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

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UNCLASIFIED

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	)	

**DECLARATORY RULING**

**Adopted:** November 18, 2009

**Released:** November 18, 2009

By the Commission: Chairman Genachowski and Commissioners Copps, McDowell, Clyburn, and Baker  
issuing separate statements.

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**I. INTRODUCTION**

1. This Declaratory Ruling by the Commission promotes the deployment of broadband and other wireless services by reducing delays in the construction and improvement of wireless networks. Wireless operators must generally obtain State and local zoning approvals before building wireless towers or attaching equipment to pre-existing structures. To encourage the expansion of wireless networks, Congress has required these entities to act "within a reasonable period of time" on such requests.<sup>1</sup> In many cases, delays in the zoning process have hindered the deployment of new wireless infrastructure.<sup>2</sup>

<sup>1</sup> 47 U.S.C. § 332(c)(7)(B)(ii).

<sup>2</sup> See para. 33, *infra*.

Accordingly, today we define timeframes for State and local action on wireless facilities siting requests, while also preserving the authority of States and localities to make the ultimate determination on local zoning and land use policies.

2. On July 11, 2008, CTIA – The Wireless Association® (CTIA) filed a petition requesting that the Commission issue a Declaratory Ruling clarifying provisions in Sections 253 and 332(c)(7) of the Communications Act of 1934, as amended (Communications Act), regarding State and local review of wireless facility siting applications (Petition).<sup>3</sup> The Petition raises three issues: the timeframes in which zoning authorities must act on siting requests for wireless towers or antenna sites, their power to restrict competitive entry by multiple providers in a given area, and their ability to impose certain procedural requirements on wireless service providers. In this Declaratory Ruling, we grant the Petition in part and deny it in part to ensure that both localities and service providers may have an opportunity to make their case in court, as contemplated by Section 332(c)(7) of the Act.<sup>4</sup>

3. Wireless services are central to the economic, civic, and social lives of over 270 million Americans.<sup>5</sup> Americans are now in the transition toward increasing reliance on their mobile devices for broadband services, in addition to voice services.<sup>6</sup> Without access to mobile wireless networks, however, consumers cannot receive voice and broadband services from providers. Providers continue to build out their networks to provide such services, and a crucial requirement for providing those services is obtaining State and local governmental approvals for constructing towers or attaching transmitting equipment to pre-existing structures. While Section 332(c)(7) of the Communications Act preserves the authority of State and local governments with respect to such approvals, Section 332(c)(7) also limits such State and local authority, thereby protecting core local and State government zoning functions while fostering infrastructure build out.

4. The first part of this Declaratory Ruling concludes that we should define what is a presumptively “reasonable time” beyond which inaction on a siting application constitutes a “failure to act.” In defining this timeframe, we have taken several measures to ensure that the reasonableness of the time for action “tak[es] into account the nature and scope” of the siting request.<sup>7</sup> In the event a State or local government fails to act within the appropriate time period, the applicant is entitled to bring an action in court under Section 332(c)(7)(B)(v) of the Communications Act, and the court will determine whether the delay was in fact unreasonable under all the circumstances of the case. We conclude that the record supports setting the following timeframes: (1) 90 days for the review of collocation applications; and (2) 150 days for the review of siting applications other than collocations.

5. In the second part of this decision, we find, as the Petitioner urges, that it is a violation of Section 332(c)(7)(B)(i)(II) of the Communications Act for a State or local government to deny a personal

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<sup>3</sup> 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 (“Petition”).

<sup>4</sup> 47 U.S.C. § 332(c)(7).

<sup>5</sup> Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless including Commercial Mobile Services, WT Docket No. 09-66, *Notice of Inquiry*, 24 FCC Rcd 11357, 11358 ¶ 2 (2009) (“*Mobile Wireless Competition NOI*”); see also *Fostering Innovation and Investment in the Wireless Communications Market*, GN Docket No. 09-157, A National Broadband Plan For Our Future, GN Docket No. 09-51, *Notice of Inquiry*, 24 FCC Rcd 11322 ¶ 1 (2009) (“Wireless communications is one of the most important sectors of our economy and one that touches the lives of nearly all Americans.”).

<sup>6</sup> *Mobile Wireless Competition NOI*, 24 FCC Rcd at 11358 ¶ 2.

<sup>7</sup> 47 U.S.C. § 332(c)(7)(B)(ii).

wireless service facility siting application because service is available from another provider. Finally, because we have not been presented with any evidence of a specific controversy, we deny the last part of the Petitioner's request, that we find that a State or local regulation that requires a variance or waiver for every wireless facility siting violates Section 253(a) of the Communications Act.

## II. BACKGROUND

6. *The Statute.* Section 332(c)(7) of the Act is titled "Preservation of Local Zoning Authority," and it addresses "the authority of a State or local government . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities."<sup>8</sup> Personal wireless service facilities are defined in Section 332(c)(7)(C)(ii) as "facilities for the provision of personal wireless services,"<sup>9</sup> and personal wireless services are defined in Section 332(c)(7)(C)(i) as "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services."<sup>10</sup>

7. Subsection (A) states that nothing in the Act limits such authority except as provided in Section 332(c)(7).<sup>11</sup> Subsection (B) identifies those limitations. Among other limitations, Clause (B)(i) states that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services."<sup>12</sup> Clause (B)(ii) requires the State or local government to act on any request to place, construct, or modify personal wireless service facilities "within a reasonable period of time . . . taking into account the nature and scope of such request."<sup>13</sup> Clause (B)(v) permits a person adversely affected by any final action or failure to act by the State or local government to commence an action in court within 30 days after such final action or failure to act.<sup>14</sup>

8. Section 253 of the Communications Act contains provisions removing barriers to entry in the provision of telecommunications services.<sup>15</sup> Specifically, Section 253(a) states: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."<sup>16</sup> Section 253(d) directs the Commission to preempt any State or local statute, regulation, or legal requirement that it determines, after notice and an opportunity for public comment, violates Section 253(a).<sup>17</sup>

9. *The Petition.* The Petition contends that the ability to deploy wireless systems depends upon the availability of sites for the construction of towers and transmitters. Before a wireless service provider can use a site for a tower or add an antenna to a tower or other structure, zoning approval is generally required at the local level, and the local zoning approval process "can be extremely time-

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<sup>8</sup> 47 U.S.C. § 332(c)(7)(A). Section 332(c)(7) appears in Appendix B in its entirety.

<sup>9</sup> 47 U.S.C. § 332(c)(7)(C)(ii).

<sup>10</sup> 47 U.S.C. § 332(c)(7)(C)(i). "Unlicensed wireless service" is defined as "the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v))." 47 U.S.C. § 332(c)(7)(C)(iii).

<sup>11</sup> 47 U.S.C. § 332(c)(7)(A).

<sup>12</sup> 47 U.S.C. § 332(c)(7)(B)(i).

<sup>13</sup> 47 U.S.C. § 332(c)(7)(B)(ii).

<sup>14</sup> 47 U.S.C. § 332(c)(7)(B)(v). In the case of an action or failure to act that is impermissibly based on the environmental effects of radio frequency emissions pursuant to Section 332(c)(7)(B)(iv), a person adversely affected may also petition the Commission for relief. *Id.*

<sup>15</sup> 47 U.S.C. § 253.

<sup>16</sup> 47 U.S.C. § 253(a).

<sup>17</sup> 47 U.S.C. § 253(d).

consuming.”<sup>18</sup> The Petition asserts that timely deployment of wireless facilities is essential to achieving the Communications Act’s public interest goals.<sup>19</sup> According to the Petition, delays in the zoning process for wireless facility siting applications are impeding those goals.<sup>20</sup> The Petition asserts that Section 332(c)(7) of the Communications Act “created a framework in which states and localities could make zoning decisions ‘subject to minimum federal standards – both substantive and procedural – as well as federal judicial review.’”<sup>21</sup> The Petition claims that those zoning authorities that do not act in a timely manner are frustrating the goals of the Communications Act.<sup>22</sup>

10. Accordingly, the Petition first requests that the Commission eliminate an ambiguity that CTIA contends currently exists in Section 332(c)(7)(B)(v) and clarify the time period in which a State or local zoning authority will be deemed to have failed to act on a wireless facility siting application.<sup>23</sup> The Petition requests that the Commission “declare that the failure to render a final decision within 45 days of a filing of a wireless siting application proposing to collocate on an existing facility constitutes a failure to act for purposes of Section 332(c)(7)(B)(v).”<sup>24</sup> Moreover, the Petition requests that the Commission “declare that the failure to render a final decision on any other, non-collocation wireless siting application within 75 days constitutes a failure to act for purposes of Section 332(c)(7)(B)(v).”<sup>25</sup> Relatedly, the Petition asks the Commission to find that, if a zoning authority fails to act within the above timeframes, the application shall be “deemed granted.”<sup>26</sup> Alternatively, the Petition requests that the Commission establish a presumption under such circumstances that entitles an applicant to a court-ordered injunction granting the application unless the zoning authority can justify the delay.<sup>27</sup>

11. Second, the Petition requests that the Commission clarify that Section 332(c)(7)(B)(i)(II), which forbids State and local facility siting decisions that “prohibit or have the effect of prohibiting the provision of personal wireless services,” bars zoning decisions that have the effect of preventing a specific provider from providing service to a location.<sup>28</sup> The Petitioner asserts that this provision prevents a local zoning authority from denying an application based on one or more carriers already serving the geographic area.<sup>29</sup>

12. Third, the Petition requests that the Commission preempt, under Section 253(a) of the Communications Act,<sup>30</sup> local ordinances and State laws that automatically require a wireless service provider to obtain a variance before siting facilities.<sup>31</sup>

13. On August 14, 2008, the Wireless Telecommunications Bureau (WTB) requested

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<sup>18</sup> Petition at 4.

<sup>19</sup> *Id.* at 8-13. The public interest goals identified by the Petition include nationwide wireless communications services for all Americans, universal service, advanced telecommunications services, broadband deployment, spectrum build-out, and public safety and E911.

<sup>20</sup> *Id.* at 13.

<sup>21</sup> *Id.* at 18 (citing *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 128 (2005) (Breyer, J., concurring)).

<sup>22</sup> *Id.* at 19.

<sup>23</sup> *Id.* at 20-23.

<sup>24</sup> *Id.* at 24.

<sup>25</sup> *Id.* at 25-26.

<sup>26</sup> *Id.* at 27-29.

<sup>27</sup> *Id.* at 29-30.

<sup>28</sup> *Id.* at 30-35 (citing 47 U.S.C. § 332(c)(7)(B)(i)(II)).

<sup>29</sup> *Id.* at 31-34.

<sup>30</sup> 47 U.S.C. § 253(a).

<sup>31</sup> Petition at 35-37.

comment on the Petition.<sup>32</sup> After a brief extension, comments were due on September 29, 2008, and replies were due on October 14, 2008.<sup>33</sup> Hundreds of comments and replies were filed in response to the Public Notice, including comments from wireless service providers, tower owners, local and State government entities, and airport authorities.<sup>34</sup>

14. Industry commenters generally support the Petition in all respects.<sup>35</sup> They argue that the Commission has the authority to interpret Section 332(c)(7)<sup>36</sup> and that the Commission's definition of the reasonable timeframes for State and local governments to process facility siting applications will promote the deployment of advanced networks, including broadband.<sup>37</sup> Wireless providers assert that without defined timeframes for State and local governments to process personal wireless service facility siting applications, they face undue delay in some localities.<sup>38</sup> They further argue that timeframes are necessary so that they know when they should seek redress from courts for State and local governments' failure to act in a timely manner.<sup>39</sup> They claim that the Petitioner's proposed timetables are fair and should be used to define the "reasonable period of time" for State and local governments to process facility siting applications in Section 332(c)(7)(B)(ii).<sup>40</sup>

15. State and local governments, as well as airport authorities, oppose the Petition. As an initial matter, they contend that Congress gave the courts, rather than the Commission, the authority to interpret Section 332(c)(7) of the Communications Act, and they cite statutory text and legislative history in support of their contention.<sup>41</sup> Thus, they contend that the Commission lacks the authority to determine what is a "reasonable period of time" and when a "failure to act" or a "prohibition of service" has occurred.<sup>42</sup> State and local government commenters further argue that both "reasonable period of time" and "failure to act" have clear meanings, and that Congress deliberately used these general terms to

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<sup>32</sup> 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, WT Docket No. 08-165, *Public Notice*, 23 FCC Rcd 12198 (WTB 2008).

<sup>33</sup> Comments originally were due on September 15, 2008, and replies were due on September 30, 2008. Several interested parties requested additional time to submit comments and replies. While the WTB found that the requests had not established good cause for the full extensions desired, the WTB granted a short extension in order to permit interested parties additional time "to file more thorough and thoughtful comments, which should lead to a more complete and better-informed record." Wireless Telecommunications Bureau Grants Extension Of Time To File Comments On CTIA's Petition For Declaratory Ruling Regarding Wireless Facilities Siting, WT Docket No. 08-165, *Public Notice*, 23 FCC Rcd 13386 (WTB 2008).

<sup>34</sup> See generally WT Docket No. 08-165. The major commenters and the short forms by which they are cited are listed in Appendix A. Brief comments are not listed but are considered in this Declaratory Ruling.

<sup>35</sup> See, e.g., Verizon Wireless Comments; AT&T Comments; Rural Cellular Association Comments; PCIA – The Wireless Infrastructure Association Comments.

<sup>36</sup> See, e.g., Sprint Nextel Comments at 8; T-Mobile Comments at 12; MetroPCS Comments at 5-6.

<sup>37</sup> See, e.g., MetroPCS Comments at 6-7; NextG Networks Comments at 4.

<sup>38</sup> See, e.g., Sprint Nextel Comments at 4-5; CalWA Comments at 2-3; T-Mobile Comments at 6.

<sup>39</sup> See, e.g., CalWA Comments at 4; Rural Cellular Association Comments at 4; T-Mobile Comments at 9-10.

<sup>40</sup> See, e.g., Rural Cellular Association Comments at 4-5; T-Mobile Comments at 11-12; MetroPCS Comments at 7-8.

<sup>41</sup> See, e.g., NATOA et al. Comments at 1-5 & 9-11; California Cities Comments at 18-21; Fairfax County, VA Comments at 14-15.

<sup>42</sup> See, e.g., Fairfax County, VA Comments at 14-15; California Cities Comments at 18-20; City of Dublin, OH Comments at 2-3; Coalition for Local Zoning Authority Comments at 10-11; NATOA et al. Reply Comments at 7-9.

preserve State and local government flexibility to process applications within the typical timeframes based on the individual circumstances of each case.<sup>43</sup> These commenters also oppose either deeming an application granted in the event of a zoning authority's "failure to act" or establishing a presumption entitling an applicant to a court-ordered injunction granting the application.<sup>44</sup>

16. The Petitioner requests that the Commission apply Section 253(a) of the Communications Act to preempt local ordinances and State laws that automatically require a wireless service provider to obtain a variance before siting facilities. In addressing this request, State and local government commenters argue that Section 253(a) cannot be applied to such ordinances because under Section 332(c)(7)(A), "[n]othing in [the Communications] Act" outside of Section 332(c)(7) shall limit State or local authority over personal wireless service facilities siting decisions.<sup>45</sup> The EMR Policy Institute (EMRPI) filed a Comment and Cross-Petition that, *inter alia*, seeks a declaratory ruling relating to the Commission's regulations regarding exposure to radio frequency emissions.<sup>46</sup>

17. Since the filing of the Petition, Congress passed the American Recovery and Reinvestment Act of 2009 (Recovery Act).<sup>47</sup> The Recovery Act directs the Commission to create a national broadband plan by February 17, 2010, that seeks to ensure that every American has access to broadband capability and establishes clear benchmarks for meeting that goal.<sup>48</sup> To this end, on April 8, 2009, the Commission initiated a Notice of Inquiry (NOI) seeking comment on the best approach to developing this Plan, the interpretation of key statutory terms, and a number of specific policy goals.<sup>49</sup> Some commenters that filed in response to the NOI also filed their comments in the instant docket, arguing that the grant of the Petition will promote the availability of wireless broadband services.<sup>50</sup> The Petitioner particularly notes that the delays experienced by wireless providers for wireless service facility siting applications are frustrating the deployment of wireless broadband services to millions of Americans.<sup>51</sup>

### III. DISCUSSION

18. Under Section 1.2 of the rules, the Commission "may . . . issue a declaratory ruling terminating a controversy or removing uncertainty."<sup>52</sup> The Commission has broad discretion whether to

<sup>43</sup> See, e.g., NATOA et al. Comments at 12-14; City of Philadelphia Comments at 3-4; Florida Cities Comments at 2-4, 15-20; City of Dublin, OH Comments at 2-3; California Cities Comments at 13-16.

<sup>44</sup> See, e.g., California Cities Comments at 17-21; NATOA et al. Comments at 15-18; SCAN NATOA Comments at 11-12.

<sup>45</sup> See, e.g., NATOA et al. Comments at 7; California Cities Comments at 23-24; Fairfax County, VA Comments at 3; Michigan Municipalities Comments at 2; N.C. Assoc. of County Commissioners Comments at 1-2.

<sup>46</sup> See EMRPI Comments and Cross-Petition.

<sup>47</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (Recovery Act).

<sup>48</sup> Recovery Act § 6001(k).

<sup>49</sup> See generally A National Broadband Plan for Our Future, GN Docket No. 09-51, *Notice of Inquiry*, 24 FCC Rcd 4342 (2009).

<sup>50</sup> See CTIA Comments, GN Docket No. 09-51, at 15-19 (filed June 8, 2009); PCIA and The DAS Forum Comments, GN Docket 09-51, at 5-6 (filed June 8, 2009); CTIA Reply Comments, GN Docket No. 09-51, at 13-15 (filed July 21, 2009); Google Inc. Reply Comments, GN Docket 09-51, at 40-41 (filed July 21, 2009).

<sup>51</sup> CTIA Comments, GN Docket No. 09-51, at 18 (filed June 8, 2009).

<sup>52</sup> 47 C.F.R. § 1.2.

issue such a ruling.<sup>53</sup>

19. Below, we address the three issues raised in CTIA's Petition. On the first issue, we conclude that we should define what constitutes a presumptively "reasonable period of time" beyond which inaction on a personal wireless service facility siting application will be deemed a "failure to act." We then determine that in the event a State or local government fails to act within the appropriate time period, the applicant is entitled to bring an action in court under Section 332(c)(7)(B)(v). At that point, the State or local government will have the opportunity to present to the court arguments to show that additional time would be reasonable, given the nature and scope of the siting application at issue. We next conclude that the record supports setting the time limits at 90 days for State and local governments to process collocation applications, and 150 days for them to process applications other than collocations. On the second issue raised by the Petition, we find that it is a violation of Section 332(c)(7)(B)(i)(II) for a State or local government to deny a personal wireless service facility siting application solely because that service is available from another provider. On the third issue, because the Petitioner has not presented us with any evidence of a specific controversy, we deny its request that we find that a State or local regulation that explicitly or effectively requires a variance or waiver for every wireless facility siting violates Section 253(a). Finally, we address other issues raised in the record, including dismissal of the EMRPI Cross-Petition.

**A. Authority to Interpret Section 332(c)(7)**

20. *Background.* The Petition claims that the Commission has the authority to interpret ambiguous provisions in Section 332(c)(7) of the Communications Act by means of a declaratory ruling.<sup>54</sup> Wireless providers support the Petition's assertion, arguing that the courts have upheld similar interpretive authority in other contexts. These commenters rely in particular on *Alliance for Community Media v. FCC*,<sup>55</sup> in which the Sixth Circuit upheld the Commission's establishment of a timeframe for local authorities to process cable franchise applications.<sup>56</sup>

21. State and local government commenters disagree, arguing that the statutory text and the legislative history evince congressional intent to deny the Commission such authority.<sup>57</sup> Specifically, State and local government commenters argue that in expressly preserving State and local government authority over personal wireless service facility siting decisions, subject only to the specific limitations stated in Section 332(c)(7), Congress withheld preemptive authority from the Commission.<sup>58</sup> Accordingly, they argue that the Commission does not have the authority to interpret Section 332(c)(7). They contend that the legislative history of Section 332(c)(7) further demonstrates this intent, as Congress indicated that "any pending rulemaking concerning the preemption of local zoning authority over the placement, construction, or modification of CM[R]S facilities should be terminated."<sup>59</sup> Other State and local government commenters assert that because the courts have exclusive jurisdiction over all disputes

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<sup>53</sup> See *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 914 (1973); Telephone Number Portability; BellSouth Corporation Petition for Declaratory Ruling and/or Waiver, CC Docket No. 95-116, *Order*, 19 FCC Rcd 6800, 6810 ¶ 20 (2004).

<sup>54</sup> Petition at 20-24.

<sup>55</sup> 529 F.3d 763 (6<sup>th</sup> Cir. 2008), *cert. denied*, 129 S.Ct. 2821 (2009) ("*Alliance for Community Media*").

<sup>56</sup> See, e.g., Sprint Nextel Comments at 8; T-Mobile Comments at 12; MetroPCS Comments at 5-6.

<sup>57</sup> See, e.g., NATOA et al. Comments at 1-5 & 9-11; California Cities Comments at 18-21; Fairfax County, VA Comments at 14-15.

<sup>58</sup> See, e.g., NATOA et al. Comments at 1-5.

<sup>59</sup> *Id.* at 9-10 (citing H.R. Conf. Rep. No. 104-458, at 208) (NATOA emphasis removed). NATOA et al. argues that Congress did not mean to address only those rulemakings in play in 1996, but any future rulemakings on personal wireless service facility issues. *Id.* at 10.

arising under Section 332(c)(7) (except for those relating to RF emissions), Congress did not contemplate any role for the Commission in the State and local zoning approval process. Thus, they argue, the Commission lacks the authority to determine what constitutes a “reasonable period of time,” “failure to act,” or “prohibit[on of] the provision of personal wireless services.”<sup>60</sup>

22. In its Reply, the Petitioner disputes the claim that Congress “left in place the complete autonomy of States and localities with respect to zoning.”<sup>61</sup> The Petitioner argues that “it is *Congress* that expressly inserted such federal concerns into the tower siting process, limiting traditional local authority, when it promulgated Section 332(c)(7)” in order to reduce delays and impediments at the State and local level.<sup>62</sup> Accordingly, the Petitioner argues that the Commission’s interpretation of Section 332(c)(7) does not contravene that section’s reservation to State and local governments of authority to review personal wireless service facility siting applications to the extent not limited by Section 332(c)(7).<sup>63</sup> Moreover, the Petitioner counters in its Reply that the Petition is not a challenge to a specific siting decision; thus, Section 332(c)(7)(B)(v)’s requirement that all controversies regarding siting decisions (other than those involving RF emissions) should be heard in the courts does not apply here.<sup>64</sup> The Petitioner also asserts that the Sixth Circuit’s decision in *Alliance for Community Media v. FCC* rejected the argument that the Commission’s implementation of a timeframe in the local franchising regime “improperly intruded on decisions left by Congress to the courts.”<sup>65</sup>

23. *Discussion.* We agree with the Petitioner that the Commission has the authority to interpret Section 332(c)(7). Congress delegated to the Commission the responsibility for administering the Communications Act. Section 1 of the Act directs the Commission to “execute and enforce the provisions of this Act” in order to, *inter alia*, regulate and promote communication “by wire and radio” on a nationwide basis.<sup>66</sup> Moreover, Section 201(b) of the Act authorizes the Commission “to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.”<sup>67</sup> Further, Section 303(r) of the Communications Act states that “the Commission from time to time, as public convenience, interest or necessity requires shall ... [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . . .”<sup>68</sup> Finally, Section 4(i) states that the Commission “may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”<sup>69</sup> These grants of authority necessarily include Title III of the Communications Act in general, and Section 332(c)(7) in particular.

24. This finding is consistent with our decision in the *Local Franchising Order*, in which we

<sup>60</sup> See, e.g., Fairfax County, VA Comments at 14-15; California Cities Comments at 18-20; City of Dublin, OH Comments at 2; NATOA et al. Reply Comments at 7-9; Coalition for Local Zoning Authority Comments at 10-11.

<sup>61</sup> CTIA Reply Comments at 12.

<sup>62</sup> *Id.* at 12-13 (emphasis in original).

<sup>63</sup> *Id.* The Petitioner also contends that it does not request that the Commission “condition or limit the scope of a zoning authority’s review of a tower siting application,” or that the Commission “preempt a zoning authority’s review of an application.” *Id.* at 2.

<sup>64</sup> *Id.* at 21-22.

<sup>65</sup> *Id.* at 22.

<sup>66</sup> 47 U.S.C. § 151.

<sup>67</sup> 47 U.S.C. § 201(b). See also *National Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (“Congress has delegated to the Commission the authority to ‘execute and enforce’ the Communications Act, § 151, and to ‘prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions’ of the Act, § 201(b).”).

<sup>68</sup> 47 U.S.C. § 303(r).

<sup>69</sup> 47 U.S.C. § 154(i).

held that the Commission has clear authority to interpret what it means for a local government to “unreasonably refuse to award” a franchise to a cable operator in Section 621(a)(1) of the Act.<sup>70</sup> That decision has been upheld by the U.S. Court of Appeals for the Sixth Circuit in *Alliance for Community Media v. FCC*. In that case, the court found that the Supreme Court’s precedent in *AT&T Corp. v. Iowa Utilities Board*<sup>71</sup> controlled, and it held that the Commission “possesses clear jurisdictional authority to formulate rules and regulations interpreting the contours of section 621(a)(1)” pursuant to its authority under Section 201(b) to carry out the provisions of the Communications Act.<sup>72</sup> The Court held that “the statutory silence in section 621(a)(1) regarding the agency’s rulemaking power does not divest the agency of its express authority to prescribe rules interpreting that provision.”<sup>73</sup> The same holds true here. Section 332(c)(7) falls within the Act; accordingly, the Commission has the authority to interpret it.

25. 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 *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. Moreover, the legislative history does not establish that the Commission is prohibited from interpreting the provisions of Section 332(c)(7). The Conference Report states that “[a]ny pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CM[R]S facilities should be terminated.”<sup>74</sup> We read the legislative history as intending to preclude 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). 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). Under Section 332(c)(7)(B)(iii), they may deny such applications if the denial is “supported by substantial evidence contained in a written record.”<sup>75</sup> However, State and local governments must act upon personal wireless service facility siting applications “within a reasonable period of time” as defined herein, and must not prohibit one carrier’s provision of service based on the availability of service from another carrier, or applicants may commence an action in a court of competent jurisdiction pursuant to Section 337(c)(7)(B)(v).

26. Moreover, we find that Section 332(c)(7)(B)(v) does not limit our authority to interpret Section 332(c)(7). Section 332(c)(7)(B)(v) states that “[a]ny person adversely affected by any final action or failure to act by a State or local government . . . may . . . commence an action in any court of

<sup>70</sup> Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 5101, 5128 ¶ 54 (2007) (“*Local Franchising Order*”) (interpreting Section 621(a)(1) of the Act, which prohibits local franchising authorities from “unreasonably refus[ing] to award” competitive cable franchises, and holding that if a local franchising authority fails to act on an application for a local franchise within 90 days for an applicant that already has access to rights-of-way or 6 months for all other applicants, then an interim franchise will be deemed granted until the franchising authority takes action on the application).

<sup>71</sup> 525 U.S. 366 (1999) (finding, *inter alia*, that the Commission has the authority to carry out provisions of the Act, including the local competition provisions added by the Telecommunications Act of 1996).

<sup>72</sup> 529 F.3d at 773-74.

<sup>73</sup> *Id.* at 774.

<sup>74</sup> H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 208 (1996).

<sup>75</sup> 47 U.S.C. § 332(c)(7)(B)(iii).

competent jurisdiction.”<sup>76</sup> State and local governments argue that Congress gave the courts, not the Commission, exclusive jurisdiction to interpret and enforce Section 332(c)(7). This is the same argument that we rejected in the *Local Franchising Order*. In that decision, we held that “[t]he mere existence of a judicial review provision in the Communications Act does not, by itself, strip the Commission of its otherwise undeniable rulemaking authority.”<sup>77</sup> The Sixth Circuit agreed, holding that “the availability of a judicial remedy for unreasonable denials of competitive franchise applications does not foreclose the agency’s rulemaking authority over section 621(a)(1).”<sup>78</sup> Accordingly, the fact that Congress provided for judicial review to remedy a violation of Section 332(c)(7) does not divest the Commission of its authority to interpret the provision or to adopt and enforce rules implementing Section 332(c)(7).

## B. Time for Acting on Facility Siting Applications

27. *Background.* Section 332(c)(7)(B)(ii) of the Communications Act states that State or local governments must act on requests for personal wireless service facility sitings “within a reasonable period of time.”<sup>79</sup> Section 332(c)(7)(B)(v) further provides that “[a]ny person adversely affected by any final action or failure to act”<sup>80</sup> by a State or local government on a personal wireless service facility siting application “may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction.”<sup>81</sup> The Petition asserts that the Commission has the authority to and should define the timeframes by which State and local governments must process personal wireless service facility siting applications.<sup>82</sup> The Petition claims that in the absence of timeframes, it is unclear when a State or local government has failed to act under the statute. Thus, an aggrieved party wishing to challenge a State or local government’s failure to act could miss the 30-day statute of limitations through no fault of its own.<sup>83</sup> The Petition proposes that the Commission declare that a State or local government has failed to act if it does not render a final decision on a collocation application within 45 days or on any other application within 75 days. The Petition asserts that the Commission should declare that, if a zoning authority fails to act within the prescribed timeframes, the application shall be “deemed granted.”<sup>84</sup> In the absence of such relief, the Petition argues, the lengthy litigation process would deprive the applicant of its ability to construct within a reasonable time, as provided by the statute.<sup>85</sup> Alternatively, the Petition requests that the Commission establish a presumption that entitles an applicant to a court-ordered injunction granting the application, unless the local zoning authority can demonstrate that the delay was reasonable.<sup>86</sup>

28. State and local government commenters assert that both “reasonable period of time” and “failure to act” are clear terms and that Congress used these general terms because it wanted State and local governments to process applications in the timeframes in which land use applications are typically processed. The Act and its legislative history, they contend, establish that the courts, not the

<sup>76</sup> 47 U.S.C. § 332(c)(7)(B)(v).

<sup>77</sup> *Local Franchising Order*, 22 FCC Rcd at 5129 ¶ 56 (2007).

<sup>78</sup> *Alliance for Community Media*, 529 F.3d at 775 (finding that this conclusion was supported by the Supreme Court’s decision in *AT&T Corp. v. Iowa Util. Bd.* upholding the Commission’s authority to issue rules governing the States’ resolution of interconnection arbitrations).

<sup>79</sup> 47 U.S.C. § 332(c)(7)(B)(ii).

<sup>80</sup> 47 U.S.C. § 332(c)(7)(B)(v).

<sup>81</sup> *Id.*

<sup>82</sup> Petition at 20-24.

<sup>83</sup> *Id.* at 20.

<sup>84</sup> *Id.* at 27-28.

<sup>85</sup> *Id.* at 28-29.

<sup>86</sup> *See id.* at 29-30.

Commission, should determine whether such processing is reasonable based on the individual facts in each case.<sup>87</sup> They argue that some applications require greater time to consider than others, and that sufficient time is needed to compile a written record as required by Section 332(c)(7)(B)(iii)<sup>88</sup> and to seek collaborative solutions with wireless providers and the surrounding communities impacted by the proposed wireless service facilities.<sup>89</sup> Finally, they assert that rigid timeframes do not account for time to amend applications that are often incomplete when submitted by wireless providers, and may provide incentive for wireless providers to submit incomplete applications and to delay correcting them until the application is “deemed granted” (as proposed by the Petitioner).<sup>90</sup>

29. Wireless providers argue that the Commission has the authority to define “reasonable period of time” and “failure to act,” and that such definition is necessary because some State and local governments are unreasonably delaying action on their applications.<sup>91</sup> They further contend that without defined timeframes, it is unclear when governments have failed to act and when they may go to court for redress.<sup>92</sup> They claim that the Petitioner’s proposed timetables are reasonable.<sup>93</sup>

30. State and local government commenters also urge the Commission to reject both the “deemed granted” proposal and the alternative presumption in favor of injunctive relief proposed in the Petition.<sup>94</sup> They argue that Congress directed applicants aggrieved by a failure to act to seek a remedy in court, and assigned to the courts the task of deciding the appropriate remedy.<sup>95</sup> Moreover, they assert, under the Petitioner’s proposed regime, local governments would have no say over siting of facilities once an application is deemed granted, even where safety factors justify modification or rejection of the facility.<sup>96</sup>

31. Sprint Nextel proposes that the Commission adopt the alternative remedy in the Petition. It argues that a presumptive grant is consistent with the Commission’s approach in the *Local Franchising Order*, in which the Commission did not deem a franchise application granted, but provided for an interim authorization, upon the local government’s failure to act upon an application in a timely fashion.<sup>97</sup> The Petitioner argues in its Reply that because a State or local authority’s failure to act within a reasonable time is specifically declared unlawful under the statute, an automatic grant is appropriate.<sup>98</sup>

32. *Discussion.* The evidence in the record demonstrates that personal wireless service providers have often faced lengthy and unreasonable delays in the consideration of their facility siting applications, and that the persistence of such delays is impeding the deployment of advanced and

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<sup>87</sup> See, e.g., NATOA et al. Comments at 12-14; City of Philadelphia Comments at 3-4; Florida Cities Comments at 2-4; City of Dublin, OH Comments at 2-3.

<sup>88</sup> 47 U.S.C. § 332(c)(7)(B)(iii) (denial of a personal wireless service facility siting application must be rendered “in writing and supported by substantial evidence contained in a written record”).

<sup>89</sup> See, e.g., California Cities Comments at 13-16; Florida Cities Comments at 15-20.

<sup>90</sup> See, e.g., Fairfax County, VA Comments at 13; City of Bellingham, WA Comments at 1-2; Michigan Municipalities Comments at 19-20.

<sup>91</sup> See, e.g., Sprint Nextel Comments at 4-5; CalWA Comments at 2-3; T-Mobile Comments at 6-9.

<sup>92</sup> See, e.g., CalWA Comments at 4; Rural Cellular Association Comments at 4-5; T-Mobile Comments at 9-10.

<sup>93</sup> See, e.g., Rural Cellular Association Comments at 6; T-Mobile Comments at 11-12; MetroPCS Comments at 7-8.

<sup>94</sup> See, e.g., California Cities Comments at 17-21; SCAN NATOA Comments at 10-12.

<sup>95</sup> See, e.g., Florida Cities Comments at 6; University of Michigan Comments at 3-4.

<sup>96</sup> See, e.g., Stokes County, N.C. Comments at 2.

<sup>97</sup> Sprint Nextel Comments at 9-11 (citing *Local Franchising Order*, 22 FCC Rcd 5101, 5139 (2007)).

<sup>98</sup> CTIA Reply Comments at 26.

emergency services. To provide guidance, remove uncertainty and encourage the expeditious deployment of wireless broadband services, we therefore determine that it is in the public interest to define the time period after which an aggrieved party can seek judicial redress for a State or local government's inaction on a personal wireless service facility siting application. Specifically, we find that a "reasonable period of time" is, presumptively, 90 days to process personal wireless service facility siting applications requesting collocations, and, also presumptively, 150 days to process all other applications. Accordingly, if State or local governments do not act upon applications within those timeframes, then a "failure to act" has occurred and personal wireless service providers may seek redress in a court of competent jurisdiction within 30 days, as provided in Section 332(c)(7)(B)(v). The State or local government, however, will have the opportunity to rebut the presumption of reasonableness.<sup>99</sup>

33. Need for Action. Initially, we find that the record shows that unreasonable delays are occurring in a significant number of cases. The Petition states that based on data the Petitioner compiled from its members, there were then more than 3,300 pending personal wireless service facility siting applications before local jurisdictions.<sup>100</sup> "Of those, approximately 760 [were] pending final action for more than one year. More than 180 such applications [were] awaiting final action for *more than 3 years*."<sup>101</sup> Moreover, almost 350 of the 760 applications that were pending for more than one year were requests to collocate on existing towers, and 135 of those collocation applications were pending for more than three years.<sup>102</sup> In addition, several wireless providers supplemented the record with their individual experiences in the personal wireless service facility siting application process. For example, Sprint Nextel asserts that the typical processing times for personal wireless service facility siting applications range from 28 to 36 months in several California communities.<sup>103</sup> Verizon Wireless asserts that "in Northern California, 27 of 30 applications took more than 6 months, with 12 applications taking more than a year, and 6 taking more than two years to be approved"; and that "in Southern California, 25 applications took more than two years to be approved, with 52 taking more than a year, and 93 taking more than 6 months."<sup>104</sup> NextG Networks describes delays of 10 to 25 months for its proposals to place facilities in public rights-of-way, and states that such delay occurred even when NextG Networks merely sought to replace old equipment.<sup>105</sup> Moreover, two wireless providers offer evidence that the personal wireless service facility siting applications process is getting longer in several jurisdictions. For example, T-Mobile contends that in Maryland, the typical zoning process went from two months to nine months in four years and in Florida, from two months to nine months in two years.<sup>106</sup> Verizon Wireless notes that in

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<sup>99</sup> We note that the operation of this presumption differs significantly from the Petitioner's alternative proposal that the Commission establish a presumption in favor of a court-ordered injunction granting the application. Under the approach we are adopting today, if a court finds that the State or local authority has failed to rebut the presumption that it failed to act within a reasonable time, the court would then review the record to determine the appropriate remedy. The State or local authority's exceeding a reasonable time for action would not, in and of itself, entitle the siting applicant to an injunction granting the application. See para. 39, *infra*.

<sup>100</sup> Petition at 15.

<sup>101</sup> *Id.* (emphasis in original).

<sup>102</sup> *Id.* The Petition claims that in "many jurisdictions" it was taking longer to obtain personal wireless service facility approvals than in prior years. *Id.*

<sup>103</sup> Sprint Nextel Comments at 5. Sprint Nextel also notes problems with processing in a New Jersey community. *Id.* The California Wireless Association also describes several instances of delays that ranged from 16 months to two years in California. CalWA Comments at 2-3.

<sup>104</sup> Verizon Wireless Comments at 6-7. T-Mobile also cites specific problems it encountered in four States. T-Mobile Comments at 7-9. Likewise, MetroPCS describes its experience with application processing delays in four jurisdictions. MetroPCS Comments at 8-12.

<sup>105</sup> NextG Networks Comments at 5-8.

<sup>106</sup> T-Mobile Comments at 6. In its comments, T-Mobile also references a collocation application submitted in LaGrange, New York, that was denied following a lengthy review process, despite the fact that the existing tower

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the Washington, D.C. metro area, the typical processing time for new tower applications increased from six to nine months in 2003 to more than one year in 2008, and the processing of collocation applications increased from 15 to 30 days in 2003 to more than 90 days in 2008.<sup>107</sup>

34. This record evidence demonstrates that unreasonable delays in the personal wireless service facility siting applications process have obstructed the provision of wireless services.<sup>108</sup> Many wireless providers have faced lengthy and costly processing. We disagree with State and local government commenters that argue that the Petition fails to provide any credible or probative evidence that any local government is engaged in delay with respect to processing personal wireless service facility siting applications,<sup>109</sup> and that there is insufficient evidence on the record as a whole to justify Commission action.<sup>110</sup> To the contrary, given the extensive statistical evidence provided by the Petitioner and supporting commenters, and the absence of more than isolated anecdotes in rebuttal, we find that the record amply establishes the occurrence of significant instances of delay.<sup>111</sup>

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was designed to accommodate multiple carriers and no height increase was required to hold the proposed installation. T-Mobile Comments at 26 (Declaration of Sabrina Bordin-Lambert). T-Mobile appealed the denial to the U.S. District Court, and the Court ruled in favor of T-Mobile and issued a permanent injunction directing the town to issue all necessary approvals to permit T-Mobile's antenna collocation within 90 days. *Omnipoint Communications, Inc. v. Town of LaGrange*, No. 08 Civ. 2201(CM)(GAY) (S.D.N.Y. Aug. 31, 2009). As support for the injunction, the Court cited the town's specific actions that resulted in a lengthy, five-year delay that ultimately prevented T-Mobile from filling an important gap in service. *Id.*

<sup>107</sup> Verizon Wireless Comments at 6. Moreover, both T-Mobile and Verizon Wireless provide information concerning pending applications. T-Mobile asserts that nearly one-third of its then 706 collocation applications had been pending for more than one year, and 114 of those had been pending for more than three years. T-Mobile Comments at 7. T-Mobile had 571 pending new tower applications, more than 30 percent of which had been pending for more than one year, and more than 25 of these applications had been pending for more than three years. *Id.* Verizon Wireless states that data it gathered "indicates that of the over 400 collocation requests reported as pending, over 30% of the requests [were] pending for more than six months." Verizon Wireless Comments at 6. In addition, it claims that "[o]f the over 350 non-collocation requests reported as pending, more than half of those applications [were] pending for more than 6 months, and nearly 100 of those applications [were] pending for more than one year." *Id.*

<sup>108</sup> We note that very late in the process, Petitioner and its supporters submitted new evidence in the form of letters and affidavits from carrier representatives that discuss specific experiences. *See Ex Parte* Letter from Christopher Guttman-McCabe, Vice President, Regulatory Affairs, CTIA -- The Wireless Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 08-165, filed November 10, 2009, Attached Letters from Michael S. Giaimo, Thomas C. Greiner, Jr., Scott P. Olson, Paul B. Albritton, and John W. Nilon, Jr., and Affidavit of Edward L. Donohue. NATOA and the Coalition for Local Zoning Authority responded that they have had no opportunity to respond to the substance of Petitioner's submissions, and suggested that the Commission should either strike CTIA's submission from the record or postpone action on the Petition until communities named in that submission have been served and given opportunity to respond. *See Ex Parte* Letter of Gerald L. Lederer, Counsel for NATOA and the Coalition for Local Zoning Authority, to Marlene Dortch, Secretary, Federal Communications Commission, WT Docket No. 08-165, filed November 10, 2009. We strongly encourage parties to submit relevant evidence as early as possible in the course of a proceeding, and preferably within the established pleading schedule, so that it may be subjected to the crucible of a response. Under the circumstances here, we do not give the record evidence contained in Petitioner's November 10 submission weight in our analysis.

<sup>109</sup> NATOA et al. Comments at 22; Stokes County, N.C. Comments at 1. Similarly, the County of Sonoma cites the proliferation of cell phones and towers as evidence that there is no problem and argues that the Commission should first investigate whether processing problems really exist. Sonoma Comments at 1.

<sup>110</sup> *See, e.g.* Coalition for Local Zoning Authority Reply Comments at 5-7; SCAN NATOA Reply Comments at 2-6; California Cities Reply Comments at 6; NATOA et al. Reply Comments at 15.

<sup>111</sup> The City of Philadelphia argues that the Petitioner's failure to identify and serve those local governments toward which its allegations are directed deprives those governments of a meaningful opportunity to verify or contest the

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35. Delays in the processing of personal wireless service facility siting applications are particularly problematic as consumers await the deployment of advanced wireless communications services, including broadband services, in all geographic areas in a timely fashion.<sup>112</sup> Wireless providers currently are in the process of deploying broadband networks which will enable them to compete with the services offered by wireline companies.<sup>113</sup> For example, Clearwire is deploying a next generation broadband wireless network for the 2.5 GHz band using the Worldwide Inter-Operability for Microwave Access (WiMAX) technology.<sup>114</sup> Clearwire asserts that its WiMAX network will “provide a true mobile broadband experience for consumers, small businesses, medium and large enterprises, public safety organizations and educational institutions.”<sup>115</sup> Similarly, we expect that the winners of recent spectrum auctions will need facility siting approvals in order to deploy their services to consumers.<sup>116</sup> At least one Advanced Wireless Service (AWS) licensee with nationwide reach already is implementing its new network in the AWS band.<sup>117</sup> Moreover, in the 700 MHz band, the Commission adopted stringent build out requirements precisely to ensure the rapid and widespread deployment of services over this spectrum.<sup>118</sup> State and local practices that unreasonably delay the siting of personal wireless service

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Petitioner’s allegations and deprives the Commission of a fair and full record. City of Philadelphia Comments at 2-3. See also Coalition for Local Zoning Authority Reply Comments at 5; Greater Metro Telecom. Consortium *et al.* Reply Comments at 6. We agree that an opportunity for rebuttal is an important element of process before making a finding regarding any individual community’s processes. Today’s decision provides such an opportunity for rebuttal by establishing presumptively reasonable timeframes that will allow the reasonableness of any particular failure to act to be litigated. The record shows that the State and local government community has had ample opportunity to respond to the aggregate evidence that supports our decision.

<sup>112</sup> See Petition at 8-10.

<sup>113</sup> The Petitioner has submitted a study which asserts that approximately 23.2 million U.S. residents and 42% of road miles in the U.S. do not currently have access to 3G mobile broadband services. It further estimates that approximately 16,000 new towers will need to be constructed and 55,000 existing towers will need to be augmented for both Code Division Multiple Access (CDMA) and Global System for Mobile communications (GSM) 3G broadband services to be ubiquitous to U.S. consumers. CostQuest Associates, Inc., U.S. Ubiquity Mobility Study, April 17, 2008 at 4, filed as attachment to CTIA Ex Parte, GN Docket No. 09-51, WT Docket Nos. 08-165, 08-166, 08-167, 09-66 (filed Aug. 14, 2009).

<sup>114</sup> *Sprint And Clearwire To Combine WiMAX Businesses, Creating A New Mobile Broadband Company*, News Release, Sprint Nextel and Clearwire Corp., May 7, 2008 (“*Sprint/Clearwire News Release*”). See Sprint Nextel Corp. and Clearwire Corp., Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations, WT Docket No. 08-94 and File Nos. 0003462540 *et al.*, *Memorandum Opinion and Order*, 23 FCC Rcd 17570, 17619 ¶ 128 (2008) (approving Clearwire and Sprint Nextel’s plan to combine their 2.5 GHz wireless broadband businesses into one company).

<sup>115</sup> *Sprint/Clearwire News Release*. Clearwire’s wireless broadband service is now available in 14 markets. *Clearwire Introduces CLEAR(TM) 4G WiMax Internet Service in 10 New Markets*, Press Release, Clearwire, Sept. 1, 2009.

<sup>116</sup> See Auction of Advanced Wireless Services Licenses Closes: Winning Bidders Announced for Auction No. 66, Report No. AUC-06-66-F, *Public Notice*, 21 FCC Rcd 10521 (WTB 2006); Auction of 700 MHz Band Licenses Closes; Winning Bidders Announced for Auction 73, *Public Notice*, Report No. AUC-08-73-1 (Auction 73), DA 08-595 (rel. Mar. 20, 2008).

<sup>117</sup> T-Mobile Comments at 2 (noting that unless it can expeditiously obtain approvals, its efforts to add high-speed services and expand coverage will be “significantly hampered”).

<sup>118</sup> See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150; Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102; Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309; Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket No. 03-264; Former Nextel Communications, Inc.

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facilities threaten to undermine achievement of the goals that the Commission sought to advance in these proceedings. Moreover, they impede the promotion of advanced services and competition that Congress deemed critical in the Telecommunications Act of 1996<sup>119</sup> and more recently in the Recovery Act.<sup>120</sup>

36. In addition, the deployment of facilities without unreasonable delay is vital to promote public safety, including the availability of wireless 911, throughout the nation. The importance of wireless communications for public safety is critical, especially as consumers increasingly rely upon their personal wireless service devices as their primary method of communication. As NENA observes in its comments:

Calls must be able to be made from as many locations as possible and dropped calls must be prevented. This is especially true for wireless 9-1-1 calls which must get through to the right Public Safety Answering Point ("PSAP") and must be as accurate as technically possible to ensure an effective response. Increased availability and reliability of commercial and public safety wireless service, along with improved 9-1-1 location accuracy, all depend on the presence of sufficient wireless towers.<sup>121</sup>

37. Right to Seek Relief. 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). And because an "action or failure to act" is the statutory trigger for seeking judicial relief, our clarification of these terms will give personal wireless service providers certainty as to when they may seek redress for inaction on an application. We expect that this certainty will enable personal wireless service providers more vigorously to enforce the statutory mandate against unreasonable delay that impedes the deployment of services that benefit the public. At the same time, our action will provide guidance to State and local governments as to what constitutes a reasonable timeframe in which they are expected to process applications, but recognizes that certain cases may legitimately require more processing time.<sup>122</sup>

38. By defining the period after which personal wireless service providers have a right to seek judicial relief, we both ensure timely State and local government action and preserve incentives for providers to work cooperatively with them 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

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Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules, WT Docket No. 06-169; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86; and Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule, WT Docket No. 07-166, *Second Report and Order*, 22 FCC Rcd 15289, 15342-55 ¶¶ 141-177 (2007).

<sup>119</sup> Telecommunications Act of 1996, Pub.L. 104-104, Feb. 8, 1996, 110 Stat. 56, codified at 47 U.S.C. § 151 *et seq.* (1996 Act). The 1996 Act amended the Communications Act of 1934.

<sup>120</sup> See *supra* note 47.

<sup>121</sup> NENA Comments at 1-2.

<sup>122</sup> We recognize that there are numerous jurisdictions that are processing personal wireless service facility siting applications well within the timeframes we establish herein. We encourage these jurisdictions to continue their expeditious processing of applications for the benefit of wireless consumers.

determines that additional time was, in fact, reasonable under the circumstances. Similarly, State and local governments will have a strong incentive to resolve each application within the timeframe defined as reasonable, or they will risk issuance of an injunction granting the application. In addition, specific 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.

39. We reject the Petitioner's proposals that we go farther and either deem an application granted when a State or local government has failed to act within a defined timeframe or adopt a presumption that the court should issue an injunction granting the application. Section 332(c)(7)(B)(v) states that when a failure to act has occurred, aggrieved parties should file with a court of competent jurisdiction within 30 days and that "[t]he court shall hear and decide such action on an expedited basis."<sup>123</sup> This provision indicates Congressional intent that courts should have the responsibility to fashion appropriate case-specific remedies. As the Petitioner notes, many courts have issued injunctions granting applications upon finding a violation of Section 332(c)(7)(B).<sup>124</sup> However, the case law does not establish that an injunction granting the application is always or presumptively appropriate when a "failure to act" occurs.<sup>125</sup> To the contrary, in those cases where courts have issued such injunctions upon finding a failure to act within a reasonable time, they have done so only after examining all the facts in the case.<sup>126</sup> While we agree that injunctions granting applications may be appropriate in many cases, the proposals in personal wireless service facility siting applications and the surrounding circumstances can vary greatly. It is therefore important for courts to consider the specific facts of individual applications and adopt remedies based on those facts.

40. We also disagree with commenters that argue that the statutory scheme precludes us from interpreting the terms "reasonable period of time" and "failure to act" by reference to specific timeframes. State and local government commenters assert that Congress used these general terms, rather than setting specific time periods in the Act, because it wanted to preserve State and local governments' discretion to process applications in the timeframes in which each government typically processes land use applications. They contend that this reading comports with the complete text of Section 332(c)(7)(B)(ii), which obligates the State or local government to act "within a reasonable period of time after the request is duly filed . . . taking into account the nature and scope of such request."<sup>127</sup> Moreover, these commenters rely upon the Conference Agreement, which states that "the time period for rendering a [personal wireless service facility siting] decision will be the usual period under such circumstances" and that "[i]t is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision[s]."<sup>128</sup>

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<sup>123</sup> 47 U.S.C. § 332(c)(7)(B)(v).

<sup>124</sup> See Petition at 28; CTIA Reply Comments at 23-25.

<sup>125</sup> We note that many of the cases the Petitioner cites involved not a failure to act within a reasonable time, but a lack of substantial evidence or other violation of Section 332(c)(7)(B). See, e.g., *New Par v. City of Saginaw*, 301 F.3d 390, 399-400 (6th Cir. 2002); *Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 24-25 (1st Cir. 2002); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1222 (11th Cir. 2002).

<sup>126</sup> See *Tennessee ex rel. Wireless Income Props. v. Chattanooga*, 403 F.3d 392 (6th Cir. 2005); *Masterpage Communications, Inc. v. Town of Olive, NY*, 418 F.Supp.2d 66 (N.D.N.Y. 2005).

<sup>127</sup> 47 C.F.R. § 332(c)(7)(B)(ii) (emphasis added). See NATOA et al. Comments at 14-15; California Cities Comments at 5-6; Fairfax County, VA Comments at 6-7; City of Dublin, OH Comments at 3; City of Grove City, OH Comments at 3; Florida Cities Comments at 5-6; City of Burien, WA Comments at 4; Village of Alden, NY Comments at 3.

<sup>128</sup> H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 208 (1996).

41. Particularly given the opportunities that we have built into the process for ensuring individualized consideration of the nature and scope of each siting request, we find these arguments unavailing. Congress did not define either “reasonable period of time” or “failure to act” in the Communications Act. As the United States Court of Appeals for the District of Columbia Circuit has held, the term “reasonable” is ambiguous and courts owe substantial deference to the interpretation that the Commission accords to ambiguous terms.<sup>129</sup> We similarly found in the *Local Franchising Order* that the term “unreasonably refuse to award” a local franchise authorization in Section 621(a)(1) is ambiguous and subject to our interpretation.<sup>130</sup> As in the local franchising context, it is not clear from the Communications Act *what* is a reasonable period of time to act on an application or *when* a failure to act occurs. As we find above, by defining timeframes in this proceeding, the Commission will lend clarity to these provisions, giving wireless providers and State and local zoning authorities greater certainty in knowing what period of time is “reasonable,” and ensuring that the point at which a State or local authority “fails to act” is not left so ambiguous that it risks depriving a wireless siting applicant of its right to redress.

42. Moreover, our construction of the statutory terms “reasonable period of time” and “failure to act” takes into account, on several levels, the Section 332(c)(7)(B)(ii) requirement that the “nature and scope” of the request be considered and the legislative history’s indication that Congress intended the decisional timeframe to be the “usual period” under the circumstances for resolving zoning matters. First, the timeframes we define below are based on actual practice as shown in the record. As discussed below, most statutes and government processes discussed in the record already conform to the timeframes we define. As such, the timeframes do not require State and local governments to give preferential treatment to personal wireless service providers over other types of land use applications. Second, we consider the nature and scope of the request by defining a shorter timeframe for collocation applications, consistent with record evidence that collocation applications generally are considered at a faster pace than other tower applications. Third, under the regime that we adopt today, 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. Finally, we have 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 applicant and the State or local authority agree to extend the time, where the application has already been pending for longer than the presumptive timeframe as of the date of this Declaratory Ruling, and 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.<sup>131</sup> For all these reasons, we conclude that our clarification of the broad terms “reasonable period of time” and “failure to act” is consistent with the statutory scheme.

43. Timeframes Constituting a “Failure to Act”. The Petition proposes a 45-day timeframe for collocation applications and a 75-day timeframe for all other applications.<sup>132</sup> The Petition asserts that because no new towers need to be constructed, collocations are the easiest applications for State and local

<sup>129</sup> *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994). In this case the court stated: “[b]ecause ‘just,’ ‘unjust,’ ‘reasonable,’ and ‘unreasonable’ are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them.” The court upheld the Commission’s rejection of a competitive carrier’s proposed tariff as patently unlawful because it was not “just and reasonable” under Section 201(b) of the Act. See also *National Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. at 982-84 (finding that where a statute is ambiguous and the implementing agency’s construction is reasonable, a federal court must accept the agency’s construction of the statute, even if the agency’s interpretation differs from prior judicial construction).

<sup>130</sup> *Local Franchising Order*, 22 FCC Rcd at 5130 ¶ 58 (2007).

<sup>131</sup> See *infra* paras. 49-53.

<sup>132</sup> Petition at 24-27. The Petition claims that over 80 percent of carriers surveyed had had “some collocations granted within one week” and new builds “granted within 2 weeks.” Petition at 16.

governments to review and, therefore, should reasonably be reviewed within a shorter period.<sup>133</sup> The Petitioner surveyed its members and found that collocations can take as little as a single day to review, and that all members responding had received zoning approvals within 14 days.<sup>134</sup> With respect to new facilities or major modifications, the Petitioner's members indicated that they had received final action "in as little as one day, with hundreds of grants within 75 days."<sup>135</sup> Wireless providers argue that the Petitioner's proposed timeframes are reasonable,<sup>136</sup> and they rely upon State and local processes as evidence to support that conclusion.<sup>137</sup> Moreover, there is evidence from local governments that they are able to decide promptly personal wireless service facility siting applications. For example, the City of Saint Paul, Minnesota, has processed personal wireless service facility siting applications within 13 days, on average, since 2000,<sup>138</sup> and the City of LaGrande, Oregon, has processed applications on average in 45 days in the last ten years.<sup>139</sup>

44. While we recognize that many applications can and perhaps should be processed within the timeframes proposed by the Petitioner, we are concerned that these timeframes may be insufficiently flexible for general applicability. In particular, some applications may reasonably require additional time to explore collaborative solutions among the governments, wireless providers, and affected communities.<sup>140</sup> Also, State and local governments may sometimes need additional time to prepare a written explanation of their decisions as required by Section 332(c)(7)(B)(iii),<sup>141</sup> and the timeframes as proposed may not accommodate reasonable, generally applicable procedural requirements in some communities.<sup>142</sup> Although, as noted above, the reviewing court will have the opportunity to consider such unique circumstances in individual cases, it is important for purposes of certainty and orderly processing that the timeframes for determining when suit may be brought in fact accommodate reasonable processes in most instances.<sup>143</sup>

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<sup>133</sup> *Id.* at 24-25.

<sup>134</sup> *Id.* at 25.

<sup>135</sup> *Id.* at 26. All members responding to the survey reported receiving approvals for new facilities within 30 days. *Id.*

<sup>136</sup> *See, e.g.,* MetroPCS Comments at 12; Rural Cellular Association Comments at 6; NextG Networks Comments at 9-12.

<sup>137</sup> Sprint Nextel Comments at 6-8 (*citing* to South Dakota Public Utility Commission's model wireless zoning ordinance and Florida and North Carolina statutes); T-Mobile Comments at 11-12 (*citing* to the processing experienced by T-Mobile in Florida, Georgia, and Texas); MetroPCS Comments at 7-8 (*citing* to the processing experienced by MetroPCS in Delaware and Pennsylvania); NextG Networks Comments at 9-14 (*citing* to North Carolina, Florida & Kentucky statutes).

<sup>138</sup> City of Saint Paul, Minnesota and the City's Board of Water Commissioners Comments at 10.

<sup>139</sup> City of LaGrande, Oregon Comments at 3.

<sup>140</sup> Such collaborative processes are asserted to have led to improved antenna deployments. *See, e.g.,* California Cities Comments at 13-16.

<sup>141</sup> Michigan Municipalities Comments at 14-19.

<sup>142</sup> *See, e.g.,* Fairfax County, VA Comments at 7-10; City of Dublin, OH Comments at 3-4; Florida Cities Comments at 8-9.

<sup>143</sup> California Cities note that the Commission previously rejected time limits for itself in a rulemaking concerning petitions filed pursuant to Section 332(c)(7)(B)(v) because they would not afford the Commission sufficient flexibility to account for particular facts in a case. California Cities Comments at 8-10 (*citing* 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, WT Docket No. 97-192, *Report and Order*, 15 FCC Rcd 22821, 22829-30 ¶ 20 (2000)). The timeframes that we adopt account for the flexibility that may be needed to address different fact situations, while at the same time adhering to the important public interest in certainty discussed above.

45. Based on our review of the record as a whole, we find 90 days to be a generally reasonable timeframe for processing collocation applications and 150 days to be a generally reasonable timeframe 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). At least one wireless provider, U.S. Cellular, suggests that such 90-day and 150-day timeframes are sufficient for State and local governments to process applications.<sup>144</sup>

46. We find that collocation applications can reasonably be processed within 90 days. Collocation applications are easier to process than other types of applications as they do not implicate the effects upon the community that may result from new construction. In particular, the addition of an antenna to an existing tower or other structure is unlikely to have a significant visual impact on the community. Therefore, many jurisdictions do not require public notice or hearings for collocations.<sup>145</sup> For purposes of this standard, an application is a request for collocation if it does not involve a “substantial increase in the size of a tower” as defined in the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas.<sup>146</sup> This limitation will help to ensure that State and local governments will have a reasonable period of time to review those applications that may require more extensive consideration.

47. Several State statutes already require application processing within 90 days. California and Minnesota require both collocation and non-collocation applications to be processed within 60 days.<sup>147</sup> North Carolina has a time period of 45 days for processing after a 45-day review period for application completeness (for a total of 90 days),<sup>148</sup> and Florida’s process is 45 business days after a 20-business day review period for application completeness (for a total of approximately 91 days, including weekends).<sup>149</sup> Moreover, the evidence submitted by local governments indicates that most already are

<sup>144</sup> U.S. Cellular Reply Comments at 2-3.

<sup>145</sup> See, e.g., N.C. Gen. Stat. Ann. § 153A-349.53(a); Fla. Stat. Ann. § 365.172(12)(a)(1)(a).

<sup>146</sup> See T-Mobile Comments at 10-11. A “[s]ubstantial increase in the size of the tower” occurs if:

(1) [t]he mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or (2) [t]he mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or (3) [t]he mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or (4) [t]he mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site.

47 C.F.R. Part 1, App. B—Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, Definitions, Subsection C.

<sup>147</sup> Cal. Gov’t. Code §§ 65950 & 65943 (assuming no environmental review is required; also has 30-day review period for completeness); Minn. Stat. Ann. § 15.99 (permitting an additional 60-day extension upon written notice to applicant).

<sup>148</sup> N.C. Gen. Stat. Ann. § 153A-349.52.

<sup>149</sup> Fla. Stat. Ann. § 365.172. In addition, the State of Connecticut’s Connecticut Siting Council states that “most applications to approve a tower-sharing request are processed by our agency in four to six weeks.” State of Connecticut’s Connecticut Siting Council Sept. 24, 2008 Letter at 2.

processing collocation applications within 90 days. Of the approximately 51 localities that submitted information concerning their processing of collocation applications, only eight state that their processing is longer than 90 days. However, five of those localities indicate that their processing is within 120 days, on average. Based on these facts, we conclude that a 90-day timeframe for processing collocation applications is reasonable.

48. We further find that the record shows that a 150-day processing period for applications other than collocations is a reasonable standard that is consistent with most statutes and local processes. First, of the eight State statutes discussed in the record that cover non-collocation applications, only one State, Connecticut, contemplates a longer process.<sup>150</sup> Nonetheless, the process in Connecticut is only 30 days longer than the timeframe set forth here.<sup>151</sup> The other seven States provide for a review period of 60 to 150 days.<sup>152</sup> Second, of the processes described by local governments in the record, most already routinely conclude within 150 days or less. Approximately 51 localities submitted information concerning their processing of personal wireless service facility siting applications. Of those, only twelve indicate that they may take longer than 150 days. However, four of these twelve cities indicate that they generally process the applications within 180 days. Based on these facts, we conclude that a 150-day timeframe for processing applications other than collocations is reasonable. Accordingly, we do not agree that the Commission's imposition of the 90-day and 150-day timeframes will disrupt many of the processes State and local governments already have in place for personal wireless service facility siting applications.<sup>153</sup>

49. Related Issues. Section 332(c)(7)(B)(v) provides that an action for judicial relief must be brought "within 30 days" after a State or local government action or failure to act.<sup>154</sup> Thus, if a failure to act occurs 90 days (for a collocation) or 150 days (in other cases) after an application is filed, any court action must be brought by day 120 or 180 on penalty of losing the ability to sue. We conclude that a rigid application of this cutoff to cases where the parties are working cooperatively toward a consensual resolution would be contrary to both the public interest and Congressional intent. Accordingly, we clarify that a "reasonable period of time" may be extended beyond 90 or 150 days by mutual consent of the personal wireless service provider and the State or local government, and that in such instances, the commencement of the 30-day period for filing suit will be tolled.

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

<sup>150</sup> See Conn. Gen. Stat. Ann. §§ 16-50(i) & (p) (action required within 180 days after application is filed).

<sup>151</sup> Moreover, the State of Connecticut, Connecticut Siting Council states that "applications to approve a new-build tower are generally reviewed and acted upon in four to five months." State of Connecticut's Connecticut Siting Council Sept. 24, 2008 Letter at 2.

<sup>152</sup> The State of California requires applications to be processed within 60 days, after a 30-day review period for completeness, assuming no environmental review is required. Cal. Gov't. Code §§ 65950 & 65943. The State of Florida requires applications to be processed within 90 business days, after a 20-business day review period for completeness. Fla. Stat. Ann. § 365.172. The State of Minnesota requires applications to be processed within 60 days, which can be extended an additional 60 days upon written notice to the applicant. Minn. Stat. Ann. § 15.99. The State of Oregon requires applications to be processed within 120 days, after a 30-day review period for completeness. Or. Rev. Stat. § 227.178. The Commonwealth of Virginia requires applications to be processed within 90 days, which can be extended an additional 60 days. Va. Code Ann. § 15.2-2232. The State of Washington requires applications to be processed within 120 days, after a 28-day review period for completeness. Wash. Rev. Code §§ 36.70B.080 & 36.70B.070. The State of Kentucky requires applications to be processed within 60 days. Ky. Rev. Stat. Ann. § 100.987.

<sup>153</sup> See, e.g., California Cities Comments at 10-12; Fairfax County, VA Comments at 7-10; City of Dublin, OH Comments at 3-4; Michigan Municipalities Comments at 11-14.

<sup>154</sup> 47 U.S.C. § 332(c)(7)(B)(v).

statutes or ordinances. Thus, where the review period in a State statute or local ordinance is shorter than the 90-day or 150-day period, the applicant may pursue any remedies granted under the State or local regulation when the applicable State or local review period has lapsed. However, the applicant must wait until the 90-day or 150-day review period has expired to bring suit for a “failure to act” under Section 332(c)(7)(B)(v). Conversely, if the review period in the State statute or local ordinance is longer than the 90-day or 150-day review period, the applicant may bring suit under Section 332(c)(7)(B)(v) after 90 days or 150 days, subject to the 30-day limitation period on filing, and may consider pursuing any remedies granted under the State or local regulation when that applicable time limit has expired. Of course, the option is also available in these cases to toll the period under Section 332(c)(7) by mutual consent.

51. We further conclude that given the ambiguity that has prevailed until now as to when a failure to act occurs, it is reasonable to give State and local governments an additional period to review currently pending applications before an applicant may file suit. Accordingly, as a general rule, for currently pending applications we deem that a “failure to act” will occur 90 days (for collocations) or 150 days (for other applications) after the release of this Declaratory Ruling. We recognize, however, that some applications have been pending for a very long period, and that delaying resolution for an additional 90 or 150 days may impose an undue burden on the applicant. Therefore, a party whose application has been pending for the applicable timeframe that we establish herein or longer as of the release date of this Declaratory Ruling may, after providing notice to the relevant State or local government, file suit under Section 332(c)(7)(B)(v) if the State or local government fails to act within 60 days from the date of such notice. The notice provided to the State or local government shall include a copy of this Declaratory Ruling. This option does not apply to applications that have currently been pending for less than 90 or 150 days, and in these instances the State or local government will have 90 or 150 days from the release of this Declaratory Ruling before it will be considered to have failed to act. We find that this transitional regime best balances the interests of applicants in finality with the needs of State and local governments for adequate time to implement our interpretation of Section 332(c)(7).

52. Finally, certain State and local government commenters argue that the timeframes should take into account that not all applications are complete as filed and that applicants do not always file necessary additional information in a timely manner.<sup>155</sup> MetroPCS does not contest this argument, but it further proposes that local authorities should be required to notify applicants of incomplete applications within three business days and to inform the applicant what additional information should be submitted.<sup>156</sup> The Petitioner supports MetroPCS’s proposal.<sup>157</sup> We concur that the timeframes should take into account whether applications are complete. Accordingly, we find that when applications are incomplete as filed, the timeframes do not include the time that applicants take to respond to State and local governments’ requests for additional information. We also find that reviewing authorities should be bound to notify applicants within a reasonable period of time that their applications are incomplete. It is important that State and local governments obtain complete applications in a timely manner, and our finding here will provide the incentive for wireless providers to file complete applications in a timely fashion.

53. Five State statutes discussed in the record specify a period for a review of the applications for completeness. The State of Florida requires an application to be reviewed within 20

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<sup>155</sup> See, e.g., Fairfax County, VA Comments at 13; City of Bellingham, WA Comments at 1-2; Michigan Municipalities Comments at 19-20; Stokes County, N.C. Comments at 1 (complete application should be required); Florida Cities Comments at 8-9 (wireless companies should also be held to timelines for responding to requests from localities concerning siting applications).

<sup>156</sup> MetroPCS Comments at 12. MetroPCS also proposes that the zoning authority should be conclusively deemed to have accepted the filing as complete if it does not respond within three days.

<sup>157</sup> CTIA Reply Comments at 18.

business days for determining whether it is complete;<sup>158</sup> the State of Washington requires review within 28 days;<sup>159</sup> the States of California and Oregon require review within 30 days,<sup>160</sup> and the State of North Carolina requires review within 45 days.<sup>161</sup> 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. Accordingly, we conclude that the time it takes for an applicant to respond to a request for additional information will not count toward the 90 or 150 days only if that State or local government notifies the applicant within the first 30 days that its application is incomplete. We find that the total amount of time, including the review period for application completeness, is generally consistent with those States that specifically include such a review period.

### C. Prohibition of Service by a Single Provider

54. *Background.* The Petitioner next asks the Commission to conclude that State or local regulation that effectively prohibits one carrier from providing service because service is available from one or more other carriers violates Section 332(c)(7)(B)(i)(II) of the Act.<sup>162</sup> The Petitioner contends that the Act does not define what constitutes a prohibition of service for purposes of Section 332(c)(7)(B)(i)(II).<sup>163</sup> The Petitioner asserts that Circuit court decisions have interpreted this provision in a number of different ways, including so as to allow the denial of an application so long as a single wireless provider serves the area, thereby creating a need for the Commission to interpret it.<sup>164</sup> The Petitioner argues that its position is consistent with the pro-competitive goals of the 1996 Telecommunications Act, and further, that the provision refers to personal wireless services in the plural, which cuts against a single provider interpretation.<sup>165</sup> Similarly, Section 332(c)(7)(B)(i)(I) bars unreasonable discrimination among providers, also suggesting a preference for multiple providers.<sup>166</sup> In addition to supporting the Petitioner's argument, numerous wireless providers assert that if local zoning authorities could deny siting applications whenever another carrier serves the area, competition as intended by the 1996 Act and the introduction of new technologies would be impeded, and E911 service and public safety could be impacted.<sup>167</sup>

55. Parties opposing the Petition argue that if, as the Petition suggests, there are local governments that deny applications solely because of coverage by another provider, the affected provider can, as courts have recognized, bring a claim of unreasonable discrimination.<sup>168</sup> Opponents also argue

<sup>158</sup> See 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).

<sup>159</sup> 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).

<sup>160</sup> 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).

<sup>161</sup> 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).

<sup>162</sup> Petition at 30-35.

<sup>163</sup> *Id.* at 30.

<sup>164</sup> *Id.* at 31.

<sup>165</sup> *Id.* at 31-32.

<sup>166</sup> *Id.* at 32.

<sup>167</sup> See, e.g., Sprint Nextel Comments at 11-12; T-Mobile Comments at 13-14; NextG Networks Comments at 14-15.

<sup>168</sup> See NATOA et al. Comments at 20.

that the Petition fails to provide any credible or probative evidence of a prohibition on the ability of any provider to provide services.<sup>169</sup> Commenters also argue that granting the Petition would limit State and local authorities' ability to regulate the location of facilities.<sup>170</sup> One opposition commenter suggests that because the interpretation advanced in the Petition would appear to prevent localities from considering the presence of service by other carriers in evaluating an additional carrier's application for an antenna site, granting this request could have a negative impact on airports by increasing the number of potential obstructions to air navigation.<sup>171</sup> Finally, one commenter argues that because Section 332(c)(7)(A)<sup>172</sup> states that the zoning authority of a State or local government over personal wireless service facilities is only limited by the specific exceptions provided in Section 332(c)(7)(B), and because Section 332(c)(7)(B) does not say that a zoning authority cannot consider the presence of other providers, the Commission may not impose such a limitation.<sup>173</sup>

56. *Discussion.* We conclude that a State or local government that denies an application for personal wireless service facilities siting solely because "one or more carriers serve a given geographic market"<sup>174</sup> has engaged in unlawful regulation that "prohibits or ha[s] the effect of prohibiting the provision of personal wireless services," within the meaning of Section 332(c)(7)(B)(i)(II). Initially, we note that courts of appeals disagree on whether a State or local policy that denies personal wireless service facility siting applications solely because of the presence of another carrier should be treated as a siting regulation that prohibits or has the effect of prohibiting such services.<sup>175</sup> Thus, a controversy exists that is appropriately resolved by declaratory ruling.<sup>176</sup> We agree with the Petitioner that the fact that another carrier or carriers provide service to an area is an inadequate defense under a claim that a prohibition exists, and we conclude that any other interpretation of this provision would be inconsistent with the Telecommunications Act's pro-competitive purpose.

57. Section 332(c)(7)(B)(i)(II) provides, as a limitation on the statute's preservation of local zoning authority, that a State or local government regulation of personal wireless facilities "shall not

<sup>169</sup> *Id.* at 22.

<sup>170</sup> See, e.g., City of Auburn, WA Comments at 3; City of SeaTac, WA Comments at 2.

<sup>171</sup> See North Carolina Department of Transportation's Division of Aviation Comments at 2.

<sup>172</sup> 47 U.S.C. § 332(c)(7)(A) (stating "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.").

<sup>173</sup> See County of Albemarle, VA Comments at 8-9.

<sup>174</sup> Petition at 32.

<sup>175</sup> Some courts of appeals have found no violation of the "effect of prohibiting" clause solely because another carrier is providing service. See *APT Pittsburgh L.P. v. Penn Township Butler County of Pa.*, 196 F.3d 469, 480 (3d Cir. 1999) ("evidence that the area the new facility will serve is not already served by another provider" essential to showing violation "effect of prohibiting" clause); *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 428-29 (4th Cir. 1998) (concluding that the statute only applies when the State or local authority has adopted a blanket ban on wireless service facilities). Other courts of appeals have reached the opposite conclusion. See *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620, 633-34 (1st Cir. 2002) (rejecting a rule that "any service equals no effective prohibition"); *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 731-33 (9th Cir. 2005) (adopting the First Circuit's analysis).

<sup>176</sup> See 47 C.F.R. § 1.2; *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S.Ct. at 2700 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion"). None of the courts of appeals has held that the meaning of Section 332(c)(7)(B)(i)(II) is unambiguous. See, e.g., *Omnipoint Holdings, Inc., v. City of Cranston*, No. 08-2491 (1st Cir. November 3, 2009) ("Beyond the statute's language, the [Communications Act] provides no guidance on what constitutes an effective prohibition, so courts ... have added judicial gloss").

prohibit or have the effect of prohibiting the provision of personal wireless services.”<sup>177</sup> While we acknowledge that this provision could be interpreted in the manner endorsed by several courts – as a safeguard against a complete ban on all personal wireless service within the State or local jurisdiction, which would have no further effect if a single provider is permitted to provide its service within the jurisdiction – we conclude that under the better reading of the statute, this limitation of State/local authority applies not just to the first carrier to enter into the market, but also to all subsequent entrants.

58. We reach this conclusion for several reasons. First, our interpretation is consistent with the statutory language referring to the prohibition of “the provision of personal wireless *services*” rather than the singular term “service.” As the First Circuit observed, “[a] straightforward reading is that ‘services’ refers to more than one carrier. Congress contemplated that there be multiple carriers competing to provide services to consumers.”<sup>178</sup>

59. Second, an interpretation that would regard the entry of one carrier into the locality as mooted a subsequent examination of whether the locality has improperly blocked personal wireless services ignores the possibility that the first carrier may not provide service to the entire locality, and a zoning approach that subsequently prohibits or effectively prohibits additional carriers therefore may leave segments of the population unserved or underserved.<sup>179</sup> In the words of the First Circuit, the “fact that some carrier provides some service to some consumers does not in itself mean that the town has not effectively prohibited services to other consumers.”<sup>180</sup> Such action on the part of the locality would contradict the clear intent of the statute.

60. Third, we find unavailing the reasons cited by the Fourth Circuit (and some other courts) to support the interpretation that the statute only limits localities from prohibiting all personal wireless services (*i.e.*, a blanket ban or “one-provider” approach). The Fourth Circuit’s principal concern was that giving each carrier an individualized right under Section 332(c)(7)(B)(i)(II) to contest an adverse zoning decision as an unlawful prohibition of its service “would effectively nullify local authority by mandating approval of all (or nearly all) applications.”<sup>181</sup> As explained below, however, our interpretation of the statute does not mandate such approval and therefore does not strip State and local authorities of their Section 332(c)(7) zoning rights. Rather, we construe the statute to bar State and local authorities from prohibiting the provision of services of individual carriers solely on the basis of the presence of another carrier in the jurisdiction; State and local authority to base zoning regulation on other grounds is left intact by this ruling.

61. Finally, our construction of the provision achieves a balance that is most consistent with the relevant goals of the Communications Act. In promoting the construction of nationwide wireless networks by multiple carriers, Congress sought ultimately to improve service quality and lower prices for consumers. Our interpretation in this Declaratory Ruling promotes these statutory objectives more effectively than the alternative, which could perpetuate significant coverage gaps within any individual

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<sup>177</sup> 47 U.S.C. § 332(c)(7)(B)(i)(II).

<sup>178</sup> *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d at 634.

<sup>179</sup> To the extent a wireless carrier has gaps in its service, a zoning restriction that bars additional carriers will cement those gaps in place and effectively prohibit any consumer from receiving service in those areas. If the gap is large enough, the people living in the gap area who tend to travel only shorter distances from home will be left without a usable service altogether. According to the First Circuit, the presence of the one carrier in the jurisdiction therefore does not end the inquiry under Section 332(c)(7)(B): “That one carrier provides some service in a geographic gap should not lead to abandonment of examination of the effect on wireless services for other carriers and their customers.” *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d at 634.

<sup>180</sup> *Id.*

<sup>181</sup> *AT&T Wireless PCS v. City Council of Va. Beach*, 155 F.3d at 428.

wireless provider's service area and, in turn, diminish the service provided to their customers.<sup>182</sup> In addition, under the Fourth Circuit's approach, competing providers may find themselves barred from entering markets to which they would have access under our interpretation of the statute, thus depriving consumers of the competitive benefits the Act seeks to foster. As the First Circuit recently stated, the "one-provider rule" "prevents customers in an area from having a choice of reliable carriers and thus undermines the [Act's] goal to improve wireless service for customers through industry competition."<sup>183</sup> In sum, our rejection of this rule "actually better serves both individual consumers and the policy goals of the [Communications Act]."<sup>184</sup>

62. Our determination also serves the Act's goal of preserving the State and local authorities' ability to reasonably regulate the location of facilities in a manner that operates in harmony with federal policies that promote competition among wireless providers.<sup>185</sup> As we indicated above, nothing we do here interferes with these authorities' consideration of and action on the issues that traditionally inform local zoning regulation. Thus, where a *bona fide* local zoning concern, rather than the mere presence of other carriers, drives a zoning decision, it should be unaffected by our ruling today. The Petitioner appears to recognize this when it states that it "does not seek a ruling that zoning authorities are prohibited from favoring collocation over new facilities where collocation is appropriate."<sup>186</sup> Our ruling here does not create such a prohibition. To the contrary, we would observe that a decision to deny a personal wireless service facility siting application that is based on the availability of adequate collocation opportunities is not one based solely on the presence of other carriers, and so is unaffected by our interpretation of the statute in this Declaratory Ruling.

63. We disagree with the assertion that granting the petition could have a negative impact on airports by increasing the number of potential obstructions to air navigation.<sup>187</sup> As the Federal Aviation Administration notes, our action on this Petition does not alter or amend the Federal Aviation Administration's regulatory requirements and process.<sup>188</sup> Under the Commission's rules as well, parties are required to submit for Federal Aviation Administration review all antenna structures<sup>189</sup> that potentially can endanger air navigation, including those near airports.<sup>190</sup> The Commission requires antenna structures that exceed 200 feet in height above ground or which require special aeronautical study to be painted and lighted<sup>191</sup> and also requires antenna structures to conform to the Federal Aviation Administration's painting and lighting recommendations.<sup>192</sup>

64. We reject the assertion that the declaration the Petitioner seeks would violate Section

<sup>182</sup> See *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d at 732 (result of "one-provider" interpretation is "a crazy patchwork quilt of intermittent coverage ... [that] might have the effect of driving the industry toward a single carrier," quoting *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d at 631).

<sup>183</sup> *Omnipoint Holdings, Inc., v. City of Cranston* (citing *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d at 631, 633).

<sup>184</sup> *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d at 722.

<sup>185</sup> See, e.g., City of Auburn, WA Comments at 3; City of SeaTac, WA Comments at 2.

<sup>186</sup> CTIA Reply Comments at 29-30 (emphasis removed).

<sup>187</sup> See North Carolina Department of Transportation's Division of Aviation Comments at 2.

<sup>188</sup> See FAA Comments at 1.

<sup>189</sup> Section 17.2(a) of the rules defines "antenna structure" as including "the radiating and/or receive system, its supporting structures and any appurtenances mounted thereon." 47 C.F.R. § 17.2(a).

<sup>190</sup> See 47 C.F.R. § 17.7.

<sup>191</sup> See 47 C.F.R. § 17.21.

<sup>192</sup> See 47 C.F.R. § 17.23.

332(c)(7)(A).<sup>193</sup> Subparagraph (A) states that the authority of a State or local government over decisions regarding the placement, construction, and modification of personal wireless service facilities is limited only by the limitations imposed in subparagraph (B).<sup>194</sup> Because the Petition requests that the Commission clarify one of the express limitations of Section 332(c)(7)(B) – *i.e.*, whether reliance solely on the presence of other carriers effectively operates as a prohibition under Section 332(c)(7)(B)(i)(II) – we find that the Petitioner is not seeking an additional limitation beyond those enumerated in subparagraph (B).

65. In addition, opponents argue that denial of a single application is insufficient to demonstrate a violation of the “effect of prohibiting” clause.<sup>195</sup> Circuit courts have generally been hesitant to find that denial of a single application demonstrates such a violation, but to varying degrees, they allow for that possibility.<sup>196</sup> We note that the denial of an application may sometimes establish a violation of Section 332(c)(7)(B)(ii) if it demonstrates a policy that has the effect of prohibiting the provision of personal wireless services as interpreted herein. Whether the denial of a single application indicates the presence of such a policy will be dependent on the facts of the particular case.

#### D. Ordinances Requiring Variances

66. *Background.* In its Petition, CTIA requests that the Commission preempt, under Section 253(a) of the Act,<sup>197</sup> local ordinances and State laws that effectively require a wireless service provider to obtain a variance, regardless of the type and location of the proposal, before siting facilities.<sup>198</sup> It asks the Commission to declare that any ordinance automatically imposing such a condition is “an impermissible barrier to entry under Section 253(a)” and is therefore preempted.<sup>199</sup> To support such action, CTIA provides two examples of zoning limitations in a “New Hampshire community” and a “Vermont community” that it claims in effect require carriers to obtain a special variance.<sup>200</sup> Wireless providers that address this issue agree with the Petition, arguing that the variance process sets a high evidentiary bar which diminishes the wireless providers’ prospects of gaining approval to site facilities.<sup>201</sup> Many other commenting parties are opposed to the Petition’s request and assert, for example, that Section 332(c)(7) is

<sup>193</sup> See County of Albemarle, Virginia Comments at 8-9.

<sup>194</sup> 47 U.S.C. § 332(c)(7)(A).

<sup>195</sup> See NATOA et al. Comments at 19-20; Coalition for Local Zoning Authority Comments at 11.

<sup>196</sup> See, e.g., *Town of Amherst, N.H. v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9, 14 (1st Cir. 1999) (“Obviously, an individual denial is not automatically a forbidden prohibition violating the [effect of prohibiting clause.]”); *APT Pittsburgh L.P. v. Penn Township Butler County of Pa.*, 196 F.3d at 478-79 (“Interpreting the [Telecommunications Act’s] ‘effect of prohibiting’ clause to encompass every individual zoning denial simply because it has the effect of precluding a specific provider from providing wireless services, however, would give the [Act] preemptive effect well beyond what Congress intended. . . . This does not mean, however, that a provider can never establish that an individual adverse zoning decision has the ‘effect’ of violating [Section] 332(c)(7)(B)(i)(II).”); *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d at 731 (“it would be extremely dubious to infer a general ban from a single [] denial”). See also *T-Mobile, USA, Inc. v. City of Anacortes*, 572 F.3d 987, 994-95 (9<sup>th</sup> Cir. 2009) (finding that because the city was unable to show that there were any available and feasible alternatives to T-Mobile’s proposed site, the City’s denial of T-Mobile’s application constituted a violation of the effect of prohibiting clause under Section 332(c)(7)(B)(i)(II)).

<sup>197</sup> 47 U.S.C. § 253(a).

<sup>198</sup> See Petition at 35-37.

<sup>199</sup> *Id.* at 37; see also *id.* at 36 (“The FCC should declare that any ordinance that automatically requires a . . . variance . . . is preempted. . .”).

<sup>200</sup> See *id.* at 36.

<sup>201</sup> See, e.g., Sprint Nextel Comments at 13-14; CalWA Comments at 3; Rural Cellular Association Comments at 8; MetroPCS Comments at 13.