

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)
)
Acceleration of Broadband Deployment) WC Docket No. 11-59
Expanding the Reach and Reducing the Cost of)
Broadband Deployment by Improving Policies)
Regarding Public Rights of Way and Wireless)
Facilities Siting)

EXHIBIT D

(GMTC and RCC Reply Comments in WT Docket No. 08-165)

TO

**COMMENTS OF THE GREATER METRO TELECOMMUNICATIONS
CONSORTIUM, THE RAINIER COMMUNICATIONS COMMISSION, THE
CITIES OF TACOMA AND SEATTLE, AND KING COUNTY WASHINGTON, AND
THE COLORADO MUNICIPAL LEAGUE**

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July 18, 2011

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

)	
In the Matter of)	
)	WT Docket No. 08-165
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)	
)	

**REPLY COMMENTS OF THE GREATER METRO TELECOMMUNICATIONS
CONSORTIUM, THE RAINIER COMMUNICATIONS COMMISSION,
THE SUMMIT COUNTY TELECOMMUNICATIONS CONSORTIUM,
AND THE CITY OF BOULDER, COLORADO**

These Reply Comments are filed by the Greater Metro Telecommunications Consortium (“GMTC”), the Rainier Communications Commission (“RCC”), the Summit County Telecommunications Consortium and the City of Boulder, Colorado (collectively referred to as the “Local Governments”).

I. INTRODUCTION

These Reply Comments will address four topics. First, we will respond to the legal arguments made by some commenters regarding Commission authority to involve itself in local land use regulation with respect to wireless communications facilities. Second, we will revisit the notice (or more appropriately, the lack of notice), the failure of the Petition and many of the filed comments to satisfy the basic tenants of due process, and the impact of the lack of notice on the credibility of the proponents’ “evidence.” Third, we will address specific comments made by others in this docket, relating directly to individual members of the Local Governments. Fourth, we will address issues raised by other commenters describing a variety of issues relevant to the Petition.

II. LEGAL ARGUMENT

A. **Congressional Intent Regarding Local Zoning Authority is Clear.**

A number of the industry commenters claim that the language of Section 332(c)(7) of the Act is ambiguous regarding the terms “failure to act” and “within a reasonable period of time.”¹ Problematically, both the Petition and the industry comments in support present a flawed argument regarding ambiguity, because they fail to consider all of the language of Section 332(c)(7) collectively, and ignore the legislative history.

As we noted in our Comments, the reference in 47 U.S.C. Sec. 332(c)(7)(B)(ii) to “taking into account the nature and scope of such request,” indicates a Congressional intent to provide flexibility to local governments in addressing siting requests. Further, to the extent there is any question as to the meaning of the statutory language, Congress made it explicitly clear that there should be no specific time period in which local governments will be expected to act, other than an individual locality’s normal time for addressing land use applications of this kind.² Multiple commenters -- all of whom oppose the relief requested by the Petition -- provided similar explanations of statutory construction and the legislative history of Section 332(c)(7).³

Some industry commenters note in general terms that Section 332 creates limits on local zoning authority, and suggest that this fact alone supports Commission action to impose time limits and remedies on local government action.⁴ It is true that Section 332 imposes some limits on local zoning authority. However, those limitations are both specific and narrow, and relate to issues such as requiring that decisions be made in writing, and prohibiting consideration of the effects of radio frequency emissions.⁵ The Congressional intent is clear that no time limitation should be imposed upon local governments other than acting within its normal timeframe.

¹ AT&T Comments at 3 (September 29, 2008); Verizon Wireless Comments at 7 (September 29, 2008); Rural Cellular Association Comments at 24 (September 29, 2008).

² GMTC, et al., Comments at 4-5 (September 29, 2008); H.R. Conf. Rep. No. 104-458, at 208 (1996).

³ Coalition for Local Zoning Authority Comments at 4 (September 29, 2008); Michigan Municipalities Comments at 2 (September 29, 2008); City of San Antonio, Texas Comments at 2 (September 29, 2008); SCAN NATOA, Inc. Comments at 4 (September 29, 2008); National Association of Telecommunications Officers and Advisors, et al., Comments at 7-9 (September 29, 2008); League of California Cities, California State Association of Counties and the City and County of San Francisco Comments at 5-7 (September 29, 2008); Fairfax County, Virginia Comments at 6-7 (September 29, 2008).

⁴ United States Cellular Corporation Comments at 2 (September 29, 2008); Verizon Wireless Comments at 2-3 (September 29, 2008).

⁵ 47 U.S.C. Sec. 332 (c)(7)(B)(iii) and (iv).

AT&T's claim that the Supreme Court's decision in *City of Rancho Palos Verdes*⁶ supports the argument that Congress imposed limitations upon the zoning of wireless communications facilities⁷ is misplaced. In fact, the key issue in that case was whether civil rights damages under 42 U.S.C. §1983 can be awarded when there is a violation of Section 332.⁸ The concurring opinion cited by AT&T actually noted the legislative history of Section 332, which makes clear that Congress chose not to impose a national, one-size-fits-all rule impacting the actions of local zoning authorities.⁹

A number of commenters also agreed with CTIA's request for preemption of any zoning regulations that require a variance before a wireless facility can be sited, claiming that preemption is authorized by 47 U.S.C. §253.¹⁰ Here again, no industry commenter addressed the Congressional intent as set forth in the legislative history, which specifically references Congress's understanding that variances may be required in the siting of wireless facilities.¹¹

The limited legal authority mentioned by industry commenters includes Verizon Wireless referencing CTIA's citation of a federal district court case from Washington, indicating the features of local ordinances that have led to preemption under Section 253.¹² Problematically for Verizon Wireless and CTIA, while the *Anacortes* court subsequently reconsidered its decision, and amended its ruling on other grounds, the language of its decision listing ordinance provisions subject to preemption under Section 253 came from both the *San Diego County* and *Auburn* decisions, which have now been overturned by the Ninth Circuit in its decision on remand in *San*

⁶ *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113 (2005).

⁷ AT&T Comments at 3, n.5.

⁸ *City of Rancho Palos Verdes v. Abrams, supra* at 115. ("We decide in this case whether an individual may enforce the limitations on local zoning authority set forth in §332(c)(7) of the Communications Act of 1934, 47 U.S.C. § 332(c)(7), through an action under Rev. Stat. § 1979, 42 U.S.C. §1983.")

⁹ *Id.*, at 128 ("Congress initially considered a single national solution, namely, a Federal Communications Commission wireless tower siting policy that would preempt state and local authority. *Ibid.*, see also H.R. Conf. Rep. No. 104-458, p. 207 (1996), U.S. Code Cong. & Admin. News 1996, pp. 124, 221. But Congress ultimately rejected the national approach...")

¹⁰ Alltel Communications, LLC Comments at 6 (September 29, 2008); United States Cellular Corporation Comments at 5 (September 29, 2008); Verizon Wireless Comments at 12-14 (September 29, 2008); Rural Cellular Association Comments at 8 (September 29, 2008); Sprint Nextel Corporation Comments at 12-15 (September 29, 2008); NextG Networks, Inc. at 15-16 (September 29, 2008).

¹¹ GMTC, et al., Comments at 5, citing H.R. Conf. Rep. No. 104-458, at 208 (1996) ("If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances.")

¹² Verizon Wireless Comments at 12 (September 29, 2008) (citing CTIA Petition at 35, quoting *T-Mobile USA v. City of Anacortes*, 2008 U.S. Dist. LEXIS 37481, *8-9 (W.D. Wash. 2008)).

Diego County.¹³ In short, the Local Governments and numerous others opposed to the Petition have offered compelling legal argument indicating no Commission authority to act as CTIA requests. Supporters of the Petition offer only policy arguments, and cannot demonstrate any legal basis for Commission action, unless the Commission chooses to ignore clear directives from Congress.

B. The Fact that States may Limit Local Government Authority does not Support a Conclusion that Federal Agencies Possess Similar Authority.

A number of commenters suggest that because some state governments impose statutory time limits upon their local governments to act upon siting applications, the federal government ought to be able to impose national limits on all local governments.¹⁴ States hold the power to create divisions of government in the form of cities by statute through the exercise of legislative power.¹⁵ Municipalities are agents of the state.¹⁶ A state “retains the power to control the disposition and use of its creatures’ property.”¹⁷

However, the fact that states may exert this type of control over its political subdivisions, does not provide similar authority for federal action. Before such federal preemption may be imposed, Congress must make its intention to interfere with state powers unmistakably clear in statutory language.¹⁸ The Commission itself cited this principle in *Nixon v. Missouri Municipal League* when it rejected the federal preemption of a state statute.¹⁹ In *Nixon*, the Commission was asked to interpret the term “any” as used in the Telecommunications Act of 1996. The Court found that the term did not include the state’s subdivisions under section 101(a), which authorizes preemption of state and local laws expressly “prohibiting the ability of *any* entity” to provide telecommunications services.²⁰ The Supreme Court held that the state retains the power to control its localities.

¹³ *Sprint Telephony PCS, L.P. v. County of San Diego*, 2008 U.S. App. LEXIS 19316 (September 1, 2008).

¹⁴ Sprint Nextel Comments at 7-8; NextG Networks Comments at 12-13.

¹⁵ *City of Worcester v. Street Railway Co.*, 196 U.S. 539, 548 (1905).

¹⁶ *South Carolina Power Co. v. South Carolina Tax Comm’n*, 52 F.2d 515, 520 (E.D.S.C. 1931), *aff’d*, 286 U.S. 525 (1932).

¹⁷ *Commissioners of Highways of Towns of Annawan v. U.S.*, 653 F.2d 292, 296 (C.A.III. 1981).

¹⁸ *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991).

¹⁹ *Nixon v. Missouri Municipal League*, 541 U.S. 125, 130 (2004).

²⁰ *Id.* (emphasis added) *see also* 47 U.S.C. § 253.

While a number of industry commenters have cited specific state statutes in support of the proposed shot clock,²¹ these statutes actually support the argument that the time required to act is best left to the state or local authorities. The Petition seeks a hard and fast deadline after which applications are deemed granted. Many of the state laws allow for exceptions where deadlines are extended, and further provide that the time frame to act does not begin until after a complete application (in accordance with local requirements) is received.²² The disparity of timeframes and exceptions provides strong evidence of the need for local decision-making. Commenters arguing for a federally imposed shot clock, who assert that state laws impose the same obligations, are simply wrong.

III. ALLEGATIONS AGAINST UNNAMED ENTITIES MUST BE DISREGARDED

A review of the Comments filed in this docket discloses scores of local governments throughout this nation that act within reasonable periods of time on land use applications, and have very good reasons to explain those limited cases when reaching a final decision takes longer than either party may like. Industry commenters acknowledge that in most cases, local governments make decisions on siting requests in reasonable periods of time.²³

²¹ See n. 13, *supra*.

²² Fla. Stat. 365.172(12)(d)1, 3 (2008) – Section (1)(45 *business* days for collocations or 90 *business* days for other applications after receipt of a *properly completed* application, including provisions allowing “[t]he local government may establish reasonable timeframes within which the required information to cure the application deficiency is to be provided or the application will be considered withdrawn or closed.”); Ind. Code 8-1-2-101(a)(4) (2008) (which provides for applications made to the state Commission if a local government does not act within 30 days – no deadline imposed for the state to act.); Kan Stat. Ann. 17-1902(i) (2008) (which requires action within 30 days on local rights of way permits, but imposes no time limitations on zoning applications.); Ky. Rev. Stat. Ann. 100.987 (2008) (which provides a 60 day deadline for planning commission action on tower siting applications, but allows mechanism for extensions.); Mich. Comp. Laws Ann. 484.3115 (West 2008) (which requires action on rights of way access permits, but impose no deadline on zoning applications for specific uses.); Mo. Rev. Stat. 67.1836.3 (2008) (which requires action on rights of way access permits, but impose no deadline on zoning applications for specific uses.); N.C. Gen Stat. 160A-400.52 (2008); 153A-349.52 (2008) (which requires action in 45 days on collocation requests only if granting the request would not cause the number of antennas to exceed that which was initially approved for the site and meets all other requirements of the original approval, AND obligation to act within a reasonable period of time for all other requests for wireless sites; Ohio Rev. Code Ann 4939.03(C) (West 2008) (which requires action on rights of way permit applications within 60 days of a completed application, and imposes no deadlines for zoning applications.); Va. Code Ann. 56-458(D) (2008) (which requires action on rights of way access permits, but impose no deadline on zoning applications for specific uses.); Wash. Rev. Code 35.99.030 (2008) (which requires action on applications for master permits for the use of the rights of way within 120 days, and use permits for the rights of way within 30 days, while providing means for extending the deadline).

²³ AT&T Comments at 2, 4 (September 29, 2008); Alltel Comments at 4 (September 29, 2008); Rural Cellular Association Comments at 2 (September 29, 2008); MetroPCS Comments at 3, 7-8 (September 29, 2008); Sprint Nextel Comments at 6 (September 29, 2008).

Exacerbating the problem of the shallow record offered by proponents of Commission preemption of local zoning authority is the failure to comply with the Commission's rules to ensure basic requirements of due process when considering preemptory rules of this nature. As noted in our Comments, Note 1 to Commission Rule 1.1206(a) requires notice to be provided of state and local entities whose laws and regulations are cited as the examples supporting a claim of federal preemption.²⁴ All interested parties must have a fair opportunity to be heard, before the Commission acts to preempt an area of traditional state or local governmental authority.

Rather than comply with Commission rules, multiple industry comments cite unnamed local governments as "evidence" supporting preemption.²⁵ Even when the Petition cited a specific community, and when certain industry commenters did name individual local governments, there was a collective failure to send copies of those allegations directly to the named local governments, as required by FCC rules.²⁶ Such "evidence" does not come close to being probative and should be disregarded. Indeed, the failure of CTIA and its members to comply with Commission rules requiring notice should cause the Petition to be dismissed.

NextG Networks began its Comments by naming individual communities, for which it should be commended, but then switched gears and continued with vague references to "southern California communities" and "four other Southwestern municipalities."²⁷ Verizon Wireless, AT&T, Alltel, MetroPCS, Sprint Nextel, T-Mobile, the Rural Cellular Association and the California Wireless Association all make allegations against unnamed entities.²⁸ Why do these commenters withhold the names of the entities they are criticizing? There is another side of the story, and before the Commission considers any action in support of the Petition, those unnamed local governments should be permitted to offer their position.

An additional example of "evidence" that is neither probative nor credible is U.S. Cellular Corporation's claim that the time to obtain local approval on siting requests is increasing in recent years.²⁹ In support, it claims that one fifth of its current applications require a variance,

²⁴ GMTC Comments at 2,3 (September 29, 2008).

²⁵ Alltel Comments at 3,4; Verizon Wireless Comments at 6,7, 11; Rural Cellular Association Comments at 4; MetroPCS Comments at 8-11, 13; Sprint Nextel Comments at 5; California Wireless Association Comments at 3; T-Mobile Comments at 6.

²⁶ Petition for Declaratory Ruling at 16; T-Mobile Comments at 7,8; California Wireless Association Comments at 2,3; Verizon Wireless Comments at 13,14; NextG Networks Comments at 5,6.

²⁷ NextG Networks Comments at 5, 7.

²⁸ See n. 21, *supra*.

²⁹ U.S. Cellular Corporation Comments at 2-3 (September 29, 2008).

and one fifth of those variance applications have been pending for over a year.³⁰ Exactly how many applications are referred to here? Where are they pending? What alternative sites were explored that may not have required a variance? What are the facts in each case? And most importantly – does the local government in which the application is pending have another view of the claim? There is simply no way that the Commission should even consider preempting the land use procedures of every local government in the nation based upon this kind of “evidence.”

IV. COMMENTS RELATING TO ACTIONS OF THESE LOCAL GOVERNMENTS

In our Comments, the Local Governments provided multiple examples of individual communities acting expeditiously on applications for wireless communications facilities. It is our position that none of the actions of these Local Governments could support a good faith argument that localities fail to act on applications within a reasonable period of time.

Upon review of the comments filed by industry representatives in this docket, of the local entities represented in this filing, only Pierce County, Washington was mentioned by T-Mobile, and cited as an example of taking an unreasonable amount of time to act on an application.³¹ In fact, the information provided by T-Mobile was less than accurate, and clearly misleading.

T-Mobile’s representative states in a declaration that Pierce County “will take” between 10 and 12 months from application to building permit issuance.³² It is not clear from Mr. Eldridge’s sworn statement if his reference to “will take” is a prediction or an allegation based upon experience. A review of T-Mobile’s actual experience in Pierce County demonstrates that Mr. Eldridge’s representations are, at best, stretching the truth.

Pierce County allows for some wireless facilities to be approved administratively by issuance of a building permit, while other applications that require land use approvals may require public hearing prior to final action. Any application must comply with Washington’s State Environmental Policy Act (SEPA). Exhibit A to these Reply Comments is a Declaration of Melanie Halsan, Senior Planner for Pierce County. As Ms. Halsan’s Declaration demonstrates, T-Mobile has made numerous applications in Pierce County since 2004 – some for building permits and others requiring more extensive land use review. Some of the building permit

³⁰ *Id.* at 3.

³¹ T-Mobile Comments, Declaration of Christopher Eldridge at ¶ 18 (September 29, 2008).

³² *Id.*

applications took between 1 and 4 months to reach decision. Some took considerably longer, but not as a result of County actions. T-Mobile knows that it is required to apply for SEPA approval, and if it does not make that application timely, it will take additional time for the State to provide feedback and for the County to review and ultimately grant SEPA approval. T-Mobile should not blame Pierce County for the delay caused by its own failure to make a timely SEPA filing.

As noted previously, NextG Networks made references to unnamed Southwestern municipalities. We have confirmed with NextG that these were not references to Colorado municipalities. Indeed, NextG has, for the most part, worked positively and effectively with local governments in Colorado. In late 2005, NextG approached GMTC and requested a model agreement that would facilitate applications for rights of way permits to individual jurisdictions, and improve the process for obtaining approval for wireless sites. NextG shared examples of agreements it had successfully worked out with other cities throughout the country. GMTC worked with NextG and developed such an agreement. These kinds of cooperative working arrangements will be discouraged, if the message is sent to local governments that no matter how cooperative you may be, the industry will still petition the federal government to preempt local land use authority and avoid the judicial remedy that Congress provided, whenever it feels pinched by the actions of a relatively small number of entities.

V. OTHER CLAIMS IN SUPPORT OF THE PETITION ARE INACCURATE AND UNSUBSTANTIATED

A number of additional points made by industry commenters in support of the Petition do not support federal preemption of traditional local zoning authority. Those issues are addressed in this section.

A. Claims That Applicants are in an Untenable Position Without a Shot Clock Mandating When a Final Decision Will be Made are Implausible.

Both Sprint Nextel and NextG Networks complain that without a federally imposed deadline, applicants who believe they are subject to unreasonable delay will be in an untenable position of not knowing whether the delay amounts to a final position. They claim that their only options are to bring legal action that may be dismissed as premature, or delay in the bringing of legal action and risk a claim that action was not brought within the statutorily required period of

time.³³ It is hard to imagine that any applicant, believing it to be the victim of unreasonable delay, would file legal action without first raising the issue with the governmental entity involved. It would be quite simple for an applicant to notify the governmental entity, indicating its position and the belief that the delay involved amounts to an effective denial of the application. A local government response indicating a belief to the contrary would insulate the applicant from any subsequent claim that a later legal action was not timely filed. Depending upon the nature of the response from the local government, the position of each party would be clarified, and it would be much more readily apparent whether there was an effective denial and whether legal action was appropriate at that point in time.

B. The Commission Cannot Force Local Governments to Shift Resources in Order to Provide Special Treatment to Wireless Providers.

After acknowledging that many zoning applications are granted within a reasonable period of time, Alltel states that in those limited cases where there are delays, a common reason includes “lack of resources.”³⁴ No place in the Communications Act is the Commission given authority to create an unfunded mandate and force local governments to acquire additional resources to address wireless siting applications during times when a lack of resources and the press of other business might cause the consideration of these applications to take longer than desired. Nor does Section 332 place the rights of property owners with wireless siting applications ahead of the rights of property owners with other land use applications.

Alltel’s acknowledgment that lack of resources can impact the timing of siting applications provides further support for the Congressional intent to allow these applications to be heard in a local community’s normal time frame for acting. If an application is filed at a time where there is not a significant press of other business, it will be addressed sooner than if it is filed a week after a community receives an application for two major housing projects, an industrial park, and a big box retail development. Yet, the Petition seeks a rule that would force a local government to retain additional staff to meet the federally imposed timeline, or alternatively, to move those other property owners to the back of the line, to accommodate the

³³ Sprint Nextel Comments at 4 (September 29, 2008); NextG Comments at 9 (September 29, 2008).

³⁴ Alltel Comments at 5 (September 29, 2008).

special treatment demanded by the wireless industry. Neither of these results was intended by Congress.

Sprint Nextel lends further support for this position when it acknowledges that the shot clock is a bad idea.³⁵ Sprint Nextel should be commended for recognizing the problem and pointing out the analogy to the Commission's own problems in keeping pace with its obligations to act upon forbearance petitions. The Commission clearly has responsibilities that extend beyond consideration of forbearance petitions, just as local planning boards and elected bodies have a wide-range of responsibilities, of which acting on wireless siting applications are only a small part.

It is strange that the industry would propose that the federal government force local governments to incur additional expenses in order to act upon these applications even when there is an understandable lack of resources. In our Comments, we pointed out a number of examples where local governments had invited the wireless industry to add facilities to communities to fill gaps in coverage, only to discover that due to resource and other business priority issues, these companies were not interested in improving their services in these places at that time.³⁶ If the Commission is seriously willing to consider forcing local governments to shift resources to wireless siting applications when those resources are dedicated elsewhere, is it also willing to adopt a rule forcing the industry to respond to local requests to improve gaps in coverage and invest resources in deploying new facilities and extending their networks when requested by local communities?

C. Local Ordinances Do Not Effectively Prohibit Provision of Services

MetroPCS Communications asks the Commission to "clarify" that zoning decisions that prohibit providing services in a given area violate Section 332(c)(7)(B)(i).³⁷ However, rather than providing examples of such decisions, MetroPCS gives examples of three kinds of ordinances that it claims prohibit the provision of services.³⁸ It should be noted that MetroPCS does not name any of the jurisdictions that it complains of, so the Commission has no way to

³⁵ Sprint Nextel Comments at 9-10 (September 29, 2008).

³⁶ See GMTC, et al. Comments at 21 (September 29, 2008).

³⁷ MetroPCS Communications, Inc. Comments at 12 (September 29, 2008).

³⁸ *Id.* at 13.

verify the accuracy of these allegations and the unnamed jurisdictions have no chance to respond. Even without any identifying features, MetroPCS' claims are clearly without merit.

MetroPCS claims that ordinances which (1) impose moratoria on towers (2) require lattice towers to be set back 500 feet from residential properties or (3) impose requirements such as sidewalk construction, painting or landscaping effectively prohibit the provision of services.³⁹ None of these arguments withstand scrutiny.

A moratorium is by definition, temporary, and such actions have always been recognized as appropriate zoning tools.⁴⁰ Reasonable moratoria do not violate Section 332.⁴¹

Requiring reasonable setbacks of any structure is necessary to protect public safety. MetroPCS' claim that a 500 foot setback for lattice towers completely prevents the provision of service is simply wrong, and does not acknowledge the wide variety of other kinds of wireless facilities available to a potential provider.

A requirement to construct a sidewalk on a previously undeveloped site, to paint a structure to better limit the visibility of wireless facilities, or to provide landscaping to shield wireless facilities are all reasonable and fairly common requirements. Each of the Local Governments has imposed similar requirements in connection with land use and/or building permit approval for both wireless and other applications. To be sure, any such requirement can, in certain circumstances, be imposed to an unreasonable degree. This is why Congress provided a judicial remedy and a process to address such claims on a case-by-case basis. MetroPCS' claim that such requirements effectively prohibit service in all cases is not supported by the facts.

VI. CONCLUSION

The Petition and Comments in support all violate Commission rules by failing to identify those local laws and regulations claimed to be subject to preemption, and by the failure to provide notice to specific communities. The Commission should dismiss the Petition based upon this failure to comply with its rules for notice. If the Commission proceeds with consideration of the Petition, it must conclude that it cannot act as requested by the Petition without

³⁹ *Id.*

⁴⁰ *National Telecomms. Advisors, LLC v. Bd. of Selectmen of Town of W. Stockbridge*, 27 F.Supp.2d 284, 287 (D.Mass. 1998).

⁴¹ *Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. 1036, 1040 (W.D. Wash. 1996).

Congressional authority. As has been demonstrated by the Local Governments and others in opposition to the Petition, the language of Section 332 is clear and the record of Congressional intent is even clearer – decisions on siting of wireless facilities are left to state and local governments, with very limited and specifically noted statutory exceptions.

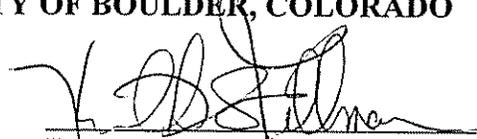
While the comments in support of the Petition are laced with anecdotal examples of problems in mostly unnamed communities, those same supporters acknowledge that it is only a minority of local jurisdictions that are being accused of acting unreasonably. The Commission must avoid granting the relief requested in the Petition, because it has no legal authority to do so. However, if the Commission wishes to play a proactive role in improving siting practices nationwide, it should utilize its available resources, including the Commission's Intergovernmental Advisory Committee, and attempt to bring local governments and the wireless industry together to address these issues outside of an adversarial proceeding – just as the Commission, the local government community, and CTIA have done in the past.

Respectfully submitted this 14th day of October, 2008.

Respectfully submitted,

**THE GREATER METRO TELECOMMUNICATIONS
CONSORTIUM, THE RAINIER COMMUNICATIONS
COMMISSION, THE SUMMIT COUNTY
TELECOMMUNICATIONS CONSORTIUM, AND THE
CITY OF BOULDER, COLORADO**

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October, 2008, I served a true and correct copy of the foregoing **REPLY COMMENTS OF THE GREATER METRO TELECOMMUNICATIONS CONSORTIUM, THE RAINIER COMMUNICATIONS COMMISSION, THE SUMMIT COUNTY TELECOMMUNICATIONS CONSORTIUM, AND THE CITY OF BOULDER, COLORADO** addressed to the following and in the manner specified:

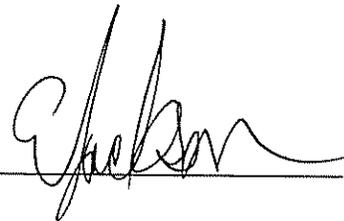
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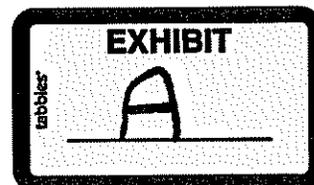


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I, Melanie Davis Halsan, declare under penalty of perjury under the laws of the State of Washington, that I am employed as a Senior Planner with the Pierce County Planning and Land Services Department, 2401 South 35th Street, Tacoma, Washington; am over age eighteen (18); am competent to be a witness herein; and make this declaration on my own personal knowledge.

T-Mobile has filed building permit applications and applications for land use approval with the Pierce County Planning Department. Whether a wireless facility can be processed outright (building permit only), administratively, or with a Conditional Use Permit (public hearing) is dependent on the height of the tower, how the property is zoned, and the community plan area. Pierce County has nine different Community Plan areas with as many as fourteen



different zones within each community plan. Some zones may not permit the towers due to the community plan policies, but in very general terms, Pierce County allows telecommunication facilities as follows: co-location is allowed in almost all zones outright; towers 60 feet or less are allowed outright in most commercial and industrial zones, and with a Conditional Use Permit in residential and rural zones; towers 60 to 150 feet in height are allowed in most commercial, industrial, and rural zones with the granting of a Conditional Use Permit; towers in excess of 150 feet in height are allowed in most rural and industrial zones with the granting of a Conditional Use Permit.

Below are tables showing the length of time (in days) it took such applications to be processed by the Planning Department (in italics) and the length of time it took to issue the permits (in bold). Time in processing by the Planning Department includes time in active review of plans by staff, and the time the plans waited to be reviewed. The difference between the Planning Department time, and the time to issue the permits is the time the County waited for the applicant to submit requested information/additional applications necessary to approve the original application.

Some applications took longer to process than others because of the time it took for the applicant (T-Mobile), or its agents, to respond to the Planning Department's request for information.

Building Permits

Year	# of Applications	Shortest		Average	Longest	
		<i># days of review by Planning Department</i>	Total # days to process		<i># days of review by Planning Department</i>	Total # days to process
2004	2	<i>46</i>	115		<i>75</i>	505⁽¹⁾
2005	0					
2006	2	<i>60</i>	98		<i>97</i>	245⁽²⁾
2007	5	<i>33</i>	33	108	<i>30</i>	365⁽³⁾

- (1) Application required an addendum to the SEPA (State Environmental Policy Act) determination, which was applied for by the applicant two months after the building permits.
- (2) Reference note (1) below.
- (3) This application also required the processing of a Conditional Use Permit. The processing of the SEPA determination was slower than normal due to heavy work load by the case planner, reference note (2) below.

Land Use Actions

Year	# of Applications	Shortest		Average	Longest	
		# days of review by Planning Department	Total # days to process		# days of review by Planning Department	Total # days to process
2004	0					
2005	2	62	203		195	227 ⁽¹⁾
2006	2	112 ⁽²⁾	517		205	374 ⁽³⁾
2007	3	59	180	69	87	264 ⁽⁴⁾

- (1) Applicant altered site plan seven months after application date in response to neighborhood concerns. Staff had to reanalyze and redistribute for comments based on revised submittal.
- (2) It needs to be noted the environmental review on this application took four and one-half months longer to process due to the work load of the case planner. It took just under seven months for the County to issue an environmental determination.
- (3) Planning had to request the submittal of a tree inventory twice, and staff had to investigate the multiple cell sites adjacent to property to verify if co-location was an option. Had to wait for the applicant to submit a geotechnical report (216 days from the date of request) and review/approve prior to issuance of SEPA threshold determination. Staff issued the SEPA threshold determination three weeks after the approval of the geotechnical report, and the public hearing was scheduled. Additionally, during the review process the agent and the lease area were changed resulting in additional time loss to do change in players and redistribution of new site plans.
- (4) Planning review completed within the County's regulatory requirement of 120 days. The associated environmental review was processed by the County in 173 days, not meeting the time requirements outlined in Pierce County Code do to heavy case load of the planner.

On two of the projects with big delays (2005 & 2006), the applicant (T-Mobile) significantly changed the site plans in the middle of the review process. When site plans change, the whole package must be re-distributed to the reviewing agencies for review and commits.

EXECUTED at Tacoma, Pierce County, Washington this 13th day of October, 2008.


Melanie Davis Halsan