

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

Petition for Declaratory Ruling to Clarify)	
Provisions of Section 332(c)(7) to Ensure)	
Timely Siting Review and to Preempt under)	WT Docket 08-165
Section 253 State and Local Ordinances that)	
Classify All Wireless Siting Proposals)	
As Requiring a Variance)	

**REPLY COMMENTS OF
CITY OF LOS ANGELES, COUNTY OF LOS ANGELES, AND COUNTY OF SAN
DIEGO, CA; TOWN OF PALM BEACH, FL; CITY OF ATLANTA, GA; CITY OF
DUBUQUE, IA; ANNE ARUNDEL COUNTY AND MONTGOMERY COUNTY, MD;
TOWN OF SOUTHAMPTON AND CITY OF WHITE PLAINS, NY; CITY OF
PORTLAND, OR; HENRICO COUNTY AND CITY OF VIRGINIA BEACH, VA**

(COALITION FOR LOCAL ZONING AUTHORITY)

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TABLE OF CONTENTS

	<u>Page</u>
I. THE CTIA PETITION MUST BE REJECTED AS DEFECTIVE.....	4
II. THE FACTS ALLEGED BY INDUSTRY COMMENTERS DO NOT SUPPORT CTIA’S PETITION.....	7
A. Application Case Histories Reveal that the Facts are Contrary to the Claims of CTIA and its Allies.	7
B. The Industry’s Claims of Potential Harms Fail to Stand.	11
C. The Industry’s “Shot Clock” Argument Undercuts Its Own Conclusions.	14
III. THE POSITION OF CTIA AND ITS ALLIES IS AS WEAK ON THE LAW AS IT IS IN VERIFIABLE FACTS.	17
A. Federal Precedent Shows that CTIA’s Proposed Remedy is Beyond the Commission’s Authority.	17
B. State Laws Provide No Foundation for the Industry’s Claims.	21
C. Taking Other Carriers Into Account is Neither Discriminatory Nor Monopolistic.	22
IV. THE STANDARDS “REASONABLE PERIOD” AND “FAILURE TO ACT” PERMIT FLEXIBILITY IN RESPONDING TO UNPREDICTABLE ZONING APPLICATIONS, AND CONGRESS MEANT THE COURTS TO INTERPRET THESE TERMS CASE BY CASE.....	23
V. CONCLUSION.....	25

SUMMARY

The CTIA petition must be rejected as defective. CTIA's initial omission to notify or identify local governments is compounded by the continuing failure of wireless providers to serve the zoning authorities accused of delay or prohibition of personal wireless services with their own similar complaints. This defective record fails to give the Commission – even if it were empowered to act – any factual basis for granting the requested relief.

Despite having months or years to prepare its case, the wireless industry was able to identify remarkably few instances where a community had, in the industry's view, acted unreasonably. Of these few, the cases so far investigated by local communities place the validity of those criticisms in considerable doubt. For example, the California Wireless Association claimed the City of Carlsbad took 16 months to act on an application. But in fact this 16 months breaks down into two separate applications, processed by the City in two months each, plus 12 months of delay by the applicant. T-Mobile's criticism of Los Angeles County states only maximum time periods, saying nothing as to the average or median time of processing. On the contrary, the County's experience is that incomplete applications and the need to remedy zoning violations can add months to the process. The height set for towers without a special exception in Fauquier County already represents favorable treatment of wireless providers, as compared with other land uses. Thus, when these local communities were able to review and respond to the claims made against them, the real story turned out to be quite different from the industry's characterizations. Nor are the industry commenters' claims regarding statistical data any more valid than their allegations about particular proceedings.

Industry commenters argue that localities *can* meet their proposed shot clock, because most applications are processed quickly, and yet also argue that localities are bad actors because

they do not meet the industry's standards of speed. The point is that local communities can and do act promptly on *most* wireless applications. But some applications are bound to raise especially difficult issues, or to be slowed by applicants' own actions. Thus, a "one size fits all" deadline that fails to take particular circumstances into account cannot be applied (and no such deadline was ever meant to apply under the statute).

CTIA's proposed regulatory scheme actually undermines the procedural protections of § 332(c)(7), which are designed to ensure that a full and complete record can be presented to a court on appeal. The industry's approach would encourage applicants to withhold information and refuse to cooperate, in hopes of setting up a better case on appeal by depriving the community of the information, as well as the time, to make a well-considered written decision.

For twelve years, the FCC has been careful to honor Congress' intent that zoning disputes (except for those involving RF radiation) be left to the courts. This conclusion remains valid. *AT&T v. Iowa Utilities Board*, cited by the industry, did not authorize the Commission to exercise regulatory authority in areas where that authority has been denied. The decision actually emphasized that its holding does not apply in cases like this one, where the statute and legislative history show that Congress did not want the Commission to conduct rulemakings or adjudications affecting local authority to make land use decisions. Nor does the existence of state laws on zoning review help the industry's case; on the contrary, these show that the states are already addressing CTIA's issues where necessary and hence no federal regulation is needed.

The standards "reasonable period" and "failure to act" permit flexibility in responding to unpredictable zoning applications, and Congress meant the courts to interpret these terms case by case. The Commission's own actions with respect to Sections 252(e)(5) and 332(c)(7)(B) support this reading.

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The City of Los Angeles, County of Los Angeles, and County of San Diego, CA; Town of Palm Beach, FL; City of Atlanta, GA; City of Dubuque, IA; Anne Arundel County and Montgomery County, MD; Town of Southampton and City of White Plains, NY; City of Portland, OR; Henrico County and City of Virginia Beach, VA (“Coalition for Local Zoning Authority” or “Coalition”) submit these reply comments with respect to the captioned petition of CTIA – The Wireless Association® (“CTIA”).

I. THE CTIA PETITION MUST BE REJECTED AS DEFECTIVE.

In its Opposition of September 29, 2008, the Coalition stated that the CTIA petition must be dismissed for its failure of service upon “state or local governments whose actions are specifically cited as a basis for requesting preemption,” as required by Section 1.1206(a) of the FCC’s Rules. Further, the petition must be dismissed or denied

because the Commission lacks the authority to grant the relief requested under Section 332(c)(7)(B) and because the claims as to Section 253 are utterly unsupported by evidence of actual or “effective” prohibition.

The initial comments filed with the FCC by the wireless industry confirm what was already evident in the CTIA petition: There is no verifiable evidence that, even if the Commission had jurisdiction in this area, intrusive federal regulation would be justified. Moreover, the overwhelming opposition from local governments, airports, and other entities re-emphasizes the harm that would be caused by acceding to the industry’s bid to turn Section 332(c)(7) on its head.

Nothing in the wireless industry’s initial comments overcomes these objections. In fact, the initial omission to notify or identify local governments is compounded by the continuing failure of wireless provider members and allies of CTIA to serve the zoning authorities accused of delay or prohibition of personal wireless services with their own similar complaints.¹ While the rule directly refers only to service of the original petition, its purpose is defeated when comments purporting to provide evidence supporting the petition are not even provided to named local governments, much less to those governments remaining unnamed whose actions are cited as a basis for requesting preemption.²

¹ As posted on the Commission’s Web site, the comments of those few wireless providers actually identifying local governments (most of the accusations remain anonymous) lack any certificates of service indicating that the targeted local communities were served.

² Working within the constraints of the limited time granted by the Commission, we have attempted to compile information about the zoning processes and experiences of Coalition members. Some of the information was included in the Coalition’s opening Opposition (*e.g.*, Portland in Exhibit III; Montgomery County and Palm Beach in Exhibit

The deficiencies in the present record are not merely procedural. They constitute a substantive failure of petitioner and its allies to give the Commission – even if it were empowered to act – any factual basis for granting the requested relief. The *ex parte* rule violated here is part of a set of regulations enacted because the courts insisted on improvement in the substance of FCC rulemaking records.³ The Coalition respectfully submits that the essential secrecy of the industry’s evidentiary record will make any grant of the petition vulnerable for the reasons stated in *Home Box Office* and its progeny.⁴ Moreover, as noted in the Coalition’s initial comments at 14, the industry’s approach is at a minimum offensive to due process. The Commission should not reward that approach by accepting these claims as evidence.

I). Additional information is found in Exhibit A to these reply comments. Despite diligent efforts to investigate the claims of CTIA and its allies concerning the few Coalition members actually named in the initial comments, the time provided by the Commission was not sufficient to complete the task, as the Commission was advised in earlier filings. The Coalition reserves the right to provide the Commission with further information regarding these claims as and when such information can be acquired.

³ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 56, *cert. denied*, 434 U.S. 829, 98 S. Ct. 111, 54 L. Ed. 2d 89 (1977) (“Equally important is the inconsistency of secrecy with fundamental notions of fairness implicit in due process, and with the ideal of reasoned decision-making on the merits which undergirds all of our administrative law”). The City of San Antonio (Comments, 26) notes that the CTIA petition is a bid for rulemaking in disguise and that the FCC Notice violates the Regulatory Flexibility Act.

⁴ Fairfax County, Virginia (Comments, 4, n.3) asked CTIA no fewer than five times to identify the Northern Virginia county referenced at pages 14 and 26 of the Petition. CTIA never responded. It is difficult to avoid the conclusion that CTIA and its allies deliberately chose to “sandbag” zoning authorities by avoiding mention of any names of local governments until the comment round, thus cutting to a minimum the time for investigation of and response to their claims.

II. THE FACTS ALLEGED BY INDUSTRY COMMENTERS DO NOT SUPPORT CTIA’S PETITION.

A. Application Case Histories Reveal that the Facts are Contrary to the Claims of CTIA and its Allies.

With months or years to prepare its case, the wireless industry was able to identify remarkably few instances where a community had, in the industry’s view, acted unreasonably. CTIA’s petition identified no such examples. The entire list of specific instances criticized in the entire industry’s comments, spread over years of successful industry growth, amounts to less than two percent of the number of applications *now* pending according to CTIA’s count (CTIA petition at 15), much less compared to the total number of applications processed by local governments over the past twelve years. Even if every one of these criticisms had been valid, CTIA and its members would be asking for disruptive federal regulation of every local jurisdiction to deal with a vanishingly small percentage of problem cases.⁵ But, in addition, the cases so far investigated by local communities place the validity of those criticisms in considerable doubt.

The California Wireless Association (Comments, 3) includes the City of Carlsbad among its culprits in delay. CALWA’s report implies City responsibility for a delay of 16 months in acting on a Sprint application to renew a Conditional Use Permit (“CUP”). The facts, however, do not bear out CALWA’s claim.⁶

8-20-06 Sprint’s CUP expired.

⁵ This is pointed out by the Commission’s Intergovernmental Advisory Committee. *See* letter from the FCC Intergovernmental Advisory Committee at 1.

⁶ Telephone conversation, Paul Edmonson, Deputy City Attorney, with Jim Hobson, Miller & Van Eaton, October 7, 2008; e-mail from Mr. Edmonson, October 10, 2008.

- 1-18-07 Through Global Signal, Sprint submitted a renewal application 5 months late.
- 2-28-07 The City notified Sprint that the application was complete and sent a letter summarizing certain open issues, including installation of new equipment cabinets and removal of the old cabinets.
- 4-4-07 Date Sprint claimed it provided requested site drawings.
- 10-29-07 Date the drawings were received according to the City.
- 11-21-07 Sprint told the City it wished to withdraw so much of its application as proposed to replace equipment cabinets. This decision transformed the CUP application to a minor (“MCUP”) action.
- 1-9-08 A new MCUP application was filed.
- 2-19-08 Complaints by residential neighbors led to a meeting to discuss their objections.
- 3-5-08 City granted MCUP for five years from 8-20-06.
- 3-11-08 The City sent the applicant its routine request for acknowledgment of the conditioned grant. Sprint replied that the grant should have been for 10 years, not five.
- 5-16-08 City approved MCUP for 10 years as Sprint requested, but Sprint has yet to acknowledge the grant as corrected.

In short, during the total 16 elapsed months, the City performed its review of two different applications in no more than two months per application. The balance of the alleged delay, 12 months, was chiefly attributable to the applicants. (It is unclear why Sprint claims it sent the site diagrams over six months before they were received by the City.) It should also be noted that during the course of the proceeding outlined above, Sprint continued to operate and was never precluded from serving its customers.

If there were any doubt that the real aim of the CTIA petition and its supporters is to preempt state and local law wherever necessary, this is erased by CALWA’s

characterization of California’s Permit Streamlining Act (“PSA”) as a “failed model that the FCC can now correct by requiring permitting authorities to adhere to reasonably defined timelines.” (Comments, 6)

It is not particularly informative for T-Mobile (Comments, Eldridge Declaration) to say that application review in Los Angeles County “takes as long as 16 months to process a new site application and as long as 14 months for a colocation request.” “As long as” 16 or 14 months simply claims to state the maximum length of review for the most problematic applications (though without identifying any particular applications whose records can be checked). It says nothing as to average or median time of processing for the various types of applications.⁷ On the contrary, the County’s experience is that incomplete applications and the need to remedy zoning violations can add months to the process. The County does not take excessive time; rather, the County must wait on the time that applicants take to make complete submissions or take corrective action.

T-Mobile makes no attempt to address what was being done during the periods it names. The combination of state and local law procedures described at Exhibit V of the Coalition’s Opposition – advance submission of newspaper notice of hearing, time that must elapse in public notice, the hearing itself – aims to give the public a voice in the

⁷ By contrast, for example, Anne Arundel County points out that even for those applications that require a special exception to construct a new monopole or tower, the time involved in the application from date of submittal to hearing is approximately three months.

process. The industry appears to be arguing that allowing affected citizens a chance to participate would take too long and therefore must be prevented.⁸

The purpose of Verizon Wireless' recitation (Comments, 14) that an ordinance in Fauquier County, Virginia "requires any facility that is over 80 feet tall and is not a collocation to go through a special exception process" is unclear. Is there a claimed harm? Facilities of 80 feet or lower are permitted with the filing of a site plan, while special exceptions require Planning Commission and Board of Supervisors hearings. The result is that most applicants file for structures less than 80 feet, and these applications are not seriously backlogged. The 80-foot limit for towers actually represents *favorable* treatment for the telecommunications industry by comparison with the County's height limitations for other structures:

We limit the height of residential structures to 35 feet in most zones, and 65 feet is the maximum height in any zone (C-2). With the exception of exempt agricultural structures (*e.g.* silos and barns for agricultural uses), telecommunications towers are the tallest permitted structures in the County. As a practical matter there are no high-rise buildings or other elevated structures in any zone except for public water towers, which are also subject to a special exception process.⁹

The emptiness of Verizon's criticism – all too typical of the criticisms in the record – is illustrated by considering what would occur if the Commission preempted the

⁸ The County has found that the incompleteness of an application can in some cases add three months or more to the time needed to process an application, and the need to remedy zoning violations at the site may add an additional three months or more. As the Coalition noted in its Opposition, federal government concerns for aviation safety, environmental protection and historical preservation may also consume review time. *See, e.g.*, the discussion of the Bristow and Kettle Run Battlefields in Comments of Prince William County, Virginia, at 3-4. (The County also notes that, contrary to the suggestions of industry commenters, conditional use permits for wireless facilities are never denied due to "health concerns.")

⁹ E-mails from County Attorney Kevin Burke to James Hobson, October 9-10, 2008.

County's ordinance. If the beneficial 80-foot exception did not apply, towers would be subject to the general 35- and 65-foot height requirements. The Commission would be forced either to set height limits for every neighborhood in the country (since no community could be expected to guess what limit would be acceptable), or to eliminate all height limits in every neighborhood, and require every person seeking a tower to go through an application process (treating those with less intrusive structures the same as those with very intrusive structures). The result cannot be squared with Section 332(c)(7), and is not likely to speed deployment in any sense.

Thus, when these local communities were able to review and respond to the claims made against them, the real story turned out to be quite different from the industry's characterizations.¹⁰

B. The Industry's Claims of Potential Harms Fail to Stand.

Industry commenters' claims regarding statistical data are no more valid than their allegations about particular proceedings. *See, e.g.*, CTIA Petition at 15; Comments of Verizon Wireless at 6-7. These claims provide none of the underlying data, do not explain how the commenters gathered their data points, and do not discuss the

¹⁰ T-Mobile at 7 n.19 approvingly quotes the comments of the City of Airway Heights regarding applications that take over a year to process. T-Mobile does not mention that the City also says: “[m]ore often than not, application processing delays are due to the applicant not filing the proper information in a timely manner, not due to a jurisdiction dragging its feet,” and, immediately following the passage T-Mobile quotes, concludes: “CTIA’s recommended remedies are too broad and ignore that fact that most jurisdictions are processing wireless tower applications appropriately and expeditiously.” In other words, the way to address this concern is to encourage applicants to submit the necessary information promptly, not, as CTIA’s proposal implies, to encourage them to delay in order to “run out the clock” on local communities.

methodology by which they purport to summarize the results. Hence these aggregate claims cannot be verified and cannot be accepted.

By contrast, the initial comments reveal a groundswell of opposition from local communities, which provide many specific and verifiable examples contrary to the industry's position. *See, e.g.*, Comments of the Cable & Telecommunications Committee of the New Orleans City Council at 12-13, 16-17, citing specific instances in publicly reported cases. Any rational analysis must give such concrete examples greater weight than the unidentified accusations in the industry's comments and in the CTIA petition.¹¹

CTIA (Petition, 10-11) and Verizon Wireless (Comments, 4-5) refer to the “stringency” of so-called build-out requirements in the service rules for commercial broadband spectrum at 700 MHz, inviting readers to infer that local zoning authorities will not be able to act within the FCC's construction deadlines for 700 MHz systems. The inference is entirely speculative. The FCC's prescribed construction periods range from four to ten years. Moreover, the required end results of 70 to 75 percent population coverage – never 100 percent – give wireless carriers and contractors ample flexibility to factor zoning reviews into their build-out schedules. And it is in the interests of local communities themselves to expedite the installation of public safety systems, making it unlikely that the communities would create unnecessary delays. Finally, should it ever be shown that a wireless provider had failed to meet its requirement because of zoning delays, it is difficult to imagine the Commission applying the penalty of a two-year

¹¹ Indeed, the industry commenters themselves admit that the vast majority of localities act reasonably. *See, e.g.*, Comments of AT&T at 2 (the “vast majority” of local governments are “reasonable”); Comments of Rural Cellular Association at 4 (a “minority” are alleged to cause problems). Thus, by their own admission, the commenters are asking for *universal* FCC regulations to deal with *isolated* problems.

reduction in license term if the provider had acted diligently. The real problem, as we have shown, is that providers often lack diligence and consistency in their attention to zoning processes.

Based on the indications above and elsewhere in the record¹² that applicants themselves are often responsible for lengthy delays, it is particularly frustrating for Alltel (Comments, 3-4) to state alleged periods of delay quite explicitly – “four years and seven months,” “three years and 11 months” (emphases in original) – without naming the offending zoning authorities. How much of that lapsed time was the fault of the local government? How much was the fault of the applicant? We have no idea. The greater the alleged delay, the greater the unfairness in rendering defense impossible.

Such secret accusations cannot be mitigated by excuses such as the one put forward by MetroPCS (Comments, 8, n.19), which purports to fear “possible recrimination if it publicly identifies dilatory city or county agencies.” If an applicant’s complaints are accurate, recrimination by any zoning authority against inconvenient facts cannot be sustained for long. Due process and a complete record are more important than the avoidance of confrontation.¹³ Not a single example of recrimination by a local government has been offered. And since the commenters are essentially asking for the right to bring immediate lawsuits against the localities with which they disagree – something that is likely to alienate the communities much more drastically – this excuse cannot be more than a pretext at best. MetroPCS’ tardy offer of information “subject to a

¹² *E.g.*, City of Airway Heights, WA, 1 (“More often than not, application processing delays are due to the applicant not filing the proper information in a timely manner, not due to a jurisdiction dragging its feet”)

¹³ *Home Box Office*, 567 F.2d at 35 (“[T]here must be an exchange of views, information and criticism between interested persons and the agency.”)

request for confidentiality” demands an unwarranted secrecy and proposes that the core of the Commission’s rulemaking process be hidden from public scrutiny.

Some commenters claim, without support, that delays are due to the involvement of third-party consultants on the local communities’ side. *See, e.g.*, Comments of PCIA at 8-9. This notion has not deterred the industry itself from the frequent use of third-party consultants to pursue its own applications. In fact local communities may have good reason to call upon independent expert advice in evaluating applications.

C. The Industry’s “Shot Clock” Argument Undercuts Its Own Conclusions.

Industry commenters promote a curiously inconsistent argument. They want to argue both ways: localities can meet their proposed shot clock, because most applications *are* processed quickly; yet localities are bad actors because they *don’t* meet the industry’s standards of speed. *See, e.g.*, Comments of T-Mobile at 11-12; Comments of Verizon Wireless at 5, 8; Comments of Sprint Nextel at 6; Comments of NextG at 11; Comments of Alltel at 3-4; Comments of MetroPCS at 3.

The industry entirely misses the point. Local communities can and do act promptly on most wireless applications (assuming that the applicant cooperates and does not itself delay the process). But some applications are bound to raise especially difficult issues, or to be slowed by applicants’ own actions. The applications that take longer to process are likely to be the problem applications. Thus, what we see in practice is exactly what we would expect to see if local communities are acting reasonably: Most applications move promptly, but a few take longer. The statute preserves local zoning authority, and leaves appeal to the courts on a case-by-case basis, precisely because it is the reviewing bodies with specific knowledge of the facts that are in the best position to

determine which applications require more detailed review and when the applicant has provided sufficient information for action.¹⁴ Any individual failures to act reasonably can be, and are, dealt with by the courts, as Congress intended.

Thus, one cannot logically get from the industry's observation that most applications are approved quickly to its desired conclusion that "any delay beyond these time periods is *necessarily* unreasonable" (Comments of NextG at 14, emphasis added). The fact that most applications can be processed quickly is evidence of the local zoning authorities' good faith. It is *not* evidence that any longer period would *necessarily* (*i.e.*, in *every* case) be unreasonable.

CTIA's proposed regulatory scheme actually undermines the procedural protections of § 332(c)(7), which are designed to ensure that a full and complete record can be presented to a court on appeal. A local zoning authority needs to be able to review the record, investigate the facts and alternative solutions, take the views of all interested parties into account (not just those of the wireless carriers, and specifically including those of the public who will be affected), reach a considered decision, prepare and approve a detailed written statement suitable for court review. Courts have struck down local zoning decisions that failed to meet this standard. By contrast, the industry seeks to rush a local community into a hasty and potentially inadequate decision. The purpose of this time pressure may be to produce rushed decisions that will then be more vulnerable to court challenges. *See* Comments of the State of Connecticut at 2-3.

¹⁴ A discussion of the intricate technical issues involved in many wireless sitings can be found in the letter from George N. Condyles, IV, of the Atlantic Group, filed October 10, 2008.

PCIA suggests that CTIA’s rush-to-judgment approach would encourage sound written decisions. Comments of PCIA at 14. On the contrary, the industry’s approach would encourage applicants to withhold information and refuse to cooperate, in hopes of setting up a better case on appeal by depriving the community of the information, as well as the time, to make a well-considered written decision. As New Orleans points out, “The proposed rules allow the applicant to run out the clock in order to get tower siting approval.” Comments of the Cable & Telecomm. Committee of the New Orleans City Council at 12.

The zoning review process very often involves a fruitful back-and-forth exchange between zoning authorities and applicants to work out the best location and conditions for construction. The best solution for all parties often turns out not to be the one the applicant originally proposed. The CTIA process, by contrast, is designed to force local communities to rule at once on the applicant's initial proposal and to cut off attempts to develop a solution that works for everyone. The industry proposal may thus actually slow down tower siting by creating a series of unsatisfactory proposals and denials – or protracted litigation – rather than interactive progress toward a solution.¹⁵

Finally, the “deemed granted” solution promoted by CTIA is tellingly criticized by one of the industry commenters. Sprint points out that the franchising order CTIA wishes to use as a model grants only an *interim* franchise that can be eliminated by the local authority at any time. But what CTIA is proposing here is a *permanent* grant that

¹⁵ CTIA’s arbitrary time limits fail to distinguish between applications by actual carriers and those by tower owners that are not carriers, which may be purely speculative. The same may apply to “carriers’ carriers” such as NextG. See Comments of NextG at 1, 2-3. Such carriers may wish to place numerous antennas, without any assurance that service providers will in fact use these rather than applying to put up their own individual facilities. A case-by-case review is necessary in such cases.

cannot later be undone. Comments of Sprint Nextel at 11. Nor is CTIA's alternative method (endorsed by Sprint, *id.* at 10-11) acceptable. Such a new rule by the FCC, even if lawful, would have the effect of shifting the burden of proof to the zoning authority to prove that its normal zoning processes are valid. The statute, however, takes for granted that normal zoning processes are valid unless shown in particular cases to be applied unreasonably. Thus, the industry commenters seek to stand the statutory approach on its head.

III. THE POSITION OF CTIA AND ITS ALLIES IS AS WEAK ON THE LAW AS IT IS IN VERIFIABLE FACTS.

A. Federal Precedent Shows that CTIA's Proposed Remedy is Beyond the Commission's Authority.

For twelve years, the FCC has been extremely careful to honor Congress' intent that zoning disputes be left to the courts, except for those involving RF radiation, which can be heard by the courts or the federal agency. A fine example of this historic caution is contained in a 1997 letter from the then-Chief of the Wireless Telecommunications Bureau to the then-President of CTIA. The Farquhar-Wheeler correspondence of January 1997 has been cited by CTIA (Petition, 34, n.85) and the Rural Cellular Association (Comments, 7, n.15), among others, as if it were authoritative on the issue of "prohibition of service" under Section 332(c)(7)(B)(i)(II). In fact, the Bureau's advice was heavily qualified:

Please keep in mind, however, that the conclusions stated in this letter constitute the views of the Wireless Telecommunications Bureau. These conclusions do not necessarily represent the opinions of the Commission or any individual Commissioner, and they do not bind the Commission in any way. Furthermore, legal jurisdiction to determine whether any State or local government action violates Section 332(c)(7) of the Communications Act, other than actions which may constitute unlawful regulation based on

the environmental effects of radio frequency emissions, is reserved by statute to the courts. Although the Bureau's expert opinion may assist the courts in interpreting and applying the remaining provisions of Section 332(c)(7), neither the Bureau's nor the Commission's interpretation of these provisions can be legally binding.¹⁶

Nineteen months later, having failed to secure an FCC declaration that “moratoria” on wireless facility siting violated Section 332(c)(7), CTIA entered into an agency-facilitated settlement described on the FCC Web site:

On August 5, 1998, the Commission's Local and State Government Advisory Committee, the Cellular Telecommunications Industry Association (CTIA), the Personal Communications Industry Association, and the American Mobile Telecommunications Association entered into an agreement addressing issues relating to moratoria on the siting of wireless telecommunications facilities. This agreement sets out recommended guidelines for local governments and carriers to follow in connection with moratoria, and it establishes a non-binding alternative dispute resolution procedure that either carriers or local governments may invoke. In addition, CTIA agreed to withdraw its pending Petition for Declaratory Ruling seeking preemption of certain local moratoria.¹⁷

Nothing has happened on the federal legal front in the past decade to change the FCC's properly circumspect view of its limited role in wireless siting disputes. CTIA and other industry commenters claim that Congress empowered the FCC to read CTIA's proposed timelines into Section 332(c)(7) based on *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 378 (1999).¹⁸ This is incorrect.

¹⁶ <http://wireless.fcc.gov/letters/letter4.html> (emphasis added, internal footnote omitted).

¹⁷ <http://wireless.fcc.gov/siting/local-state-gov.html>. PCIA (Comments, 10) attempts to revive the moratorium issue, apparently unaware of the 1998 guidelines facilitated by the FCC.

¹⁸ Petition at 20-21; Comments of Telecommunications Industry Association at 8; Comments of T-Mobile USA, Inc. at 10; Comments of Verizon Wireless at 5.

AT&T concerned Congress’s addition of two new local competition provisions, Sections 251 and 252, to the Communications Act of 1934. *Id.* at 372. The new provisions concerned charges for intrastate service, a topic that a longstanding provision of the Communications Act, Section 152(b), had previously suggested were beyond the Act’s scope. *Id.* at 379. The local competition provisions also expressly empowered the FCC to make new rules on these issues. *See* 47 U.S.C. § 251(d)(1). Despite the historical bar in the Act on such intrastate matters, the Court concluded that Congress’s insertion of the new provisions into the Act, along with their accompanying rulemaking powers, showed that Congress intended the FCC to use its pre-existing Section 201(b) authority to make rules governing such matters. *AT&T*, 525 U.S. at 377-81. *See AT&T*, 525 U.S. at 381, n.7 (distinguishing *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), because “that case involved the Commission’s attempt to regulate services over which it had not explicitly been given rulemaking authority; this one involves its attempt to regulate services over which it *has* explicitly been given rulemaking authority”) (emphasis in original).

With Section 332(c)(7), the situation is very different. With the addition of Section 332(c)(7) to the Act, Congress did not bestow any new rulemaking powers on the agency. Moreover, Congress was not silent on how the FCC’s pre-existing rulemaking authority in Section 201(b) would operate vis-à-vis the new section. Instead, it instructed: “Except as provided in this paragraph, *nothing in this Act* shall limit or affect” local authority over such facility siting. 47 U.S.C. § 332(c)(7)(A) (emphasis added). This precludes the application of pre-existing FCC rulemaking authority in Section 201(b), as the Conference Report explains: “Any pending Commission rulemaking

concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities should be terminated.” See H.R. Rep. No. 104-458 at 208. Congress thus made it clear that the courts, not the FCC, shall have “exclusive jurisdiction” over this Section. *Id.* To paraphrase *AT&T*, this case involves matters over which the Commission has *not* been given rulemaking powers. The rule of *AT&T* has no applicability to sections like Section 332(c)(7), where Congress expressly states, both in text and in legislative history, that the Commission has no rulemaking authority – and where it expressly states other provisions of the Act do not apply.¹⁹

Even if Congress had not barred the FCC from making rules with respect to Section 332(c)(7), the FCC could not construe Section 332(c)(7) to incorporate CTIA’s timelines. In the 1996 Act, Congress provided:

This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

Section 601(c), 47 U.S.C. § 152 nt. Because Section 332(c)(7) does not “expressly . . . provide[]” for fixed timelines to preempt local zoning law, the FCC may not read them into the Act.

¹⁹ For the same reason, CTIA’s and the industry’s reliance on *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), is misplaced. Like *AT&T*, that case concerned a provision that Congress added to the Communications Act *without* limiting the pre-existing application of Section 201(b). As a result, the Sixth Circuit’s decision (currently subject to a petition for rehearing) found that Section 201(b) applied to the newly-added language of Section 621(a)(1). That conclusion, even if it is correct, has no application when Congress has *expressly instructed* that other provisions of the Act do not apply.

CTIA (Petition, 3, n.7) and its allies are fond of citing the Supreme Court’s *Abrams* decision as if it had some meaning for this discussion.²⁰ It does not. The Court’s description of the purpose of Section 332(c)(7) does not differ with Congress’ own explanation of the enactment,²¹ which is the preferred authority since the Court was not ruling on the point. Instead, the Court’s sole responsibility in *Abrams* was to decide “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.” *Id.* at 115.

The answer was negative, and the Court concluded that “[e]nforcement of § 332(c)(7) through § 1983 would distort the scheme of expedited judicial review and limited remedies created by § 332(c)(7)(B)(v).” *Id.* at 127. Yet CTIA’s petition proposes precisely what the Court’s decision in *Abrams* disfavors. It would distort the scheme of “limited remedies created by § 332(c)(7)(B)(v)” through having the FCC override the courts.

B. State Laws Provide No Foundation for the Industry’s Claims.

Industry commenters argue that recent developments in state law favor wireless providers and their allied industries. New statutes are cited by NextG (Comments, 12-13) and others. However, the industry does not always describe these laws correctly. For example, NextG’s statement about North Carolina law at note 14 fails to note that the statutory 45-day period for decision on completed co-location applications may be extended if deficiencies are found. Moreover, the deadline would not apply if the

²⁰ *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113 (2005).

²¹ H.R. Report 104-458. 104th Cong. 2d Sess., 207-209.

application were for facilities in excess of the number previously approved, or if there are increases in height, width, load and other factors.²²

CTIA and its allies point to state legislation setting time frames for local zoning decisions as if these prove the need for federal administrative intervention. The reverse is true. These laws demonstrate that the states are addressing CTIA's issues where necessary. This is the appropriate venue in a federal system in which preemption of the states is not to be taken lightly. CTIA's requests for preemption are not only unlawful but unnecessary.²³

C. Taking Other Carriers Into Account is Neither Discriminatory Nor Monopolistic.

Some commenters claim that a community that declines to approve (for example) the fifth application for a particular area is guilty of discrimination. *See* Comments of Sprint Nextel at 12; Comments of AT&T at 8. On the contrary, it is reasonable to take into account that in some cases the burden on existing structures and the impact on existing aesthetics and property values may have a cumulative effect.²⁴ The fifth applicant is not always similarly situated to the first.

The industry speaks as if taking such factors into account were tantamount to endorsing a monopoly, assuming, apparently, that only *one* carrier would be permitted.

²² Comments, City of Greensboro, 2-3.

²³ In other situations where the FCC has considered its authority questionable, it has relied upon state action to remedy particular problems. *In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Report and Order and Second Further Notice, 18 FCC Rcd 25340 (2003).

²⁴ *See, e.g., Airtouch Cellular v. City of El Cajon*, 83 F.Supp.2d 1158, 1165-66 (S.D. Cal. 2000).

See, e.g., Comments of Sprint Nextel at 12; Comments of Alltel at 6; Comments of MetroPCS at 12. The CTIA approach, however, would seem to require the locality to ignore the presence of *all* other carriers *no matter how many* were already in place. No one is advocating monopolies, but it may be necessary to recognize in some cases that it may be possible to accommodate only so many carriers on a given site.

IV. THE STANDARDS “REASONABLE PERIOD” AND “FAILURE TO ACT” PERMIT FLEXIBILITY IN RESPONDING TO UNPREDICTABLE ZONING APPLICATIONS, AND CONGRESS MEANT THE COURTS TO INTERPRET THESE TERMS CASE BY CASE.

When asked to implement the term “failure to act” by a state for purposes of Section 252(e)(5) of the Communications Act, added by the Telecommunications Act of 1996, the Commission declined to fix a period of days or months. Instead, it decided:

The Commission will not take an expansive view of what constitutes a state's "failure to act." Instead, the Commission interprets "failure to act" to mean a state's failure to complete its duties in a timely manner. This would limit Commission action to instances where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C). The Commission will place the burden of proof on parties alleging that the state commission has failed to respond to a request for mediation or arbitration within a reasonable time frame.²⁵

Analogously, the burden of proof rests with the wireless provider alleging a local zoning authority failure to act. The courts have given sufficient guidance on Section 332(c)(7)(B)(v) that the jurisdictional risk of FCC intervention is wholly unwarranted.²⁶

²⁵ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 16127, ¶ 1285 (1996).

²⁶ *See, e.g., Wireless Income Properties v. City of Chattanooga*, 403 F.3d 392, 397 (2005) (“Under the circumstances of this case, we conclude that the City's actions during the nine months following the expiration of the moratorium amounted not simply to a

Moreover, since the courts are more than willing to order injunctive relief to a carrier wronged under the statute,²⁷ neither the “deemed granted” nor “presumed granted” options of the CTIA petition are necessary (leaving aside their legal unsoundness).

In the one circumstance where the FCC is permitted to entertain petitions for relief pursuant to Section 332(c)(7)(B) – disputes about RF radiation safeguards under (B)(iv) – the Commission has refused to fix a deadline for its own decisions:

For example, we decline to adopt the recommendation of several carriers that we impose a 30 day deadline for our own resolution of petitions filed under Section 332(c)(7)(B)(v). While we understand the need to facilitate the build-out process and the need for carriers to have fast resolution of siting disputes in order to allow for faster build-out, we are not prepared to adopt a time limit for resolving petitions for relief under Section 332(c)(7)(B)(v) because we are concerned that doing so will not afford the Commission sufficient flexibility to account for the particular circumstances of each case.²⁸

The Commission should respect the same principle here.

failure to act but rather constituted a functional denial of Wireless's applications.”). *See also, Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687 (3d Cir. 2002); *Preferred Sites LLC v. Troup County*, 296 F.3d 1210, n.5 (11th Cir. 2002) (“We note a state or local government or instrumentality thereof could not circumvent a party's right to commence an action by not issuing a written decision because the TCA also provides a party may file an action for a failure to act. 47 U.S.C. § 332(c)(7)(B)(v).”); *Kay v. City of Rancho Palos Verdes*, 504 F.3d 803, 814-15 (9th Cir. 2007) (“Congress's creation of a quasi-administrative review process for zoning and permitting decisions in the TCA that mirrors that of the states suggests that the appropriate remedies under that review process should also mirror those available under state law”); *Nextel Communications v. City of Margate*, 305 F.3d 188, 194 (3d Cir. 2002) (“Here, as we have stated, Nextel's telecommunications facility received the necessary administrative clearance, in addition to the Zoning Board's decision, and remains up and running,” explaining why City's failure to reach final decision required judicial abstention without harm to Nextel).

²⁷ *Red Sky Commc'n, LLC v. Lenexa*, 2008 WL 559696 at *18 (D. Kan. 2008); *USCOC of Va. RSA #3*, 343 F.3d 262, 272 (4th Cir. 2003).

²⁸ *In re Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(b)(V) of Communications Act of 1934*, 15 FCC Rcd. 22821, 22827 (2000), ¶ 14 (emphasis added).

There is no “catch-22” (MetroPCS Comments, 4-5) in the absence of a pat definition of failure to act. Most state and local law is quite clear on when the 30 days for appeal of a properly final written decision begins to run. Without such a marker, the wireless provider is allowed and expected to determine for itself when inaction itself becomes ground for appeal.²⁹

It would be a great shame to lose the opportunities provided by the existing “reasonable period” for zoning decisions to make cooperative improvements upon a wireless provider’s initial plan and, on the other side, for local governments to reconsider any internally flawed initial decisions.³⁰

V. CONCLUSION

For the reasons discussed above, the Coalition for Local Zoning Authority asks that the Commission dismiss or deny the Petition for Declaratory Ruling of CTIA.

²⁹ Of course, a written decision, up or down, is to be preferred. But the real catch-22 would fall upon the zoning authority if it were forced to rush into print – to satisfy CTIA deadlines – a ruling on which it will be scrutinized closely under Section 332(c)(7)(B)(iii).

³⁰ Comments of the American Planning Association at 1, 2.

Respectfully submitted,

CITY OF LOS ANGELES,
COUNTY OF LOS ANGELES,
AND COUNTY OF SAN DIEGO,
CA; TOWN OF PALM BEACH,
FL; CITY OF ATLANTA, GA;
CITY OF DUBUQUE, IA; ANNE
ARUNDEL COUNTY AND
MONTGOMERY COUNTY, MD;
TOWN OF SOUTHAMPTON AND
CITY OF WHITE PLAINS, NY;
CITY OF PORTLAND, OR;
HENRICO COUNTY AND CITY
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Information from Coalition members

San Diego County Sprint is simply wrong when it asserts [Sprint Comments at 14] that different procedural requirements are imposed on wireless facilities. Wireless facilities and all other land use types are subjected to the same procedural requirements (hearings, appeals, etc.). The County of San Diego does have certain substantive requirements that apply only to wireless facilities (requirement that facilities be camouflaged; minimum setback distances from property lines). However, the County has also established requirements that apply to other land use types, but not to wireless facilities. In any event, the Ninth Circuit concluded that the County's zoning ordinance provisions do not prohibit or have the effect of prohibiting Sprint from providing service.³¹

Verizon's comments (ii and 6) state that "[i]n the San Diego area, time frames for new towers have increased from 6 months to more than 2 years." There is no citation to any evidence that supports this assertion. Indeed, I do not know what is meant by the "San Diego area." There are 18 incorporated cities plus the County of San Diego that have land use jurisdiction in the County over the siting of wireless facilities. There really is no way to address this comment because there is nothing to back it up.³²

Anne Arundel County. Our records on the computer date back to 1995. Since that time we have had 9 commercial telecommunication facilities cases to construct a monopole and four (4) modifications to expand an existing monopole. Generally these cases create opposition from the community Records indicate 2 were withdrawn by the applicant and one was denied. The denied case was in Davidsonville and involved a historic church. Currently, we have one pending, Verizon Wireless--Sleepy Hollow Road in Severn scheduled for hearing on October 16, 2008; this also includes a variance to a setback from residential property line. This application was received on August 11, 2008.³³

³¹ E-mail, Tom Bunton, Deputy County Attorney, to Rick Ellrod, Miller & Van Eaton, October 10, 2008.

³² E-mail, Bunton to Jim Hobson, Miller & Van Eaton, October 6, 2008.

³³ E-mail, Suzanne Schappert, Planning Administrator, Zoning Division, to Lori Blair, Senior Assistant County Attorney, September 15, 2008.