)(b)(i)(II), a “failure to act” occurs within Section 332(c)(7)(B)(v).¹⁶

The Commission’s next step was to interpret what constitutes a “reasonable period of time.” The Commission found “90 days to be a generally reasonable timeframe for processing collocation applications and 150 days . . . for processing applications other than collocations. Thus, a lack of a decision within these timeframes presumptively constitutes a failure to act under Section 332(c)(7)(B)(v),”¹⁷ clarifying that an applicant can pursue judicial relief thereafter.

It is important to recognize that the *Declaratory Ruling* established these time periods as rebuttable presumptions and acknowledged that more time may be needed in individual cases. In particular, in the event an applicant pursues a judicial remedy, the zoning board “will have the opportunity to rebut the presumption of reasonableness.”¹⁸ Ultimately, the Commission observed, “the court will determine whether the delay was in fact unreasonable under all the circumstances of the case.”¹⁹

¹⁵ *Id.* at 14002 ¶ 24 (citing *Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 2821 (2009)).

¹⁶ *Declaratory Ruling*, 24 FCC Rcd at 14008 ¶ 37.

¹⁷ *Id.* at 14012 ¶ 45.

¹⁸ *Id.* at 14005 ¶ 32.

¹⁹ *Id.* at 13995 ¶ 4.

C. The Commission Provided for an Initial 30-Day Review Period During Which Zoning Authorities May Automatically Toll the Timelines in the Event Applications Are Incomplete

Finally – and critical to the claims at issue here – the Commission also provided for “further adjustments to the presumptive deadlines in order to ensure that the timeframes accommodate certain contingencies that may arise in individual cases, including ... where the application review process has been delayed by the applicant’s failure to submit a complete application or to file necessary additional information in a timely manner.”²⁰

Numerous parties addressed the issue of application review for completeness and the reasonableness of time for a zoning authority to issue a decision. The *Declaratory Ruling* cited a number of local government commenters urging the Commission to “take into account that not all applications are complete as filed.”²¹ Several wireless industry commenters pointed out that incompleteness can be used as a pretext for not acting in a timely fashion — for example, MetroPCS proposed that zoning authorities have three business days to review an application for completeness, after which the application would be deemed complete.²² CTIA supported this approach.²³ Other proposals in *ex parte* filings advocated a 10-day completeness review period, with the timeline for action tolled until the deficiencies identified at that stage were remedied.²⁴

²⁰ *Id.* at 14010 ¶ 42.

²¹ *Id.* at 14014 ¶ 52 & n.155 (citing Comments of Fairfax County, VA at 13; Comments of City of Bellingham, WA at 1-2; Comments of Michigan Municipalities at 19-20; Comments of Stokes County, N.C. at 1; Comments of Florida Cities at 8-9).

²² *See* Comments of MetroPCS Communications, Inc., WT Docket No. 08-165, at 12 (filed Sept. 29, 2008) (“MetroPCS Comments”) (cited in *Declaratory Ruling* at ¶ 52); *see also* Comments of PCIA-The Wireless Infrastructure Association, WT Docket No. 08-165, at 13 (filed Sept. 29, 2008).

²³ Reply Comments of CTIA, WT Docket No. 08-165, at 18 (filed Oct. 14, 2008) (“CTIA Reply Comments”).

²⁴ Letter from PCIA to FCC, WT Docket No. 08-165, attachment at 7 (filed Dec. 5, 2008); Letter from PCIA to FCC, WT Docket No. 08-165, at 2 (filed Oct. 23, 2009).

The Petitioners' initial comments did not address completeness. Their reply comments recited the completeness review provisions of several states,²⁵ but did not take a position on how the completeness review should be factored into the FCC's assessment of reasonableness. Petitioners never responded to the specific proposal for an initial review period of three days for review raised in initial comments; nor did it address the additional proposals made by PCIA in subsequent *ex parte* filings for a longer 10-day review period for completeness that would result in automatic tolling of the timeline for incomplete applications.

The Commission's *Declaratory Ruling* responded to the filings raising the completeness issue by finding that "the timeframes should take into account whether applications are complete,"²⁶ and it defined the review period for automatic tolling as 30 days – *i.e.*, if a zoning authority notifies an applicant within the first 30 days that its application is incomplete and supplies a list of deficiencies, then the time it takes for the applicant to respond with additional information "will not count toward the 90 or 150 days."²⁷ In this way, the Commission concluded, "State and local governments [have] sufficient time for reviewing applications for completeness, while protecting applicants from a last minute decision that applications should be denied as incomplete."²⁸ In addition, the Commission clarified that the "reasonable period of time" could be "extended beyond 90 or 150 days by mutual consent . . . and that in such instances, the commencement of the 30-day period for filing suit will be tolled."²⁹

²⁵ See Reply Comments of NATOA *et al.*, WT Docket No. 08-165, at 3-7 (filed Oct. 14, 2008) ("NATOA Reply Comments").

²⁶ *Declaratory Ruling*, 24 FCC Rcd at 14014 ¶ 52.

²⁷ *Id.* at 14015 ¶ 53.

²⁸ *Id.*

²⁹ *Id.* at 14013 ¶ 49.

II. THE PETITION FOR RECONSIDERATION SHOULD BE DENIED BECAUSE THE COMMISSION INTERPRETED SECTION 332(C)(7) CONSISTENT WITH THE LAW

Petitioners claim that the Commission's authority to interpret Section 332 does not include the authority to create "intermediate, internal procedures and deadlines"³⁰ and that establishment of a 30-day automatic tolling period conflicts with the *Declaratory Ruling's* own reasoning that it does not impose new limitations beyond Section 332(c)(7).³¹ Petitioners also assert that interested parties had no notice of the Commission's plans to adopt a review period for automatic tolling and that additional notice-and-comment is required. These arguments are meritless, and reconsideration is unwarranted.

A. The Commission Reasonably Interpreted Section 332(c)(7) to Include a Period to Review the Completeness of Applications and Automatically Toll Applicable Timeframes if Necessary

Petitioners argue that even if the Commission can lawfully interpret a "reasonable period of time" as presumptively being 90 or 150 days, the review period for automatic tolling does not clarify the meaning of that statutory term but is rather a "new burden" and a "deadline."³² This argument fails on numerous counts.

By way of background, as the Supreme Court has explained, agencies "are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer."³³ Time and again, courts have granted the Commission broad authority to interpret the provisions of the Communications Act.³⁴ Moreover, the Commission is afforded substantial deference

³⁰ Petition at 5.

³¹ *Id.* at 4 (citing *Declaratory Ruling*, 24 FCC Rcd at 14002 ¶ 25).

³² Petition at 5.

³³ *Rapanos v. United States*, 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring) (citing *Chevron USA Inc. v. NRDC*, 467 U.S. 837, 842-845 (1984)).

³⁴ For example, the Supreme Court affirmed the Commission's authority to interpret provisions related to intrastate local competition to be administered by state regulators. *See AT&T Corp. v. Iowa*

(continued on next page)

when interpreting ambiguous provisions, or there is a gap that Congress intended the agency to fill.³⁵

Here, if the Commission has authority to interpret what constitutes a “reasonable time period” for reaching a decision, it clearly has authority to interpret how that time is computed, because the method of computing and tolling the time is an integral part of the time period deemed “reasonable.” The 30-day review period for automatic tolling is inextricably intertwined with how the 90- or 150-day periods are computed: If, during the first 30 days, the zoning authority informs the applicant of deficiencies that must be completed, the 90- or 150-day period is automatically tolled until the needed information is supplied; otherwise the parties work towards resolution of the application within the presumptive timeframes or mutually agree to extend the period.

The Commission’s choice of a 30-day review period for automatic tolling is a reasoned approach to ensuring that zoning authorities act within “a reasonable period of time.” As the Commission stated, the 30-day review period for automatic tolling “protect[s] applicants from a last minute decision” that an application is incomplete.³⁶ If, as Petitioners maintain, there were no limit on automatic tolling, then an authority would be able to toll the applicable shot clock on an application on the 89th or 149th day by declaring it “incomplete” – effectively nullifying the Commission’s interpretation of the statute and the federal goal of fostering wireless facility buildout. The processing period and its interrelated standard for counting and tolling that period

(footnote continued)

Utilities Bd., 525 U.S. 366, 377-84 (1999). Likewise, the Sixth Circuit affirmed the Commission’s decision establishing a “shot clock” as part of its interpretation of the provision involving action by cable franchise boards. *Alliance for Cmty. Media*, 529 F.3d at 773-74.

³⁵ *Chevron*, 467 U.S. at 863-64; *accord NCTA v. Brand X Internet Services*, 545 U.S. 967, 980-82 (2005); *NCTA v. Gulf Power Co.*, 534 U.S. 327, 333-339 (2002); *see also United States v. Mead Corp.*, 533 U.S. 218, 231-234 (2001).

³⁶ *Declaratory Ruling*, 24 FCC Rcd at 14015 ¶ 53.

thus constitutes a reasonable interpretation of “the limits Congress already imposed on State and local governments” in Section 332(c)(7), and is subject to considerable deference by the courts.³⁷

The Petitioners simply disagree as to the wisdom of drawing a line to delineate when completeness review does or does not result in automatic tolling, which does not affect the validity of the Commission’s own reasonable interpretation of the statute. The Supreme Court has made clear that “[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.”³⁸

B. The Period for Review Does Not Violate the Commission’s Own Interpretation or Legislative History

Petitioners claim that the 30-day automatic tolling period violates the Commission’s own view of its authority because it creates a “‘new limitation’ on State and local governments.”³⁹ They assert that this action is inconsistent with the statement in the *Declaratory Ruling* that the legislative history of Section 332(c)(7) “preclude[s] the Commission from maintaining a rulemaking proceeding to impose *additional* limitations on the personal wireless service facility siting process beyond those stated in Section 332(c)(7).”⁴⁰

Petitioners ignore that the Commission already rejected this very argument. The *Declaratory Ruling* explained that the decision fits squarely within the limitations in Section 332(c)(7) and does not impose “new limitations”:

We disagree with State and local government commenters that our interpreting the limitations that Congress imposed on State and local governments in Section 332(c)(7) is the same as imposing

³⁷ *Id.* at 14002 ¶ 25.

³⁸ *Chevron*, 467 U.S. at 866.

³⁹ Petition at 5.

⁴⁰ *Declaratory Ruling*, 24 FCC Rcd at 14002 ¶ 25 (emphasis in original), quoted in Petition at 4.

new limitations on State and local governments. Our interpretation of Section 332(c)(7) is not the imposition of new limitations, as it merely interprets the limits Congress already imposed on State and local governments.⁴¹

Indeed, the Commission’s actions are entirely consistent with Section 332(c)(7)’s legislative history. The *Declaratory Ruling* specifically noted Congress’ direction that the Commission “terminat[e]” – *i.e.*, not “maintain[],” – “[a]ny *pending* Commission rulemaking concerning the *preemption of local zoning authority*” regarding personal wireless facilities.⁴² When Section 332(c)(7) was enacted, there was a pending petition for rulemaking directed at preemption of local zoning authority, but the Commission dismissed that petition over a dozen years ago in light of the legislative history of the statute.⁴³ The Commission, in contrast, acted here in response to a petition for declaratory ruling filed in 2008. Moreover, as the Commission emphasized:

Our actions herein will not preempt State or local governments from reviewing applications for personal wireless service facilities placement, construction, or modification. State and local governments will continue to decide the outcome of personal wireless service facility siting applications pursuant to the authority Congress reserved to them in Section 332(c)(7)(A).⁴⁴

As a result, *neither* of the criteria from that legislative history language applies here: The *Declaratory Ruling* did not involve a (1) rulemaking that was *pending* in 1996 that (2) concerned

⁴¹ *Declaratory Ruling*, 24 FCC Rcd at 14002 ¶ 25.

⁴² H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 208 (1996), *quoted in Declaratory Ruling*, 24 FCC Rcd at 14002 ¶ 25.

⁴³ Petition of Cellular Telecommunications Industry Association for Rule Making, WT Docket No. 97-192 (filed Dec. 22, 1994). The Commission dismissed that petition in more than a dozen years ago. *See Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934, Second Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 12 FCC Rcd 13494, 13541 ¶ 116, 13563 ¶ 165 (1997).

⁴⁴ *Declaratory Ruling*, 24 FCC Rcd at 14002 ¶ 25; *see also id.* at 14013-14 ¶ 50 (“To the extent existing State statutes or local ordinances set different review periods than we do here, we clarify that our interpretation of Section 332(c)(7) is independent of the operation of these statutes or ordinances.”).

preemption of local zoning authority. Of relevance here, the *Declaratory Ruling* appropriately concluded that “the legislative history does not establish that the Commission is prohibited from interpreting the provisions of Section 332(c)(7).”⁴⁵

Finally, it is worth noting that contrary to Petitioners’ claim, the 30-day period simply sets the time within which a zoning board can *automatically* toll the running of the shot clock due to application deficiencies. As discussed below, if deficiencies are found after the 30 days has elapsed, the Commission provides for tolling the shot clock by mutual agreement between the applicant and the zoning board.

C. The Commission Provided Ample Opportunity for Public Input, but Petitioners Refrained from Commenting on Proposals in the Record Regarding an Appropriate Review Period for Automatically Tolling an Application for Incompleteness

Petitioners argue that “no impacted party” had notice of the proposal, stating it was not identified as part of CTIA’s initial petition and claiming it “was never the subject of any *ex parte* filing or comment in this proceeding.”⁴⁶ Petitioners thus claim that the review period for automatic tolling should not be implemented and the Commission instead should pursue “proper notice and comment.”⁴⁷ These arguments are completely without merit. The issue actually was addressed in comments, reply comments, and *ex parte* submissions.

As the Commission is well aware, a declaratory ruling may be issued in response to a petition or simply on the Commission’s own motion,⁴⁸ and it is a common procedure for interpreting the statute – for example, the Commission established the regulatory classification

⁴⁵ *Id.* at 14002 ¶ 25.

⁴⁶ Petition at 10.

⁴⁷ *Id.*

⁴⁸ 47 C.F.R. § 1.2.

for cable modem service in a declaratory ruling.⁴⁹ Declaratory rulings are not subject to the notice-and-comment requirements that the Administrative Procedure Act (“APA”) applies to the adoption of “legislative” rules.⁵⁰ Here, the Commission nonetheless solicited comments and replies with respect to CTIA’s petition, which was noticed in the Federal Register, and permitted *ex parte* filings subject to disclosure in the docketed proceeding.

In fact, the Commission took application completeness into account in response to specific comments asserting that: (i) applicants should not benefit from relevant timelines if their applications are incomplete; and (ii) zoning authorities should be prohibited from delaying rulings by asserting applications are incomplete. Indeed, the record shows comments, reply comments, and *ex parte* submissions in which the issues of application completeness and time limits for tolling based on incompleteness were raised and discussed:

- Initial comments filed by state and local governments (many of whom are represented by Petitioners) asserted that applicants should not benefit if their applications are not acted upon due to incompleteness.⁵¹ For example, Stokes County, North Carolina asserted, “The proposed deadlines ignore the fact that many applications are not complete and do not provide the information (required by local law) to enable an informed decision to be made. Any deadlines should be tied to the provision of a ‘complete’ application.”⁵²
- MetroPCS submitted initial comments proposing that zoning authorities have a strict three-business day deadline for reviewing applications for completeness in order to toll the timeline.⁵³

⁴⁹ See, e.g., *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002) (“*Cable Modem Declaratory Ruling*”), *aff’d sub nom. NCTA v. Brand X Internet Services*, 545 U.S. 967 (2005).

⁵⁰ 5 U.S.C. § 553(b)-(c).

⁵¹ See *Declaratory Ruling*, 24 FCC Rcd at 14014 ¶ 52 & n.155 (citing Comments of Fairfax County, VA at 13; Comments of City of Bellingham, WA at 1-2; Comments of Michigan Municipalities at 19-20; Comments of Stokes County, N.C. at 1; Comments of Florida Cities at 8-9).

⁵² Comments of Stokes County Manager, WT Docket No. 08-165, at 1 (filed Sept. 30, 2008).

⁵³ See MetroPCS Comments at 12 (“MetroPCS believes that the Commission also should require a zoning authority to notify an applicant within 3 business days whether an application is complete and

(continued on next page)

- CTIA filed reply comments endorsing the MetroPCS three-day limit on review for completeness.⁵⁴
- PCIA made two *ex parte* filings that proposed tolling based on a completeness review during the initial 10 days.⁵⁵

NATOA *et al.* chose not to respond to the comments of Stokes County and other municipalities,⁵⁶ the proposal from MetroPCS, CTIA’s endorsement of it, or PCIA’s *ex parte* filings about the period for tolling based on completeness review. Their reply comments nonetheless demonstrated an awareness of the interrelationship of application completeness and tolling of the shot clock, because they discussed state procedures for determining time limits for action based on when an application is complete.⁵⁷

In any event, the Commission proceeded properly with respect to adoption of the review period for automatic tolling. The *Declaratory Ruling* at issue here is at most an “interpretive rule” under the APA and as a matter of law is exempt from notice-and-comment requirements.⁵⁸ Interpretative rules “advise the public of the agency’s construction of the statutes and rules which it administers.”⁵⁹ They are generally defined as a statement of “what the administrative agency

(footnote continued)

what else needs to be submitted, if anything. In order to make this self-effectuating, the zoning authority should be conclusively deemed to have accepted the filing as complete if it does not respond within 3 days. A carrier should then have the right to treat any claim of incompleteness as a denial of the application.”).

⁵⁴ CTIA Reply Comments at 18.

⁵⁵ *See supra* n.24.

⁵⁶ *See Declaratory Ruling*, 24 FCC Rcd at 14014 ¶ 52 & n.155 (citing Comments of Fairfax County, VA at 13; Comments of City of Bellingham, WA at 1-2; Comments of Michigan Municipalities at 19-20; Comments of Stokes County, N.C. at 1; Comments of Florida Cities at 8-9).

⁵⁷ *See NATOA Reply Comments* at 3-6.

⁵⁸ 5 U.S.C. § 553(b)(A) provides that the notice-and-comment requirement “does not apply . . . to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” *See also* 5 U.S.C. § 554(e) (permitting issuance of declaratory rulings through adjudication).

⁵⁹ *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995) (quotation omitted).

thinks the statute means,” and they serve to “remind[] affected parties of existing duties.”⁶⁰ Moreover, interpretive rules can be “conduct-altering” and can “transform a vague statutory duty or right into a sharply delineated duty or right.”⁶¹ Here, in response to filings on the subject of application completeness and timelines for review, the *Declaratory Ruling* advises the public of the Commission’s interpretation of terms in Section 332(c)(7), identifying presumptive timeframes and establishing a reasonable initial review period for zoning authorities to automatically toll applications if deemed incomplete. The Commission properly balanced the interests raised in comments, and there is no basis to conclude additional notice-and-comment is necessary. Thus, the Petition should be denied because, as demonstrated above, the Commission properly interpreted Section 332(c)(7) consistent with the law and the evidence in the record.

III. THE REVIEW PERIOD FOR AUTOMATIC TOLLING IS SOUND POLICY THAT BALANCES THE IMPORTANT OBJECTIVES – STATE, LOCAL AND FEDERAL – SET FORTH IN SECTION 332(C)(7)

A. Thirty Days Is a Reasonable Period for *Automatic Tolling* Based on Prompt Initial Review for Completeness, and *Consensual Tolling* Encourages Both the Applicant and the Zoning Board to Act Reasonably and in Good Faith

In response to comments by municipalities regarding the risk of timelines for action in the event of incomplete applications, the Commission provided flexibility by allowing a zoning authority to unilaterally engage in automatic tolling of the applicable timeline if the application is deemed incomplete. At the same time, in response to comments by the wireless industry expressing concern that zoning authorities could engage in last-minute gamesmanship by deeming an application incomplete, the Commission limited the right to automatically toll an

⁶⁰ *SBC Inc. v. FCC*, 414 F.3d 486, 498 (3d Cir. 2005) (citations omitted); *see also NAB v. FCC*, 569 F.3d 416, 425-26 (D.C. Cir. 2009); *Sorenson Commc’ns, Inc. v. FCC*, 567 F.3d 1215, 1222-23 (10th Cir. 2009).

⁶¹ *Central Texas Tel. Coop., Inc. v. FCC*, 402 F.3d 205, 214 (D.C. Cir. 2005) (quotation omitted).

application to the first 30 days after filing, which it concluded was a reasonable period to review an application for completeness.

Petitioners nonetheless argue that the shot clock “will not work” unless the zoning authorities can toll the timeframe at *any* time,⁶² arguing that the 30-day review period for automatic tolling will deprive agencies of the ability to toll the applicable timeframe when an application requires information from “third parties, such as the Federal Aviation Administration (FAA), environmental authorities, and power utilities,” or when the zoning authority discovers application deficiencies after the 30-day period.⁶³

As CTIA noted above, the Petitioners’ real objection is not to the 30-day window; it is to the very idea of a shot clock itself – that “timeframes cannot work unless they can be stopped.”⁶⁴ The 30-day period serves to *benefit* the zoning board – it provides that a zoning board has the ability to *automatically* toll the shot clock if an application is deemed incomplete. It is not a limitation on when a zoning board can determine that additional information is needed before the application can be processed. A zoning authority may determine that an application is incomplete or needs additional information after the 30-day period, but such a determination will not *automatically* toll the running of the clock. Likewise, it is not a limitation on the basis for tolling – if issues arise other than facial incompleteness, there is no *automatic* tolling of the clock, but there can be tolling by agreement.

Petitioners’ argument that zoning authorities should be able to stop the clock at any time leaves open the prospect that applicants could be placed in the situation of waiting until just

⁶² Petition at 6.

⁶³ *Id.* at 6, 8.

⁶⁴ Opposition of PCIA to Petition for Reconsideration or Clarification, WT Docket No. 08-165, at 9 (filed Dec. 28, 2009).

before the 90th or 150th day, only to find that the zoning authority has deemed their applications incomplete at the last minute. In contrast, as the *Declaratory Ruling* noted, “specific timeframes” – meaningful timeframes – “for State and local government deliberations will allow wireless providers to better plan and allocate resources. This is especially important as providers plan to deploy their new broadband networks.”⁶⁵

Further, the record identifies five states that have their own zoning statutes expressly specifying a period for a review of applications for completeness: Florida requires an application to be reviewed within 20 business days; Washington requires review within 28 days; California and Oregon require review within 30 days; and North Carolina requires review within 45 days.⁶⁶ The review period in four of the five states is 30 days or less, and NATOA and the other parties filing the instant Petition each have members in these states. As the *Declaratory Ruling* concluded:

Considering this evidence as a whole, a review period of 30 days gives State and local governments sufficient time for reviewing applications for completeness, while protecting applicants from a last minute decision that applications should be denied as incomplete.⁶⁷

⁶⁵ *Declaratory Ruling*, 24 FCC Rcd at 14009 ¶ 38.

⁶⁶ *See id.* at 14014-15 ¶ 53 & nn.158-161 (citing Fla. Stat. Ann. § 365.172 (providing for a 20-business day review for application completeness, then a 45-business day period for collocation application processing and a 90-business day period for all other application processing); Wash. Rev. Code §§ 36.70B.080 & 36.70B.070 (providing for a 28-day review for application completeness, then a 120-day period for application processing); Cal. Gov’t. Code §§ 65943 & 65950 (providing for a 30-day review for application completeness, then a 60-day period for application processing assuming there are no environmental issues); Or. Rev. Stat. § 227.178 (providing for a 30-day review for application completeness, then a 120-day period for application processing); N.C. Gen. Stat. Ann. § 153A-349.52 (providing for a 45-day review for application completeness, then a 45-day period for collocation application processing).

⁶⁷ *Declaratory Ruling*, 24 FCC Rcd at 14015 ¶ 53. The Commission noted, “[t]o the extent existing State statutes or local ordinances set different review periods than we do here, we clarify that our interpretation of Section 332(c)(7) is independent of the operation of these statutes or ordinances.” *Id.* at 14013-14 ¶ 50.

Eliminating the 30-day window for automatic tolling of an application would re-institute opportunities for continued “unreasonable delay” in resolving applications, would undermine the very purpose of the *Declaratory Ruling*, and would perpetuate the practices the Commission has found harm the public interest.

Petitioners’ concerns that zoning authorities will be deprived of necessary information are unfounded. The *Declaratory Ruling* preserves incentives for applicants to work cooperatively to address community needs: “Wireless providers will have the incentive to resolve legitimate issues raised by State or local governments within the timeframes defined as reasonable, or they will incur the costs of litigation and may face additional delay if the court determines that additional time was, in fact, reasonable under the circumstances.”⁶⁸

The Commission observed there would be situations where both the applicant and the zoning authority recognize that additional time is needed to process an application. That is why the Commission allowed applicants and zoning boards to work together toward a zoning decision on a schedule that takes all of the relevant factors into account. To encourage parties to “work[] cooperatively toward a consensual resolution,” the Commission clarified that the “reasonable period of time” for reaching a decision “may be extended beyond 90 or 150 days by mutual consent.”⁶⁹

B. The Timeframes and 30-Day Review Period for Automatic Tolling Will Not Cause, Encourage or Pre-Determine the Outcome of Litigation, and Any Judicial Review Will Still Occur on a Case-by-Case Basis

Finally, Petitioners claim that some applicants may perceive a tactical advantage in pursuing litigation, or may feel compelled to file suit if the shot clock has expired without being

⁶⁸ *Id.* at 14008-09 ¶ 38.

⁶⁹ *Id.* at 14013 ¶ 49.

tolled.⁷⁰ This is surely an exaggeration that ignores the reality of litigation, as lawsuits are a costly and lengthy burden to both parties involved.

The shot clock establishes only the time when an agency may be *presumed* to have failed to act, and thus *allows* an applicant to initiate a lawsuit. The applicant and its attorneys will need to consider the evidence likely to be provided in rebuttal to assess the prospects of a lawsuit and decide whether the cost and pursuit of litigation is prudent.

Even if an applicant chooses to pursue a judicial remedy regarding an application not acted upon, under the regime adopted in the *Declaratory Ruling*, “the 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.”⁷¹ Further, the *Declaratory Ruling* does not decide what evidence a court may consider, or in any way mandate or predetermine the result. The court will hear the zoning authority’s evidence concerning the individual circumstances and reach a decision based on all of the evidence admitted. As a result, zoning authorities will be able to prevail in lawsuits when they are able to show they have acted at a reasonable pace in light of the circumstances of a specific application.

Ultimately, what the Commission’s balanced and flexible approach will accomplish is to give both the applicant and the zoning board incentives to work together to seek resolution of applications within a reasonable period of time.

⁷⁰ See Petition at 7.

⁷¹ *Declaratory Ruling*, 24 FCC Rcd at 14010 ¶ 42.

CONCLUSION

For all of the reasons stated above, the Commission should deny the Petition.

Respectfully submitted,

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Dated: January 22, 2010

CERTIFICATE OF SERVICE

I, Shanée Meeks hereby certify that on this 22nd day of January, 2010, I hereby served a copy of the foregoing Opposition to Petition for Reconsideration or Clarification by First Class U.S. Mail, postage prepaid, to the following:

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