

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

THE CITY OF ARLINGTON,  
TEXAS

Petitioner,

v.

FEDERAL COMMUNICATIONS  
COMMISSION, *et al.*,

Respondents

Case No. 10-60039

Agency No. 08-165

**BRIEF OF THE PETITIONER CITY OF ARLINGTON, TEXAS, AND  
INTERVENORS CITY OF GLENDALE, CALIFORNIA; CITY OF  
DALLAS, TEXAS; FAIRFAX COUNTY, VIRGINIA; CITY OF LOS  
ANGELES, CALIFORNIA; LOS ANGELES COUNTY, CALIFORNIA;  
CITY OF PORTLAND, OREGON; SAN DIEGO COUNTY,  
CALIFORNIA; AND TEXAS COALITION OF CITIES FOR UTILITY  
ISSUES**

Joseph Van Eaton  
James R. Hobson  
Matthew K. Schettenhelm  
MILLER & VAN EATON, PLLC  
1155 Connecticut Avenue, N.W.  
Suite 1000  
Washington, DC 20036  
Phone: (202) 785-0600  
Fax: (202) 785-1234

*Counsel for Petitioner and Intervenors*

## CERTIFICATE OF INTERESTED PERSONS

*City of Arlington, Texas v. United States of America,*  
Case No. 10-60039

The undersigned counsel of record certifies that the following listed persons have a financial interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

The parties to this appeal are:

- City of Arlington, Texas
- City of San Antonio, Texas
- City of Glendale, California
- EMR Policy Institute
- City of Dallas, Texas
- City of Los Angeles, California
- City of Portland, Oregon
- Los Angeles County, California
- San Diego County, California
- Texas Coalition of Cities for Utility Issues
- Fairfax County, Virginia
- Federal Communications Commission
- United States of America
- CTIA – The Wireless Association
- Cellco Partnership
- Cable and Telecommunications Committee of the New Orleans City Council

The interested persons supporting Petitioners are governmental entities, or organizations representing governmental entities. While no identification is required by the rules, other non-party contributors to the costs of preparing the brief include:

- City of Dubuque, Iowa
- City of Carlsbad, California

The other law firms and counsel include:

- James Michael Carr  
Daniel Armstrong  
Austin Schlick  
Federal Communications Commission
- Nancy Garrison  
Catherine O’Sullivan  
U.S. Department of Justice
- Michael Kellogg  
Gergory Rapawy  
Kellogg, Huber, Hansen, Todd, Evans & Figel
- Helgard Walker  
Brendan Carr  
Thomas McCarthy  
Wiley Rein
- William Aaron  
Maria Nguyen  
Goins Aaron
- Tillman Lowry Lay  
Spiegel & McDiarmid
- Whitney North Seymour  
EMR Policy Institute

/s/ Joseph Van Eaton  
Joseph Van Eaton  
*Attorney of Record for Petitioner  
and Intervenors*

## STATEMENT REGARDING ORAL ARGUMENT

As this case presents an important, unresolved question regarding the authority of the Federal Communications Commission (“FCC”) under Section 332(c)(7) of the Communications Act of 1934, Petitioner and Intervenors on this brief submit that oral argument would be helpful to the Court.

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## JURISDICTIONAL STATEMENT

On November 18, 2009, the FCC adopted *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b) to Ensure Timely Siting Review & to Preempt Under Section 253 State & Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance*, 24 F.C.C.R. 13994 (2009) (the “Order”). The FCC asserted it had subject matter jurisdiction to issue the Order based on Sections 1, 4(i), 201(b), and 303(r) of the Communications Act.<sup>1</sup> On December 17, 2009, five organizations<sup>2</sup> filed a Petition for Reconsideration or Clarification with the FCC. On August 4, 2010, the FCC denied reconsideration. *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b) to Ensure Timely Siting Review & to Preempt Under Section 253 State & Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance*, 25 F.C.C.R. 11157 (2010) (“Reconsideration Order”).

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<sup>1</sup> Order ¶ 23.

<sup>2</sup> The National Association of Telecommunications Officers and Advisors (“NATOA”), the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association.

On January 14, 2010, the City of Arlington, Texas, filed a Petition for Review of the Order. This Court has jurisdiction pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2344.

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Since Section 332(c)(7)(A) of the Communications Act<sup>3</sup> states that “[e]xcept as provided” in that paragraph, nothing in the Communications Act may “limit or affect the authority of a State or local government . . . regarding the placement, construction, and modification of personal wireless service facilities,” did the FCC exceed its authority by adopting rules that limit or affect State and local authority over the placement, construction, and modification of such facilities based on Sections 1, 4(i), 201(b), and 303(r) of the Act?

2. Did the FCC violate its rules, the Administrative Procedure Act and the Due Process Clause of the United States Constitution<sup>4</sup> when it issued the Order based on allegations regarding misconduct by certain local governments without requiring the petitioner to identify and serve the local governments supposedly involved in that misconduct?

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<sup>3</sup> 47 U.S.C. § 332(c)(7)(A).

<sup>4</sup> U.S. Const. amend. V.

3. Is the Order, which shifts legal burdens regardless of the reasonableness of State or local actions, consistent with Section 332(c)(7) or otherwise arbitrary and capricious?

### STATEMENT OF THE CASE

This matter is before the Court on a petition for review of the FCC's Order implementing Section 332(c)(7) of the Communications Act.

In the Telecommunications Act of 1996,<sup>5</sup> Congress added Section 332(c)(7), 47 U.S.C. § 332(c)(7), to the Communications Act to address the regulation of the placement of “personal wireless service facilities.”<sup>6</sup> Such facilities include cellular phone towers and similar facilities. Titled “Preservation of Local Zoning Authority,” Section 332(c)(7) states that “nothing in this Act” shall “limit or affect” State or local authority over placement of personal wireless service facilities, except as paragraph (7) provides. The statute then lists four express limits on

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<sup>5</sup> Pub. L. 104-104, 110 Stat. 56 (Feb. 8, 1996). The Telecommunications Act of 1996 is a series of amendments to the Communications Act of 1934, 48 Stat. 1064 (the “Communications Act” or the “Act”). The Act is codified as amended at 47 U.S.C. §151 *et seq.*

<sup>6</sup> “[P]ersonal wireless services” means “commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services.” 47 U.S.C. § 332(c)(7)(C)(i). “Personal wireless service facilities” means “facilities for the provision of personal wireless services.” 47 U.S.C. § 332(c)(7)(C)(ii).

State and local authority. With one exception not relevant here (cases involving the environmental effects of radio frequency emissions, where the FCC is given concurrent jurisdiction with the courts), Section 332(c)(7) contains no provision permitting the FCC to regulate the State and local siting process or to hear cases related thereto, and assigns exclusive responsibility to adjudicate disputes to the courts.

On July 11, 2008, CTIA-The Wireless Association (“CTIA”) filed a petition urging the FCC to issue a ruling under Section 332(c)(7) that:

- (i) establishes fixed 45 and 75 day time frames in which State and local governments must act on a wireless facility siting request;
- (ii) “deem[s] granted” any request that is not acted upon within such time frames, or creates a presumption that a court should issue an injunction granting the request; and
- (iii) rules that a local government may not deny a request based on the presence of other providers.<sup>7</sup>

CTIA claimed that FCC action was necessary because local authorities were unreasonably delaying deployment of cell towers, relying on

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<sup>7</sup> CTIA Petition for Declaratory Ruling, WT Docket No. 08-165, dated July 11, 2008 (“CTIA Petition”). CTIA also urged the FCC to rely on 47 U.S.C. § 253 to preempt ordinances that require a provider to obtain a variance.

allegations of misconduct by unidentified municipalities.<sup>8</sup> Several local governments asked that the FCC require CTIA to identify the infringing governments so that appropriate responses could be filed, but the FCC did not do so. The FCC sought comment on the Petition.

On November 18, 2009, based in part on CTIA’s allegations regarding local government delays,<sup>9</sup> the FCC granted CTIA’s petition in significant part.<sup>10</sup> The FCC found that the general direction to it to “execute and enforce” the provisions of the Act, along with the rulemaking authority granted to it in sections *other than* Section 332(c)(7) — specifically Sections 1, 4(i), 201(b), and 303(r) — empowered the agency to interpret and establish rules and regulations governing all of Section 332(c)(7).<sup>11</sup>

The FCC proceeded to adopt new rules to govern the State and local zoning process. First, it implemented the requirement under Section 332(c)(7)(B)(ii) that states and localities must act on a zoning application within a “reasonable period of time,” by creating 90 and 150

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<sup>8</sup> CTIA Petition at 13.

<sup>9</sup> Order ¶ 32.

<sup>10</sup> Order ¶ 71.

<sup>11</sup> Order ¶¶ 23, 72.

day “shot clocks” for State and local action on a siting request.<sup>12</sup> Although the FCC did not approve CTIA’s request to “deem” a request for zoning approval “granted” at the expiration of these periods,<sup>13</sup> the FCC ruled that if a State or local government does not act within these time frames, a “failure to act” under Section 332(c)(7)(B)(v) will have occurred.<sup>14</sup> At such time, and for 30 days thereafter, the provider may sue the State or local government. In the subsequent litigation, the locality must be presumed to have delayed unreasonably.<sup>15</sup> As a result, the burden of proof (normally with the applicant/plaintiff) is shifted to the State or local government.<sup>16</sup>

The FCC ruled that the deadline for local action may be extended beyond 90 or 150 days by the mutual consent of the applicant and the State or local government.<sup>17</sup> The agency also determined that if an application is incomplete when filed, the time it takes for an applicant to respond to a request for additional information will not count toward

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<sup>12</sup> Order ¶¶ 4, 32, 37, 45.

<sup>13</sup> Order ¶ 39.

<sup>14</sup> Order ¶¶ 4, 32, 37.

<sup>15</sup> Order ¶¶ 42.

<sup>16</sup> Order ¶¶ 19, 34 n.111.

<sup>17</sup> Order ¶ 49.

the 90 or 150 days — but only if the State or local government “notifies the applicant within the first 30 days that its application is incomplete.”<sup>18</sup> In addition, the FCC declared that a State or local government that denies an application solely because “one or more carriers serve a given geographic market” has engaged in unlawful regulation that “prohibits or ha[s] the effect of prohibiting the provision of personal wireless services.”<sup>19</sup>

On January 14, 2010, the City of Arlington, Texas, filed a Petition for Review of the Order.

#### **Reconsideration.**

On December 17, 2009, five organizations — the National Association of Telecommunications Officers and Advisors (“NATOA”), the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association — filed a Petition for Reconsideration or Clarification with the FCC. The petition focused on the FCC’s ruling that to toll the FCC’s

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<sup>18</sup> Order ¶ 53.

<sup>19</sup> Order ¶ 56 (citing 47 U.S.C. § 332(c)(7)(B)(i)(II)). The FCC also declined to grant CTIA’s request that it preempt ordinances that impose variance requirements. Order ¶ 67. The Commission ruled that CTIA had not presented the agency with sufficient information or evidence of a specific controversy on which to base such action or ruling. *Id.*

90 and 150 day time frames, a State or local government must notify an applicant that its application is incomplete within the first 30 days.<sup>20</sup> Among other things, the petitioners noted that Section 332(c)(7) does not specifically address the time frame in which a State or local government must notify an applicant that its application is incomplete. The completeness standard was a new and statutorily unauthorized rule governing State and local zoning actions.

On August 4, 2010, the FCC denied the petition on both legal and policy grounds. First, the FCC found that the 30-day rule is consistent with the agency's view of its own jurisdiction over Section 332(c)(7). The FCC declared that the 30-day rule is not a "new limitation that [is] not within the statute," but it instead represented a necessary aspect of the FCC's rules regarding what constitutes a "reasonable period of time" under Section 332(c)(7)(B)(ii).<sup>21</sup>

With respect to policy, the FCC was not persuaded by the harms arising out of the 30-day rule, discussed *infra*. Although the FCC recognized that "in some instances a State or local government may

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<sup>20</sup> Order ¶ 53.

<sup>21</sup> Reconsideration Order ¶ 10.

choose to grant an application rather than incur [litigation] costs,”<sup>22</sup> the FCC determined that this and other harms were mitigated because: (1) an applicant might agree to extend the new deadlines; and (2) if the applicant refuses to do so, the State or local government has the opportunity to prove it acted reasonably in subsequent litigation.<sup>23</sup> On October 1, 2010, the City of San Antonio filed a petition for review of the Reconsideration Order. This Court’s October 22, 2010 order stated that the cases would be considered under the same docket number.

### STATEMENT OF FACTS

When Congress adopted Section 332(c)(7) in 1996, it did so against the backdrop of an FCC proceeding that involved policy issues similar to those raised here. Two years earlier, in 1994, the Cellular Telephone Industry Association (“CTIA”) had petitioned the FCC to make rules to bar State and local governments from “interfering with the build out of CMRS infrastructure and the development of a competitive, efficient

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<sup>22</sup> Reconsideration Order ¶ 18.

<sup>23</sup> Reconsideration Order ¶¶ 16-18. The FCC also rejected the claim that the record did not contain sufficient facts on the 30-day completeness issue (*Id.* at ¶ 19), as well as other claims that it believed had not been timely raised (*Id.* at ¶¶ 20-22).

CMRS marketplace, through zoning and other similar regulations.”<sup>24</sup> CTIA claimed that federal rules were needed because “[f]urther development of the nation’s infrastructure will be significantly hampered if localities are able to inject additional costs and delays into the build out process,” and it asked the FCC to preempt local and state zoning procedures that it claimed were impeding cell tower deployment.<sup>25</sup>

Shortly thereafter, the debate over the proper balance between deployment and local police powers shifted to Congress as it began work on the bill that eventually became the Telecommunications Act of 1996. The House of Representatives initially adopted language that would have empowered the FCC to “prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or operation of facilities for the provision of commercial mobile services.” H.R. Rep. No. 104-204 at 25, 1996 U.S.C.C.A.N. 10 (1995). Among other things, the bill directed the FCC to adopt

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<sup>24</sup> CTIA’s Petition for Rulemaking, In re Amendment of the Commission’s Rules To Preempt State and Local Regulation of Tower Siting for Commercial Mobile Service Providers, RM 8577, at 17 (Dec. 22, 1994).

<sup>25</sup> *Id.* at 10.

“policies” that would require a local government to act “within a reasonable period of time after the request is fully filed with such government or instrumentality.” The section was titled the “National Wireless Telecommunications Siting Policy.”

In conference, however, Congress rejected this national approach and instead adopted Section 332(c)(7) under a very different title: “Preservation of Local Zoning Authority.” The Conference Report explained that the section:

*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.*

H.R. Conf. Rep. 104-458 at 207-208 (emphasis added). Section 332(c)(7) provides the FCC a role in one area: to ensure facilities comply with its RF rules, and to hear complaints (concurrently with the courts) regarding local regulation of RF emissions. But otherwise, the report stated that it was “the intent of the conferees that other than under section 332(c)(7)(B)(iv) of the Communications Act of 1934 as amended by this Act and section 704 of the Telecommunications Act of 1996 the courts shall have exclusive jurisdiction over all other disputes arising

under this section.” *Id.* The report directed the courts to measure the reasonableness and timeliness of actions in light of the “generally applicable time frames for zoning decision” in a particular community. *Id.* The Conference Report continued “Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities should be terminated.” *Id.* Based in part on this legislative history, the FCC dismissed the 1994 CTIA Petition.<sup>26</sup>

Twelve years later, the CTIA returned to the FCC and again asked the FCC to interject itself into the State and local zoning process.<sup>27</sup> In ruling on the CTIA Petition, among other things, the FCC adopted shot clocks based on its perception of the average time required to process applications, recognizing that this could have a significant effect on local processes in some cases. The effect is shown at ¶ 53 of the Order, where the FCC discusses the 30-day “shot clock” for notifying an applicant when its application is incomplete. As the FCC explains, the record showed that the States of California, Oregon, and Washington required

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<sup>26</sup> *Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act*, 12 F.C.C.R. 13494, 13540-41 ¶ 116 (1997).

<sup>27</sup> CTIA Petition.

local governments to notify applicants that an application was incomplete in 30 days or less. The North Carolina legislature required notice within 45 days of the date an application was received. The Commission identified nothing in the record to indicate that the North Carolina State standard was delaying consideration of personal wireless facilities. Nonetheless, the Commission established a 30-day notice rule. *Id.* Under the Order, a North Carolina community that gives timely notice of incompleteness under state law will be presumed to have acted unreasonably unless it acts on the petition within 90 days of the date it was originally submitted, and the locality will have the burden of proving that its actions were reasonable.

The record also includes substantial evidence showing that, in particular cases, a federal shot clock would be inconsistent with normal zoning processes, and could prevent a local government from complying with other statutory requirements, including environmental review requirements that apply to particular applications.<sup>28</sup>

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<sup>28</sup> See, e.g., *Opposition of City of Los Angeles et. al* (filed September 29, 2008) at 7-9, Exh. V.; *Comments of Fairfax County, Virginia in Opposition to Declaratory Ruling* (filed September 29, 2008) at 10-13 (noting that Virginia law establishes a deadline that applies to many applications for placement of personal wireless facilities, but does not apply to facilities that may require more detailed review because of their effect on wetlands or historic districts).

When the FCC granted CTIA's petition in part, this appeal followed.

### SUMMARY OF ARGUMENT

As a creature of statute, an administrative agency must honor Congress's choices. In 1996, Congress made a specific choice: it left zoning decisions with respect to personal wireless facilities in the hands of States and local governments. Congress clarified that with the exception of cases involving RF emissions, the FCC may not use its general powers under other provisions of the Communications Act to regulate the State and local siting process. The FCC Order here exceeds the agency's authority under the statute.

While the FCC has broad authority under the Communications Act, it is not unlimited. The agency cannot regulate in an area if the Act's plain language and history show that Congress did not intend the agency to do so. In this case, Congress considered and rejected legislation that would have given the FCC authority to establish national rules governing State and local siting processes. In its place, Congress adopted Section 332(c)(7), titled "Preservation of Local Zoning Authority."

True to its title, Section 332(c)(7) preserves State and local authority subject to certain federal standards that the statute grants the courts (with the exception of RF emissions standards not at issue here) the exclusive power to adjudicate. The statute further instructs that “except as provided” within Section 332(c)(7) itself, “nothing in [the Communications] Act” may “limit” or even “affect” State or local authority over decisions. 47 U.S.C. § 332(c)(7)(A).

In adopting the Order, the FCC relied not on Section 332(c)(7) itself (which on its face limits the FCC to deciding cases involving RF emissions), but on Sections 1, 4(i), 201(b), and 303(r) of the Act.<sup>29</sup> Accordingly, the central question on appeal is whether the FCC may use these sections to “limit” or “affect” the State and local authority in this area notwithstanding the language of Section 332(c)(7)(A). It may not. By adopting a national approach to the State and local siting process that is remarkably similar to the policy that Congress specifically considered and rejected in 1996, the FCC defied Congress’s choice.

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<sup>29</sup> 47 U.S.C. §§ 151, 154(i), 201(b), 303(r). *See* H.R. Conf. Rep. No. 104-458, at 208 (1996) (indicating courts are to have “exclusive jurisdiction” over Section 332(c)(7) disputes other than those concerning RF emissions, and the FCC must “terminate” rulemakings).

Section 332(c)(7)(A)'s language is clear: no other provision of the Act may be used to "limit" or "affect" State and local zoning authority. But by inserting itself into the State and local zoning process, the FCC is necessarily "limit[ing]" and "affect[ing]" State and local authority. One can hardly imagine a greater "limitation" than a policy that requires states and localities to apply directives of a federal agency in place of their normal procedures.<sup>30</sup> Section 332(c)(7) looks to the facts in a particular community, directing a State or local government to act "within a reasonable period of time after the request is duly filed . . . taking into account the nature and scope of such request." 47 U.S.C. § 332(c)(7)(B)(ii). In contrast, the Order directly affects the minutiae of State and local processes. The FCC uses this statutory language to create a federal "shot clock" of 90 or 150 days for all siting applications across the nation, regardless of the local circumstances.<sup>31</sup> This "shot clock" forces a State or local zoning authority into agreement or litigation, to further the FCC's policy choices. In addition, although

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<sup>30</sup> Of course, a State or local government could also apply its normal procedures, but it would then either be forced to litigate and bear the burden of proving its procedure is "reasonable," or developing alternative processes applicant-by-applicant, by agreement. Either way, the Order limits and affects the normal process.

<sup>31</sup> Order ¶ 45.

Section 332(c)(7) does not regulate application completeness at all, the FCC uses its claimed authority to create a new 30-day “application completeness” deadline.<sup>32</sup>

Section 332(c)(7) represents not an invitation for federal rules, but an “experiment in federalism.” *Town of Amherst v. Omnipoint Commc’ns Enter., Inc.*, 173 F.3d 9, 17 (1st Cir. 1999). Congress deliberately did not offer a “single ‘cookie cutter’ solution for diverse local situations.” *Id.* And its choice necessarily leads to “some cost and delay for the carriers.” *Id.* But Congress conceived that this course would produce “individual solutions best adapted to the needs and desires of particular communities.” *Id.* If Congress’s experiment fails, Congress remains free to alter it. *Id.* The FCC cannot do so.

In adopting the Order, the FCC relied heavily on the decision of the Sixth Circuit in *Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 776 (6th Cir. 2008) cert. denied, 129 S. Ct. 2821 (2009), a case in which the FCC adopted time frames to regulate the issuance of cable franchises. It is not controlling here. The statute at issue there, 47 U.S.C. § 541(a)(1), did not specifically limit the applicability of other provisions

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<sup>32</sup> Order ¶¶ 52-53.

of the Act. Consequently, the Court concluded that the FCC could rely on its general authority in Section 201(b), 47 U.S.C. § 201(b), to regulate the cable franchising process. This case could not be more different: Congress specifically provided in Section 332(c)(7) that other provisions of the Act may not so much as “affect” State and local authority in this area.

The action here fails for other reasons: the process here did not comply with due process or the Administrative Procedure Act; and, even if the FCC had jurisdiction to regulate in this area, the resulting rules do not comply with Section 332(c)(7) itself and constitute arbitrary and capricious agency action.

## ARGUMENT

### I. STANDARD OF REVIEW

Under the Administrative Procedure Act, a substantive rule may not be issued “except within jurisdiction delegated to the agency and as authorized by law.” 5 U.S.C. § 558.<sup>33</sup> Although an administrative agency can receive deference in interpreting a statute that it has been

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<sup>33</sup> A “rule” is defined broadly as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . .”. 5 U.S.C. § 551(4).

delegated the power to administer, *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-45 (1984), deference is warranted only “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law.” *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *see Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (“*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved....[T]he rule must be promulgated pursuant to authority Congress has delegated to the official.”); *Am. Library Ass'n v. FCC*, 406 F.3d 689, 699 (D.C. Cir. 2005); *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 362 (5th Cir. 2009). An agency lacking policy-making or rulemaking authority is not entitled to deference. *United Steelworkers of Am., AFL-CIO-CLC v. Schuylkill Metals Corp.*, 828 F.2d 314, 319 (5th Cir. 1987).

Because this case involves a pre-*Chevron* question of law regarding the scope of the FCC’s authority, the traditional standard for appeals controls: questions of law are decided *de novo*. *Ramirez-Molina v. Ziglar*, 436 F.3d 508, 513 (5th Cir. 2006); *Inst. for Tech. Dev. v.*

*Brown*, 63 F.3d 445, 450 (5th Cir. 1995); *Davidson v. Glickman*, 169 F.3d 996, 1000 (5th Cir. 1999).

Deference to the FCC on the question of the agency's jurisdiction would also be inappropriate for a more basic reason. In deciding whether it had authority to issue the rules in question, the FCC did not exercise its own policy-making judgment.<sup>34</sup> This is apparent from the Order ¶ 23 (applying plain language). An agency is entitled to deference when it fills a statutory ambiguity by making its own policy choice. But when an agency acts like a court, merely purporting to apply a statute's plain language (however wrongly, as shown *infra*), the court need not defer to the agency. *PDK Laboratories Inc. v. U.S. DEA*, 362 F.3d 786, 797-798 (D.C. Cir. 2004); *Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002); *see also R&W Technical Services Ltd. v. Commodity Futures Trading Comm'n*, 205 F.3d 165, 169 (5th Cir. 2000). Thus, regarding the Commission's claim that it may use Section 1, 4(i), 201(b), and 303(r) to make rules under Section 332(c)(7), *de novo* review is appropriate.

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<sup>34</sup> Order ¶ 23.

If the Court elects to apply a deferential standard of review to some elements of the Order, the Court must first determine “whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A., Inc.*, 467 U.S. at 842. “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842-43. “[I]f the statute is silent or ambiguous with respect to the specific issue,” the Court proceeds to ask “whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843.

## **II. THE FCC HAS NO AUTHORITY TO ADOPT RULES THAT LIMIT OR AFFECT STATE OR LOCAL AUTHORITY OVER SITING DECISIONS.**

In the Order, the FCC ignores clear statutory limits on its authority and concludes that it can regulate the State and local siting process under Section 332(c)(7). Under any standard of review, the Court should find that the FCC impermissibly expanded its regulatory authority beyond the bounds prescribed by Congress.

**A. An Administrative Agency May Not Make Rules That Carry the Force of Law Unless Congress Delegates It Such Authority.**

In our constitutional system, an administrative agency cannot make rules that carry the force of law unless Congress delegates it such authority.

The power to make law is vested in the Congress of the United States. U.S. Const. Art. I. § 1. “The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803) (Marshall, C.J.). “This principle applies with equal force to the so-called modern administrative state.” *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). As a creature of statute, the FCC has no constitutional or common law authority. *Id.* “It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

Although Congress can delegate quasi-lawmaking power to an administrative agency by authorizing the agency to make rules, it is for Congress to assign that power:

An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.

*La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374-375 (1986). When an agency claims that it has been delegated authority to act in new areas, courts “perform a close and searching analysis of congressional intent.” *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

Even after Congress confers power upon an agency, Congress may subsequently restrict or limit that power. *First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 901 (5th Cir. 1995) (“Congress designates the scope of agency authority, and if Congress so chooses, it can subsequently restrict or limit that delegation of power to the agency.”). If Congress enacts such a limitation, an administrative agency cannot ignore it to “take action which it thinks will best effectuate a federal policy.” *La. Pub. Serv. Comm'n*, 476 U.S. at 374 (finding Communications Act provision denied power to the FCC to regulate state commissions). Administrative agencies and courts are bound not only by the ultimate purposes Congress has selected but “by the means

it has deemed appropriate, and prescribed, for the pursuit of those purposes.” *Texas v. United States*, 497 F.3d 491, 502 (5th Cir. 2007) (quoting *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 231 n.4 (1994)).

When an agency makes rules that would preempt State and local authority, it is especially critical to confirm that Congress authorized the agency to regulate in the area. Under the Supremacy Clause, only “[t]h[e] Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land.” U.S. Const. art. VI, cl. 2. The phrase “Laws of the United States” encompasses an agency’s rules only if such rules are “adopted in accordance with statutory authorization.” *City of New York v. FCC*, 486 U.S. 57, 63 (1988).<sup>35</sup>

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<sup>35</sup> If an agency can show that Congress delegated it the authority to administer a statute, this does not end the inquiry. For if the agency has not also been specifically delegated the authority to make a preemption determination thereunder, an agency’s preemption determination is not binding. *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 413 (5th Cir. 2010). Here, the FCC lacks *both* forms of authority, as discussed *infra*.

**B. In Section 332(c)(7), Other Than for RF Emissions Matters, Congress Barred the FCC from Regulating the State and Local Siting Process.**

Congress carefully crafted Section 332(c)(7) to provide that the FCC may not make rules to limit or affect State or local authority regarding the placement of personal wireless facilities.

1. *The plain language provides that the FCC may not rely on its rulemaking powers to “limit or affect” State or local authority.*

Section 332(c)(7)’s plain language establishes that the FCC may *not* implement the statute through its general rulemaking powers. Titled “Preservation of Local Zoning Authority,” the statute provides that except as provided in the balance of Section 332(c)(7):

*[N]othing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.*

47 U.S.C. § 332(c)(7)(A) (emphasis added).<sup>36</sup> This language is absolute — “nothing in this Act” necessarily reaches the statutes under which

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<sup>36</sup> As codified in the U.S. Code, Section 332(c)(7)(A) reads “nothing in this chapter,” rather than “nothing in this Act.” This reflects the fact that the Communications Act of 1934, as amended, is codified as Chapter 5 of Title 47 of the U.S. Code. In this brief, we use the Statutes at Large and Communications Act phrase, “nothing in this Act.”

the FCC has authority to make rules. And it is broad — other provisions of the Act may not so much as “affect” local authority over decisions regarding the placement, construction, and modification of wireless facilities. Despite this, as discussed *supra*, the FCC openly uses other provisions of the Act — Sections 1, 4(i), 201(b), and 303(r) — to give itself a supervisory role over state and local zoning that Section 332(c)(7) itself does not assign the agency.<sup>37</sup>

Section 332(c)(7)(B) codifies five substantive limitations on State and local authority. A State or local government:

- may not “unreasonably discriminate” among providers;
- may not “prohibit or have the effect of prohibiting” the provision of services;
- must “act on any request . . . within a reasonable period of time after the request is duly filed . . ., taking into account the nature and scope of such request”;
- must make its decisions “in writing” and “supported by substantial evidence”; and
- may not regulate “on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning emissions.”

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<sup>37</sup> Order ¶ 23.

47 U.S.C. § 332(c)(7)(B). With respect to these limitations, the statute assigns the FCC a specific and narrow role. Only as to the last limitation, which concerns the FCC’s RF emissions regulations, may an affected party petition the FCC for relief. 47 U.S.C. § 332(c)(7)(B)(v).<sup>38</sup> For any other final action or failure to act that is inconsistent with the limitations, the statute directs an affected party to a “court of competent jurisdiction.” *Id.*

Congress provided additional, direct instruction as to how these limitations are to be construed: the limitations may “not be construed to modify, impair, or supersede Federal, State or local law *unless expressly so provided* in such Acts or amendments.” Pub. L. 104-104 § 601(c), 110 Stat. 56 (Feb. 8, 1996) (emphasis added).<sup>39</sup> Through this design, Congress crafted Section 332(c)(7) not as an invitation for future federal regulation, but as an “experiment in federalism”:

[Section 332(c)(7)’s] balance of local autonomy subject to federal limitations does not offer a single “cookie cutter” solution for diverse local situations, and it

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<sup>38</sup> The Order is not concerned with RF issues. Order ¶¶ 69-70.

<sup>39</sup> *See, e.g., City of Dallas v. FCC*, 165 F.3d 341, 347 (5th Cir. 1999) (finding a statute “simply saying that Section 621 shall not apply to OVS providers does not expressly preempt local franchising authority.”). Here, while Congress did adopt specific limitations on the State and local siting process, only the express limitations themselves (not FCC rules *construing* the limitations) would control.

imposes an unusual burden on the courts. But Congress conceived that this course would produce (albeit at some cost and delay for the carriers) individual solutions best adapted to the needs and desires of particular communities. If this refreshing experiment in federalism does not work, Congress can always alter the law.

*Town of Amherst v. Omnipoint Commc'ns Enter., Inc.*, 173 F.3d 9, 17 (1st Cir. 1999).

The statute's plain language and structure limit the FCC's authority in important ways. The FCC's general rulemaking powers — Sections 1, 4(i), 201(b), and 303(r) — may not be used to “limit” or even to “affect” State or local authority over siting decisions, much less allow the FCC to assert generalized authority to implement the provisions of Section 332(c)(7). Section 332(c)(7) cannot be “construed” to preempt beyond the terms “expressly . . . provided” in the statute itself.<sup>40</sup> Reading the Communications Act to ignore these limitations would create a national wireless zoning authority, something Congress explicitly refused to do. H.R. Conf. Rep. No. 104-458, at 208 (1996); *Town of Amherst*, 173 F.3d at 17.

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<sup>40</sup> Pub. L. 104-104 § 601(c), 110 Stat. 56 (Feb. 8, 1996).

The FCC issued the Order under its regulations implementing the adjudication section of the Administrative Procedure Act. Order at ¶ 18 n.52 (citing 47 C.F.R. § 1.2); 5 U.S.C. § 554. Thus, quite literally, based on Sections 1, 4(i), 201(b), and 303(r), the FCC claims to be adjudicating a dispute arising under Section 332(c)(7). But if the FCC were correct that Sections 1, 4(i), 201(b), and 303(r) empower it to resolve disputes with respect to all of Section 332(c)(7)'s limitations, Congress's specific direction that a person may petition the FCC for relief with respect to one such limitation, RF interference matters, would be superfluous. *Duncan v. Walker*, 533 U.S. 167, 174 (2001). The Court can give meaning to all of Section 332(c)(7)'s language by finding that the FCC may resolve disputes with respect to RF interference matters, but it may not resolve disputes with respect to Section 332(c)(7)'s other limitations.<sup>41</sup>

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<sup>41</sup> For the same reason, one must read Section 332(c)(7)(v) as providing for exclusive court jurisdiction over challenges regarding the non-RF limitations.

2. *The legislative history reiterates that the FCC cannot resolve disputes and must terminate rulemakings.*

Section 332(c)(7)'s legislative history clearly shows that the role the FCC asserts here defies Congress's intent.<sup>42</sup> As detailed in the Statement of Facts, when it adopted Section 332(c)(7), Congress considered and rejected a model that would have permitted the FCC to establish national zoning policies. The Conference Report spells out word-for-word what Section 332(c)(7)(A)'s plain language already makes clear: RF interference matters aside, the FCC may not use its general rulemaking authority to "limit or affect" State and local authority over siting of personal wireless facilities. H.R. Conf. Rep. No. 104-458, at 208 (1996) (indicating courts are to have "exclusive jurisdiction" over Section 332(c)(7) disputes other than those concerning RF emissions, and the FCC must "terminate" rulemakings).

Moreover, with respect to Section 332(c)(7)'s "reasonable period of time" requirement, the legislative history makes clear that "reasonableness" is to be measured in terms of usual local zoning — not nationally prescribed — standards:

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<sup>42</sup> See *Sprint Spectrum L.P. v. City of Carmel*, 361 F.3d 998, 1003 (7th Cir. 2004) (finding the legislative history is "significant").

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. *It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their request to anything but the generally applicable time frames for zoning decision[s].*

H.R. Conf. Rep. No. 104-458, at 208 (1996) (emphasis added).<sup>43</sup> Thus, to say that the FCC's new "shot clocks" are inconsistent with Congressional intent is a considerable understatement. The Order effectively forces States and local governments to do precisely what the statute did not: to give preferential treatment to wireless zoning applications. This and other significant and substantial effects of the rules are discussed in Part I.C.

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<sup>43</sup> Of course, Congress did not strip the FCC of its general regulatory authority over radio communications spectrum licensing or its authority to regulate the licensee or applicant's operation of its facilities. Such matters are addressed in other provisions of Title III of the Communications Act. But with respect to State and local authority over the placement of personal wireless service facilities, Congress's choice is clear. H.R. Conf. Rep. No. 104-458, at 208 (1996) ("The limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations and are not intended to limit or affect the Commission's general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities.").

3. *Section 332(c)(7) is consistent with the FCC's lack of police powers or zoning authority.*

Congress's choice not to rely on the FCC as the ultimate zoning authority honors and continues the Communications Act's long tradition of treading lightly in areas of State and local concern and property management. The Communications Act is focused primarily on communications services and facilities, not on local property or police powers. The Act gives the FCC "express and expansive authority to regulate common carrier services, . . . radio transmissions, including broadcast television, radio, and cellular telephony, and 'cable service,' including cable television." *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (D.C. Cir. 2010). Section 2 of the Act further clarifies that the provisions of the Act apply to "communication by wire or radio" and to "all persons engaged within the United States in such communication or such transmission of energy by radio." 47 U.S.C. § 152(a). On the other hand, the Act does not assign police power or authority over state and local property management to the FCC.

When Congress intends a federal agency to regulate areas that are traditionally regulated by the States, it says so. *Miss. Comm'n on Natural Res. v. Costle*, 625 F.2d 1269, 1275-76 (5th Cir. 1980) (finding

that the EPA is by statute “given the final voice” regarding state water quality standards). Zoning — the regulation of land use for reasons of health, safety, aesthetics, and other matters of local concern — involves the exercise of police powers long recognized as falling within the purview of State and local governments. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).<sup>44</sup> Courts have not expanded the FCC’s authority over communications services to allow the agency to regulate more comprehensively. *See, e.g., Ill. Citizens Comm. for Broad. v. FCC*, 467 F.2d 1397, 1400 (7th Cir. 1972) (avoiding a reading of the Act that would “expand[ ] the FCC's already substantial responsibilities to include a wide range of activities, whether or not actually involving the transmission of radio or television signals”).

This Court therefore has required the FCC to show a clear statement that Congress intended it to regulate before allowing the agency to intrude upon traditional state and local powers. For example, Section 653(c)(1)(C) of the Act, which concerns Open Video Service, does

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<sup>44</sup> This Court has recognized the federal government’s limited role with respect to zoning. *Groome Res. Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 216 (5th Cir. 2000) (“[N]othing in this analysis supports the argument that the federal government can regulate the intricacies of local zoning decisions. In fact, the vast majority of local zoning decisions support the rationale of federalism, providing political accountability and flexibility through local control.”).

not broadly preempt local property management and franchise requirements with respect to such service. Instead, Section 653(c)(1)(C) renders the *federal* requirement to obtain a franchise in Section 621(a)(1) inapplicable; but the statute does not specifically address or preempt franchise requirements arising under State and local law. 47 U.S.C. § 573(c)(1)(C). When, despite this, the FCC construed Section 653(c)(1)(C) broadly to preempt these State and local franchise requirements, this Court refused to allow it:

The FCC's preemption of local franchising requirements is at odds with the Act's preservation of state and local authority and with a 'clear statement' principle the Supreme Court has articulated."

*City of Dallas v. FCC*, 165 F.3d 341, 347 (5th Cir. 1999).<sup>45</sup>

In this case, Congress again treads lightly where State and local authority are at stake. Congress provided no "clear statement" to grant the FCC authority to regulate the State and local siting process. To the contrary, Congress adopted a "clear statement" to limit the FCC's pre-existing authority. 47 U.S.C. § 332(c)(7)(A). If this does not limit the FCC's authority, it is hard to imagine how it could be limited.

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<sup>45</sup> The Court cited *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) and Section 601(c) of the 1996 Act, discussed above. *Dallas*, 165 F.3d at 347-48.

Consistent with Congress’s historical choices, Section 332(c)(7) allows the FCC to resolve disputes in a narrow, technical area concerning RF emissions, where the agency has expertise. *See Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 323 (2d Cir. 2000) (finding in light of FCC’s regulation of broadcast technology, the FCC may regulate RF interference). But, beyond this, Section 332(c)(7) provides no role for the agency to affect or limit State or local authority. As the Second Circuit put it, Section 332(c)(7) is best understood as authorizing local governments “to exercise zoning power based on matters not directly regulated by the FCC.” *Id.* But if the FCC were correct, all of Section 332(c)(7) is “directly regulated by the FCC.” That is not the case.

4. *The FCC had long recognized the limits on its authority.*

Until its dramatic shift in the Order, the FCC had long recognized the statutory limits on its jurisdiction under Section 332(c)(7), and it had never — in the 13 years since the statute’s enactment — resolved a dispute or issued a rule regarding the other limitations in Section 332(c)(7). *In re Facilitating the Provision of Spectrum-Based Services to Rural Areas*, 19 F.C.C.R. 19078 at ¶ 123 (2004) (referring to an RF emissions matter and finding that except for areas “within the

Commission’s exclusive jurisdiction,” Section 332(c)(7) “generally preserves local authority over land use decisions, and limits the Commission’s authority in this area”); *In re Cingular Wireless L.L.C.*, 18 F.C.C.R. 13126 at ¶ 21 (2003) (finding that Section 332(c)(7)(B)(v) does not limit the Commission's jurisdiction to consider a RF emissions Petition “because the Ordinance provisions do not regulate the ‘placement, construction, and modification’ of facilities, and therefore do not fall within the scope of section 332(c)(7)”). *Mr. Thomas E. Wheeler*, 1997 WL 14744 (Wireless Telecomm. Bureau Jan. 13, 1997) (finding that the Commission’s interpretation of the “remaining provisions” of Section 332(c)(7) cannot “be legally binding” because legal jurisdiction “is reserved by statute to the courts”). This long-standing administrative interpretation is persuasive evidence that the FCC lacks the delegated authority it now claims. *New Process Steel v. NLRB*, \_\_\_ U.S. \_\_\_, \_\_\_, 2010 WL 2400089 (U.S. June 17, 2010).

### C. The FCC's Rules "Limit" and "Affect" State or Local Authority.

"To affect" is to "produce an effect or change in."<sup>46</sup> The Order makes it clear that its purpose is to produce an effect or change in the State and local siting process to further *federal, administrative* policy choices. As the FCC puts it: "State and local governments must act upon personal wireless service facility siting applications 'within a reasonable period of time' *as defined herein*, and *must not* prohibit one carrier's provision of service based on the availability of service from another carrier."<sup>47</sup> Relying on Sections 1, 4(i), 201(b), and 303(r), the FCC adopts rules that "limit" and "affect" State and local authority over siting decisions — as the plain language of Section 332(c)(7) itself did not.

1. *The FCC's new rules shift the burden of proof to State and local governments after fixed periods of 90 and 150 days.*

After fixed periods of 90 or 150 days, the FCC automatically shifts the burden of proof to State and local governments, regardless of the

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<sup>46</sup> *Dictionary.com Unabridged.* Random House, Inc. <http://dictionary.reference.com/browse/affect> (accessed: Nov. 2, 2010).

<sup>47</sup> Order at ¶ 25 (emphasis added); *see also* Order ¶ 1 (targeting "delays in the zoning process").

circumstances of particular cases. Order ¶¶ 4, 32, 45. This rule fundamentally alters the traditional burdens that apply when local zoning actions are challenged.

By contrast, the courts have recognized that, under Section 332(c)(7), the burden rests with the carrier challenging the State or local action to show that a State or local government has not acted “within a reasonable period of time after the request is duly filed . . . , taking into account the nature and scope of such request.” *U.S. Cellular Corp. v. City of Wichita Falls*, 364 F.3d 250, 256 (5th Cir. 2004). As noted above, Congress used general language amenable to case-by-case decisions by a court because it specifically intended not to create specific, “one-size-fits-all” time frames for the personal wireless industry. H.R. Conf. Rep. No. 104-458, at 208 (1996). Appropriately, courts have recognized that this “reasonable period of time” limitation “is not absolute and no specific time period within which to pass on applications is prescribed; the limit is one of reasonableness under the circumstances.” *Omnipoint Commc’ns Enters. v. Town of Amherst*, 74 F. Supp. 2d 109, 121 (D.N.H.1998), *rev’d on other grounds*, 173 F.3d 9 (1st Cir. 1999). If a local government makes “steady progress in acting on

the application,” it does not run afoul of the statute. *See N.Y. SMSA Ltd. v. Town of Riverhead*, 45 Fed. Appx. 24, 26-27 (2d Cir. 2002) (one year lapse between filing of application and preliminary decision was not an unreasonable delay because town had been conducting, among other things, an environmental analysis).

To determine whether a State or local government has acted “within a reasonable period of time,” courts are also bound to apply a “presumption *against* preemption.” *City of Dallas v. FCC*, 165 F.3d 341, 347 (5th Cir. 1999) (citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991)) (emphasis added); *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 603 F. Supp. 2d 715, 721 (S.D.N.Y. 2009) (applying presumption to provisions soundly within the Town's traditional police powers, *i.e.*, substantive requirements pertaining to aesthetics, height, setback, and distance, and procedural requirements in the nature of deadlines and fees). The presumption is consistent with Congress’s instruction that the 1996 amendments to the Act — including “reasonable period of time” — cannot be “construed” to modify, impair, or supersede Federal, State or local law “*unless expressly so provided* in such Act[ ] or amendment[ ].” Pub. L. 104-104 § 601(c), 110 Stat. 56 (Feb. 8, 1996) (emphasis added).

As “construed” by the FCC’s new rules, however, Section 332(c)(7) operates very differently. The personal wireless service industry now enjoys its own preferential time frames of 90 and 150 days for State and local action.<sup>48</sup> These time frames are not in the Act, and they do not apply to other zoning requests. When these time frames expire, regardless of the circumstances of particular cases,<sup>49</sup> the “presumption against preemption” is replaced with a presumption *for* preemption: the burden of proof is shifted as a matter of law to State and local governments. This clearly “limits” and “affects” State and local authority.

2. *The FCC attempts to compel State or local action by creating a heightened threat of litigation.*

The Order also affects State and local authority in another significant way: it raises the likelihood of litigation.

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<sup>48</sup> Order ¶¶ 4, 32, 45.

<sup>49</sup> In an earlier decision, the FCC refused to fix a deadline for its own decisions under the one limitation over which the statute assigns it authority, RF emissions matters. The FCC refused to adopt such deadlines for itself because it was “concerned that doing so will not afford the Commission sufficient flexibility to account for the particular circumstances of each case.” *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 F.C.C.R. 22821, 22827 at ¶ 14 (2000).

Under the statute’s plain language, courts had recognized that the cause of action under Section 332(c)(7) — a showing of a “failure to act” under Section 332(c)(7)(B)(v) — is linked to the question on the merits — whether the State or local government had acted “within a reasonable period of time” under Section 332(c)(7)(B)(ii). *Nextel Partners Inc. v. Kingston Twp.*, 286 F.3d 687, 692 (3d Cir. 2002) (indicating that “‘failure to act’ must be read in conjunction with the previously noted provision requiring state and local governments and instrumentalities to act within a reasonable time”). If a State or local government had acted within a reasonable time under the circumstances (on the merits), a “failure to act” did not occur automatically or arbitrarily. Thus, if the parties could not reach an agreement, litigation was not compelled on a pre-set time schedule, and certainly not if the State or local government was acting reasonably.

But the FCC now decouples these parallel statutory terms. Absent an agreement, the cause of action — a “failure to act” — now accrues automatically and arbitrarily at 91 or 151 days *even if* the State or local government has acted entirely reasonably under the

circumstances.<sup>50</sup> The cause of action runs so rigidly that if an applicant does not either reach some agreement with or sue the State or local government by day 120 or 180, it loses the right to sue entirely.<sup>51</sup> By adding these fixed time frames as the “trigger” for a “failure to act” suit,<sup>52</sup> the FCC – in its own words – requires the “reasonableness of any particular failure to act to be litigated.”<sup>53</sup>

The FCC certainly does not dispute that its new federal clock on the cause of action is designed “to limit” and “to affect” State and local action. As the FCC puts it, “State and local governments will have a strong incentive to resolve each application within the timeframe

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<sup>50</sup> See Order ¶ 4 (“In the event a State or local government fails to act within the appropriate time period, the applicant *is entitled* to bring an action in court under Section 332(c)(7)(B)(v) of the Communications Act, and the court will determine whether the delay was in fact unreasonable under all the circumstances of the case.”) (emphasis added); Order ¶ 32. This is also the height of arbitrary and capricious agency action. After an arbitrary number of days, all State and local governments are decreed by operation of law to have committed a “failure to act” even when their actions are entirely reasonable under the circumstances.

<sup>51</sup> Order ¶ 49. Prior to the Order, a court was free to conclude that a “failure to act” did not occur at a fixed point in time, but was on-going. Under this reading, in the absence of an agreement, an applicant was not compelled to bring a lawsuit after a fixed number of days.

<sup>52</sup> Order ¶ 37 (“[B]ecause an ‘action or failure to act’ is the statutory trigger for seeking judicial relief, our clarification of these terms will give personal wireless service providers certainty as to when they may seek redress for inaction on application.”).

<sup>53</sup> Order ¶ 34 n.111.

defined as reasonable, or they will risk issuance of an injunction granting the application.”<sup>54</sup> Or, as the FCC later explained: “We recognize that defending litigation imposes costs, and that in some instances a State or local government may choose to grant an application rather than incur those costs.”<sup>55</sup> In other words, by creating a heightened threat of litigation, the FCC impacts State and local action and advances *its own* federal administrative policy goals. This turns Section 332(c)(7) on its head.

The FCC makes much of the fact that its new rules only alter State or local government authority indirectly. The agency notes that: (1) an applicant might agree to extend the new deadlines;<sup>56</sup> and (2) if the applicant refuses to do so, the State or local government has the opportunity to prove it acted reasonably in subsequent litigation.<sup>57</sup> But this misses the point in two respects. First, the fact remains that the

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<sup>54</sup> Order ¶ 39.

<sup>55</sup> Reconsideration Order ¶ 18.

<sup>56</sup> Industry applicants often have the resources to bear the costs of litigation as State and local governments cannot. Thus, by creating an automatic threat of litigation after 90 and 150 days — even when such lawsuit is entirely unwarranted on the merits, the FCC’s rules empower industry applicants to use the threat of litigation as a bargaining tool.

<sup>57</sup> *See, e.g.*, Reconsideration Order ¶¶ 16-18.

rules increase both the likelihood of litigation, and the possibility that a State or local government will need to bear litigation costs even when it has acted reasonably on the merits. This clearly serves to “limit” and “affect” State and local authority. Second, it runs afoul of the basic principle that an agency may not do indirectly what it is forbidden to do directly. *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959). It is certainly true that the FCC’s new rules could have been even more disruptive and intrusive. But this does not excuse an otherwise unlawful exercise of authority, particularly one that is intended to have precisely the result forbidden by Congress.

*3. The FCC imposes new application “completeness” requirements that force State and local action.*

The Order adopts a new rule regarding application “completeness” that is utterly foreign to Section 332(c)(7).<sup>58</sup> Specifically, the FCC decrees that State and local governments are “bound to notify applicants within a reasonable period of time that their applications are incomplete.”<sup>59</sup> The FCC rules that this must be done within 30 days.<sup>60</sup>

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<sup>58</sup> It is thus an “additional” limitation which the FCC purports to forswear. Order ¶ 25.

<sup>59</sup> Order ¶ 52.

If the State or local government requests additional information within this period, the FCC’s new 90 and 150 day time frames will be tolled until the applicant responds. If the request comes on day 31 or thereafter, however, no such tolling will occur: absent an agreement, the State or local government will have committed a “failure to act” on day 90 and 150, regardless of how much information is missing and when (if ever) the carrier provides it.<sup>61</sup>

This is a significant change under Section 332(c)(7). The plain language of Section 332(c)(7) does not regulate application completeness *at all*. In addition, no court has ruled that the cause of action for a “failure to act” is linked to the arbitrary question of whether the State or local government requested additional information on day 29 or day 31. If nothing else, the new completeness regime shows that once the FCC finds jurisdiction to regulate in an area, it will not hesitate to do so. For example, Section 332(c)(7) requires that an application be “duly filed.” 47 U.S.C. § 332(c)(7)(B)(ii). Under the FCC’s approach, it could

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<sup>60</sup> Order ¶ 53.

<sup>61</sup> *Id.*

adopt national filing requirements, and override local ones, in the interest of ensuring that applications be acted upon with all due speed.

Moreover, the record shows that the new completeness requirement disrupts many communities' basic siting processes. For example, Fairfax County, Virginia, stressed the "practical realities" of processing applications,<sup>62</sup> including the fact that it often needs additional information *after* the first 30 days. The County noted that the applications it receives are often "only partially formulated or purely conceptual," and such applications often change "as an applicant refines its plans and/or coordinates the application with the staff or community."<sup>63</sup> In addition, applications are reviewed by several County departments including, but not limited to, the Department of Planning and Zoning, the Department of Public Works and Environmental Services, the Department of Transportation, and public safety agencies. In addition, institutions outside the County — including the National Park Service, the Northern Virginia Regional Park Authority, and the Virginia Department of Transportation — often review applications and

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<sup>62</sup> Reply Comments of Fairfax County, Virginia, In Support of Petition for Reconsideration, WT Docket No. 08-165 (Feb. 8, 2010).

<sup>63</sup> *Id.* at 3.

offer comments. In light of this, as the County put it, “[a]n inflexible initial 30-day clock is simply not well suited to the practical realities of processing such applications.”<sup>64</sup>

Under the Order, if a local government finds that additional information is required after day 30, the local government finds itself in a difficult position. The local government can ask the applicant for the additional information. If the applicant refuses — perhaps because it prefers to litigate or knows that the local government cannot — the local government’s only option is to deny the application entirely, or to seek relief in a court.<sup>65</sup> As noted, it is *precisely* these “practical realities” of the zoning process that Congress left to the control of State

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<sup>64</sup> *Id.* at 4. Some local governments noted that the new rule may force them to deny applications that are incomplete as filed, in order to avoid the threat of litigation. Comments of City of Portland In Support of NATOA *et al.* Petition for Reconsideration, WT Docket No. 08-165 at 4 (Jan. 20, 2010). Local governments explained that the completeness rule could cause them to engage in “defensive zoning”: to adopt very strict requirements as to what must be included in an initial application in order for the local government to accept the application at all. Comments of the Greater Metro Telecommunications Consortium in of NATOA *et al* Petition for Reconsideration, WT Docket No. 08-165, at 4 (Jan. 22, 2010); Comments of the City of Philadelphia in Support of NATOA *et al* Petition for Reconsideration, WT Docket No. 08-165 at 4 (Jan. 22, 2010). As explained, *supra*, Congress plainly did not intend federal law to impact the siting process in this way.

<sup>65</sup> Reconsideration Order ¶ 16.

and local governments, not to a federal agency.<sup>66</sup> Section 332(c)(7)'s general language serves these ends; the Order's specific rules do not.

**D. The FCC Order Fails To Justify Its Decision To Assert Authority Over Local Zoning Processes.**

In light of this history, and the clear limiting language in Section 332(c)(7)(A), one might expect the FCC to provide a vigorous defense of its authority in this new area. But the Order provides nothing of the sort. First, the FCC fails to address how the plain language of Section 332(c)(7)(A) — “[e]xcept as provided in this paragraph, nothing in this Act . . .” — affects its ability to rely on provisions of the Act *outside* of Section 332(c)(7) to impact the siting process. The FCC then puzzlingly claims that Congress only barred it from imposing “new” or “additional” limitations on the siting process, not from making new or additional rules under the terms of Section 332(c)(7) itself. And — in what appears to be the crux of its jurisdictional position — the FCC claims it has authority to adopt rules regarding Section 332(c)(7) simply because it “falls within the Act.” Order ¶ 24. The FCC is wrong.

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<sup>66</sup> 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. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests.”).

The FCC maintains that Congress delegated it the authority to adopt rules regarding Section 332(c)(7) pursuant to four sections of the Communications Act: Sections 1, 4(i), 201(b), and 303(r). Order ¶ 23.<sup>67</sup> These rulemaking grants, which are nearly as old as the Communications Act itself,<sup>68</sup> generally assign the FCC the authority to “make such rules and regulations” as may be necessary “to carry out the provisions of this Act.” *See, e.g.*, 47 U.S.C. § 303(r).

But of course, these provisions cannot be applied in defiance of Congress’s direction. Congress does not give, and is not obligated to give, the FCC the plenary power to regulate every communications activity merely because it is mentioned in the Act. *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (D.C. Cir. 2010). To be sure, if Congress is silent as to how Sections 1, 4(i), 201(b), and 303(r) apply to a provision inserted into the Act, and if Congress’s intent is not otherwise clear, courts have found that the FCC’s authority generally reaches the new provision. But, under well-established principles, if Congress

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<sup>67</sup> In the Ordering Clauses of the Order, however, the FCC does not cite Section 1 of the Communications Act as a basis for its action. Order ¶ 72.

<sup>68</sup> Section 303(r), 47 U.S.C. § 303(r), was added in 1937. 50 Stat. 189, 191 (1937). Section 201(b), 47 U.S.C. § 201(b), was added in 1938. 52 Stat. 588 (1938). Section 1, 47 U.S.C. § 151, and Section 4(i), 47 U.S.C. § 154(i), were included in the original Communications Act of 1934.

affirmatively limits the agency’s pre-existing rulemaking authority, Congress’s later choice controls. *First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 901 (5th Cir. 1995) (“Congress designates the scope of agency authority, and if Congress so chooses, it can subsequently restrict or limit that delegation of power to the agency.”).

Indeed, the decisions cited by the FCC to support its newfound power over zoning are rooted in this very principle.<sup>69</sup> In *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 377-78 (1999), the Supreme Court ultimately decided that the FCC may rely on its pre-existing rulemaking authority in Section 201(b) to implement two other provisions that Congress added to the Act in 1996, Sections 251 and 252.<sup>70</sup> But the Court’s holding rests on an important principle. Writing separately, Justice Breyer asserted that the Court should not conclude that the FCC’s Section 201(b) authority extends to Sections 251 and 252 without first closely examining what Congress intended when it added the *new* language:

The scope of the FCC’s legal power to apply an explicit grant of general authority to make rules implementing

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<sup>69</sup> Order ¶ 24.

<sup>70</sup> 47 U.S.C. §§ 251, 252.

the more specific terms of a later enacted statute depends upon what that *later enacted statute* contemplates.

*Id.* at 420 (Breyer, J., concurring in part and dissenting in part) (emphasis added). On this important point, the Court agreed. 525 U.S. at 378 n.5 (finding it “assuredly true”). The Court parted with Justice Breyer, however, regarding what Congress intended with respect to the particular new sections at issue, Sections 251 and 252. Ultimately, the Court found it unnecessary and inappropriate to speculate as to whether Congress intended the FCC to have authority to implement these sections:

[W]e think that what the later statute contemplates is best determined, not by speculating about what the 1996 Act (and presumably every other amendment to the Communications Act since 1938) “foresees,” *ibid.*, but by the clear fact that the 1996 Act was adopted, not as a freestanding enactment, but as an amendment to, and hence *part of*, an Act which said that “[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.” Justice BREYER cannot plausibly assert that the 1996 Congress was unaware of the general grant of rulemaking authority contained within the Communications Act, since § 251(i) specifically provides that “[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.”

*Id.* at 378 n.5 (emphasis in original).

A very different result necessarily follows if Congress, when adding new language to the Act, *expressly limits* the applicability of the FCC’s pre-existing rulemaking authority. In such a case, there is no need for judicial “speculation.” *AT&T*, 525 U.S. at 378 n.5. Congress’s plain language controls. That is the case here.

When Congress inserted Section 332(c)(7) into the Act, Congress stated what it “contemplates” and “foresees” regarding the FCC’s pre-existing rulemaking authority: Such powers may not be used to “limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities,” and hence cannot be used to give the FCC a supervisory role over the zoning process. 47 U.S.C. § 332(c)(7)(A) (emphasis added); H.R. Conf. Rep. 104-458 at 207-08 (FCC rulemaking shall be terminated, and disputes resolved by the courts).

In this respect, this case could not be more different than the case on which the FCC chiefly relies, *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).<sup>71</sup> There, the FCC also claimed it had

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<sup>71</sup> Order ¶ 24.

authority to implement the Act by adding time frames for local action with respect to the granting of a cable franchise under Section 621(a)(1).<sup>72</sup> That case turns on the fact that, when Congress added the language at issue to Section 621(a)(1), it said *nothing* about the FCC’s pre-existing rulemaking authority. 47 U.S.C. § 541(a)(1). In the absence of such limitation, the Sixth Circuit found that it could apply the general rule of *AT&T* to find that the FCC’s general rulemaking authority under Section 201(b) extends to Section 621(a)(1). *Alliance for Cmty Media*, 529 F.3d at 774.<sup>73</sup> If, as here, Congress had instructed that “nothing in the Act” beyond Section 621(a)(1) could be used to “limit” or even “affect” the State and local cable franchising authority at issue, a very different result would surely have followed even under the Sixth Circuit’s approach.<sup>74</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> We assume, *arguendo*, the case was decided correctly. The Sixth Circuit’s decision is difficult to square with this Circuit’s decision in *City of Dallas v. FCC*, 165 F.3d 341, 347 (5th Cir. 1999). There was no “clear statement” giving the FCC control of local franchising processes.

<sup>74</sup> The statutory language at issue in *Alliance* was added in 1992. Pub. L. 102-385, 106 Stat. 1460 (1992). As such, unlike the language in Section 332(c)(7), it also is not subject to Congress’s instruction that the language can only be “construed” to preempt expressly. Pub. L. 104-104 (1996), § 601(c).

The FCC is left to contend that Congress only barred the agency from imposing “additional” or “new” limitations on State and local governments, not from adopting additional or new rules regarding the existing limitations in the Act.<sup>75</sup> The FCC cites nothing in the Act to support only a partial limitation on its pre-existing authority, and the basis for its claim is unclear.<sup>76</sup> To be sure, in the general rulemaking sections of the Act, Congress grants the FCC the power “to carry out” the existing “provisions of the Act”;<sup>77</sup> and, in one case, to exercise certain ancillary authority not “inconsistent” with the Act.<sup>78</sup> But here the point is academic: Section 332(c)(7)(A) provides that neither form of FCC jurisdiction — each arising *outside* Section 332(c)(7) — may “limit or affect” State or local authority over decisions regarding the

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<sup>75</sup> Order ¶ 25.

<sup>76</sup> Without further explanation, the FCC asserts that the legislative history supports this view. Order ¶ 25. But, even if that were true (and it is not, see *supra*), the language of Section 332(c)(7) itself does not support any such distinction between the authority of the FCC to use its general rulemaking powers under other provisions of the Act to address “new,” as opposed to “existing” terms. Moreover, given the court decisions defining “reasonableness,” to suggest the “shot clock” and “incompleteness” rules are not “new” limitations is strange to say the least.

<sup>77</sup> 47 U.S.C. § 201(b); 47 U.S.C. § 303(r).

<sup>78</sup> 47 U.S.C. § 154(i). The D.C. Circuit recently ruled that the FCC’s “ancillary” power is significantly limited by, and must be linked to, the terms of Titles II, III, and VI of the Communications Act. *Comcast Corp. v. FCC*, 600 F.3d 642, 655 (D.C. Cir. 2010).

placement of personal wireless service facilities.<sup>79</sup> Presumably, the FCC means that it is only regulating in areas where Congress has established certain standards. But that local actions must meet certain standards does not mean that the FCC may define those standards. If it means nothing else, Section 332(c)(7)(a) surely means that the FCC cannot import authority to supervise the zoning process from elsewhere in the Act.

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The FCC's new claim of authority over State and local siting processes under Section 332(c)(7) is far from benign. As suggested above, under the FCC's approach, if a local government cannot satisfy local public hearing requirements and meet the FCC shot clock, it must either eliminate the public hearing requirement, or defend it in court. It is *presumptively* an unlawful requirement. Likewise, if FAA approval is required before a zoning application for a tower can be approved, and the FAA delays, the locality's failure to act within the new "shot clocks" is nonetheless *presumptively* unlawful. This creates a strange zoning environment where decisions are driven not by the

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

local processes, but by federal standards that the FCC itself must concede may have no applicability in many local situations.

In many cases, Congress seeks to have a federal agency supply uniformity to the statutes it enacts. But Congress is not bound to apply this federal administrative model to every area of federal law — for it is one of Congress’s own creation and control.<sup>80</sup> Congress remains free to experiment with other models, including those that encourage case-by-case resolution of disputes and that discourage one-size-fits-all federal rules, by withholding authority from an agency over certain subject matter. In *AT&T*, Justice Scalia found it “surpassing strange” that Congress would have intended a “federal program” to be “administered by 50 independent state agencies.” 525 U.S. at 378 n.6. But, unlike the statutes at issue in *AT&T*, Section 332(c)(7) was not intended to create a “federal program,” but to establish standards that would be applied by the courts based on local circumstances and processes, not arbitrary

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<sup>80</sup> T.W. Merrill, *Chevron's Domain*, 89 Geo. L.J. 833, 872 (2001) (“[I]f *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply. In delineating the types of delegations of agency authority that trigger *Chevron* deference, it is therefore important to determine whether a plausible case can be made that Congress would want such a delegation to mean that agencies enjoy primary interpretational authority.”).

federal shot clocks. Congress crafted Section 332(c)(7) as the antithesis to “cookie cutter” federal rules. This choice — Congress’s “experiment in federalism” — must be honored.<sup>81</sup>

### **III. THE ORDER IS INCONSISTENT WITH BASIC NOTIONS OF DUE PROCESS AND ADMINISTRATIVE PROCEDURE.**

#### **A. The Order Is Inconsistent with Basic Due Process Protections in the FCC’s Own Rules.**

The FCC issued the Order under its regulation implementing the adjudication section of the Administrative Procedure Act.<sup>82</sup> Thus, quite literally, the FCC claims to be adjudicating a dispute arising under Section 332(c)(7). But the FCC’s so-called adjudication here defies fundamental notions of due process, including the basic notice requirements under the FCC’s own rules.

The adjudication model the FCC has applied here differs markedly from that of an Article III court. The “dispute” before the FCC was not a specific case or controversy. Instead, the matter was commenced after an industry trade association complained about State and local siting processes, and justified its request that the FCC

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<sup>81</sup> *Town of Amherst*, 173 F.3d at 17.

<sup>82</sup> Order at ¶ 18 n.52 (citing 47 C.F.R. § 1.2); 5 U.S.C. § 554.

preempt state and local governments based on specific, anecdotal complaints about — as the FCC puts it — “unidentified jurisdictions.”<sup>83</sup>

This adjudication model undermines Congress’s case-by-case adjudication design of Section 332(c)(7). As importantly, it also appears to defy the FCC’s own rules.<sup>84</sup> The rules provide that:

In the case of petitions for declaratory ruling that seek Commission preemption of state or local regulatory authority and petitions for relief under 47 U.S.C. § 332(c)(7)(B)(v), the petitioner must serve the original petition on any state or local government, the actions of which are specifically cited as a basis for requesting preemption. . . . Such pleadings that are not served will be dismissed without consideration as a defective pleading and treated as a violation of the ex parte rules unless the Commission determines that the matter should be entertained by making it part of the record under 1.1212(d) and the parties are so informed.

47 C.F.R. § 1.1206(a), note 1. Here, the FCC recognized that CTIA was citing specific actions of local governments, but did not serve its petition on the State and local governments that had allegedly delayed siting decisions: The Commission further recognized the effect of this

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<sup>83</sup> Order ¶ 68.

<sup>84</sup> The FCC appears to interpret the rule to apply to any request for preemption of local regulatory authority. Order ¶ 68. While the FCC may argue that it did not actually preempt any rules – it merely adopted presumptions, CTIA’s petition sought a broadly preemptive rule that would deem an application granted as a matter of federal law if not acted upon within a specific period of time, regardless of local requirements. CTIA Petition at 27.

omission: “We recognize . . . that in the absence of identification it has not been possible for some local governments to respond to certain factual statements in the Petition, either directly or through their associations.”<sup>85</sup> Despite this, the FCC did not “dismiss” the pleading, as opponents immediately requested.<sup>86</sup> Instead, in a highly-strained reading, the FCC found that a petition need not be served if it only “cites examples of the practices of unidentified jurisdictions.”<sup>87</sup> Consequently, the FCC simply claimed that it would “take this [anonymous citing] into account in considering the weight” it gives to such assertions. The FCC failed to explain how it did so, and granting those comments any weight either violated the FCC’s own rules or it violated due process.

This Circuit has described the "minimal" requirements of due process as "notice of the reasons for a proposed deprivation and some opportunity to respond to the substance of the allegations before a final deprivation occurs." *Williams v. Texas Tech. Univ. Health Sciences*

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<sup>85</sup> Order ¶ 68.

<sup>86</sup> *Opposition of Coalition for Local Zoning Authority*, WT Docket No. 08-165 (Sept. 29, 2008).

<sup>87</sup> *Id.*

*Ctr.*, 6 F.3d 290, 293 (5th Cir. 1993). To allow the FCC to rely (in some undefined way) upon factual determinations based upon allegations to which no one can respond violates this fundamental tenet. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 56, (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (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”). Notably, where communities were identified, local governments were able to show that delays were due to applicants, not to flaws in the zoning process.<sup>88</sup>

The FCC’s other attempt to justify its decision to rely upon anonymous allegations is perhaps more troubling. The FCC contends that these unnamed local governments do not need the opportunity to appear before the FCC *at all*. This is so, the FCC claims, because when the Order is used against these local governments, they will have the opportunity *to litigate* in defense of their local processes. Order ¶ 34 n.111 (noting the Order provides unserved local governments with

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<sup>88</sup> Reply Comments of City of Los Angeles et. al (filed October 14, 2008) at 7-11.

“opportunity for rebuttal” by allowing “the reasonableness of any particular failure to act to be litigated.”).

This misses the point. As we have shown, the Order transforms the siting process in fundamental ways based to some unknown degree on these anonymous allegations about local governments. Unless the FCC is endorsing a collateral attack on its rules – which we presume it is not – in future court proceedings, a State or local government will be unable to address the claim that the rules lacked a sound rational and factual basis, and therefore should not have been adopted. To the extent that the FCC adopted rules based on findings with respect to zoning issues that were supported by anecdotal claims to which no one had a fair opportunity to respond, the rules are defective.

#### **B. The Order Adopts New Rules Outside the APA.**

The FCC claims merely to be interpreting existing limitations rather than adopting new ones.<sup>89</sup> For the reasons discussed at II.E above, the Order’s new rules run far beyond the limitations Congress adopted in Section 332(c)(7)(B). The new rules are “substantive” changes requiring “fidelity to the rulemaking requirements of the

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<sup>89</sup> Order ¶ 25.

APA.”<sup>90</sup> Among these requirements is the duty to “give interested persons an opportunity to participate in the rule making.”<sup>91</sup> But, here, even though it was adopting new nationwide standards, not resolving a dispute between particular parties, the FCC did not release a Notice of Proposed Rulemaking or otherwise comply with the APA’s rulemaking requirements. For the reasons discussed at Section III.A, the opportunity the FCC provided was not meaningful or equitable for many local governments.

#### **IV. THE NEW RULES ARE INCONSISTENT WITH SECTION 332(c)(7) AND CONSTITUTE ARBITRARY AND CAPRICIOUS AGENCY ACTION.**

Even if Congress had delegated the FCC the authority to issue rules interpreting “reasonable period of time . . . taking into account the nature and scope of such request” (and, as shown, it clearly has not),

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<sup>90</sup> *United States Telecom Association v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005) citing *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100 (1995) (emphases added) (quotation marks omitted); *see id.* at 101. Although these verbal formulations vary somewhat, their underlying principle is the same: fidelity to the rulemaking requirements of the APA bars courts from permitting agencies to avoid those requirements by calling a substantive regulatory change an interpretative rule. *See Appalachian Power Co.*, 208 F.3d at 1024 (“An agency may not escape ... notice and comment requirements ... by labeling a major substantive legal addition to a rule a mere interpretation.”); *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir.1997) (holding that the FCC “may not bypass [the APA’s notice-and-comment] procedure by rewriting its rules under the rubric of ‘interpretation’”).

<sup>91</sup> 5 U.S.C. § 553(c).

the FCC's effort to interpret the statutory limitation here would be unlawful. Because the FCC adopts a one-size-fits-all national rule when Congress clearly intended that State and local actions would be judged based on local circumstances, the FCC's new rules are inconsistent with Section 332(c)(7) and constitute arbitrary and capricious agency action.

As explained above, the FCC's new rules flatly defy Congress's intention under Section 332(c)(7) itself. Even if there is "some uncertainty" in a statute, the FCC cannot rely on *Chevron* to adopt a reading that exceeds the statute's "outer limits." *Cuomo v. Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710, 2715 (2009). It did so here.

Moreover, the FCC's rules are arbitrary and capricious in their essence. As the Supreme Court has explained, "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Under the "reasonable period of time" limitation, Congress intended the fact-finder (a court) to consider the "generally applicable time frames for zoning decision[s]" in the local community. H.R. Conf. Rep. No. 104-458, at 208

(1996) (noting that it “is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their request to anything but the generally applicable time frames for zoning decision[s].”). As the Conference Report further explains, “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.” *Id.*

But the FCC did not assess the “generally applicable time frames” for zoning decisions in any State or local community, or take into account the “nature and scope” of the request in light of local zoning processes. Instead, the FCC first decided that rules were necessary in Order to promote other purposes of the Act, including broadband deployment.<sup>92</sup> It then looked to the record to determine the *average* times commenting communities took to process wireless siting facilities, and from this derived a national “one-size-fits all” shot clock.<sup>93</sup> The FCC admits that its timeframes were only designed to accommodate

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<sup>92</sup> Order ¶ 35.

<sup>93</sup> Order ¶¶ 43-47.

reasonable processes “in most instances.”<sup>94</sup> Thus, the FCC did not consider the relevant factors under the statute either in its “public interest” justification for the rules, or in fashioning the rules themselves. This defect cannot be remedied after the fact. When the shot clocks expire, if the parties have not reached an agreement, a State or local government has *per se* committed a “failure to act” and is presumed to have not acted within a “reasonable period of time,” notwithstanding its generally applicable time frames for zoning decisions.

The North Carolina case illustrates just how divorced this Order is from Congress’s direction. North Carolina passed a law setting time limits for action on personal wireless facilities which included a streamlined process for processing applications for placement of personal wireless facilities on existing towers (“collocation”). N.C.G.S. §§ 153A-349.50 *et. seq.* It defines what facilities are eligible for the streamlines process, adopting a standard different than that adopted by the FCC in connection with its 90-day collocation rule. N.C.G.S. § 153A-349.53. As described in the Statement of the Facts, the North Carolina State Legislature also

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<sup>94</sup> Order ¶ 44.

established time frames for action on an application different from those adopted by the FCC. The FCC did not find that the North Carolina law was actually creating delays, or that it was unreasonable under the circumstances in North Carolina. However, it essentially nullified the North Carolina law – altering the normal state-adopted process – because three states on the West Coast had adopted different time periods. It is hard to square that override of a sovereign state's police power with Section 332(c)(7), which states at the outset that its purpose is the preservation of local zoning authority.

## CONCLUSION

In Section 332(c)(7), Congress made a deliberate choice about the roles to be played by various actors in our federal system, including the FCC and State and local governments:

Some may disagree with Congress's decision to leave so much authority in the hands of state and local governments to affect the placement of the physical infrastructure of an important part of the nation's evolving telecommunications network. But that is what it did when it passed the Telecommunications Act of 1996, and it is not our job to second-guess that political decision.

*Aegerter v. City of Delafield*, 174 F.3d 886, 892 (7th Cir. 1999). Lacking delegated rulemaking authority, the FCC also cannot second-guess

Congress's decision by transforming the State and local siting process into a process defined by "one-size-fits-all" federal rules. The FCC, a creature of statute, must honor Congress's express direction: the FCC cannot use Sections 1, 4(i), 201(b), or 303(r) of the Act (or any other provision outside of Section 332(c)(7)) to adopt federal rules that "limit" or "affect" State and local authority over the placement of personal wireless service facilities. 47 U.S.C. § 332(c)(7)(A). The Court should grant the petition and reverse the Order.

Respectfully submitted,

/s/ Joseph Van Eaton

Joseph Van Eaton

James R. Hobson

Matthew K. Schettenhelm

MILLER & VAN EATON, PLLC

1155 Connecticut Avenue, N.W.

Suite 1000

Washington, DC 20036

Phone: (202) 785-0600

Fax: (202) 785-1234

*Counsel for Petitioner and Intervenors*

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## STATUTORY ADDENDUM

### Section 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. § 332(c)(7)

#### (7) Preservation of local zoning authority

##### (A) General authority

Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

##### (B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

#### (C) Definitions

For purposes of this paragraph--

(i) the term “personal wireless services” means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term “personal wireless service facilities” means facilities for the provision of personal wireless services; and

(iii) the term “unlicensed wireless service” means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in [section 303\(v\)](#) of this title).

### **Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. § 151**

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on

the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the “Federal Communications Commission”, which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

**Section 4(i) of the Communications Act of 1934, as amended,  
47 U.S.C. § 154(i)**

(i) Duties and powers

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

**Section 201(b) of the Communications Act of 1934, as amended,  
47 U.S.C. § 201(b)**

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for

the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this Act or in any other provision of law shall prevent a common carrier subject to this Act from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.

**Section 303(r) of the Communications Act of 1934, as amended,  
47 U.S.C. § 303(r)**

**(r)** Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

H.R. CONF. REP. 104-458, H.R. Conf. Rep. No. 458, 104TH Cong., 2ND Sess., 1996 WL 46795, 1996 U.S.C.C.A.N. 10 (Leg.Hist.)  
P.L. 104-104, TELECOMMUNICATIONS ACT OF 1996

HOUSE CONFERENCE REPORT NO. 104-458  
January 31, 1996

Mr. Bliley, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 652]

SECTION 704-FACILITIES SITING; RADIO FREQUENCY  
EMISSION STANDARDS

...

Senate bill

No provision.

House amendment

Section 108 of the House amendment required the Commission to issue regulations within 180 days of enactment for siting of \*\*\*222 CMS. A negotiated rulemaking committee comprised of State and local governments, public safety agencies and the affected industries were to have attempted to develop a uniform policy to propose to the Commission for the siting of wireless tower sites.

The House amendment also required the Commission to complete its pending Radio Frequency (RF) emission exposure standards within 180 days of enactment. The siting of facilities could not be denied on the basis of RF emission levels for facilities that were in compliance with the Commission standard.

The House amendment also required that to the greatest extent possible the Federal government make available to use of Federal property, rights-of-way, easements and any other physical instruments in the siting of wireless telecommunications facilities.

## Conference agreement

\*\*185 The conference agreement creates a new section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over \*208 zoning and land use matters except in the limited circumstances set forth in the conference agreement. The conference agreement also provides a mechanism for judicial relief from zoning decisions that fail to comply with the provisions of this section. It is the intent of the conferees that other than under section 332(c)(7)(B)(iv) of the Communications Act of 1934 as amended by this Act and section 704 of the Telecommunications Act of 1996 the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities should be terminated.

When utilizing the term “functionally equivalent services” the conferees are referring only to personal wireless services as defined in this section that directly compete against one another. The intent of the conferees is to ensure that a State or local government does not in making a decision regarding the placement, construction and modification of facilities of personal wireless services described in this section unreasonably favor one competitor over another. The conferees also intend that the phrase “unreasonably discriminate among providers of functionally equivalent services” will provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services. For example, the conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district.

Actions taken by State or local governments shall not prohibit or have the effect of prohibiting the placement, construction or modification of personal wireless services. It is the intent of this section that bans or policies that have the effect of banning personal wireless services or

facilities not be allowed and that decisions be made on a case-by-case basis.

\*\*\*223 Under subsection (c)(7)(B)(ii), decisions are to be rendered in a reasonable period of time, taking into account the nature and scope of each request. 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. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision.

The phrase “substantial evidence contained in a written record” is the traditional standard used for judicial review of agency actions.

\*\*186 The conferees intend section 332(c)(7)(B)(iv) to prevent a State or local government or its instrumentalities from basing the regulation of the placement, construction or modification of CMS facilities directly or indirectly on the environmental effects of radio frequency emissions if those facilities comply with the Commission's regulations adopted pursuant to section 704(b) concerning such emissions.

\*209 The limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations and are not intended to limit or affect the Commission's general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities.

The conferees intend that the court to which a party appeals a decision under section 332(c)(7)(B)(v) may be the Federal district court in which the facilities are located or a State court of competent jurisdiction, at the option of the party making the appeal, and that the courts act expeditiously in deciding such cases. The term “final action” of that new subparagraph means final administrative action at the State or local government level so that a party can commence action under the subparagraph rather than waiting for the exhaustion of any independent State court remedy otherwise required.

With respect to the availability of Federal property for the use of wireless telecommunications infrastructure sites under section 704(c), the conferees generally adopt the House provisions, but substitute the President or his designee for the Commission.

It should be noted that the provisions relating to telecommunications facilities are not limited to commercial mobile radio licensees, but also will include other Commission licensed wireless common carriers such as point to point microwave in the extremely high frequency portion of the electromagnetic spectrum which rely on line of sight for transmitting communication services.

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 13,918 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in New Century Schoolbook, 14-point font (12-point for footnotes).

November 2, 2010

/s/ Joseph Van Eaton  
Joseph Van Eaton

Attorney for Petitioner and Intervenors

## CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2010, I electronically filed the foregoing Brief of Petitioner and Intervenors with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I certify further that I have directed that copies of the foregoing document be e-mailed to the following counsel, who have consented to electronic service except where otherwise noted.

James Michael Carr  
Daniel Armstrong  
Austin Schlick  
Federal Communications  
Commission  
445 12th Street S.W.  
Washington, DC 20554

Nancy Garrison  
Catherine O'Sullivan  
U.S. Department of Justice  
950 Pennsylvania Ave. N.W.  
Suite 3224  
Washington, DC 20530

Michael Kellogg  
Gergory Rapawy  
Kellogg, Huber, Hansen, Todd,  
Evans & Figel  
1615 M Street N.W.  
Suite 400  
Washington, DC 20036

Helgard Walker  
Brendan Carr  
Thomas McCarthy  
Wiley Rein  
1776 K Street N.W.  
Washington, DC 20006

Tillman Lowry Lay  
Spiegel & McDiarmid  
1333 New Hampshire Ave. N.W.  
Washington DC 20036

Whitney North Seymour  
EMR Policy Institute  
425 Lexington Avenue  
Suite 1721  
New York NY 10017  
(by first-class mail)

William Aaron  
Maria Nguyen  
Goins Aaron  
201 St. Charles Avenue  
Suite 3800  
New Orleans LA 70170

/s/ Matthew K. Schettenhelm  
Matthew K. Schettenhelm

November 2, 2010  
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