

Before the
Federal Communications Commission
Washington, DC 20554

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

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To: The Commission

Federal Communications Commission
Bureau / Office *Secretariat*

REPLY COMMENTS OF CTIA-THE WIRELESS ASSOCIATION®

CTIA-The Wireless Association® (“CTIA”) hereby replies¹ to the comments filed in support of 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”)² concerning the Commission’s Wireless Facility “Shot Clock” *Declaratory Ruling*.³ As CTIA noted in its

¹ While reply comments were originally due February 8, 2010, the federal government closed on the afternoon of February 5th and did not reopen until February 12, 2010. Accordingly, CTIA’s reply comments are timely filed. *See* 47 C.F.R. § 1.4(e)(1).

² Comments in support of the Petition were filed January 22, 2010 by the City of Albuquerque (“Albuquerque”), the City of Centerville, Member of the North Metro Telecommunication Commission (“Centerville”), the Greater Metro Telecommunications Consortium (“Greater Metro”), the International Municipal Lawyers Association (“IMLA”), the Village of Hoffman Estates (“Hoffman Estates”), the City of Livonia (“Livonia”), the City of Los Angeles (“Los Angeles”), the City of Mentor, Ohio (“Mentor”), the City of Philadelphia (“Philadelphia”), the City of Portland, Oregon (“Portland”), the City of San Antonio, Texas (“San Antonio”), and the Charter Township of Waterford, MI (“Waterford”). On the same day, comments in Opposition to the Petition were filed by CTIA and others.

³ *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*
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Opposition,⁴ the Petition misconstrues what the *Declaratory Ruling* does and does not do, and accordingly fails to justify overturning the 30-day review period during which a zoning authority may unilaterally toll the applicable 90- or 150-day shot clock period if it deems an application incomplete. The comments filed in support merely expand on the flawed Petition, providing a “parade of horrors” that inaccurately depicts how the framework established in the *Declaratory Ruling* will relate to particular local zoning procedures. Simply put, the comments, like the Petition, misconstrue the scope of the *Declaratory Ruling’s* reasoned interpretation of zoning authorities’ statutory duty “to act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.”⁵ Tellingly, the comments demonstrate a continuing opposition to the commenters’ obligation to act on wireless facilities siting requests “within a reasonable period of time” and provide no support for reconsideration of the FCC’s *Declaratory Ruling*.

BACKGROUND

At the outset, it is important to recognize the nature of the *Declaratory Ruling* – something the commenters fail to do:

- 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, finding 90 days to be a generally reasonable timeframe for processing collocation applications and 150 days for processing other wireless siting applications. Lack of a decision within these timeframes presumptively constitutes a “failure to act,” thereby allowing – but not requiring – an applicant to pursue a judicial remedy.

(footnote continued)

Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Declaratory Ruling*, 24 FCC Rcd 13994 (2009) (“*Declaratory Ruling*”).

⁴ Opposition of CTIA–The Wireless Association® to Petition for Reconsideration or Clarification, WT Docket No. 08-165 (filed Jan. 22, 2010) (“*Opposition*”).

⁵ 47 U.S.C. § 332(c)(7)(B)(ii).

- In response to comments, the Commission set forth an initial 30-day review period during which a zoning authority can automatically toll the applicable 90- or 150-day shot clock if it deems an application to be incomplete. The authority to determine the method of computing and tolling the time is an integral part of the authority to identify a “reasonable period of time.”
- The Commission established the 90- and 150-day time periods as rebuttable presumptions and acknowledged that more time may be needed in individual cases.
- The Commission expressly permitted zoning authorities and applicants to extend the timeframes by mutual consent.
- If a zoning authority has failed to act when the presumptively reasonable period expires, the applicant has the right to go to court, where the zoning authority will have a full opportunity to rebut the presumption as to what is “a reasonable period of time . . . taking into account the nature and scope of such request.”

It also is important to recognize what the *Declaratory Ruling* does *not* do. It does not place any time limit on when a zoning authority can review an application for completeness; it does not place any limit on a zoning authority’s ability to obtain additional information from the applicant or third parties after the initial 30-day period; and it does not require revisions to local zoning authority decision making or procedures.

DISCUSSION

A. **Commenters Inaccurately Depict How the Framework Set Forth in the *Declaratory Ruling* Relates to the Zoning Process.**

Several commenters fundamentally misconstrue the nature of the *Declaratory Ruling*, resulting in inaccurate and unavailing claims. For example, Los Angeles contends that “the new 90- and 150-day timelines can *only* be tolled if the City requests additional information from the applicant within the first 30 days.”⁶ Likewise, Portland asserts that the *Declaratory Ruling* sets a “one-time only opportunity to toll the applicable shot clock” and “requir[es] the completeness of

⁶ Los Angeles Comments at 2 (emphasis added).

a wireless facility application to be determined within the first 30 days.”⁷ These statements are not accurate.

The *Declaratory Ruling* made clear 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.”⁸ Moreover, in rejecting Petitioners’ request to stay the *Declaratory Ruling* just ten days ago, the Wireless Telecommunications Bureau (“Bureau”) observed, “local governmental bodies are free to request supplemental information, and even deem a wireless facility siting request incomplete anytime during the 90/150-day period for processing applications.”⁹ The 30-day period operates as a *benefit* to zoning authorities – it provides the ability to *automatically* toll the shot clock if an application is deemed incomplete. There is no limit against seeking information thereafter, and as the *Stay Denial Order* established, parties can and likely will engage in consensual tolling for legitimate purposes:

[G]overnmental authorities and applicants can agree to toll the applicable processing timeframe by mutual consent. There is no reason to think that applicants, which have a strong incentive to cooperate with State and local governments in order to gain approval of their applications, are unlikely to reach tolling agreements to accommodate reasonable requests for additional information. If an applicant declines to do so in an appropriate case, government officials will have the opportunity to rebut in

⁷ Portland Comments at 3; *see also* Hoffman Estates Comments at 2 (“The new 30-day regulation imposed by the FCC would in effect restrict the Village’s ability to properly apply its zoning authority by forcing an application to be processed through a public hearing without regard to content or completeness.”); *id.* at 4 (“mandatory time limit”).

⁸ *Declaratory Ruling*, 24 FCC Rcd at 14013 ¶ 49.

⁹ *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, *Order*, DA 10-212, ¶ 10 (WTB Jan. 29, 2010) (“*Stay Denial Order*”).

court the presumption that the 90/150-day timeframe was reasonable.¹⁰

Separately, Los Angeles mischaracterizes the *Declaratory Ruling* by concluding that “the City and the applicant would be immediately forced into litigation if they did not agree to extend the timelines.”¹¹ The *Declaratory Ruling* imposes no such requirement. 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. Since litigation is both costly and time-consuming, an applicant will need to carefully consider whether litigation is prudent, given the facts and circumstances of the case. It is, therefore, not valid to assume that litigation will ensue automatically after the running of the shot clock. As the Commission stated in the *Declaratory Ruling*, applicants “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.”¹² For example, the applicant would need to take into account the evidence a zoning authority could likely provide on rebuttal; for example, an applicant would not rush into litigation if the zoning authority’s failure to meet the shot clock deadline was largely due to the applicant’s delay in responding to legitimate deficiencies and not due to an the eleventh hour request for unnecessary information.

Thus the Commission’s *Declaratory Ruling* balances the interests of both parties. As the Bureau stated in its *Stay Denial Order*, the Commission found that the “public interest in timely review” weighed against “creating the potential for protracted delays due to unreasonable last-minute requests for additional information.”¹³

¹⁰ *Id.* at ¶ 10.

¹¹ Los Angeles at 2; Livonia Comments at 3 (expressing concern regarding the threat of litigation expenses).

¹² *Declaratory Ruling*, 24 FCC Rcd at 14008-09 ¶ 38.

¹³ *Stay Denial Order* at ¶ 14.

B. Commenters' Unrealistic Predictions (or Ominous Threats) of How the Zoning Process Will Proceed Fail to Recognize the Balance the Commission Achieved in Aligning Incentives for All Parties to Act in Good Faith to Meet the Goals of Section 332(c)(7)

Some commenters mischaracterize the likely consequences of the 30-day review period during which a zoning authority may unilaterally toll the applicable 90- or 150-day shot clock period if it deems an application incomplete. These claims offer no basis for reversing the automatic tolling review period. Hoffman Estates, for example, illogically threatens to dismiss applications found to be incomplete *during the initial 30-day period* after filing¹⁴ — even though these are the very applications for which Hoffman Estates would be entitled to toll the shot clock automatically on its own motion.

Several commenters point out that it is often necessary to obtain additional information from other agencies or third parties before an application can be approved, and that in many cases the need for information cannot be identified at the time of initial filing.¹⁵ Greater Metro

¹⁴ See Hoffman Estates Comments at 4 (“The effect of the new mandatory ‘shot clock’ regulation implemented by the FCC will be that the Village will no longer accept partial submittals from cellular antenna applicants. With the mandatory time limit taking effect upon the initial submittal, the Village will be forced to implement strict application requirements and will not allow an application to be ‘pending’ if it is not complete. If a partial submittal is made, the applicant will be notified that their submittal is incomplete and it will be denied unless it is corrected to a 100% complete level within the first 30 days. After 30 days has elapsed, any incomplete application will be denied. . . .”).

¹⁵ See, e.g., Greater Metro Comments at 3 (“Land use applications are often referred to other entities for review and comment. Some of those entities are public utilities; some are other governmental entities, such as regional drainage and flood control agencies, or the U.S. Military. A local jurisdiction cannot guaranty that it will receive feedback from another government agency fast enough to consider the information and then make a request of the applicant for more information (if requested by the commenting entity) within 30 days of the application's filing.”); *id.* (citing local public notice requirements); Mentor Comments at 2-3 (discussing wetlands studies); Hoffman Estates Comments at 3 (“The plans refer to design information to be done ‘by others.’”); IMLA Comments at 10 (citing the need to obtain “rulings and advice required by law from other agencies or units of government (e.g., on environmental matters or historic preservation issues)”); see also Albuquerque Comments at 2-3 (multiple reviews by hydrology,

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said that in the absence of tolling for third-party information, the zoning authority “might be inclined to deny an application” or could refuse to entertain applications at the outset that do not include all such “ancillary approvals.”¹⁶ Again, in situations like these, the zoning authority and applicant may choose to negotiate a tolling agreement that takes into account the necessary time for third-party clearances; both the applicant and the zoning authority have incentives to reach agreement. And even without agreement, there is no automatic leap into court; the applicant will have to consider whether the authority is likely to show that it proceeded reasonably. As T-Mobile stated in its opposition to the Petition:

If a zoning authority has completed its review and is ready to act on an application, but is merely awaiting information from an environmental agency or the FAA as the 90 or 150 day timeline expires, an applicant must weigh the benefits of seeking judicial review under those circumstances. If judicial review was sought, the local authority would have an opportunity to rebut the presumption that it failed to act within a reasonable time by establishing that it stood ready to render a decision pending action by the aforementioned third-parties.¹⁷

Other commenters have equally creative but unavailing views. Philadelphia asserts that agencies might be forced to engage in “defensive zoning,” requiring massive amounts of information with every application at the outset in light of the possibility that such information might be needed at some point.¹⁸ This is hardly a reasonable or realistic approach — an agency that demands information that may be irrelevant and unnecessary could be found to be acting unreasonably when it takes longer than 90 or 150 days to act on an application, and in the course of needlessly burdening applicants, such an agency would impose unnecessary burdens on its

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transportation, utility, and other specialists within the planning agency, before review by Senior Planner).

¹⁶ Greater Metro Comments at 4, 3.

¹⁷ Opposition of T-Mobile USA, Inc., WT Docket No. 08-165, at 8 (filed Jan. 22, 2010).

¹⁸ Philadelphia Comments at 4.

own limited resources by requiring zoning officials to review irrelevant information for completeness. And Mentor's suggestion that a bad-faith applicant might submit third-party information after the initial 30-day review period in order to prevent the zoning authority from reviewing and considering it is misplaced, given that what is at issue under the statute is the reasonableness of the time taken by the zoning authority to reach a decision.¹⁹ The Commission's balanced and flexible approach creates incentives for both the applicant and the zoning board to work together to seek resolution of applications within a reasonable period of time.

Philadelphia and IMLA argued that the Commission's approach is inconsistent with zoning administrative procedures that rely on a multi-stage process, including administrative appeals, such as procedures that do not permit grant at the lower administrative level when a variance or Special Use Permit is needed.²⁰ Livonia and Waterford make related comments about the timing of scheduled proceedings of the relevant zoning authority, which may result in difficulty meeting the benchmarks set out in the *Declaratory Ruling*.²¹ All of these factors are relevant to the reasonableness of time needed to reach a decision. As a result, the applicant has an incentive to reach agreement with zoning authorities on an appropriate tolling agreement that accounts for the additional proceedings. Further, as discussed above, an applicant always will need to carefully consider whether litigation is prudent given the facts and circumstances of the application before pursuing a judicial remedy, given that the reviewing court will likely weigh

¹⁹ Mentor Comments at 3.

²⁰ See Philadelphia Comments at 3-4; IMLA Comments at 2-7; see also Waterford Comments at 2 (citing variances).

²¹ See Livonia Comments at 2 (citing possibility that an application may be determined to be incomplete at a planning commission meeting scheduled after the initial 30 days); Waterford Comments at 2 (citing public hearing notifications exceeding 30 days).

the existence of these local zoning procedural requirements in determining whether the zoning authority has taken an unreasonable period of time and thus failed to act.

Several applicants raised issues that are beyond the scope of the Petition. San Antonio, for example, asserts “*all of the CTIA Ruling’s interpretations of Section 332(c)(7)(B)(i), (ii) and (v) exceed the Commission’s authority . . .*” and the decision is “a rulemaking in disguise” that “fails to comply with the Regulatory Flexibility Act.”²² San Antonio goes directly to the merits of an issue that NATOA *et al.* specifically *excluded* from the scope of their petition; further, it provides no support for its claim that a declaratory ruling is subject to the Regulatory Flexibility Act. Los Angeles claims the 90-day period for collocation applications is too short.²³ Likewise, the Los Angeles argument goes directly to the merits of an issue that Petitioners specifically *excluded* from the scope of their petition, namely the validity of the shot clock itself, and in any event, Los Angeles ignores the fact that the Commission established the 90 day time period as a rebuttable presumption and acknowledged that more time may be needed in individual cases. IMLA argues that reference in Section 332(c)(7)(B)(5) to a “final order” creates a distinction between the time for action and the time for final action.²⁴ However, as the Commission recognized, the reference to a “final order” is irrelevant in a case where there has been no action on an application; in such cases, the only issue is whether the local zoning authorities have satisfied their statutory duty “to act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time” Ultimately, however, these concerns that go beyond the issues raised in the Petition cannot be raised in comments supporting the petition for reconsideration, and with no small irony given the subject

²² San Antonio Comments at 2 (emphasis in original).

²³ Los Angeles Comments at 3.

²⁴ IMLA Comments at 7-10.

matter of the Petition, these additional claims are now tolled because the 30-day period for seeking reconsideration on any ground is established by statute.²⁵

CONCLUSION

For the reasons stated above and in CTIA's Opposition, the Commission should deny the Petition.

Respectfully submitted,

By: /s/ Brian M. Josef

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²⁵ 47 U.S.C. § 405(a).

CERTIFICATE OF SERVICE

I, Shanée Meeks hereby certify that on this 12th day of February, 2010, I hereby served a copy of the foregoing Reply Comments to Petition for Reconsideration or Clarification by First Class U.S. Mail, postage prepaid, and via electronic mail, to the following:

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