

AGENDA ITEM 1

SUPPORTING DOCUMENTATION FOLLOWS WITH: 57 PAGES

1. Discussion/Decision regarding Consideration of Verizon's request to make upgrades to existing cellular facility on Trinidad Head.

LAW OFFICES OF
PERLMAN & STUNICH LLP

RANDY S. PERLMAN
ANDREW J. STUNICH

1036 FIFTH STREET, SUITE E
EUREKA, CALIFORNIA 95501

Telephone: (707) 442-2927
Fax: (707) 443-2747
E-mail address: ajs@perlmanstunichlaw.com

MAILING ADDRESS:
P. O. Box 1248
Eureka, CA 95502

June 28, 2012

Trinidad City Council, Mayor and City Manager
409 Trinity Street
Trinidad, California 95570

* RE: DISCUSSION/ACTION AGENDA ITEM; STAFF REPORT FROM CITY ATTORNEY

* ITEM: MODIFICATIONS TO EXISTING VERIZON WIRELESS FACILITY ON
TRINIDAD HEAD

* BACKGROUND: Verizon has requested permission under its cell phone tower Leasehold with the City of Trinidad to make certain upgrades to its cell phone towers. Verizon seeks to make some minor changes inside the existing structure, replace three existing antennas with three new antennas of the same height and dimensions at the same locations, and replace a four foot dish with a three foot dish. I spoke with Verizon's attorney, Mr. Heard, on June 25, 2012. He advised that pursuant to the City Manager's request, a detailed work plan is being prepared to show exactly what will be done. His subsequent letter dated June 28, 2012 sets forth the exact details on page 2 (his letter is attached hereto). As can be seen, relatively minor modifications are proposed that will not make substantial changes to the Leasehold.

Note that when I use the term "substantial," I do so in the legal sense with the full understanding that many people view the matter emotionally or politically and on that basis anything done to the Leasehold is substantial. However, as an attorney, my focus must be on the law and, regardless as to my personal views, I must give sound, objective legal advice that focuses on what the law is and not what I believe it should be. Under an objective legal analysis, the proposed changes are far from substantial.

* HISTORICAL BACKGROUND OF THE LEASE: The original Lease was approved by the City Council on April 17, 1997, and has a term of twenty years, to expire in 2017, but there is an option to extend the Lease for five years. That option to extend does not require the City of Trinidad's consent. If the City wanted to challenge the five-year option, it would have to establish that the clause is ambiguous and means with the City of Trinidad's consent, but that would be an unusual interpretation and some documentary evidence would need to be found establishing that was the intent at the time the agreement was signed. The Lease is for

approximately 2,400 square feet of ground on Trinidad Head, where Verizon's predecessors in interest have installed and operate cellular communication equipment. Rent for the Ground Lease was originally set at \$250.00 per month. The Ground Lease was amended once, effective January 1, 2001, to approve specific sub-leases. The sublessees are (1) Ubiquitel Leasing Company, LCC (a Delaware corp.), and (2) Edge Wireless, LCC (an OR corp.). The Ground Lease amendment contains a provision that 30% of any sublease fees from these sublessees to the lessee will go to the City; this was scheduled to be \$780.00 per month beginning February 1, 2002, and was set to rise at a rate of 4% each year thereafter. I do not have a copy of the amendment, but observed it referred to in prior reports by past City Attorneys.

* ASSIGNMENT/TRANSFER ISSUES: In July and August of 2006, former City Attorney, Jeff Guttero, had communications with an attorney representing Cellco Partnership, which does business as ("dba") Verizon Wireless. These communications centered around the City's then perception that Cal-One had breached the Ground Lease in agreeing to an assignment of it to a third party without the City's consent. The response was that the transaction was not an assignment, but rather a transfer of ownership interests, and thus did not require the City's consent. Case law was provided to support the argument. I am informed the matter was dropped by the City at this point. I have reviewed the applicable Lease provisions and agree that there was nothing the City of Trinidad could do about the transfer. Besides, an objection would have to have been made based upon reasonable grounds and I believe the City of Trinidad would have been hard-pressed to find reasonable grounds to avoid an assignment. The alleged breaches of contract raised at the last City Council meeting relate to assignment without written consent. But read clause 10.01 of the Lease. We do not have enough information to know if the clause was violated because some transfers are allowed with no consent as Mr. Guttero observed when the matter was last considered. But even if we assume for sake of argument the clause was violated, California law holds that if a restriction on transfer of the tenant's (Lessee's) interest in a lease requires the landlord's consent for transfer but provides no standard for giving or withholding consent (this is the case in our Verizon contract), the restriction on transfer shall be construed to include an implied standard that the landlord's consent may not be unreasonably withheld.

Whether the landlord's consent has been unreasonably withheld in a particular case is a question of fact on which the tenant has the burden of proof. The tenant may satisfy the burden of proof by showing that, in response to the tenant's written request for a statement of reasons for withholding consent, the landlord has failed, within a reasonable time, to state in writing a reasonable objection to the transfer.

Those potential breaches were not the type of breaches that are "material" because consent could not have been lawfully withheld. Hence, the only relief available would have been the actual damages related to the breaches and there was no damage. Besides, the statute of limitations has run for the first alleged breach (four years for breach of a written contract). Keep in mind that in

California pursuant to Civil Code § 711: "Conditions restraining alienation, when repugnant to the interest created, are void."

In other words, California highly favors the right to assign interests such as the subject Lease contract where there is no harm to the other party. The second incident may not be an unlawful assignment. It appears the Verizon legal entity has been maintained, but even if there was an assignment it was not material given that consent for the assignment could not have been withheld. The Restatement of Contracts favors an interpretation that holds covenants to be independent. (Rest.2d. Contracts §227(1)). California law is in accord. Where covenants are independent and the obligations so unrelated, failure to perform one does not excuse performance of the other.

Finally, by accepting rent and not doing anything since the alleged breach of contract and appearing to have ratified the assignment, any rights to void the breaches, if in fact a breach occurred, was waived.

It follows that the claims made at the last Council meeting by members of the public that there are breaches of contract that give the City of Trinidad a legal way to avoid new requests from Verizon were inaccurate. Only material breaches of contract excuse further performance and breaches of contract that do no real harm are never deemed material.

* PROPOSED ACTION: I strongly recommend that the City of Trinidad give immediate written consent to Verizon for the proposed changes. I further recommend that any necessary permits be issued as soon as possible. Note that such permits must be issued as quickly as possible and ninety days is the maximum length of time to give prior final approval, but even 90 days can be held unreasonable if that much time is not needed. Here, we have had a considerable amount of time to evaluate the matter before a permit request has even been submitted and we must, therefore, act quickly as new laws mandate a fast response. The rest of this document will explain the basis for my recommendations.

**The Coastal Commission's Position on Cell Towers on Trinidad
Head Has Probably Changed Due To Changes In The Applicable Law**

The coastal development permit for the 1997 Lease (and three subsequent "local permit actions" concerning it) were all approved by the City of Trinidad without appeal to the Commission; hence, there was no review of the issues by the Commission up to that time. That changed in October, 2006 when U.S. Cellular applied for a Coastal Development and Conditional Use Permit to install cellular antennae on Trinidad Head.

The Commission staff report on the appeal of U.S. Cellular's permit is informative about the inconsistency of cell towers with various provisions of the City's certified Local Coastal Program, Zoning Ordinance, and Land use Plan generally. The report takes particular notice of the City's 1997 (and subsequent) coastal development permitting activity regarding the cell tower and antennae.

The staff report for the U.S. Cellular hearing for February 16, 2007, states that it was not until this 2006 appeal of U.S. Cellular's application:

that staff fully analyzed the use limitations of the site and determined that the [Cal-One] cellular transmission facilities did not conform with the [City's] Open Space zoning district's requirement [...]. Notwithstanding the lack of factual evidence to support [the City's] approval [of Cal-One's requests in 1997 and subsequently] as conditionally permitted accessory structures [i.e., the antennae], the four preceding development permits are now legally vested.

Accordingly, it may well be that the City of Trinidad may have erred in approving each of the four coastal development permits now held by Verizon as the uses allowed by the City were inconsistent with various policies and laws at the local, state and federal levels at the time. However, the four preceding development permits are now legally vested, meaning that the permit holder cannot be denied the uses allowed in the permits despite the City's potential past error in approving them.

Since the issue last was presented to the Coastal Commission, the applicable laws have changed. Given that the laws have changed, the Coastal Commission may have no choice but to approve Verizon's pending requests if the matter reaches the Commission. President Obama signed HR 3630, the Middle Class Tax Relief and Job Creation Act of 2012, into law. In addition to extending unemployment benefits and tax cuts, the law amended the Telecommunications Act of 1996.

The applicable language of the new law is contained in Section 6409:

(a) FACILITY MODIFICATIONS.

(1) IN GENERAL. Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104-104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

(2) ELIGIBLE FACILITIES REQUEST. For purposes of this subsection, the term “eligible facilities request” means any request for modification of an existing wireless tower or base station that involves

- (A) collocation of new transmission equipment;
- (B) removal of transmission equipment; or
- (C) replacement of transmission equipment.

The new law does not provide any guidance as to what constitutes a “modification” or a substantial change so that is a factual issue, but I would be hard-pressed to argue in court with any credibility that what is being requested here is anything other than within the ambit of the foregoing law.

Another fact that makes any desire to deny Verizon’s request untenable is that the removal or replacement of transmission equipment has often been administratively approved by local siting authorities where the number and size of antennas have not substantially changed. Hence, a denial here would be out of the ordinary.

I believe the foregoing new law applies to both the City of Trinidad giving consent under the Lease and allowing the permits to issue ***because federal law supercedes the local rules and guidelines***. I could be wrong about the permits, but I suspect I am correct. There is no way to know for sure until a case with this same factual scenario is decided on appeal. The new law seems clear and unambiguous to me and I would be surprised if any loophole could be found. If there is some basis by which a permit might be denied, that should be left to the permit process by way of appeal to the Commission as to do otherwise risks expensive litigation.

**Denial of Verizon’s Request Would Result in Expensive
Litigation That The City of Trinidad Would Probably Lose**

Where a contract confers on one party a discretionary power affecting rights of the other party as is the case here wherein Verizon needs our written consent for the proposed changes, a legal duty is imposed to exercise that discretion in good faith and in accordance with fair dealing. Good faith relates to the nature of the contract. Maybe the contract should not have been made, but it was made and to withhold consent just because we think a past mistake was made by entering into the contract would not be commercially reasonable and the City will have breached the implied covenant of good faith and fair dealing.

The safest way to handle this matter is to give conditioned written approval dependent upon compliance with lease clause 5.05(d). If permits are denied based upon some matter unforeseeable at this time, that is not a lessor/lessee issue wherein a breach of contract is

involved as long as the matter is treated as a permit issue and not a written consent issue. That way the issue can be decided in a more favorable forum wherein we DO NOT risk having to pay Verizon's legal fees.

Moreover, we cannot demand higher rent as a condition to approving the requested changes as failure to agree to a higher Lease payment would not constitute commercially reasonable grounds under the circumstances before us.

CONCLUSION

The cell tower, antennae and supporting equipment, etc., are legally permitted and the Lease with the City runs until 2017 and probably until 2022 if the option to extend is exercised. It appears there is no legal basis to deny the requested upgrades and I strongly advise against doing so as I believe it would result in expensive litigation that could not be won. I also recommend a quick granting of the requested permit as it appears the new law would apply to that issue as well.

* Attachments: FCC Declaratory Ruling and Letter from Verizon's Counsel

Cordially,



Andrew Stunich
City Attorney

MACKENZIE & ALBRITTON LLP

220 SANSOME STREET, 14TH FLOOR
SAN FRANCISCO, CALIFORNIA 94104

TELEPHONE 415/288-4000

FACSIMILE 415/288-4010

SENDER'S EMAIL: JHEARD@MALLP.COM

June 28, 2012

Via Email Only

Karen Suiker
City Manager
City of Trinidad
409 Trinity Street
PO Box 390
Trinidad, CA 95570

Andrew Stunich, Esq.
City Attorney
City of Trinidad
c/o Perlman & Stunich LLP
1036 5th Street, Suite E
Eureka, California 95501

Re: *Modifications to Existing Verizon Wireless Facility on Trinidad Head*

Dear Ms. Suiker and Mr. Stunich:

We are litigation and land use counsel for Verizon Wireless. I am writing to respond to your respective email correspondence with our client's representative Nathan Giguere. First, in order to eliminate any possible confusion, I would like to fully describe the nature of the minor modifications that Verizon Wireless intends to make to its telecommunications facility on Trinidad Head (the "Existing Facility"). I will then explain why the City may not deny Verizon Wireless the right to make these modifications, either as landlord or permitting authority.

I. The Proposed Modifications Will Bring Advanced Wireless Services to Trinidad With No Increase in the Facility's Size Or Visual Impact.

Before describing the work in question, it is important to understand its purpose. Verizon Wireless needs to upgrade the Existing Facility in order to deploy additional radio spectrum purchased from the federal government at considerable cost. From a local perspective, the upgrades are necessary in order for Verizon Wireless to provide Trinidad with enhanced, fourth-generation wireless broadband service known as Long-Term Evolution or 4G LTE. These advanced services are already being provided in other communities throughout California and the United States.

While the modifications are very significant to Verizon Wireless and those who depend on its service, they are utterly *insignificant* from any legitimate land use perspective. This is because they will not increase the size or visual impact of the Existing Facility in the least. The modifications include the following:

Karen Suiker
Andrew Stunich, Esq.
City of Trinidad
June 28, 2012
Page 2 of 6

- Replace three existing panel antennas with three antennas of the same dimensions at the same height and location;
- Replace the existing 4-foot diameter microwave dish with a 3-foot diameter microwave dish at the same height and location (or if preferred, Verizon Wireless can replace the existing dish with one of nearly identical size);
- Equipment upgrades inside the existing building, including replacing one existing cabinet, installing one additional cabinet, and installing six small diplexers¹ inside the building.

In previous descriptions of the modifications, Verizon Wireless has focused on aspects of the work that will arguably require some type of permit or approval under the lease. That is why the changes inside the building were not previously mentioned, as neither the lease nor the existing permits restricted the type or amount of equipment inside the building (in addition, the diplexers are a recent addition as discussed below). At this point, given the questions that have been raised about the scope of the work, we wanted to take this opportunity to describe all aspects of the project, even those which do not require the City's approval.

Please note that Verizon Wireless no longer proposes to install additional coax runs. By adding the diplexers inside the equipment building, Verizon Wireless was able to eliminate the six new cable runs and thus avoid routing additional coax lines up the existing pole. In addition, the work will not entail any tree trimming or removal of vegetation, and there will be no grading or soil disturbance, no air or water pollution, no increase in noise – in short, no environmental or land use impacts of any kind.

II. The City May Not Withhold Consent Under the Lease.

As a threshold matter, it is doubtful whether any consent is required under the lease for the proposed modifications. Pursuant to Section 5.05(a) of the lease, no consent is required for repair and replacement of equipment that is consistent with prior approvals by the City. In this case, as described above, Verizon Wireless proposes to replace the existing antennas with the same number of new antennas, and in each case the new antennas are the same size or smaller than the existing antennas. In short, the proposed antenna swap is consistent with the City's prior consent to the existing improvements. At a minimum, the equipment changes inside the building certainly do not require consent because the lease simply approved a building of a certain size, without restricting the equipment that may be placed within it.

In any event, even assuming that some portion of the modifications arguably require consent, the lease provides that it may not be unreasonably withheld *or delayed* (Sections 5.06(e) and 19.11). Given the truly insignificant nature of the proposed

¹ A diplexer is a small device that makes it possible to transmit two signals on a single cable.

Karen Suiker
Andrew Stunich, Esq.
City of Trinidad
June 28, 2012
Page 3 of 6

modifications, there is no legitimate basis for the City to withhold any required consent. We note in this regard that Verizon Wireless will be entitled to recover its attorneys' fees if compelled to enforce its rights under the lease (Section 9.10).

III. The City Has No Discretionary Authority and Must Grant any Required Permits.

A. The Code Does Not Require Discretionary Permits.

We understand from your correspondence with Mr. Giguiere that the City contends the proposed modifications will require a conditional use permit ("CUP"), design review, and a coastal development permit ("CDP"). Based on our reading of the code, we do not believe the proposed work requires any discretionary review because it does not involve any structural changes or change in the visual profile of the Existing Facility. While the code requires a CUP for any "accessory structure" in the open space zone (Section 17.16.030(E)), the City has already reviewed and approved all of the structures at the site – the existing pole and equipment building – in the existing CUP. Because Verizon Wireless does not propose any change to those structures, we do not see any basis for the City to require a CUP.

In addition, design review does not apply to "remodeling that does not affect the external profile or appearance of an existing structure," or to exterior maintenance of existing structures. (Section 17.60.030.) The proposed work is the type of routine maintenance performed throughout the Verizon Wireless network as it becomes necessary to replace obsolete equipment in order to provide the latest wireless services. As discussed above, the work will either improve or have no effect on the appearance or visual profile of the Existing Facility.² Consequently, we do not see any basis to require design review.

For the same reason, the modifications are exempt from a CDP. Under the code, a CDP is not required for minor "Remodeling, which does not affect the external profile or appearance of the structure" (Section 17.72.070(D)(2)).

We understand from the City's correspondence with the Coastal Commission that planning staff believe a CDP may be required because a separate exemption (Section 17.72.070(D)(3)) for replacement of "component parts" is limited to \$2,000 in total cost, and excludes electrical or mechanical installations and permanent fixtures. In the first place, whether the work is or is not exempt under this provision is immaterial. That is

² The only possible change would be to reduce the visual profile. As discussed above, while Verizon Wireless proposes to *improve* the visual profile by replacing the 4-foot microwave dish with a smaller, 3-foot dish, it is possible to use a new dish of the same 4-foot diameter if the City contends that using a smaller dish will trigger design review or other permit requirements.

Karen Suiker
Andrew Stunich, Esq.
City of Trinidad
June 28, 2012
Page 4 of 6

true because it qualifies under the exemption discussed immediately above for modifications that do not affect the visual profile or appearance (Section 7.72.070(D)(2)).

Furthermore, the exemption for "component parts" discussed in staff's letter to the Commission is at best ambiguous, and neither its intent nor applicability are clear. There is certainly no basis for treating the Verizon Wireless antennas or equipment as "permanent fixtures," as such equipment is routinely replaced as technology changes, and in any event the Existing Facility will be removed when the lease terminates.

Furthermore, to the extent this ambiguous provision could be read to require a CDP, it is inconsistent with the Coastal Act and guidance from the Coastal Commission itself. As noted in staff's letter to the Commission, the type of work proposed here is exempt under Section 30610 of the Coastal Act, which contains the exemption: "*no coastal development permit shall be required pursuant to this chapter for... d) Repair or maintenance activities that do not result in an addition to, or enlargement or expansion of, the object of those repair or maintenance activities.*" In 1978 the Coastal Commission adopted further guidance for these types of exemptions (entitled 'Repair, Maintenance and Utility Hook-up Exclusions from Permit Requirements'). This document includes the following language for communication facilities: "*A coastal permit is not required to maintain, replace, or modify existing overhead facilities, including the addition of equipment and wires to existing poles or other structures, right-of-way maintenance, and minor pole and equipment relocations. A coastal permit is not required ... [for] work required to supply increased demand of existing customers' facilities in order to maintain the existing standard of service.*" Given the clear intention by both the Legislature and the Coastal Commission that these types of minor utility upgrades do not require a CDP, and the City's own exemption for minor modifications that have no visual impact, we suggest that other ambiguous language in the City's code cannot be construed to require a CDP here.

B. Federal Law Precludes Discretionary Review and Mandates Approval.

Even if the code could be construed to require a CUP, design review, and/or a CDP, federal law preempts local discretionary review and requires that the City grant any permits that may be required. The Middle Class Tax Relief and Job Creation Act of 2012 (the "Act"), which President Obama signed into law this February, includes several provisions related to wireless spectrum and facilities deployment. Section 6409 of the Act provides, in relevant part:

(1) IN GENERAL- Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104-104) or any other provision of law, a State or local government *may not deny, and shall approve*, any eligible facilities request for a modification of an existing

Karen Suiker
Andrew Stunich, Esq.
City of Trinidad
June 28, 2012
Page 5 of 6

wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

(2) ELIGIBLE FACILITIES REQUEST- For purposes of this subsection, the term 'eligible facilities request' means any request for modification of an existing wireless tower or base station that involves--

- (A) collocation of new transmission equipment;
- (B) removal of transmission equipment; or
- (C) replacement of transmission equipment.

Public Law 112-96, § 6409 (emphasis added).

Under any fair reading, the proposed minor modification of the Existing Facility falls squarely within the terms of Section 6409. Verizon Wireless intends in the near future to submit an application to the City for its proposed modifications. Under Section 6409, the City's only lawful choice will be to approve that application.

Furthermore, even if a CDP were required, an appeal by project opponents to the Coastal Commission will not avoid the effect of Section 6409. The statute applies by its terms to both state and local government. As a unit of state government, the Coastal Commission is obviously subject to Section 6409's mandate just like the City.

Finally, federal law requires prompt action on the permit application that Verizon Wireless intends to file. Under the Telecommunications Act, state and local authorities must act on wireless facility permit applications "within a reasonable period of time." (47 U.S.C. § 332(c)(7)(B)(ii).) In a 2009 declaratory ruling, the Federal Communications Commission established a rebuttable presumption that a permitting authority has violated this statute if it takes longer than 90 days to act on an application to collocate a wireless facility, or 150 days to act on any other request to install a wireless facility. *See In Re: Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review, Etc.*, FCC 09-99 (FCC November 18, 2009) (the "Ruling") (copy enclosed).

The Verizon Wireless modifications qualify as a collocation under the Ruling, so the 90-day deadline will apply. That is, of course, just the outside limit. In this case, we do not believe that it should take nearly 90 days for the City to grant the necessary approvals, given the minor modifications at issue and the fact that federal law mandates issuance of any required permits.

Conclusion

We understand that this facility has generated local controversy, and that Verizon Wireless will have to remove it in approximately five years unless the lease term is extended. In the meantime, however, Verizon Wireless has the clear right under both the

Karen Suiker
Andrew Stunich, Esq.
City of Trinidad
June 28, 2012
Page 6 of 6

lease and applicable law to use the Existing Facility and to make the modifications in question. We hope that this clarification of those rights will facilitate the prompt resolution of any issues regarding the City's consent under the lease and the ultimate approval of any required permits. Please feel free to contact us if you have any questions.

Sincerely,


James A. Heard

Enclosures

cc: Peter Maushardt
Ed McGah, Esq.
Trevor Parker, City Planner
Jim Baskin, California Coastal Commission (North Coast)

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

In the Matter of)	
)	
Petition for Declaratory Ruling to Clarify)	WT Docket No. 08-165
Provisions of Section 332(c)(7)(B) to Ensure)	
Timely Siting Review and to Preempt Under)	
Section 253 State and Local Ordinances that)	
Classify All Wireless Siting Proposals as)	
Requiring a Variance)	

DECLARATORY RULING

Adopted: November 18, 2009

Released: November 18, 2009

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

TABLE OF CONTENTS

Heading	Paragraph #
I. INTRODUCTION	1
II. BACKGROUND	6
III. DISCUSSION.....	18
A. Authority to Interpret Section 332(c)(7)	20
B. Time for Acting on Facility Siting Applications.....	27
C. Prohibition of Service by a Single Provider.....	54
D. Ordinances Requiring Variances	66
E. Other Issues.....	68
IV. CONCLUSION	71
V. ORDERING CLAUSES.....	72
APPENDIX - A	
APPENDIX - B	

I. INTRODUCTION

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

¹ 47 U.S.C. § 332(c)(7)(B)(ii).

² See para. 33, *infra*.

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

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

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

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

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

³ In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Petition for Declaratory Ruling*, filed July 11, 2008 (“Petition”).

⁴ 47 U.S.C. § 332(c)(7).

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

⁶ *Mobile Wireless Competition NOI*, 24 FCC Rcd at 11358 ¶ 2.

⁷ 47 U.S.C. § 332(c)(7)(B)(ii).

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

II. BACKGROUND

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

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

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

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

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

⁹ 47 U.S.C. § 332(c)(7)(C)(ii).

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

¹¹ 47 U.S.C. § 332(c)(7)(A).

¹² 47 U.S.C. § 332(c)(7)(B)(i).

¹³ 47 U.S.C. § 332(c)(7)(B)(ii).

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

¹⁵ 47 U.S.C. § 253.

¹⁶ 47 U.S.C. § 253(a).

¹⁷ 47 U.S.C. § 253(d).

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

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

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

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

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

¹⁸ Petition at 4.

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

²⁰ *Id.* at 13.

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

²² *Id.* at 19.

²³ *Id.* at 20-23.

²⁴ *Id.* at 24.

²⁵ *Id.* at 25-26.

²⁶ *Id.* at 27-29.

²⁷ *Id.* at 29-30.

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

²⁹ *Id.* at 31-34.

³⁰ 47 U.S.C. § 253(a).

³¹ Petition at 35-37.

comment on the Petition.³² After a brief extension, comments were due on September 29, 2008, and replies were due on October 14, 2008.³³ Hundreds of comments and replies were filed in response to the Public Notice, including comments from wireless service providers, tower owners, local and State government entities, and airport authorities.³⁴

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

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

³² Wireless Telecommunications Bureau Seeks Comment On Petition For Declaratory Ruling By CTIA – The Wireless Association To Clarify Provisions Of Section 332(c)(7)(B) To Ensure Timely Siting Review And To Preempt Under Section 253 State And Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance, WT Docket No. 08-165, *Public Notice*, 23 FCC Rcd 12198 (WTB 2008).

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

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

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

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

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

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

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

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

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

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

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

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

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

III. DISCUSSION

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

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

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

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

⁴⁶ See EMRPI Comments and Cross-Petition.

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

⁴⁸ Recovery Act § 6001(k).

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

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

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

⁵² 47 C.F.R. § 1.2.

issue such a ruling.⁵³

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

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

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

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

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

⁵⁴ Petition at 20-24.

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

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

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

⁵⁸ See, e.g., NATOA et al. Comments at 1-5.

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

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

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

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

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

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

⁶¹ CTIA Reply Comments at 12.

⁶² *Id.* at 12-13 (emphasis in original).

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

⁶⁴ *Id.* at 21-22.

⁶⁵ *Id.* at 22.

⁶⁶ 47 U.S.C. § 151.

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

⁶⁸ 47 U.S.C. § 303(r).

⁶⁹ 47 U.S.C. § 154(i).

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

25. We disagree with State and local government commenters that our interpreting the limitations that Congress imposed on State and local governments in Section 332(c)(7) is the same as imposing *new* limitations on State and local governments. Our interpretation of Section 332(c)(7) is not the imposition of new limitations, as it merely interprets the limits Congress already imposed on State and local governments. Moreover, the legislative history does not establish that the Commission is prohibited from interpreting the provisions of Section 332(c)(7). The Conference Report states that “[a]ny pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CM[R]S facilities should be terminated.”⁷⁴ We read the legislative history as intending to preclude the Commission from maintaining a rulemaking proceeding to impose *additional* limitations on the personal wireless service facility siting process beyond those stated in Section 332(c)(7). Our actions herein will not preempt State or local governments from reviewing applications for personal wireless service facilities placement, construction, or modification. State and local governments will continue to decide the outcome of personal wireless service facility siting applications pursuant to the authority Congress reserved to them in Section 332(c)(7)(A). Under Section 332(c)(7)(B)(iii), they may deny such applications if the denial is “supported by substantial evidence contained in a written record.”⁷⁵ However, State and local governments must act upon personal wireless service facility siting applications “within a reasonable period of time” as defined herein, and must not prohibit one carrier’s provision of service based on the availability of service from another carrier, or applicants may commence an action in a court of competent jurisdiction pursuant to Section 337(c)(7)(B)(v).

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

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

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

⁷² 529 F.3d at 773-74.

⁷³ *Id.* at 774.

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

⁷⁵ 47 U.S.C. § 332(c)(7)(B)(iii).

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

B. Time for Acting on Facility Siting Applications

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

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

⁷⁶ 47 U.S.C. § 332(c)(7)(B)(v).

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

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

⁷⁹ 47 U.S.C. § 332(c)(7)(B)(ii).

⁸⁰ 47 U.S.C. § 332(c)(7)(B)(v).

⁸¹ *Id.*

⁸² Petition at 20-24.

⁸³ *Id.* at 20.

⁸⁴ *Id.* at 27-28.

⁸⁵ *Id.* at 28-29.

⁸⁶ *See id.* at 29-30.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁹⁶ See, e.g., Stokes County, N.C. Comments at 2.

⁹⁷ Sprint Nextel Comments at 9-11 (citing *Local Franchising Order*, 22 FCC Red 5101, 5139 (2007)).

⁹⁸ CTIA Reply Comments at 26.

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

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

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

¹⁰⁰ Petition at 15.

¹⁰¹ *Id.* (emphasis in original).

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

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

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

¹⁰⁵ NextG Networks Comments at 5-8.

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

(continued....)

the Washington, D.C. metro area, the typical processing time for new tower applications increased from six to nine months in 2003 to more than one year in 2008, and the processing of collocation applications increased from 15 to 30 days in 2003 to more than 90 days in 2008.¹⁰⁷

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

(...continued from previous page)

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

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

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

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

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

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

(continued....)

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

(...continued from previous page)

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

¹¹² See Petition at 8-10.

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

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

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

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

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

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

(continued....)

facilities threaten to undermine achievement of the goals that the Commission sought to advance in these proceedings. Moreover, they impede the promotion of advanced services and competition that Congress deemed critical in the Telecommunications Act of 1996¹¹⁹ and more recently in the Recovery Act.¹²⁰

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

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

37. Right to Seek Relief. Given the evidence of unreasonable delays and the public interest in avoiding such delays, we conclude that the Commission should define the statutory terms "reasonable period of time" and "failure to act" in order to clarify when an adversely affected service provider may take a dilatory State or local government to court. Specifically, we find that when a State or local government does not act within a "reasonable period of time" under Section 332(c)(7)(B)(i)(II), a "failure to act" occurs within Section 332(c)(7)(B)(v). And because an "action or failure to act" is the statutory trigger for seeking judicial relief, our clarification of these terms will give personal wireless service providers certainty as to when they may seek redress for inaction on an application. We expect that this certainty will enable personal wireless service providers more vigorously to enforce the statutory mandate against unreasonable delay that impedes the deployment of services that benefit the public. At the same time, our action will provide guidance to State and local governments as to what constitutes a reasonable timeframe in which they are expected to process applications, but recognizes that certain cases may legitimately require more processing time.¹²²

38. By defining the period after which personal wireless service providers have a right to seek judicial relief, we both ensure timely State and local government action and preserve incentives for providers to work cooperatively with them to address community needs. Wireless providers will have the incentive to resolve legitimate issues raised by State or local governments within the timeframes defined as reasonable, or they will incur the costs of litigation and may face additional delay if the court

(...continued from previous page)

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

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

¹²⁰ See *supra* note 47.

¹²¹ NENA Comments at 1-2.

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

determines that additional time was, in fact, reasonable under the circumstances. Similarly, State and local governments will have a strong incentive to resolve each application within the timeframe defined as reasonable, or they will risk issuance of an injunction granting the application. In addition, specific timeframes for State and local government deliberations will allow wireless providers to better plan and allocate resources. This is especially important as providers plan to deploy their new broadband networks.

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

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

¹²³ 47 U.S.C. § 332(c)(7)(B)(v).

¹²⁴ See Petition at 28; CTIA Reply Comments at 23-25.

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

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

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

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

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

42. Moreover, our construction of the statutory terms “reasonable period of time” and “failure to act” takes into account, on several levels, the Section 332(c)(7)(B)(ii) requirement that the “nature and scope” of the request be considered and the legislative history’s indication that Congress intended the decisional timeframe to be the “usual period” under the circumstances for resolving zoning matters. First, the timeframes we define below are based on actual practice as shown in the record. As discussed below, most statutes and government processes discussed in the record already conform to the timeframes we define. As such, the timeframes do not require State and local governments to give preferential treatment to personal wireless service providers over other types of land use applications. Second, we consider the nature and scope of the request by defining a shorter timeframe for collocation applications, consistent with record evidence that collocation applications generally are considered at a faster pace than other tower applications. Third, under the regime that we adopt today, the State or local authority will have the opportunity, in any given case that comes before a court, to rebut the presumption that the established timeframes are reasonable. Finally, we have provided for further adjustments to the presumptive deadlines in order to ensure that the timeframes accommodate certain contingencies that may arise in individual cases, including where the applicant and the State or local authority agree to extend the time, where the application has already been pending for longer than the presumptive timeframe as of the date of this Declaratory Ruling, and where the application review process has been delayed by the applicant’s failure to submit a complete application or to file necessary additional information in a timely manner.¹³¹ For all these reasons, we conclude that our clarification of the broad terms “reasonable period of time” and “failure to act” is consistent with the statutory scheme.

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

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

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

¹³¹ See *infra* paras. 49-53.

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

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

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

¹³³ *Id.* at 24-25.

¹³⁴ *Id.* at 25.

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

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

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

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

¹³⁹ City of LaGrande, Oregon Comments at 3.

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

¹⁴¹ Michigan Municipalities Comments at 14-19.

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

¹⁴³ California Cities note that the Commission previously rejected time limits for itself in a rulemaking concerning petitions filed pursuant to Section 332(c)(7)(B)(v) because they would not afford the Commission sufficient flexibility to account for particular facts in a case. California Cities Comments at 8-10 (*citing* Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934, WT Docket No. 97-192, *Report and Order*, 15 FCC Rcd 22821, 22829-30 ¶ 20 (2000)). The timeframes that we adopt account for the flexibility that may be needed to address different fact situations, while at the same time adhering to the important public interest in certainty discussed above.

45. Based on our review of the record as a whole, we find 90 days to be a generally reasonable timeframe for processing collocation applications and 150 days to be a generally reasonable timeframe for processing applications other than collocations. Thus, a lack of a decision within these timeframes presumptively constitutes a failure to act under Section 332(c)(7)(B)(v). At least one wireless provider, U.S. Cellular, suggests that such 90-day and 150-day timeframes are sufficient for State and local governments to process applications.¹⁴⁴

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

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

¹⁴⁴ U.S. Cellular Reply Comments at 2-3.

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

¹⁴⁶ See T-Mobile Comments at 10-11. A "[s]ubstantial increase in the size of the tower" occurs if:

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

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

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

¹⁴⁸ N.C. Gen. Stat. Ann. § 153A-349.52.

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

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

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

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

50. To the extent existing State statutes or local ordinances set different review periods than we do here, we clarify that our interpretation of Section 332(c)(7) is independent of the operation of these

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

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

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

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

¹⁵⁴ 47 U.S.C. § 332(c)(7)(B)(v).

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

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

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

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

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

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

¹⁵⁷ CTIA Reply Comments at 18.

business days for determining whether it is complete;¹⁵⁸ the State of Washington requires review within 28 days;¹⁵⁹ the States of California and Oregon require review within 30 days,¹⁶⁰ and the State of North Carolina requires review within 45 days.¹⁶¹ Considering this evidence as a whole, a review period of 30 days gives State and local governments sufficient time for reviewing applications for completeness, while protecting applicants from a last minute decision that applications should be denied as incomplete. Accordingly, we conclude that the time it takes for an applicant to respond to a request for additional information will not count toward the 90 or 150 days only if that State or local government notifies the applicant within the first 30 days that its application is incomplete. We find that the total amount of time, including the review period for application completeness, is generally consistent with those States that specifically include such a review period.

C. Prohibition of Service by a Single Provider

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

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

¹⁵⁸ See Fla. Stat. Ann. § 365.172 (providing for a 20-business day review for application completeness, then a 45-business day period for collocation application processing and a 90-business day period for all other application processing).

¹⁵⁹ Wash. Rev. Code §§ 36.70B.080 & 36.70B.070 (providing for a 28-day review for application completeness, then a 120-day period for application processing).

¹⁶⁰ Cal. Gov't. Code §§ 65943 & 65950 (providing for a 30-day review for application completeness, then a 60-day period for application processing assuming there are no environmental issues); Or. Rev. Stat. § 227.178 (providing for a 30-day review for application completeness, then a 120-day period for application processing).

¹⁶¹ N.C. Gen. Stat. Ann. § 153A-349.52 (providing for a 45-day review for application completeness, then a 45-day period for collocation application processing).

¹⁶² Petition at 30-35.

¹⁶³ *Id.* at 30.

¹⁶⁴ *Id.* at 31.

¹⁶⁵ *Id.* at 31-32.

¹⁶⁶ *Id.* at 32.

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

¹⁶⁸ See NATOA et al. Comments at 20.

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

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

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

¹⁶⁹ *Id.* at 22.

¹⁷⁰ *See, e.g.,* City of Auburn, WA Comments at 3; City of SeaTac, WA Comments at 2.

¹⁷¹ *See* North Carolina Department of Transportation's Division of Aviation Comments at 2.

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

¹⁷³ *See* County of Albemarle, VA Comments at 8-9.

¹⁷⁴ Petition at 32.

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

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

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

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

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

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

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

¹⁷⁷ 47 U.S.C. § 332(c)(7)(B)(i)(II).

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

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

¹⁸⁰ *Id.*

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

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

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

63. We disagree with the assertion that granting the petition could have a negative impact on airports by increasing the number of potential obstructions to air navigation.¹⁸⁷ As the Federal Aviation Administration notes, our action on this Petition does not alter or amend the Federal Aviation Administration's regulatory requirements and process.¹⁸⁸ Under the Commission's rules as well, parties are required to submit for Federal Aviation Administration review all antenna structures¹⁸⁹ that potentially can endanger air navigation, including those near airports.¹⁹⁰ The Commission requires antenna structures that exceed 200 feet in height above ground or which require special aeronautical study to be painted and lighted¹⁹¹ and also requires antenna structures to conform to the Federal Aviation Administration's painting and lighting recommendations.¹⁹²

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

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

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

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

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

¹⁸⁶ CTIA Reply Comments at 29-30 (emphasis removed).

¹⁸⁷ See North Carolina Department of Transportation's Division of Aviation Comments at 2.

¹⁸⁸ See FAA Comments at 1.

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

¹⁹⁰ See 47 C.F.R. § 17.7.

¹⁹¹ See 47 C.F.R. § 17.21.

¹⁹² See 47 C.F.R. § 17.23.

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

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

D. Ordinances Requiring Variances

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

¹⁹³ See County of Albemarle, Virginia Comments at 8-9.

¹⁹⁴ 47 U.S.C. § 332(c)(7)(A).

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

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

¹⁹⁷ 47 U.S.C. § 253(a).

¹⁹⁸ See Petition at 35-37.

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

²⁰⁰ See *id.* at 36.

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

the exclusive authority in the Act on matters involving wireless facility siting.²⁰² They maintain that Section 253 does not apply to wireless facility siting disputes involving blanket variance ordinances.²⁰³

67. *Discussion.* We deny CTIA's request for preemption of ordinances that impose blanket variance requirements on the siting of wireless facilities. Because CTIA does not seek actual preemption of any ordinance by its Petition,²⁰⁴ we decline to issue a declaratory ruling that "zoning ordinances requiring variances for all wireless siting requests are unlawful and will be struck down if challenged in the context of a Section 253 preemption action."²⁰⁵ CTIA does not present us with sufficient information or evidence of a specific controversy on which to base such action or ruling,²⁰⁶ and we conclude that any further consideration of blanket variance ordinances should occur within the factual context of specific cases. To the extent specific evidence is presented to the Commission that a blanket variance ordinance is an effective prohibition of service, then we will in that context consider whether to preempt the enforcement of that ordinance in accordance with the statute. We note that in denying CTIA's request, we make no interpretation of whether and how a matter involving a blanket variance ordinance for personal wireless service facility siting would be treated under Section 332(c)(7) and/or Section 253 of the Act.²⁰⁷

E. Other Issues

68. *Service Requirements.* Numerous parties argue that the Petitioner failed to follow the Commission's service requirements with respect to preemption petitions.²⁰⁸ Our rules require that a party filing either a petition for declaratory ruling seeking preemption of State or local regulatory authority, or a petition for relief under Section 332(c)(7)(B)(v), must serve the original petition on any State or local government whose actions are cited as a basis for requesting preemption.²⁰⁹ By its terms, the service requirement does not apply to a petition that cites examples of the practices of unidentified jurisdictions to demonstrate the need for a declaratory ruling interpreting provisions of the Communications Act.²¹⁰ Commenters' principal argument is that the Commission should require the Petitioner to identify the

²⁰² 47 U.S.C. § 332(c)(7).

²⁰³ Several commenters argue that by using the sweeping phrase "nothing in this chapter," Congress made clear that it intended Section 332(c)(7) to override any other provision in the Communications Act that may be in conflict, including Section 253. They further argue that CTIA's proposal to have the Commission broadly preempt any ordinances "effectively" requiring a variance directly conflicts with Congress' preservation of local zoning authority in Section 332(c)(7). *See, e.g.,* NATOA et al. Comments at 7; California Cities Comments at 23-24; Fairfax County Comments at 3; Michigan Municipalities Comments at 2; N.C. Assoc. of County Commissioners Comments at 1-2.

²⁰⁴ *See, e.g.,* CTIA Reply Comments at 33 n.124.

²⁰⁵ *Id.* at 30.

²⁰⁶ Although the Petition identifies two examples that Petitioner describes as problematic, it does not represent that the ordinances explicitly require variances for all applications, nor does it attempt to demonstrate with any specificity why the examples effectively require variances in all instances. *See* Petition at 36 (briefly describing ordinances of communities in Vermont and New Hampshire).

²⁰⁷ 47 U.S.C. §§ 332(c)(7), 253.

²⁰⁸ *See, e.g.,* Coalition for Local Zoning Authority Comments at 2-4; NATOA et al. Comments at 21; Greater Metro Telecom. Consortium and City of Boulder, CO Comments at 2-3.

²⁰⁹ 47 C.F.R. § 1.1206(a), Note 1.

²¹⁰ We note that the Petitioner did belatedly serve the two local governments whose ordinances were described in the Petition as requiring variances; however, as discussed above, we deny Petitioner's request to preempt ordinances that require variances. *See* Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Opposition to Motions for Extension of Time*, at 3 n.7 (filed Aug. 26, 2008).

jurisdictions that it references anonymously, which, they assert, would then trigger the service requirement. However, nothing in the rules requires that these jurisdictions be identified. We recognize, as commenters emphasize, 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,²¹¹ and we take this into account in considering the weight we give to these assertions. At the same time, State and local governments have entered voluminous evidence into the record on their own behalf, including responses to several of the specific examples offered by the Petitioner. Accordingly, we conclude that the record is sufficient to address the Petitioner's claims.

69. *Radiofrequency (RF) Emissions.* Several commenters argue that we should deny CTIA's Petition in order to protect local citizens against the health hazards that these commenters attribute to RF emissions.²¹² Section 332(c)(7)(B)(iv) of the Act provides that "[n]o 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."²¹³ To the extent commenters argue that State and local governments require flexibility to deny personal wireless service facility siting applications or delay action on such applications based on the perceived health effects of RF emissions, this authority is denied by statute under Section 332(c)(7)(B)(iv). Accordingly, such arguments are outside the scope of this proceeding.

70. In its Comments and Cross-Petition, EMRPI contends that in light of additional data that has been compiled since 1996, the RF safety regulations that the Commission adopted at that time are no longer adequate.²¹⁴ EMRPI is asking us to revisit the Commission's previous decision that the scientific evidence did not support the establishment of guidelines to address the non-thermal effects of RF emissions.²¹⁵ This request is also outside the scope of the current proceeding, and we therefore dismiss EMRPI's Cross-Petition.

IV. CONCLUSION

71. For the reasons discussed above, we grant in part and deny in part CTIA's Petition for a Declaratory Ruling interpreting provisions of Section 332(c)(7) of the Communications Act. In particular, we find that a "reasonable period of time" for a State or local government to act on a personal wireless service facility siting application is presumptively 90 days for collocation applications and presumptively 150 days for siting applications other than collocations, and that the lack of a decision within these timeframes constitutes a "failure to act" based on which a service provider may commence an action in court under Section 332(c)(7)(B)(v). We also find that where a State or local government denies a personal wireless service facility siting application solely because that service is available from another provider, such a denial violates Section 332(c)(7)(B)(i)(II). By clarifying the statute in this manner, we recognize Congress' dual interests in promoting the rapid and ubiquitous deployment of advanced, innovative, and competitive services, and in preserving the substantial area of authority that Congress reserved to State and local governments to ensure that personal wireless service facility siting

²¹¹ See, e.g., City of Philadelphia Comments at 2-3 (arguing that the failure of the Petitioner to identify and serve the localities discussed in its Petition denies the Commission a complete and fair record of the facts).

²¹² See, e.g., Catherine Kleiber Comments; E. Stanton Maxey Comments at 1; Maria S. Sanchez Comments at 1-2; Miranda R. Taylor Comments at 1-2.

²¹³ 47 U.S.C. § 332(c)(7)(B)(iv).

²¹⁴ EMRPI Comments and Cross-Petition at 4.

²¹⁵ Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, ET Docket No. 93-62, *Second Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 13494, 13505 ¶ 31 (1997), *aff'd sub nom. Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000), *cert. denied sub nom. Citizens for the Appropriate Placement of Telecommunications Facilities v. FCC*, 531 U.S. 1070 (2001).

occurs in a manner consistent with each community's values.

V. ORDERING CLAUSES

72. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 201(b), 253(a), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 201(b), 253(a), 303(r), 332(c)(7), and Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, the Petition for Declaratory Ruling filed by CTIA—The Wireless Association IS GRANTED to the extent specified in this Declaratory Ruling and otherwise IS DENIED.

73. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 4(j), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 332(c)(7), and Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, the Cross-Petition filed by the EMR Policy Institute IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

List of Participants in Proceeding*Comments*

AT&T Inc. (AT&T)
Air Line Pilots Association, International
Aircraft Owners and Pilots Association
Airports Council International-North America
Alltel Communications, LLC
American Legislative Exchange Council
American Planning Association
Arthur Firstenberg
Atlantic Technology Consultants, Inc.
Aviation Council of Alabama Inc.
Aviation Department, Charles B. Wheeler Downtown Airport
B. Blake Levitt
Bartonville, Texas
Broadcast Signal Lab, LLC
Cable and Telecommunications Committee of the New Orleans City Council
California Wireless Association (CalWA)
Carole Maurer and John Dilworth
Cascade Charter Township, Michigan
Catawba County
Catherine Kleiber
Charles B. Wheeler Downtown Airport
Charleston County Planning Department, Charleston County, South Carolina
Citizens Against Government Waste
City of Airway Heights, Washington State
City of Albany, California
City of Albuquerque, New Mexico
City of Anacortes, Washington
City of Apple Valley, Dakota County Minnesota
City of Arlington, Texas
City of Auburn, Washington (City of Auburn, WA)
City of Austin, Texas
City of Bartonville, Texas
City of Bellevue, Washington
City of Bellingham, Washington (City of Bellingham, WA)
City of Bloomington Minnesota
City of Boca Raton
City of Burien, Washington (City of Burien, WA)
City of Champaign, Illinois
City of Cincinnati, Ohio
City of Columbia, South Carolina
City of Coppell, Texas
City of Dallas, Texas
City of Des Plaines, Illinois
City of Dublin, Ohio (City of Dublin, OH)
City of Dubuque

City of Evanston, Illinois
City of Farmers Branch
City of Gahanna, Ohio
City of Golf Shores
City of Grand Rapids
City of Greensboro, North Carolina
City of Grove City, Ohio (City of Grove City, OH)
City of Gulf Shores, Alabama
City of Hammond, Michigan
City of Henderson, Nevada
City of Houston, Texas
City of Huntsville, Alabama
City of Kasson, Minnesota
City of Kirkland, Washington
City of Lancaster, Texas
City of LaGrande, Oregon
City of Las Vegas, Nevada
City of Longmont, Colorado
City of Lucas, Texas
City of New Ulm, Minnesota
City of North Oaks
City of North Ridgeville, Ohio
City of Oak Park Heights
City of Philadelphia
City of Plymouth, Minnesota
City of Prior Lake, Minnesota
City of Red Wing
City of Richardson Texas
City of Rowlett Texas
City of Saint Paul, Minnesota and the City's Board of Water Commissioners
City of San Antonio, Texas
City of Scottsdale
City of SeaTac, Washington (City of SeaTac, WA)
City of Sebastopol
City of Tyler
City of Walker, Michigan
City of Wichita and Sedgwick County, Kansas
Clear Creek County, Colorado
Coalition for Local Zoning Authority City of Los Angeles, et al. (Coalition for Local Zoning Authority)
Connecticut Siting Council, State of Connecticut
County of Albemarle, Virginia
County of Frederick, Virginia
County of Goochland & Office of the County Attorney
County of Sonoma (Sonoma County, CA)
Craven County Board of Commissioners
CTIA - The Wireless Association (Petitioner)
Domagoj Vucic
Donna G. Haldane
DuPage Mayors and Managers Conference
Elizabeth Kelley
Evelyn Savarin
FCC Intergovernmental Advisory Committee

Fairfax County, VA
Federal Aviation Administration (FAA)
Florida Airports Council
Florida Department of Transportation
GMTC-RCC
George Heartwell, Mayor of City of Grand Rapids, Michigan
Glenda Cassutt
Goochland County, Virginia
Grand County, Colorado
Gray Robinson, P.A.
Greater Metro Telecommunications Consortium, et al.
Incorporated Village of Laurel Hollow
Iredell County, North Carolina
Jill Koontz
Kimberly Kitano
La Grande, Oregon
League of Minnesota Cities
League of Oregon Cities
Lee County Port Authority
Louisville Regional Airport Authority
Maria S. Sanchez
Marilyn Stollon
Marjorie Lundquist
MetroPCS Communications, Inc. (MetroPCS)
Michael C. Seamands
Michigan Municipalities and Other Concerned Communities (Michigan Municipalities)
Miranda Taylor
Miriam Dyak
Missouri State Aviation Council
National Agricultural Aviation Association
National Association of Counties (NACo)
National Association of State Aviation Officials
National Association of Telecommunications Officers and Advisors, National League of Cities, and
United States Conference of Mayors (NATOA et al.)
National Emergency Number Association (NENA)
NextG Networks, Inc. (NextG Networks)
North Carolina Association of County Commissioners (N.C. Assoc. of County Commissioners)
North Carolina Chapter of the American Planning Association
North Carolina Department of Transportation's Division of Aviation
North Carolina League of Municipalities
Northwest Municipal Conference
NYC Council Member Tony Avella, Chair, Zoning and Franchises Subcommittee
Olemara Peters
Olmsted County Board of Commissioners
Palm Beach County Planning, Zoning & Building Department
PCIA—The Wireless Infrastructure Association and The DAS Forum
Piedmont Environmental Council, Citizens for Fauquier County, Shenandoah
Valley Network, and Appalachian Trail Conservancy
Pima County, Arizona
Prince William County, Virginia
Robeson County, North Carolina
Rural Cellular Association

SCAN NATOA, Inc. (SCAN NATOA)
San Francisco Neighborhood Antenna-Free Union
Sandi Maurer
Sanford Airport Authority
Soledad M. de Pinillos
Sprint Nextel Corporation (Sprint Nextel)
State of Connecticut
Stokes County, North Carolina (Stokes County, N.C.)
Susan Izzo
Texas Municipal League
The Colony, Texas
The EMR Network
The EMR Policy Institute (EMRPI)
The League of California Cities, the California State Association of Counties, and the City and County of San Francisco (California Cities)
The University of Michigan (University of Michigan)
T-Mobile USA, Inc. (T-Mobile)
Town of Alton, New Hampshire
Town of Apex, North Carolina
Town of Cary, North Carolina
Town of Gilbert, Arizona
Town of Grand Lake, Colorado
Town of Matthews, North Carolina
Town of Trent Woods
United States Cellular Corporation (U.S. Cellular)
Varnum, Riddering, Schmidt & Howlett, LLP
Verizon Wireless
Victoria Jewett
Village of Bay Harbor, Town of Bay Harbor Islands, Town of Cutler Bay, City of Hollywood, City of Homestead, City of Miramar, City of Sunrise, City of Weston (Florida Cities)
Village of Alden, New York (Village of Alden, NY)
Village of Buffalo Grove
Village of East Hills, New York
Village of Hoffman Estates
Village of Morton Grove
Village of Mount Prospect, Illinois
Village of New Albany, Ohio
Village of Roslyn Estates (Nassau County, New York)
Village of Round Lake
Village of Skokie
Wake County (North Carolina) Planning Department
West Sayville Civic Association
Wichita-Sedgwick County Metropolitan Area Planning Department

Reply Comments

American Consumer Institute Center for Citizen Research
Americans for Tax Reform
Cable and Telecommunications Committee of the New Orleans City Council
California Wireless Association (CalWA)
Citizens Against Government Waste
City of Albuquerque, New Mexico

City of Cincinnati - City Planning Department
City of New York
City of Philadelphia
City of San Antonio, Texas
City of San Diego
City of Texas City
Coalition for Local Zoning Authority City of Los Angeles, et al. (Coalition for Local Zoning Authority)
County of Fairfax, Virginia (Fairfax County)
CTIA - The Wireless Association (CTIA Reply)
Greater Metro Telecommunications Consortium, et al.
The League of California Cities, the California State Association of Counties, and the City and County of San Francisco (California Cities)
Montgomery County, Maryland
National Association of Telecommunications Officers and Advisors, National League of Cities, and United States Conference of Mayors (NATOA et al.)
National Association of Towns and Townships
NextG Networks, Inc. (NextG Networks)
Ohio Township Association
PCIA—The Wireless Infrastructure Association and The DAS Forum
Rural Telecommunications Group, Inc.
SCAN NATOA, Inc. (SCAN NATOA)
United States Cellular Corporation (U.S. Cellular)
Wisconsin Towns Association
Verizon Wireless

APPENDIX B

Section 332(c) of the Communications Act of 1934

(7) Preservation of local zoning authority

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

(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)).

**STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI**

Re: *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165.

Wireless communication—mobile—has always been central to the FCC's mission. And mobile has never had greater potential to help address vital priorities—including generating economic growth, spurring job creation, and advancing national purposes like health care, education, energy independence, and public safety. We must ensure that America leads the world in mobile.

Because mobile increasingly means broadband as well as voice, issues involving spectrum policy and wireless deployment will be important elements of our National Broadband Plan, due by February 17th, and we will hear more about that later today. But even as we work on a National Broadband Plan, we can and should move forward with concrete actions to unleash the opportunity of mobile.

To that end, in August the Commission launched inquiries into how best to promote innovation, investment, and competition in the wireless industry, as well as how to protect and empower consumers of wireless and other communications services.

In October, I outlined a Mobile Broadband Agenda that included as a key element removing obstacles to robust and ubiquitous mobile networks.

And with today's Declaratory Ruling, the Commission moves forward on that agenda and takes an important step to cut through red tape and accelerate the deployment of next-generation wireless services.

After years on the distant horizon, 4G networks are ready to move from the drawing board to the marketplace. One major provider has already launched 4G WiMAX service in select markets. Competitors have announced plans to debut LTE networks in major markets around the country beginning next year.

The real winners here will be American consumers and businesses, who will soon be able to experience mobile broadband speeds and capacities that rival what many fixed broadband customers receive at home today. These new wireless networks will change how we communicate and how we engage in commerce. And they hold the promise of improving our quality of life. To take one example offered by the American Telemedicine Association in encouraging us to take the step we take today, next generation wireless networks will allow doctors to start using mobile technology to monitor and treat chronic illnesses like heart disease and to improve doctor-patient communications.

Accelerating the deployment of these new networks is obviously a critical goal for the nation. But there is a lot of work that remains to be done before we can enjoy their benefits, and it won't be easy. We at the FCC understand the many challenges mobile operators face in turning engineering plans into actual networks of steel towers, antennas, silicon chips, and sophisticated electronics. We understand that sometimes the Commission needs to act, to establish clear rules of the road to reduce uncertainty and delay, spur investment, encourage innovation, and ensure that the benefits of advanced communications are available to all Americans.

Today's ruling is one example of creating such rules. One challenge mobile operators face is getting timely zoning approvals from state and local officials before building towers or deploying new equipment. Recognizing this problem, Congress required these entities to act on such requests "within a reasonable period of time." Yet, despite Congress's strong statement, the record before us indicates that delays have continued to persist in too many states and localities.

For example, at the time the petition was filed, of the 3,300 pending zoning applications for wireless facilities, over 760 had been pending for more than a year and 180 had been pending for more than three years. There is evidence that in certain jurisdictions the tower siting process is getting longer, even as the need for more towers and for timely decisions is growing.

Today's Declaratory Ruling will help end these unnecessary delays and speed the deployment of 4G networks, while also respecting the legitimate concerns of local authorities and preserving their control over local zoning and land use policies.

Our decision achieves this balance by defining reasonable and achievable timeframes for state and local governments to act on zoning applications—90 days for collocations and 150 days for other siting applications. I want to be clear that the process we establish does not dictate any substantive outcome in any particular case, or otherwise limit state and local governments' fundamental authority over local land use. It simply requires that they must reach land use decisions that involve wireless equipment in a timely fashion and be able to justify their conclusions to a federal district court if challenged, just as Congress specified.

I should note that we reach today's Ruling in response to a petition brought by CTIA, the wireless industry's trade association, and I would like to acknowledge CTIA's role in bringing this important issue to the Commission's attention. The decision we reach today does not grant the full relief that the industry's petition seeks—for example, the petition argued for a shorter set of deadlines, and a requirement that zoning applications be "deemed granted" as soon as the deadlines expired. I believe that the timeframes we adopt today, and the requirement that parties seek injunctive relief from a court, are more consistent with preserving State and local sovereignty and with the intent of Congress.

Nevertheless, I believe the rules we adopt today are amply sufficient to the task and will have an important effect in speeding up wireless carriers' ability to build new 4G networks—which will in turn expand and improve the range of wireless choices available to American consumers. Of course, we won't rely just on a belief that our rules are having the effects we intend. We will continue to monitor this area closely and ensure that the zoning process with respect to tower siting is operating in the way Congress intended.

I would also like to thank the many able representatives of state and local governments who have worked with my office and the Wireless Bureau to ensure that today's ruling respects the legitimate needs and prerogatives of local land use authorities.

And of course special thanks to Ruth Milkman and her hardworking staff in the Wireless Bureau for their excellent work on this item, and for striving to strike a smart and effective balance between the deployment and expansion of wireless networks and preserving state and local zoning authority.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165.

Today's action makes a further down-payment on the objectives of the National Broadband Plan to ensure that all Americans have access to Twenty-first century communications. Wireless service is clearly going to play—is already playing—a huge role in delivering broadband to rural areas—with the capability of offering connectivity where none exists today and mind-boggling new services to consumers as networks are upgraded. Building wireless broadband infrastructure—and building it expeditiously—is integral to our nation's success in too many ways to recount here this morning. Nor do we have to go beyond the obvious in pointing out how urgent it is to have tower infrastructure in place to support all this.

Building new wireless towers and attaching additional antennae to existing towers generally require—and rightly so—State and local zoning approval. State and local governments are the ones best positioned to take into account the legitimate interests of citizens in their communities in often-complex zoning decisions. Congress, in enacting Section 332 of the Communications Act, preserved this important zoning role that State and local authorities play. At the same time, in order to encourage the expansion of wireless networks nationwide, Congress directed that zoning decisions be made “within a reasonable period of time,” allowing court review for failure to act within that timeframe.

In today's decision, we seek to provide greater certainty to both State and local governments, as well as to the wireless industry, as to what constitutes a reasonable period of review for collocation and other tower siting applications. Based on the record and our interpretation of the statute, we clarify the point at which an applicant may seek—should it choose to do so—court review where a State or local zoning authority has not acted. While we establish a presumption here, nothing in this decision reduces the authority of a court of relevant jurisdiction from assessing, based on the merits of any individual case, whether a zoning review of more than 90 days for collocation applications or 150 days for other tower siting applications is reasonable.

I am a great believer in our federal system of government, and have not been shy in the past about opposing Commission action that unnecessarily encroached on the authority of State and local governments. It is for that reason that I strongly dissented from the 2006 *Local Franchising Order*—which I thought went too far in usurping the authority of local franchising authorities without an adequately granular record to justify such action. Additionally, the Commission announced in that previous decision that a cable franchise application pending for more than a given timeframe was deemed granted. Nothing subtle about that approach!

We take no such actions today. Instead, we actually recognize the rights of State and local jurisdictions and also the importance of the courts. We refrain from dictating final outcomes. But we give an important boost to getting this important infrastructure building job done so that consumers may reap more of the blessings of the great potential of wireless technologies and services. That looks like a win-win-win to me. So I commend the Chairman for getting this important item to us, and I thank all my colleagues, and the Bureau, too, for their hard work and for listening to the concerns of *all* parties as we went about crafting today's ruling. It's fair and balanced for real and I am pleased to support it.

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

Re: *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165.

In pursuit of helping to create more choices for consumers, I have long emphasized the importance of removing regulatory roadblocks to ease the ability of new entrants, and existing service providers, to build more delivery platforms for innovative services. For instance, I heartily supported the Commission's work to: free up the TV white spaces for unlicensed use, set shot clocks for local video franchise proceedings, and classify broadband services – no matter the platform – as unregulated Title I information services, to name just a few examples.

Today we are taking yet another positive deregulatory step: We are promoting deployment of broadband, and other emerging wireless services, by reducing the delays associated with the construction and improvement of wireless facilities. I am pleased to support this declaratory ruling, and I thank Chairman Genachowski for his leadership in this area.

Our ruling strikes an elegant balance between establishing a deregulatory national framework to clear unnecessary underbrush, while preserving state and local control over tower siting. In creating deadlines for decisions on wireless siting requests – 90 days for the review of collocation applications and 150 days for the review of other siting applications – we have both granted the industry greater certainty and provided our state and local colleagues reasonable periods for action, as well as the flexibility, to fully consider the nature and scope of a particular siting request. Put another way, our action eliminates unreasonable delay and uncertainty, the costs of which are passed on to wireless consumers, and allows our state and local colleagues the continued ability to safeguard the interests of their constituents. As we fashion a National Broadband Plan for Congress, we should continue to adopt simple initiatives to speed broadband deployment such as this one, which will help spur America's Internet economy, create jobs, and make us more competitive internationally.

On a related point, in recent months, I have heard many in the wireless industry and elsewhere call for "more spectrum." Some have suggested a critical need for many hundreds of megahertz. I fully agree that identifying additional bandwidth for long-term growth is a necessary and worthy endeavor, and I look forward to engaging in that effort. In the meantime, though, I hope that today's action – and the associated reduction in regulatory costs – will also free up capital that may be more effectively used to take better advantage of the immediate fixes already available in the marketplace. These include more robust deployment of enhanced antenna systems; improved development, testing and roll-out of creative technologies, where appropriate, such as cognitive radios; and enhanced consideration of, and more targeted consumer education on, the use of femto cells. Each of these technological options augments capacity and coverage, which are especially important for data and multimedia transmissions.

In short, the Commission's action today will save the builders of tomorrow's broadband infrastructure time and money. It is my hope that those two crucial resources will be used to squeeze more efficiency out of the airwaves while we undergo the slower process of identifying and bringing more spectrum to market. Accordingly, I eagerly anticipate learning more about the benefits that our decision today has on technological improvements and, ultimately, on consumers.

Thank you to Ruth Milkman and the talented Wireless Telecommunications Bureau staff. Also, many thanks to Austin Schlick and his team in OGC for strengthening the legal arguments underpinning this ruling. We especially appreciate the close coordination among your teams and the 8th floor offices on

this draft. Today is a win-win due in no small part to your efforts.

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165.

One of the challenges we sometimes face at the Commission is harmonizing federal and local interests. Having recently arrived at the FCC from a state commission, I understand both sides of this occasionally unavoidable tension. In my experience, when these interests collide, the most appropriate path to resolution can be found in the answer to one simple question: What outcome is best for consumers?

Today's item, which explains what constitutes a "reasonable period of time" to act on a wireless facility siting application, provides a textbook example of the merits of such an approach. On the one hand, states and localities have understandably expressed concern about ceding power over zoning decisions – determinations that are clearly within their purview. On the other hand, the Commission has a strong interest in ensuring the timely rollout of robust wireless networks throughout the country, especially in light of our statutory obligation to develop a national broadband plan. By asking ourselves what is best for consumers – in this case whether a specified reasonable time period for acting on wireless facility siting applications is more advantageous than an unlimited and undefined timeframe – we are able to arrive at a decision that, in reality, makes good sense for all parties.

There is simply no reason to allow an interminable process for these applications. Consumers suffer when any governmental body – federal, state, or local – unnecessarily stands in the way of making timely determinations that have a direct impact on the quality of their lives. At the same time, consumers are harmed when arbitrary and unreasonable timeframes are imposed that speed up a process, resulting in decisions lacking appropriate due process protections or that are based on insufficient evidence.

Today's compromise preserves, as it must, state and local governments' roles as the arbiters of the merits of wireless service facility siting applications. It also, based on the record developed, provides the presumptively reasonable timeframes required to process these applications. In fact, the item merely adopts the time frames under which many responsible jurisdictions already operate in practice.

The compromise also recognizes, however, that a need has arisen for the Commission to act pursuant to its authority under the Communications Act, in order to ensure that other important Congressional and Commission goals are achieved. By giving meaning to the phrase "a reasonable period of time," we are breathing life into a provision of the Act that is essential to our mobile future. Consumers rely on all of us – federal, state, and local governments – to be responsible and responsive, and by ensuring an orderly siting application process, we are doing just that.

I would like to thank the staff of the Wireless Telecommunications Bureau and the Office of the General Counsel for their terrific work on this pro-consumer item. In developing this fine solution to a tricky problem, they have appropriately accounted for all of the legitimate interests involved, and have arrived at an answer that will benefit the provision of mobile services in the near future. I am pleased to support this item. Thank you.

**STATEMENT OF
COMMISSIONER MEREDITH ATTWELL BAKER**

Re: *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165.

Wireless broadband is improving the quality of lives across the country. By 2020 it is expected that most people will access the Internet with a wireless device and that most broadband networks will contain wireline and wireless components. As we are learning every day, building the infrastructure necessary to support those networks, to bring the benefits of these networks to the people who need them, any place, any time is an enormous challenge.

Our action today addresses one important aspect of network infrastructure deployment—the time it can take to build out wireless infrastructure—and will help facilitate the process of building or upgrading the towers that are necessary to support our wireless broadband. However, it is only a first step. We will need to continue to look for ways to encourage and facilitate broadband deployments in ways that are consistent with the needs and interests of the communities where they are deployed.

The item before us carefully balances several concerns in accomplishing the Commission's goal. First, the item recognizes the rights and duties of local communities to review and approve applications for zoning approvals for wireless communications facilities. At the same time, the item also appreciates the need to provide greater timeliness and certainty to the men and women who build our mobile broadband infrastructure.

Several years ago, I was involved NTIA's comprehensive effort to lower barriers for broadband innovation, which included a process for streamlining and simplifying permitting on federal lands for rights-of-way, including tower siting. It was a useful undertaking that helped spur wireless deployments in previously unserved areas. I hope our action today will be equally successful.

In general, as we seek to promote and encourage our nation's broadband infrastructure, and particularly mobile broadband, we should always seek ways to streamline the deployment process while at the same time preserving the interests of local communities. I believe the item before us is a step in the right direction.

I am especially pleased that our item today recognizes the streamlined tower citing procedures that are already in place in a number of states across the country, and hope other states will follow their lead as well.

I thank the Chairman and the Bureau leadership for bringing this item before the Commission, and am pleased to join my colleagues in lending my support.

**Friends of Trinidad Head Comments for 7-11-12 Trinidad City Council Meeting
Re: Verizon's Proposed Antenna Swap and Installation of 6 Additional Coaxial Cables and
Mounting Equipment to Trinidad Head Cell Tower Site**

Importance of Trinidad Head

One of California's most prominent rocky headlands; a visual resource of both locally designated and statewide significance; an Environmentally Sensitive Habitat Area (ESHA); culturally and spiritually significant landmark to Native Americans; Gateway to California Coastal National Monument.

Friends of Trinidad Head Position

Any additions to or enlargement of the facility is expanding a nonconforming use in Open Space and would increase the cumulative impacts to the site; we are not trying to eliminate this service from our area; we know it is vital to our community; the cell towers should be moved to a less sensitive and legal location; this unique, important landmark should not be degraded by the presence of commercial cell towers.

Relevant Language from the Coastal Commission's 2006 Staff Report

(See: <http://documents.coastal.ca.gov/reports/2007/2/F7a-2-2007.pdf>)

C. Impermissible Uses Within Open Space Designated Lands

Section 3.01 of the City's Zoning Ordinance: "No building or part thereof or other structure shall be erected, altered, added to or enlarged, nor shall land, water, building, structure or premises be used for any purpose or in any manner other than is included among the uses hereinafter listed as permitted in the zone in which such land, water, building, or premises is located." (See p14.)

Appendix A of City of Trinidad's Land-Use Plan (LUP) re: Open Space: "The natural constraints require that development be carefully controlled in open space areas. [...] Public open space and park lands are also included in the Open Space category." (See p15.)

Section 4.02 of the City's Zoning Ordinance re: Open Space (OS) zoning district: "The open space zone is intended to be applied to areas designated open space in the Trinidad General Plan. The purpose of this zone is to maximize preservation of the natural and scenic character of these areas including protection of important wildlife habitat and cultural resources [...]." (See p15.)

Section 4.02.A of City's Zoning Ordinance re: "Principal Permitted Uses" in the OS zoning district:

1. "Public and private open space, wildlife habitat; 2. Low-intensity recreation on publicly controlled lands and waters such as beachcombing, hiking, fishing; 3. Pedestrian travel within public access easements consistent with the trail system identified in the General Plan; 4. Removal of vegetation posing an imminent hazard to structures or people if approved by the City Engineer; and 5. Picnicing on public lands designated for such use." (See p15.)

Our comment: Commercial cell towers are not a principal permitted use in Open Space.

2. [Coastal Commission] Analysis

"No discretionary authority is granted under the zoning ordinance for a City administrator or hearing officer to waive application of the various development regulations, to exempt imposition of applicable land use regulatory law because of past erroneous regulatory practices, or to make determinations as to the similarity of any unlisted land use to another identified use for purpose of how the zoning standards might be administered for that unlisted use. Moreover, as specifically stated in ZOCT Section 3.01, unless the land use for which the proposed new development is intended to serve has been expressly included in the list of

permissible uses of the zoning district in which the new development would be located, any erection, alteration, addition to or enlargement of any such building or structure or part thereof is not to be authorized." (See p17.)

E. Protection of the Open Space Coastal Resources of Trinidad Head

"The Land Use Plan (LUP) component of the City of Trinidad's certified Local Coastal Program comprise the policies contained in the Trinidad General Plan. The LUP identifies numerous types of natural resources present on Trinidad Head warranting protection, establishes development proposal procedures, and sets limitations on the type and scale of development so that the inherent quality of these resources are sustained. The natural resources include its historic significance, prominent coastal headland topography, open space aesthetics, flora and fauna, recreational opportunities and visual resources." (See p21.)

Policy No. 66 of the Recreation chapter of the LUP: "Trinidad Head will be kept in its natural state with hiking trails and vista points." (See pp21-22.)

Relevant Language from Trinidad Municipal Code

Chapter 17.64 Nonconforming Uses and Structures

Section 010 – "The lawful use of lands or structures existing on the effective date of the regulations codified in this title, although such use or structure does not conform to the regulations applied to such property or structure, may be continued, except as provided as follows ...:

A. Any structure conforming as to use but not conforming as to [...] height or other requirements [...] may be altered, repaired or extended provided such alteration, repair, or extension shall not increase the existing degree of nonconformance.

C. Any change to a nonconforming use shall be to a conforming use [...]."

Our Comments: This site was illegally established (therefore, nonconforming); adding 6 coaxial cables and mounting hardware will increase degree of nonconformity of the structure.

Relevant Lease Language

- Section 4.05: "Lessee shall not do or permit anything to be done [...] which will conflict with any law, statute, ordinance or governmental rule or regulation now in force or which may hereafter be enacted or promulgated by any public authority." (See p.6.)

Our comments: Expanding a nonconforming use in Open Space conflicts with City ordinances / regulations; Coastal Commission 3-9-07 letter states there should be "no future additional development of telecommunication facilities and related appurtenances on Trinidad Head [...]."

- Section 19.04: "Lessee assumes all responsibility regarding the [...] legal use and adaptability of the Site and compliance with all applicable laws and regulations in effect during the term of this Lease." (See p.15)

Impacts from Cell Towers on Trinidad Head

- Cell towers impact coastal views from land and sea and from homes and businesses.
- Presence of cell towers discourages hiking public from exploring the top of Trinidad Head and experiencing the sweeping views of the coastline and Monument rocks from that vantage point.
- Additional development of cell towers will further interfere with low-intensity recreational uses on Trinidad Head.
- More cell tower additions/upgrades = more traffic from commercial utility vehicles, resulting in further hazards to hikers.

Increase in Intensity of Use

The installation of 6 additional coaxial cables and mounting hardware is an additional appurtenance that would expand the degree of non-conformity of the site. Also, an upgrade from 3G to 4G technology would increase the intensity of use of the site, due to increases in signal strength, amounts of service occurring and the likelihood of higher radio energy transmissions coming from the site on Trinidad Head. Finally, allowing additional equipment to provide 4G service will result in more resistance to removal of the facility at the end of lease term in 2017.

City's Fear of Lawsuits

City's fear of lawsuits should not control City decisions. A solid review and understanding of our land-use laws/LCP should give the City confidence that it has the right to deny requests to expand the cell tower facility on Trinidad Head.

The public expects the City to uphold its own laws and not allow further expansion of this nonconforming use in Open Space.

A moratorium should be placed on any further additions to or expansion of the cell site on Trinidad Head. The City Council should then notify City staff, Verizon, AT&T and Sprint of such moratorium and communicate its desire to terminate the lease when it expires in 2017.

Verizon's Proposed Project and Cumulative Impacts

Cumulative impacts = successive projects of the same type, in the same place, over time which become significant. Installing 6 additional cables / mounting hardware onto poles will increase cumulative impacts to an already heavily-impacted site.

Because of the successive additions to and expansion of the cell site over the years, the cumulative impacts must be considered under CEQA. (Refer to cumulative impacts table and illustration submitted by Stan Binnie for the 6-20-12 Council meeting.)

This is a turning point in the Trinidad Head cell site debate. If Verizon is allowed to add more equipment to the site, sublessees AT&T and Sprint will expect the same privilege, guaranteeing increased cumulative impacts to this nonconforming commercial use on Trinidad Head.

Conclusion

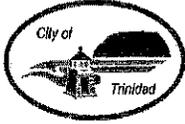
If the City of Trinidad grants a Coastal Development Permit that allows any addition to the structure or changes the intensity of use of the site, the City will violate its land-use laws and encourage further requests to expand and enlarge the site. **The City has the right, and it would be reasonable, to deny any proposed project that violates our LCP and land-use laws.**

If Verizon is unable to function on the site with its current technology and equipment, or by conducting simple repair and maintenance activities that do not expand the degree of nonconformity of this site, then it should seek an alternative location where such upgrades and additional equipment installations would be allowed.

Friends want to work with the City and cellular carriers to site this service in a more appropriate, legal location, so the public can better enjoy Open Space on Trinidad Head.

Summary of Concerns

- Importance of Trinidad Head: Prominent headland, ESHA, significant (local, statewide, Native American) landmark.
- Friends' Position: Additions/enlargements to Head cell site not allowed.
- Relevant Language from the Coastal Commission's 2006 Staff Report: Cell facilities not a use permitted in Open Space; protected features include historic, headland topography, flora and fauna, recreation and visual resources.
- Relevant Language from Trinidad Municipal Code: Any change to a nonconforming use shall be to a conforming use.
- Relevant Lease Language: Section 4.05: not permitted to conflict with any rule, etc.; Section 19.04: lessee responsible for all laws and regulations in effect.
- Impacts from Cell Towers on Trinidad Head: Degraded coastal views; discourages hiking to the top; noise; traffic hazards to public.
- Increase in Intensity of Use: Addition of equipment and upgrade from 3G to 4G technology increases the intensity of use of site.
- City's Fear of Lawsuit: Understanding laws and regulations gives City right to deny further development requests; moratorium should be instituted.
- Verizon's Proposed Project and Cumulative Impacts: Repeated additions over the years; AT&T and Sprint will want to add equipment; cumulative impacts considered under CEQA.
- Conclusion: If City issues CDP, it will violate its own laws; Verizon should seek alternate location that allows expansion/upgrades; Open Space should be restored on Trinidad Head.



AGENDA ITEM 2

SUPPORTING DOCUMENTATION FOLLOWS WITH: 2 PAGES

2. Discussion/Decision regarding Azalea & Pacific State Transportation Improvement Project.

DISCUSSION/ACTION AGENDA

Date: July 11, 2012

Item: Azalea & Pacific State Transportation Improvement Project

Background:

The proposed Azalea and Pacific STIP Project includes the rehabilitation of Azalea Way and Pacific Street to bring the roads up to City standards, provide better emergency vehicle access and improve the road drainage facilities.

This project was initially included in the State/Regional Transportation Improvement Program (STIP/RTIP) in 2002 following a series of public meetings. State funds to complete the design on this project expired in 2008; however, the City Council more recently approved an allocation of Proposition 1B funds to replace those expired funds which enabled the archaeological review, survey and project design to move forward. Two public meetings have been held to present the proposed design specifics and respond to numerous citizen inquiries and concerns, in particular the need for a 20 foot width to meet fire code standards and the desire for a permeable surface.

The resulting proposed improvements include roadway widening and paving, and installation of curb and gutters, concrete connections between the new paved roadway and adjacent existing residential concrete driveways, drainage swales, subsurface drainage systems, street signs, and trees. Azalea Way will be widened from approximately 9-feet to 20-feet, as required to comply with the California Fire Code, and paved with a combination of asphalt concrete and grass pavers. The grass pavers will allow for narrowing the visible pavement on Azalea to approximately 17 feet and achieve the remaining required width with a grass paver system. This is basically a plastic interlocking grid that is backfilled with soil and seeded with grass, and can be designed to support fire trucks. The disadvantage is that the City will need to maintain the grass on the grid and ensure that organic material doesn't built up so as to reduce its ability to support vehicles. It is felt this surface will address the citizen concerns for less paving and reduced width appearance, while still meeting fire code standards. Pacific Street's graveled surface will be replaced with an asphalt concrete paved surface that will generally follow the same extents as the graveled surface.

If funding allows, improvements may also include the replacement of an existing 2-inch water line and the addition of a new fire hydrant. The project is limited to work within the City Right-of-Way (ROW) with the exception of minor driveway transitions to the newly paved roadway.

The project is programmed for construction (construction capital and construction engineering) in FY 12/13 for the total amount of \$423,000.

Proposed Action:

Authorize staff to finalize design, CEQA documentation and permits, and request an allocation of construction funds from the California Transportation Commission (CTC).



AGENDA ITEM 3

SUPPORTING DOCUMENTATION FOLLOWS WITH: 1 PAGES

3. Presentation of County's Draft General Plan and draft Environment Impact report. - 8:30 pm



COMMUNITY DEVELOPMENT SERVICES
PLANNING DIVISION
COUNTY OF HUMBOLDT

<http://co.humboldt.ca.us/CDS/Planning>

April 26, 2012

Kathy Bhajdwaj, Mayor
City of Trinidad
P.O. Box 390
Trinidad, CA 95570



RE: Notice of Release for the Planning Commission Approved Draft General Plan and Draft Environmental Impact Report

Dear Ms. Bhajdwaj,

It is with great pleasure that the Humboldt County Board of Supervisors announces the release of the Planning Commission Approved Draft General Plan and Draft Environmental Impact Report! At this time, we would like to reach out to you, our local planning partner, and request to be placed on your Council's agenda for a public presentation of the recommended changes to the Plan and the key findings of the environmental review.

County staff recently provided your organization with a disc containing copies of the draft Plan, the DEIR and recommended countywide mapping changes made by the Commission. Supervisor Sundberg and I would like the opportunity to provide a brief overview of these changes, the key differences from the draft Plan and Framework Plan, and the identified environmental impacts. We will then provide a status of the General Plan Update program, with an explanation of the opportunities for input and involvement for Board consideration.

We envision that the presentation will last from 15 to 20 minutes and be followed by a 10-minute question and answer session. Of course, we'd also make ourselves available to respond to any public comments per your council's direction.

Thank you for considering our request. We stand by to answer any questions you may have and to schedule the presentation as appropriate. We have always appreciated your City's participation in county-wide planning initiatives and look forward to working with you and your staff.

Sincerely,

Martha Spencer
Supervising Planner
(707) 268-3704



AGENDA ITEM 4

SUPPORTING DOCUMENTATION FOLLOWS WITH: 4 PAGES

4. Trinidad Head Study Committee Interim Report

Trinidad Head Study Committee Interim Report
Presented to Trinidad City Council, July 11, 2012

Original Committee Members: Stan Binnie, Shirley
Laos, Allie Lindgren, Sarah Lindgren-Akana, Ben
Morehead, Mareva Russo, Victoria Sackville,
Virginia Waters

Sept. 28, 2011 First Meeting Trinidad Head Study Committee
(THSC)

- Elected Chair, Vice-Chair & Secretary—Stan Binnie, Ben Morehead, Mareva Russo.
- Determined regular meeting schedule—3rd Tuesday of the month.
- Distributed map of Trinidad Head (the Head) area—members indicated on map what they considered to be the Head—variety of boundaries indicated.
- Polled THSC members as to why they wanted to be on the committee. Vegetation management (veg. mgmt.) on trail and roadsides was a major concern mentioned by 6 of 8 committee members.
- Decided next meeting should be walking tour of the Head.

Oct. 19, 2011 Trinidad Planning Commission (TPC) meeting

- TPC discussed City Planner's CDP 2011-6 staff report (which included, "not...wait(ing) for the Trinidad Head Committee to provide recommendations on this vegetation maintenance, since vegetation growth occurs so quickly...")
- TPC decided to delay vote until suggestions were received from THSC.

Oct. 20, 2011 THSC Special Meeting

- Walking tour of the Head—list of 19 specific features (trail widths, invasive plants, structures, etc.)

provided to all for note-taking & discussion. Tour not completed—second tour required.

Oct. 25, 2011 THSC meeting

- Discussed initial walking tour.
- Discussed committee's interest and concern regarding veg. mgmt. along trail and roadsides.
- Decided to develop and present our veg mgmt. recommendations.

Nov. 1, 2011 THSC Special Meeting

- Part 2 of walking tour of the Head. Observed and discussed features not covered in initial tour on Oct. 20.

Nov. 15, 2011 THSC meeting

- Discussed response to City Manager's request that THSC not deal with veg. mgmt. on the Head.
- Decided to write letter to Trinidad City Council (TCC) requesting that vegetation management recommendations be added to THSC's tasks. Committee crafted wording of that letter.

Dec. 5, 2011

- THSC submitted letter (see Nov. 15 entry above) to TCC.

Dec. 14, 2011 TCC meeting

- THSC asked TCC to add veg. mgmt. to committee's tasks and provided list of recommended veg. mgmt. practices.
- TCC member Dwight Miller expressed opinion that vegetation management could be considered as fitting into existing list of tasks and volunteered to serve as liaison between Department of Public Works (DPW) and THSC. This was approved by TCC.

Dec. 20, 2011 THSC meeting

- Discussed TCC's response to request for adding veg. mgmt. to our tasks.
- Discussed response from DPW to THSC's recommendations for veg. mgmt. on the Head.

Jan. 9, 2012 Meeting of TCC member Miller, DPW director
Bryan Buckman, THSC chair Binnie

- Binnie presented list of compromises from THSC.
- Group spent 3 hours walking Head trail and discussing issues.

Jan. 24, 2012 THSC meeting

- Discussed current draft of Trinidad Head Vegetation Management Plan (Plan); continued revisions (with TCC member Miller).
- Decided on early Feb. THSC meeting to finish Plan revisions for TPC Feb. meeting.

Feb. 1, 2012 THSC meeting

- Discussed Plan, concluded revisions.
- TCC member Miller agreed to incorporate THSC's revisions into CDP 2011-6 "Trinidad Head Vegetation Management Guidelines" application.

Feb. 15, 2012 TPC meeting

- CDP 2011-6 (including THSC's revisions) approved, establishing Trinidad Head Vegetation Management Guidelines.

Mar. 20, 2012 THSC meeting

- Reviewed/discussed documents regarding transfer of BLM 47 acres on Trinidad Head to the City of Trinidad in 1983.

Apr. 17, 2012 THSC meeting with Guest Lynda Roush, BLM
Arcata Field Manager

- Discussed current status of 12+ acres US Coast Guard (CG) property (excluding Light Station and Fog signal building); CG has declared this excess to their needs.
- If BLM receives this property, could work with interested parties (City of Trinidad, Trinidad Rancheria, Tsurai Ancestral Society and Yurok Tribe) to develop cooperative partnership management plan.
- Continued discussion of documents re: transfer of BLM 47 acres on the Head to City.

May 22, 2012 THSC meeting

- Discussed content/presentation of interim report to TCC at June TCC meeting—established subcommittee Binnie/Russo/Waters to report.
- Reviewed/discussed document regarding who has regulatory authority over TH.

June 19, 2012 THSC meeting

- Met @ CG gate to lighthouse (inc. Leslie Sanders for Trinidad Rancheria); tour of lighthouse 12+ acres; vegetation, structures noted.
- Discussed CG 12+ ac. concerns: historic, land transfer/maintenance, etc.
- Discussed cell tower lease agreement; importance of next TCC meeting.
- Discussed interim report to TCC; reviewed draft summary.

Submitted July 2, 2012 Mareva Russo, Secretary, THSC



AGENDA ITEM 5

SUPPORTING DOCUMENTATION FOLLOWS WITH: 1 PAGES

5. November Election Schedule and Upcoming Deadlines

DISCUSSION AGENDA ITEM

Date: July 11, 2012

Item: November Election Schedule and Upcoming Deadlines

Background Info: The City's November 06, 2012 Election ballot currently includes two items; 1) A measure to continue the current 3/4% Sales Tax Increase, and 2) Two (2) Councilmember seats.

The list of deadlines related to the Election is as follows:

- **On or before July 14 - Election Notice:** A notice will be published in the 3 locations throughout the City (City Hall, Murphy's Market, and the Trinidad Post Office), and in the McKinleyville Press announcing the November Election and the Council positions available.
- **July 16 – Candidate Nomination Period Opens:** Anyone who wants to file as candidate for one of the (2) open positions may pick up nomination packets from the Clerk's office at the Town Hall. Fee for filing a candidate statement in the election ballot is \$375. Payment must be made when the nomination packets are submitted. ***Deadline for incumbents to file nomination papers is 2:00pm, Friday, August 10.***
- **On or before August 02 – Notice Published to Accept Arguments For/Against Sales Tax Increase:** The City Clerk must file a notice to the public announcing that anyone who wishes to file arguments for or against the Sales Tax Increase continuation measure may do so by the ***deadline of 2:00pm Friday, August 10.***
- **August 10 – Deadline for Incumbents to file Nomination Packet, and Arguments For/Against the Sales Tax Increase.**
- **August 15 – Deadline for Nomination Packets IF NO INCUMBENTS file for the positions.**
- **August 20 – Deadline to file REBUTTALS to Arguments For/Against Sales Tax Increase.**
- **August 23 – Deadline to Appoint Council Candidates:** If only 2 candidates apply for 2 open positions, the Council may choose to appoint the members and cancel that part of the election. If this ends up being the case, the Council will have to hold a Special Meeting sometime between the August 15 and August 23 and make their announcement to the public.
- **November 06 – Election Day**

Staff Recommendation: Review and file. Clerk will notify the Council and public of each deadline as it approaches. Monthly election progress reports will be included in the packets each month.

Attachments: None.