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TO: Parties interested in zoning and siting of wireless antennas

FROM: Miller & Van Eaton

SUBJECT: CTIA Petition for Declaratory Ruling

CTIA, the trade association of the cellular telephone industry, has asked the FCC to declare new limitations on local zoning authority as it affects cell tower siting. Specifically, CTIA requests the FCC to:

- create a “shot clock” of 45 or 75 days for wireless antenna or tower zoning applications;
- rule that applications are automatically deemed granted if a local government misses the FCC’s deadline;
- prevent localities from considering the presence of service by other carriers in evaluating an additional carrier’s application for an antenna site; and
- preempt any local ordinance that would effectively require a variance for every tower application.

On August 14, the FCC issued a public notice setting an aggressive schedule for comments on the CTIA petition. Initial comments are to be filed September 15, 2008, and reply comments September 30, 2008. Because the FCC has issued this notice during the August lull in Washington, individual local governments will need to move particularly quickly to participate in this important matter. Even so, a motion to extend time for comment is likely to be needed.

A detailed analysis of the CTIA petition is attached. A copy of CTIA’s filing may be found at:

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http://files.ctia.org/pdf/filings/080711_Shot_Clock_Petition.pdf

CTIA explicitly seeks to emulate the telephone industry's recent success in the cable franchising area in convincing the FCC to exceed its authority by creating new, industry-favorable regulations limiting local government authority based on claims that this will promote competition (*see* p. 21 of the petition).

It appears that CTIA senses a void in local government concerns and hopes it can get the FCC to act before local governments can mount an effective defense. We recommend immediate action to oppose CTIA's petition. Local government needs a cogent and comprehensive response to the FCC. Please contact MVE if your community will participate in a coalition effort to fight this CTIA attack on local zoning.

Please call if you have questions or need additional information.

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Analysis of CTIA petition

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

CTIA – The Wireless Association

July 11, 2008

http://files.ctia.org/pdf/filings/080711_Shot_Clock_Petition.pdf

Federal Law on Antenna Zoning and Siting

The 1996 Communications Act contained two amendments which affect local government authority over the entry of telecommunications providers into local communities. Section 332(c)(7) addressed antenna and tower siting for cellular and personal wireless services and Section 253 addressed state and local “barriers to entry” into the rights-of-way for telecommunications service.¹ Both sections forbid local “prohibition” of new entry but both explicitly acknowledge the need for continuing municipal regulation. Since 1996, the courts have interpreted the two provisions quite differently.

Section 332(c)(7) emphatically affirmed the traditional roles of local zoning in antenna siting. The amendment did impose procedural requirements to promote fair and prompt decision-making. The courts have repeatedly recognized that 332(c)(7) does not significantly restrain local discretion in zoning, provided the procedures are followed. In contrast, Section 253 also explicitly recognizes, in 253(c), localities’ continuing local right to manage and charge for use of public rights-of-way on a competitively neutral and nondiscriminatory basis. However, court decisions on Section 253 have sometimes read this local “safe harbor” too narrowly, allowing preemption of local regulatory and compensation rights.

The cellular industry has largely failed in its challenges to local authority under 332(c)(7). So in recent years, cellular operators have turned to claims under Section 253, hoping the victories by wireline providers can be extended to tower and antenna siting.

CTIA’s Petition for Declaratory Ruling

The CTIA petition is a bold attack on the congressional compromises of 1996 that produced a careful balancing of local and federal interests.

¹ Respectively, 47 U.S.C. §§ 332(c)(7) and 253.

Section 332(c)(7)

CTIA's petition asks the FCC to create new rules restricting local communities' authority over antenna zoning matters. This ignores the Congressional Conference Report on the 1996 legislation and the language of the statute itself – that local zoning boards, under the eyes of the courts, are to play the lead role and that the FCC's responsibilities are minimal.² The House of Representatives had proposed an FCC rulemaking on wireless antenna placement, while the Senate bill had no provision at all. The conference rejected the House proposal in these words:

The conference agreement creates a new section 704 [of the Telecommunications Act of 1996] which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement. *Id.*

Reasonable period for action. CTIA asks the Commission to interpret the “reasonable period” for decisions under Section 332(c)(7)(B)(ii), along with “failure to act” under Section 332(c)(7)(B)(v).³ CTIA likens this request to the FCC's recent “interpretation” of Section 621(a) regarding alleged unreasonable delay in the award of competitive cable franchises.⁴ CTIA never mentions the legislative purpose of Section 621(a) as different from that of Section 332(c)(7), where Congress expressly declined to allow the FCC to set rules for local zoning and individual siting of wireless antennas.

CTIA asserts the FCC should declare that (1) any wireless carrier siting application not resolved within 45-75 days (regardless of complexity or the carrier's failure to prosecute the application) be “deemed granted,” or (2) the delay beyond this period create a “presumption” of a failure to act which would then allow the courts to order grant of the application.

Congress chose the general language of “reasonable period” for zoning action under (B)(ii), rather than setting a specific period, “taking into account the nature and scope of such

² Report 104-458. 104th Congress, 2d Session, January 31, 1996, 207-209. For example, at page 208, the exclusive jurisdiction of the courts over disputes arising under the section is qualified only by the FCC's shared jurisdiction as to disputes involving preemptive federal standards of protection from non-ionizing radiation. Section 332(c)(7)(B)(iv).

³ The petition's emphasis is on interpretation of “failure to act” under (B)(v), but it also reaches “reasonable period” under (B)(ii).

⁴ The Commission's administrative ruling was affirmed in *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

request.” The CTIA ignores that nuance and rejects any flexibility in the determination of “failure to act” under (B)(v). These same arguments have been made before by the cellular industry in federal court. Thus far, the courts have rejected the argument and accepted the generality of these statutory terms.

There is no evidence for a crisis of backlogged zoning applications, only CTIA’s alleged urgency of broadband deployment. Local zoning authorities and courts have been resolving tower and antenna applications for entry into public rights-of-way for several years now, as wireless carriers increasingly have sought admission to the public right of way for reasons of “capacity” rather than “coverage.”

At pages 14-15, the petition resorts to anonymous accusations of backlogs to pump up the sense of a crisis. This familiar tactic replicates CTIA’s effort ten years ago to ban wireless siting moratoria and, more recently, the telephone industry’s push for time limits on deciding competitive cable franchise applications. If CTIA were to name the allegedly offending governments, the communities would have to be notified by CTIA, and this would allow the communities to rebut the accusations.⁵

Prohibition of service of a particular carrier. At pages 30-35, the petition discusses a conflict among federal courts of appeal interpreting 332(c)(7)(B). There is a split in the decisions in deciding when a second carrier’s application to fill a gap in that carrier’s service should be considered an unlawful prohibition if a first carrier already serves the gap. The disagreement among the Circuits is amenable to resolution in the usual way – a petition for review by the U.S. Supreme Court. Thus far, no carrier has chosen to appeal to the Supreme Court.

Section 253

Since its enactment in 1996, Section 253 has been used primarily to address local requirements regarding admission of telecommunications providers to the public rights-of-way, including, most recently, antenna systems that pervasively use the public rights-of-way. CTIA now seeks to expand the reach of this argument to strike down local zoning authority as well, ignoring the express language of Section 332.

Section 253 (47 U.S.C. § 253) was designed to eliminate state or local laws which, like the pre-1996 federal ban on telephone companies’ entry into the cable business in their service areas, ruled out competitive entry by certain types of entities. The broad statement of the

⁵ CTIA’s failure to serve the local governments described at 14-15 violates the spirit, if not also the letter, of an FCC rule which requires local governments accused of wrongdoing to be served with the papers filed at the FCC. Section 1.1206(a), Note 1.

prohibition in Section 253(a), however, has encouraged many telecommunications carriers to claim that “barriers” can be found in all kinds of local requirements.

(a) IN GENERAL. 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.

In the legislative battle over this section, local communities obtained a “safe harbor” provision in Section 253(c) designed to protect their property rights and regulatory authority over their public rights-of-way:

(c) STATE AND LOCAL GOVERNMENT AUTHORITY. Nothing in this section affects the authority of a State or local government to manage the public rights of way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights of way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

Unless a state or local rule actually prohibits entry (or has the effect of doing so), it is unnecessary to reach Section 253(c), since the rule does not fall under Section 253(a) in the first place. But even if a requirement is considered prohibitive under Section 253(a), it is saved from preemption if it meets the conditions of Section 253(c).

The courts have been divided on what constitutes a “prohibition” under Section 253(a), and on what reasonable management and compensation arrangements fall within the safe harbor of Section 253(c). Some courts have decided that (for example) requiring a fair price for the use of public rights-of-way does not prohibit entry, and in any case falls within the protection of Section 253(c). Others have assumed that even an application process is enough to “prohibit or have the effect of prohibiting” entry under Section 253(a).⁶

CTIA uses these adverse decisions to buttress its attack on local zoning authority. With respect to the “single carrier gap” issue, CTIA claims that a zoning decision denying a tower application based, among other things, on the fact that other carriers already provide service to the area has the effect of prohibiting entry. The petition also argues that such a decision would unreasonably discriminate among carriers (although the nondiscrimination criterion has nothing to do with Section 253(a), only with the safe harbor in Section 253(c)). *See* petition at 8, 34.

⁶ For an analysis of the text and legislative history of Section 253 and of the cases through 2002, *see* Frederick E. Ellrod III and Nicholas P. Miller, *Property Rights, Federalism, and the Public Rights-of-Way*, 26 Seattle U. L. Rev. 475 (2003), available online at www.millervaneaton.com/pdf_docs/EllrodMillerLawReview.PDF.

In addition, at pages 35-37, the petition proposes that siting ordinances which automatically funnel wireless applications into “variance” procedures be declared unlawful, citing the recent *Anacortes* decision.⁷ CTIA argues that a variance requires an inherently onerous application process and is therefore a “prohibition” under Section 253(a).

CTIA points to the differing conclusions reached by the federal courts of appeal, and the pending reconsideration of the Ninth Circuit’s extreme position on Section 253, as if it justified FCC intervention to resolve the conflict. In effect CTIA proposes that the FCC, rather than the Supreme Court, resolve the interpretive conflicts among the federal courts.

Conclusion

If the FCC grants the CTIA petition, the careful balance in federal law respecting local zoning authority will be destroyed. It is incompatible with responsible zoning to impose a presumption of a right to construct, regardless of the local community values embodied in local zoning. Opposing this erroneous and disruptive attack by CTIA is essential to the welfare of local government zoning authority.

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⁷ *T-Mobile USA v. City of Anacortes*, 2008 U.S. Dist. LEXIS 37481, *8 (W.D. Wash. 2008).