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	)	
	)	

REPLY COMMENTS IN 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

I. INTRODUCTION

PCIA—The Wireless Infrastructure Association ("PCIA")[1] hereby submits these reply comments in opposition to the *Petition for Reconsideration* ("*Petition*") filed by NATOA *et al.* ("Petitioners").[2] The *Petition* contains alternative requests asking the Federal Communications Commission ("Commission") to reconsider the 30-day completeness review portion of the *Declaratory Ruling*.[3] Specifically, Petitioners ask the Commission to amend the *Declaratory*

[1] 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.
[2] *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*").
[3] *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*").

Ruling to (a) provide that any time period in which additional information is required that is not a delay caused by the local government 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 rule in its entirety.

The comments filed in the initial round of this proceeding resoundingly demonstrate that the Commission should deny Petitioners' requests because no comments filed provide the legal or public interest justification necessary to bolster the *Petition*'s own shortcomings in meeting the Commission's standards for reconsideration. Indeed comments filed in opposition demonstrate that the Commission, in issuing its *Declaratory Ruling*, acted within its legal authority and subject to proper procedures when it made its policy decision to require that timelines on wireless infrastructure siting applications should not be tolled if an application is deemed incomplete after the 30-day time period elapses.

II. SUPPORTERS OF THE PETITION FAIL TO DEMONSTRATE THAT THE COMMISSION ACTED OUTSIDE OF ITS AUTHORITY IN DEVELOPING ITS COMPLETENESS-REVIEW TIMEFRAME

Commenters who support the *Petition* have failed to demonstrate that the *Petition*'s challenge on the Commission's legal authority to implement the 30-day completeness review for infrastructure siting applications "cites material error of fact or law" necessary for reconsideration by the Commission.[4] Notably, no commenter in support of the *Petition* offers any additional legal justification for the *Petition*'s claim that "the Commission exceeded its interpretation of its authority under Section 332(c)(7) in implementing a 30 day review for completeness deadline because the 30 day incompleteness deadline imposes additional

[4] *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).

limitations on personal wireless service facility siting process beyond those stated in Section 332(c)(7)."[5] All commenters that support Petitioners' statement merely assert, in nearly identical language, that they simply adopt and support the Petition's legal rationale.[6] The mere support of the *Petition*'s legal rationale, however, does nothing to boost its merit.

In contrast, those commenters in opposition to the *Petition* have adequately explained the sound legal authority on which the Commission made its decision. As Verizon Wireless notes, "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*."[7] PCIA agrees that there is no requirement that a jurisdiction must review the application for completeness within a 30-day period—it is simply to its own advantage to do so. PCIA also agrees with T-Mobile that "30-day period for determining application completeness is inextricably intertwined with the calculation of the [overall timeframe]" and that "[a]bsent a deadline for determining application completeness, the 90 and 150 day deadlines would be eviscerated."[8] This supports what PCIA's statement that "[u]nlimited tolling would allow a jurisdiction to "pause" the timelines on numerous occasions by requesting new information thereby forestalling the actual effect of the timeline."[9]

Further, as numerous commenters correctly explain, the 30-day review period is merely a procedural mechanism which the Commission has broad discretion to establish through its statutory interpretations. T-Mobile correctly argues that agencies such as the FCC are "afforded

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[5] *Petition* at 4.
[6] *See, e.g.*, Comments of City of Centerville, WT Dkt. 08-165 (Jan. 14, 2010) at 2; Comments of San Antonio, Texas, WT Dkt. 08-165 (Jan. 20, 2010) at 2; Comments of Waterford Township, MI, WT Dkt. 08-165 at 2; Comments of City of Portland, WT Dkt. 08-165 (Jan. 20, 2010) at 2; Comments of City of Los Angeles, CA, WT Dkt 08-165 (Jan. 22, 2010) at 2.
[7] Comments of Verizon Wireless, WT Dkt. 08-165 (Jan. 22, 2010) at 4 (emphasis added).
[8] Comments of T-Mobile, WT Dkt. 08-165 (Jan. 22, 2010) at 6.
[9] Comments of PCIA—The Wireless Infrastructure Association, WT Dkt. 08-165 (Dec. 28, 2010) at 4.

generous leeway by courts in interpreting the statute they are trusted to administer."[10] CTIA concurs with this point and further rebuts the *Petition* when it argues that "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.'"[11] As noted above, commenters in support of the *Petition* provide no argument to the contrary and thus fail to provide the evidence of material fact or law necessary for reconsideration by the Commission.

III. THE RECORD DEMONSTRATES THAT PETITIONERS WERE PROVIDED AMPLE NOTICE THAT THE COMMISSION WOULD CONSIDER A COMPLETENESS REVIEW TIMEFRAME

The *Petition* asks the Commission to reconsider its 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."[12] Commenters in opposition to the *Petition* have all shown that this exact subject was publicly placed in front of the Commission on numerous occasions over more than a year.[13] Further, as CTIA points out, the "[d]eclaratory rulings are not subject to the notice-and-comment requirements that the Administrative Procedure Act applies to the adoption of 'legislative' rules"[14] so even in the event that such filings did not exist, the legal rationale for the *Petition*'s argument is invalid. Yet, given that the evidence raising the completeness review issue does in fact exist, the Commission should reject Petitioners argument.

IV. COMMENTERS TACTICS OF ILLUSTRATING POTENTIAL ISSUES OF DELAY FAIL TO MEET THE COMMISSION'S STANDARDS TO WARRANT RECONSIDERATION

[10] T-Mobile Comments at 5 (citing *Rapanos* v. *United States*, 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring)). *See also* Comments of CTIA—The Wireless Association, WT Dkt. 08-165 (Jan. 22, 2010) at 8.
[11] CTIA Comments at 9.
[12] *Petition* at 10.
[13] T-Mobile Comments at 7; Verizon Comments at 6-7; CTIA Comments at 12-15.
[14] CTIA Comments at 13.

In nearly every filing in support of the *Petition*, commenters do not argue the merits but instead present new facts intended to persuade the Commission that it made a bad policy decision because the application review period does not comport with its zoning process.[15] Yet, as PCIA noted in its initial filings, all such new facts should be rejected. 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
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> (3) The Commission determines that consideration of the facts relied on is required in the public interest.[16]

While commenters present the facts of their local zoning process to the Commission for the first time in support of the *Petition*, the fact is that they have neither "changed since the last opportunity to present them to the Commission"[17] nor were they "unknown to petitioner until after his last opportunity to present them to the Commission."[18] The local zoning processes described by commenters are established processes; commenters chose not to provide this information for the record over the 15 months that this was an open proceeding before the Commission.

As such, the only ground left that supporters of the *Petition* can use to justify reconsideration is that "consideration of the facts relied on is required in the public interest."[19]

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[15] *See, e.g.*, City of Centerville Comments at 2-3; City of Portland Comments at 2-3; Comments of City of Mentor, OH, WT Dkt. 08-165 (Jan. 21, 2010) at 2-3; Comments of City of Albuquerque, NM WT Dkt. 08-165 (Jan. 21, 2010) at 4; City of Los Angeles at 2-3; City of Livonia Comments at 2-3; Waterford Township Comments at 2-4.
[16] 47 C.F.R. § 1.429(b) (2009).
[17] *Id.*
[18] *Id.*
[19] *Id.*

Yet, as CTIA establishes, these new facts should not be considered on this ground either because "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; (ii) zoning authorities should be prohibited from delaying rulings by asserting applications are incomplete."[20]

PCIA pointed out that "Petitioners claim that the Commission's decision does not take into account that things such as 'incomplete structural or environmental analyses' may cause delays. Yet the Commission itself has cited to the comments of Fairfax County, VA that espoused nearly identical facts."[21] CTIA also provides the telling example of Stokes County, NC, which advised the Commission to tie any deadlines to the provision of a complete application.[22] In other words, the Commission has already reviewed the relevant facts associated with the completeness-review timeframe and determined that it was in the public interest to implement the completeness review. The new facts raised in these comments are not sufficiently novel to change the public interest determination that the Commission has already made. This is particularly true in light of the fact that a local jurisdiction can show that any delay in excess of the Commission's mandated timeframes were reasonable under the circumstances, thus removing the threat that reasonable delays will not be tolerated.

III. CONCLUSION

Neither the Petitioners nor commenters in support of the *Petition* have been able to demonstrate that the completeness-review process warrants reconsideration under the

[20] CTIA Comments at 13.
[21] PCIA Comments at 7-8 (internal citations omitted).
[22] CTIA Comments at 13.

Commission's standards. For the foregoing reasons the Commission should deny the *Petition* in its entirety.

Respectfully submitted,

PCIA—THE WIRELESS INFRASTRUCTURE ASSOCIATION

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