

**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)	

PETITION FOR RECONSIDERATION OR CLARIFICATION

**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

The Commission should reconsider or, at least, clarify the 30 day incompleteness review deadline in its Declaratory Ruling of November 18, 2009 (“Order”). This Petition does not address the Commission’s finding that it has the authority to establish a “shot clock” of 90 days for collocations and 150 days for other wireless facilities applications after which a local government authority faces litigation if it has not taken final action on that application. Petitioners still completely, and unequivocally, reject the Commission’s finding that it has such authority under Section 332(c)(7) of the Communications Act. Nonetheless, for the limited purposes of this Petition, Petitioners accept *arguendo* the Commission’s interpretation of its authority as to this matter.

Even assuming that the Commission has the authority it describes in the Order, it has exceeded the limits of that authority with its implementation of a 30 day incompleteness review deadline. The Commission stated, in the Order, that it had the authority to interpret the rules established in the Communications Act. But, it stated, it had no power to “impose additional limitations on personal wireless service facility siting process beyond those stated in Section 332(c)(7)....”. The 30 day incompleteness deadline is not based on the text of Section 332(c)(7) nor is it based on the legislative history of that Section. The 30 day deadline is a new rule created by the Commission without statutory basis or authority, even under the Commission’s own interpretation of that authority.

Furthermore, the 30 day incompleteness deadline has significant practical and procedural problems that were not properly considered prior to the implementation of the Order. First, the Order does not take into account that there are many valid situations in which a local government should have the power to toll the shot clock for reasons beyond application incompleteness. For

example, if actions of the applicant or a third party cause the delay in the application review, the shot clock should be tolled until the application is back under the power of the local government zoning authority. In an ideal world, applicants would not bring or threaten litigation against a local government clearly not at fault for the delay. But, we do not live in an ideal world and some applicants may use such delays as a strategic advantage. And, although such litigation may ultimately be settled in favor of the local government, the mere threat of expensive litigation may be all the applicant needs to obtain an unfair advantage. Second, the 30 day deadline will result in a more rigid process with increased application rejections, possibly higher fees, and more delays in the deployment of wireless and mobile broadband services to our nation's communities.

Finally, the 30 day deadline was not in CTIA's initial petition, nor was it discussed in any comment or ex parte on the record prior to the issuance of the Order. Common notions of fairness require that it be subject to full, data driven, investigation and public comment prior to implementation.

For these reasons, the Commission should reconsider the 30 day completeness review portion of the *Declaratory Ruling*, and either (1) amend it to (a) provide that any time period in which additional information is required that is not a delay caused by the local government will not count against the shot clock and (b) clarify that applicants cannot refuse to provide supplemental information required by the local government more than 30 days after an application, or (3) eliminate the 30 day completeness review rule in its entirety.

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Pursuant to 47 U.S.C. § 405(a) and 47 C.F.R. § 1.429, 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

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. NACo advances issues with a unified voice before the federal government, improves the public's

American Planning Association (APA)⁵ (collectively “Petitioners”), hereby submit this Petition requesting that the Commission reconsider 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 (“*Declaratory Ruling*”). Petitioners seek to make clear to the Commission, and any Circuit Court of Appeals in which the Declaratory Order might be subject to a petition for review, that while we do not agree with the Commission’s interpretation of its authority under Section 332 of the Act, that interpretation is not the subject of this Petition. All assertions of the illegality of the Order made in this Petition are based on the Commission’s own interpretation of its authority as articulated in the Order.

I. BACKGROUND

On July 11, 2008, CTIA – The Wireless Association (“CTIA”) filed a petition (“CTIA Petition”) requesting that the Commission issue a Declaratory Ruling that reinterprets 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

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.

wireless facility siting application (“application”). CTIA also requested that the Commission revoke the ability of local zoning 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 it in part. Without request by CTIA (in its original petition or based on any public comment cited in the record from any party), the Order created an internal 30 day deadline within which a governmental authority can advise an applicant of the completeness of its application for a wireless communications facility.⁶ While local government is troubled by the whole of the Order, Petitioners only seek reconsideration or clarification of this 30 day deadline.

As Petitioners understand the rule, beginning with the date on which an application is submitted, a local authority now has 30 days to review applications for completeness.⁷ If the authority notifies the applicant that an application is incomplete within that 30 day period, deadlines for action are tolled until the applicant submits the required information. However, if the authority is not able to verify the completeness until after 30 days or if the incompleteness does not manifest until after the 30 days, the deadlines within which final action must be taken are not tolled. The Commission made this ruling despite the fact that it was not requested in CTIA’s petition, nor was it the subject of any comment or ex parte communication on record.

⁶ See Order at ¶ 53.

⁷ Order at ¶ 53.

II. THE COMMISSION SHOULD MODIFY THE 30 DAY REVIEW FOR INCOMPLETENESS REQUIREMENT

Petitioners seek reconsideration and clarification of the 30 day incompleteness deadline on both legal and policy grounds. First, the Commission exceeded its interpretation of its authority under Section 332(c)(7) in implementing a 30 day review for completeness deadline because the 30 day incompleteness deadline imposes additional limitations on personal wireless service facility siting process beyond those stated in Section 332(c)(7). Second, the ability to toll the shot clock must extend to valid reasons beyond the facial incompleteness of the application. Third, the 30 day review period does not reflect the realities of the zoning application process and will result in significant problems for local governments and applicants across the nation and could result in unnecessary litigation and/or siting delays unless modified. Fourth, the rule should be reconsidered based on input received by interested parties because the 30 day completeness rule was developed without public notice and without prior discussions with many interested parties.

A. The 30 Day Review For Completeness Deadline Violates the Commission’s Interpretation of its Authority under Section 332(c)(7).

In the Declaratory Order the Commission found that while the legislative history of the Communications Act reflected that 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)...”.⁸ 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

⁸ Order at ¶ 25.

for completeness of an application that would apply regardless of the application being governed by the 90 or 150 day shot clock.⁹

This completeness deadline violates the Commission’s interpretation of its own authority as expressed in the Order because it creates a “new limitation” on State and local governments. Again, for the limited purposes of this Petition, Petitioners accept without conceding the Commission’s interpretation that it has the authority to establish 90 and 150 day deadlines. The Commission states that this authority exists because these timeframes are merely interpreting or clarifying an ambiguity in Section 332(c)(7) that requires authorities to act on an application within a “reasonable period of time.”¹⁰ The Commission admitted that Section 332(c)(7) does not include the authority to create entirely new requirements for local government processes. The creation of the internal deadline clarifies no statutory ambiguity. It is plainly and simply a new burden placed upon local governments.¹¹

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 procedures and deadlines that are in no way anticipated, required, or referenced in any portion of the Act or its legislative history. The Act does *not* state that State and local governments must verify the completeness of an application within a “reasonable period of time.” If it did, the Commission’s interpretation of its authority would give it the ability to establish the internal deadline it sets forth in this rule; but the Act says no such thing.

⁹ See Order at ¶ 53.

¹⁰ See Order at ¶ 19 (*citing* 47 U.S.C. § 332(c)(7)(B)(ii)).

¹¹ Order at ¶ 25.

In this way, the rules established here are different than the ones at issue in *Alliance for Community Media v. FCC*.¹² In that case, it was held that the Commission has the power to “interpret...the contours of [the section at issue].”¹³ In this case, as to the 30 day incompleteness deadline, the Commission is not interpreting anything. Instead, it is making new rules out of whole cloth.¹⁴ Thus, given the Commission’s own limited view of its authority under the Section at issue here, it was incorrect to create a 30 day review for completeness deadline. As will be discussed subsequently, the practical implications of this rule will also prove to be damaging and substantial.

B. Local Authorities Must Be Able to Toll the 90/150 Day Shot Clock for Reasons Beyond Initial Application Completeness.

The Commission’s 90/150 day shot clock will not work unless local authorities can toll the time for legitimate purposes which further the goals of a fair and complete consideration of siting applications. For example, local governments sometimes must get approval or other information from third parties, such as the Federal Aviation Administration (FAA), environmental authorities, and power utilities before an application can be approved. The local government authority has no power to expedite the review processes of these third parties. While waiting on these third parties to act, which can be months or even longer, there is no mechanism in the Order that tolls the shot clock. The applications are neither “incomplete” nor is the local authority at fault for the delay.

¹² 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 129 S.Ct. 2821 (2009).

¹³ *Id.* at 773-74.

¹⁴ The Order cites no provision in the Act or its legislative history that it is “interpreting” in the development of a 30 day review for completeness deadline. *See* Order at ¶ 53. Instead, the Order merely cites to a small number of states that have similar requirements *by statute*. In fact, only 8% of all states have a statute giving 30 days or less. Only one state has a statute that gives more time. 90% of the states have decided not to impose this problematic and unrealistic internal deadline.

In other circumstances, the delay may be due directly to the actions or inactions of the applicant. Many jurisdictions require that the applicant follow publication and notice requirements before public hearings are convened on a zoning application. If the applicant makes a mistake in this process, the local government has no legal power to proceed with the hearing. Again, in such cases, the delay in final action is not because the application is “incomplete” but because the applicant has failed to properly take additional steps required by law.

In an ideal world, applicants would not pursue or threaten litigation when the applicant or a third party causes the delay. But, some applicants may perceive a tactical advantage in pursuing litigation, or may feel compelled to file suit because the 90/150 day shot clock has not been tolled. And an applicant that recognizes it is not likely to be approved may game the system by threatening litigation against local governments with limited resources to try to gain by threat what could not be won on the merits. Merely having to explain oneself to the court is expensive. Many local governments lack the resources to risk such suits even if they would be likely to ultimately prevail on the merits.

C. The 30 Day Review Deadline Does Not Reflect the Realities of the Zoning Application Process and Will Result in Significant Unintended Consequences.

The 30 day review for completeness deadline will result in many applications being denied where an area of concern becomes known after the 30 day deadline. Whereas today neither party has an incentive to hide an issue in the application process, the 30 day incompleteness deadline rewards an applicant who intentionally or inadvertently does not fully disclose an issue on an application or forces the local authority to act quickly to deny because there is no time to engage in further exchanges of data and modifications of the application.

The 30 day review for completeness deadline does not reflect the realities of the zoning review process. For example, incomplete structural or environmental analyses may become evident only after extensive investigation by the local authority or third party commenters. In other cases, the local authority may not require such analyses unless the staff review indicates the applicant should conduct the additional studies. Facts and circumstances that are learned at later points in the review may be the first indication that such analyses are needed. To require *every* applicant to expend substantial money on such analyses prior to submitting an application would be costly and inefficient. But the 30 day deadline may compel local authorities to require such studies as part of the initial application. A much better solution is for the Commission to clarify its order to make clear that the shot clock is tolled whenever such analyses are ordered and until the results are made available. Once the need develops, the application should be treated as incomplete and the shot clock should be tolled.

Local governments will likely have no choice but to strictly formalize the application review process. In the past, it was not uncommon for local governments to use informal communications with applicants to ensure that the review process continues while the applicant corrects or supplements some information. Under the rule implemented by the Order, local governments will have to suspend all review and send a formal letter to the applicant notifying the applicant of the problem and the tolling of the shot clock until it receives the needed information. It is not uncommon to find land use applications (for wireless facilities as well as other kinds of land use approvals) that are not tailored by the applicants to meet the criteria of local ordinances. Most local governments will work informally with the applicant to supplement the application with specific information required by ordinance. As a result of the Order, applications for wireless facilities that do not comply with every applicable local ordinance will

likely not even be accepted by local governments when initially submitted. Each applicant will be required to review all local ordinances and rules for every community around the country in which they plan to build a wireless facility and then individually tailor each application to the specifications of each local ordinance. Unlike other kinds of land use applications, local governments will not be able to afford applications for wireless facilities the informal process that has traditionally been used, because to do so would be risking the ability to toll the shot clock when necessary.

Furthermore, some local governments may be forced to require applicants to pay additional, increased fees for applying. We have been told that some local governments will have no choice but to increase their costs (additional staff, more meetings, etc.) in order to respond to the requirements of the Order – especially the 30 day review for completeness requirement. Increased costs will necessitate increased application fees to offset these costs to the local taxpayers. Additionally, because some local governments will increase the initial scrutiny and more applications will be rejected or “deemed withdrawn,” applicants may have to pay additional fees for each new submission when initial applications fail to meet local standards.

Those that will be hurt most by the Order in general, and the 30 day review period in particular, will be the citizens of our nation’s towns, cities, and counties. Our citizens are hungry for increased wireless and mobile broadband capacity. But, at the same time, they are insistent that new facilities are built in a way that is conducive to public safety, future development, and aesthetic concerns. The Order (and particularly the 30 day completeness review deadline) will slow down the review process due to increased rejections and withdrawn applications and will

also prevent local governments from giving full consideration to the concerns of their citizens because of the increased time pressure they will face to review applications.

D. The 30 Day Incompleteness Deadline Was Not Requested by CTIA and was not Published by the FCC thereby Depriving Impacted Parties the Opportunity to Provide Input.

Due process and fairness demand reconsideration of the 30 day incompleteness deadline as no impacted party was given notice of the Commission's plans. The 30 day proposal was not outlined in CTIA's original petition. Also, according to the Order the proposal was never the subject of any ex parte filing or comment in this proceeding. The only references to the basis for an incompleteness shot clock were references to five state laws on siting that include an incompleteness shot clock.¹⁵ Citing rules that 45 states have decided not to implement is not sufficient justification for the Commission to take its current actions. Had the Commission sought comments from local governments and other interested entities prior to the implementation of this rule, the Commission would have discovered the problems, both legal and practical, with imposing an artificial, internal review deadline. Therefore, the 30 day deadline should not be implemented without, at a minimum, proper notice and comment by interested entities and should only be implemented based on data received from such public requests.

III. CONCLUSION

In implementing the 30 day incompleteness deadline, the Commission has exceeded its statutory authority in issuing the *Declaratory Ruling* under the Communications Act of 1934, even under the Commission's own interpretation of that authority. In addition, the rule that was issued has serious practical consequences that were not adequately considered by the Commission. For the reasons indicated above, the Commission should reconsider the 30 day

¹⁵ See Order at ¶ 53.

completeness review portion of the *Declaratory Ruling*, and either (1) amend it to (a) provide that any time period in which additional information is required that is not a delay caused by the local government will not count against the shot clock and (b) clarify that applicants cannot refuse to provide supplemental information required by the local government more than 30 days after an application, or (3) eliminate the 30 day completeness review rule in its entirety.

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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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