

**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)	

EMERGENCY MOTION FOR STAY

**THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND
ADVISORS, THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL
LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, AND THE
AMERICAN PLANNING ASSOCIATION**

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SUMMARY

Petitioners move the Commission for an emergency stay in the effect of its Declaratory Ruling adopted *In the Matter of 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*, FCC 09-99, WT Docket No. 08-165 (“Order”) based on the Commission’s failure to comply with its own interpretation of Section 332(c)(7) of the Telecommunications Act of 1996 (“Communications Act”). In the alternative, Petitioners request that the Commission stay the effectiveness of the 30 day incompleteness deadline and permit a tolling of the shot clock for incompleteness at any time during the review process.

Petitioners are simultaneously filing a Petition for Reconsideration or Clarification requesting that the Commission alter, amend, or remove the 30 day incompleteness deadline. We request a stay of the entire Order, or at a minimum, the 30 day incompleteness rule because of the significant, immediate, injury that will be caused to local governments and the public if the rule were to continue in immediate effect.

Petitioners satisfy all of the requirements for the granting of a stay request. Petitioners are likely to succeed on the merits of their Petition because the Commission exceeded even its own understanding of its authority in establishing the 30 day incompleteness deadline. Also, Petitioners’ members are likely to suffer significant, immediate harm if the Order is not stayed, at least in part. On the other hand, other parties, such as applicants, will not suffer any significant injury by a stay in the Order, or at least the 30 day incompleteness deadline. Finally, the public interest is strongly in favor of a stay because the public will also suffer injury if this rule were to continue in immediate effect. For these reasons, we request that the Commission grant this Emergency Stay Request in very short order and with immediate effect.

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Pursuant to 47 C.F.R. §§ 1.14, 1.43, and 1.429(k), local governments across the nation as represented in Washington by the National Association of Telecommunications Officers and Advisors (NATOA),¹ the United States Conference of Mayors (USCM),² the National League of Cities (NLC),³ the National Association of Counties (NACo),⁴ and the American Planning

¹ NATOA is the national association that represents the communications needs and interests of local governments, and those who advise local governments. NATOA's membership includes local government officials and staff members from across the nation whose responsibility is to advise and implement telecommunications policy for the nation's local governments.

² USCM is the official nonpartisan organization of cities with populations of 30,000 or more. There are 1,201 such cities in the country today. Each city is represented in the Conference by its chief elected official, the mayor. USCM was formed back in 1932 as a response to the Great Depression. Since that time, mayors have gathered to speak with one voice to promote policies and programs that would move our country in a direction that would promote jobs and economic competitiveness.

³ NLC is the nation's oldest and largest organization devoted to strengthening and promoting cities as centers of opportunity, leadership, and governance. Founded in 1924, NLC is a resource and advocate for more than 1,600 member cities and the 49 state municipal leagues, representing 19,000 cities and towns and more than 218 million Americans.

⁴ NACo is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,068 counties.

Association (APA)⁵ (collectively “Petitioners”) hereby move the Commission to stay the effect of its Declaratory Ruling adopted *In the Matter of 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*, FCC 09-99, WT Docket No. 08-165 (“Order”) based on the Commission’s failure to comply with its own interpretation of Section 332(c)(7) of the Telecommunications Act of 1996 (“Communications Act”).

Petitioners assert that the Commission has erred in establishing a 30 day review for completeness deadline and that this error is exacerbated by both the effective date and expiration of the 30 day incompleteness deadline occurring before local governments across the nation are afforded the opportunity to be informed of the rule by means of Federal Register publication.

Even assuming the Commission’s interpretation of its authority under Section 332(c)(7) is correct, the 30 day review deadline violates the Commission’s own interpretation of the law that Commission action cannot result in local governments being denied the ability to review

NACo advances issues with a unified voice before the federal government, improves the public's understanding of county government, assists counties in finding and sharing innovative solutions through education and research, and provides value-added services to save counties and taxpayers money.

⁵ APA is a nonprofit public interest and research organization founded in 1978 to advance the art and science of planning – including physical, economic and social planning – at the local, regional, state, and national levels. The APA's mission is to encourage planning that will contribute to the public well-being by developing communities and environments that more effectively meet the present and future needs of people and society.

The APA resulted from a merger between the American Institute of Planners, founded in 1917, and the American Society of Planning Officials, established in 1934. The organization has 47 regional chapters and 20 divisions devoted to specialized planning interests. APA represents more than 44,000 practicing planners, officials, and citizens involved in urban and rural planning issues. These members are involved, day-to-day basis, in formulating planning policies and preparing land-use regulations.

applications.⁶ The 30 day incompleteness deadline will result in certain local governments being denied the ability to review applications where an area of concern becomes known only after the 30 day deadline.⁷ Whereas today neither party has an incentive to hide an issue in the application process, the 30 day rule for incompleteness rewards an applicant that intentionally or inadvertently does not fully disclose an issue on an application.

Petitioners are also simultaneously filing a Petition for Reconsideration or Clarification of the Order (“Petition”). Petitioners are likely to prevail on the merits of the Petition because the Commission implemented a 30 day review for completeness requirement without statutory authority and against the Commission’s own interpretation of its authority in the Order. Furthermore, a stay is necessary to prevent irreparable harm to Petitioner’s members. On the other hand, granting a stay pending review of our Petition will not change the status quo of other parties and will further the public interest.

Petitioners request that all rules established in the Order be stayed pending review of the Petition for Reconsideration and Clarification and pending judicial appeals. This would provide the most manageable and predictable regime for this interim period. In the alternative, Petitioners request that the Commission, at a minimum, stay the 30 day review for completeness rule, but that in no case any rule be effective until 30 days after the Order is published in the Federal Register. In the event of a stay of this single rule, the Commission should clarify that, in the interim period, when an application is returned to an applicant as incomplete, the “shot

⁶ See Order ¶ 25 (“We read the legislative history as intending to preclude the Commission from maintaining a rulemaking proceeding to impose *additional* limitations on the personal wireless facility siting process beyond those stated in Section 332(c)(7).” (emphasis in original)) *citing* H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 208 (1996).

⁷ See Petition for Reconsideration and Clarification of NATOA et al *In the Matter of 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*, FCC 09-99, WT Docket No. 08-165 (“Petition”) at 5-10.

clock” is tolled regardless of whether the request for missing information comes before or after 30 days since the application was initially submitted and regardless of whether the reason for delay is related to the facial completeness of the application or if it is for another valid reason.

For all these reasons, the grant of a stay is warranted under well-established Commission precedent. Petitioners ask that the Commission grant this motion immediately, so that they are not required to file a petition with the courts for relief.

I. BACKGROUND

On July 11, 2008, CTIA – The Wireless Association (“CTIA”) filed a petition (“CTIA Petition”) requesting that the Commission issue a Declaratory Ruling reinterpreting Sections 332(c)(7) and 253 of the Communications Act of 1934. CTIA requested that timeframes be implemented on State and local zoning authorities after which the authority must act on a wireless facility siting application (“application”). CTIA also requested that the Commission revoke the ability of local authorities to deny an application by a provider because wireless service is already provided in a given area. Finally, CTIA also requested that local zoning authorities be restricted in their ability to require variances before granting an application.

On August 14, 2008, the Wireless Telecommunications Bureau (“WTB”) of the Commission requested comment on CTIA’s petition. On September 29, 2008, NATOA, NLC, NACo, and USCM filed joint comments in opposition to CTIA’s petition (“Comments of NATOA et al”).

On November 17, 2009, the Commission voted to grant CTIA’s petition, in part, and to deny CTIA’s petition, in part., including granting, without request by CTIA (in its original petition or based on any public comment cited in the record from any party), an internal thirty day deadline for review of the “completeness” of an application that would apply regardless of

whether the application was governed by the 90 or 150 day shot clock.⁸ While local government is troubled by the whole of the Declaratory Order, Petitioners seek review of this 30 day deadline.

As Petitioners understand the rule, starting from the date on which an application is submitted, a local authority now has the obligation to review and return all applications for incompleteness.⁹ If the authority notifies the applicant of the incompleteness within that 30 day period, deadlines for action are tolled until the applicant submits the required information. However, if the authority does not notice the incompleteness until after 30 days or if the incompleteness does not manifest until after the 30 days, the deadlines are not tolled. This ruling was made by the Commission despite the fact that it was not requested in CTIA's petition, was not the subject of any *ex parte* on record, and not discussed with Petitioners.

II. THE COMMISSION HAS FAILED TO COMPLY WITH THE TELECOMMUNICATIONS ACT IN THE DEVELOPMENT OF A 30 DAY "INCOMPLETENESS" DEADLINE.

Petitioners are seeking reconsideration and clarification of the thirty incompleteness deadline on both legal and policy grounds. For the details of our legal and policy arguments, please see the Petition for Reconsideration and Clarification being filed simultaneously with this Emergency Motion for Stay.

On legal grounds, the incompleteness deadline violates the Commission's own interpretation of the law that Commission action cannot result in local governments being denied the ability to review applications. The Commission, citing its general rulemaking power,¹⁰ voted

⁸ See Order at ¶ 53.

⁹ Order at ¶ 53.

¹⁰ See Order at ¶ 23 ("These grants of authority necessary include Title III of the Communications Act in general, and Section 332(c)(7) in particular.") (*citing* 47 U.S.C. §§ 201(b), 303(r), and 4(i)).

to grant CTIA’s petition, in part, and to deny CTIA’s petition, in part.¹¹ The Commission found that while the legislative history indicates the FCC must terminate rulemakings, Congress only intended “to preclude the Commission from maintaining a rulemaking proceeding to impose additional limitations on personal wireless service facility siting process beyond those stated in Section 332(c)(7)...” and that its actions did not preempt State or local governments from reviewing applications.¹² In the Order the Commission created, without request by CTIA in its original petition or based on any public comment cited in the record from any party, an internal deadline for completeness of an application that would apply regardless of the application would be governed by the 90 or 150 day shot clock.¹³

This completeness deadline violates the Commission’s interpretation of its own authority as expressed in the Order. The Commission defends its authority to establish 90 and 150 day deadlines claiming that it is merely interpreting or clarifying an ambiguity in Section 332(c)(7) that requires local zoning authorities to act on an application within a “reasonable period of time.”¹⁴ The Commission justified this interpretation by claiming that it was not a “new limitation” on State and local governments; rather, it “merely interprets the limits Congress already imposed on State and local governments.”¹⁵ While we disagree with the Commission’s interpretation of its authority under Section 332(c)(7), we agree that *if* the Commission had the power to interpret that section, it would have the power to define a “reasonable period of time”

¹¹ Petitioners continue to adamantly reject the argument that the Commission has the power to take any of the action it takes in the Order. *See* Comments of NATOA et al. Petitioners support the ongoing appeals against the entirety of this order and will continually reassess whether it is in our members’ interest to join such an appeal at a later date.

¹² Order at ¶ 25.

¹³ *See* Order at ¶ 53.

¹⁴ *See* Order at ¶ 19 (*citing* 47 U.S.C. § 332(c)(7)(B)(ii)).

¹⁵ Order at ¶25.

as either 90 or 150 days depending on the type of application submitted. On the other hand, the power to define a “reasonable period of time” for a final action on an application does not mean that the Commission would have the ability to create intermediate, internal deadlines that are in no way referenced in any portion of the Act or its legislative history.

On policy grounds, the 30 day incompleteness deadline will result in certain local governments being denied the ability to review applications where an area of concern becomes known after the 30 day deadline. The Order also fails to give local governments the ability to toll the shot clock for other reasons that require such a tolling besides facial incompleteness. Before this Order went into effect, neither party had an incentive to hide an issue in an application process or act in an uncooperative manner under the threat of litigation. Now, the 30 day rule for incompleteness rewards an applicant that intentionally or inadvertently does not fully disclose an issue on an application. The rule also punishes local governments when issues arise that delay an application without any fault on the part of the local government. Furthermore, the 30 day deadline will have the unintended consequences of slowing down the review process, increase application fees, and result in a more rigid and formal application process.

Petitioners will further assert that reconsideration is in order in that no local government was given notice of the Commission’s plans for this incompleteness deadline, nor was such a proposal outlined in CTIA’s original petition, nor according the Order was the proposal ever the subject of an ex parte filing or comment in this proceeding. The only references to the basis for an incompleteness deadline were references to five state laws on siting that include an incompleteness deadline. Finally, many local governments have not even received proper notice of this change in the law because it has not yet been published in the Federal Register.

III. THE COMMISSION SHOULD GRANT THE MOTION TO STAY BECAUSE PETITIONERS HAVE A HIGH LIKELIHOOD OF SUCCESS ON THE MERITS, WILL SUFFER IRREPERABLE HARM OTHERWISE, THERE IS NO HARM FROM A STAY, AND A STAY IS IN THE PUBLIC INTEREST.

The Commission considers requests for stay under well-established principles.

Petitioners must show that they are: (1) likely to prevail on the merits; (2) will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be substantially harmed if the stay is granted; and (4) the public interest favors granting a stay.¹⁶

When evaluating these factors, the probability that the Petitioners will succeed on the merits may vary depending on the Commission's assessment of the remaining three factors. It is not necessary that the Petitioner establish with absolute certainty that they will prevail on the merits. Indeed, if the remaining factors favor interim relief, the Commission may exercise its discretion to grant a stay. The Commission performs a balancing test on a case-by-case basis and may grant a stay if Petitioners can make a particularly strong showing as to at least one of the factors.¹⁷

A. Petitioners Are Likely to Prevail on Their Petition for Reconsideration and Clarification

Petitioners are likely to prevail on their Petition because, as discussed above in Part II and in detail in our Petition, the Commission failed to follow even their own interpretation of the Commission's authority under Section 332(c)(7). Even if the Commission has the authority that the Order claims, which we believe it does not, the Commission violated that authority by

¹⁶ *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified by *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 59 F.2d 841, 843 (D.C. Cir. 1977).

¹⁷ *See, e.g., Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies*, Third Memorandum Opinion and Order, Third Further Notice of Proposed Rulemaking and Order, 19 F.C.C. Rcd 25045, 25063, ¶ 43 (2004).

conjuring a 30 day review for incompleteness deadline that does not come from the text of Section 332(c)(7) or any good faith interpretation of that section or its legislative history.

Even if the Commission determines that it does have the authority to implement the 30 day review for incompleteness deadline, the Order is fatally ambiguous as to the details of that incompleteness review process. As discussed in Part II above and in detail in the Petition for Reconsideration and Clarification filed simultaneously with this Motion, these ambiguities will lead to many unintended consequences such as rewarding bad faith and incompetent applicants when applications are found to be incomplete, or in need of supplementation, after 30 days from the application submission.

B. Petitioners' Members Will Suffer Irreparable Harm in the Absence of a Stay

The new rules implemented by the Order took effect *immediately* on November 18, 2009. This means, that communities who had applications pending on November 18, 2009 (even those received on that day) have only 30 days to review those applications for incompleteness or they lose the ability to toll the “shot clock” for the time it takes an applicant to submit the missing information. This means that many communities, especially small ones without extensive legal resources, are required to make major changes immediately or risk court action. The clock began running on these communities the moment the Order took effect – and many of them do not even know it because the Order has yet to be published in the Federal Register. This provides applicants an incentive to “keep quiet” about their incomplete application and the new requirements until December 18, 2009 at which point the applicant can refuse to cooperate with any further requests and still demand approval within 90 or 150 days on threat of legal action against the community.

While this immediate harm may be correctable by a short stay in the implementation of these requirements and publication, the longer term harms described above in Part II and in detail in our Petition, require a longer stay. As was discussed, the rules, as written, will cause significant harm to our member communities and the citizens who live in them. The 30 day review for incompleteness rule, as written, does not reflect the realities of the application process and does not account for the fact that often times, supplemental information will be required after 30 days. Also, unlike the 90 day and 150 day deadlines – which we also oppose – the 30 day deadline is a hard one. There is no exception for when the request is “reasonable” outside of 30 days.

Ironically, this requirement will slow the application process to a halt. Local zoning authorities could be forced to reject, or “deem withdrawn,” *every* application that is determined to be incomplete after the 30 day period has elapsed unless the applicant agrees to a waiver of the applicable deadline. This will be the only way that a local zoning authority will be able to protect itself against costly litigation and bad faith applicants. The increase in applications that are rejected very early in the process, will result in applicants having to pay increased fees and will slow down the process.¹⁸

Preservation of the *status quo* on the 30 day incompleteness deadline, pending full consideration of our Petition by the Commission, is necessary to avoid these and other adverse

¹⁸ It is worth noting that before the Order changed the process, it was common for zoning authorities to informally request additional information whenever it became necessary. This Order will require a formalization of the process with rigid requirements and no exceptions for applicants who are not completely in line with local ordinances. This will require applicants to spend significant resources on conforming their applications to thousands of local zoning ordinances on their own without the informal help of local governments throughout the process.

consequences that will arise from the immediate application of the *Order*.¹⁹ Also, as was discussed in Part III-A, our Petition is likely to succeed. The harm caused by taking the serious actions required to comply with this Order, such as drafting new ordinances, forms, and fee schedules is significant. Furthermore, that harm would be increased if the local government had to redraft those documents after the permanent rule was developed after if it is reworked in response to our Petition.

C. Issuance of a Stay Will Not Result in Substantial Injury to Other Parties

A stay of the rules, pertaining to the 30 day review for incompleteness deadline, set forth in the Order would not harm the interest of applicants, providers, or prospective providers. Under the system that has been in place, there was no concrete deadline for acting on an application. Thus, under a stay of the entire order, the status quo would be maintained and there would be no harm to other parties. With a stay of only the 30 day incompleteness deadline, there will be a firm deadline of 90 days for collocations and 150 days for all other applications. All that is required of applicants, in the interim, is to timely respond to requests for information that was not initially submitted when the shot clock is tolled. Even if this is an “injury” as compared to the current rule in the Order, it is certainly not a substantial injury. It is, if anything, significantly less burdensome than would be the injury to local governments if this rule were to continue in immediate effect without numerous changes. Also, it is worth pointing out that a stay would be beneficial to applicants who will need to make significant changes in their application processes to conform to the new requirements that local governments will implement under this Order.

¹⁹ Petitioners also support a stay of the entire Order pending the outcome of ongoing appeals. However, we see a stay of the 30 day completeness requirement as the most critical issue at this time.

D. The Public Interest Favors Granting a Stay

The public has an interest in allowing their representatives in local government conduct full inquiries into wireless facilities siting applications. And, the public has an interest in making sure that applicants do not have an incentive to obscure important information that may result in hazardous or unsightly placement of facilities. Furthermore, the public has an interest in the quick, efficient deployment of wireless services. Staying and amending or discarding the rule at issue here would increase this efficient deployment. The current rule gives applicants an incentive to obscure deficiencies in their application and will leave local authorities with no choice but to reject applications, formalize the process, and charge increased fees – all actions that will slow down the deployment of wireless services. On the other hand, the granting of the stay will allow time to develop rules that will truly aid the deployment of wireless services while allowing local governments to provide the public with the protection and oversight it needs.

IV. CONCLUSION

For the foregoing reasons established herein, it is respectfully requested that the Commission stay the effective date of the *Order* in the above-referenced proceeding. In the alternative, it is asked that the Commission at least stay the effective date of the 30 day review for incompleteness deadline until it considers our pending Petition for Reconsideration and Clarification.

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December 17, 2009

CERTIFICATION PURSUANT TO 47 C.F.R. § 1.16(2)

I declare under penalty of perjury that the foregoing is true and correct. Executed on
December 17, 2009.

Respectfully submitted,



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