

**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)	

**REPLY COMMENTS ON PETITION FOR RECONSIDERATION AND
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, THE
AMERICAN PLANNING ASSOCIATION, AND THE CITY OF LAREDO, TEXAS**

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TABLE OF CONTENTS

SUMMARY iii

I. BACKGROUND2

II. OPPONENTS MISCHARACTERIZE LOCAL GOVERNMENTS’ POSITION
CONCERNING THE COMMISSION’S LEGAL AUTHORITY.....2

 A. Local Governments’ Petition Addresses Only the 30-Day Deadline and the
 Tolling of the Shot Clock.....3

 B. The Commission’s Own Interpretation of its Legal Authority Bars the 30-Day
 Deadline.....3

 C. Opponents Mischaracterize the Petition’s Procedural Argument.....4

III. THE RECORD DEMONSTRATES THAT THE 30-DAY DEADLINE IS NOT
SOUND POLICY.4

 A. Opponents Mischaracterize Both the Incentives of Local Governments and the
 Power the 30-Day Deadline Would Give Applicants to Stone-Wall
 Information Requests.....5

 B. The Record Shows the Practical Problems with the 30-Day Deadline.....6

VI. CONCLUSION.....9

CERTIFICATE OF SERVICE11

SUMMARY

On December 17, 2009, the National Association of Telecommunications Officers and Advisors, The United States Conference of Mayors, National League of Cities, National Association of Counties, and American Planning Association (collectively “Local Government”) filed a Petition for Reconsideration and Clarification with the Commission requesting that it reconsider its decision to impose an internal 30 day deadline during which time a local zoning authority could toll the 90 or 150 day “shot clock” if it was determined that an application was incomplete (“30-Day Deadline”). Local Government requested that the Commission permit the tolling of the shot clock for reasons beyond facial completeness and at any time during the application review process. A significant number of entities filed in support of Local Government’s petition. A few industry groups filed in opposition of that petition. In these Reply Comments, we respond to the mischaracterizations and inaccuracies of the opposition and highlight the many practical problems this rule will present, as documented in the responses received by the Commission.

The opponents mischaracterize Local Government’s petition. The petition accepts *arguendo* the Commission’s interpretation of its legal authority and does not challenge the underlying “shot clock.” Our challenge, rather, pointed out that the 30-Day Deadline exceeded the Commission’s own interpretation of its authority. Also, the petition never claims that the Administrative Procedures Act was violated. Rather, it asserts that more detailed discussions with local government on the specific issue of a *deadline* for tolling the shot clock would have provided significant practical information that was not considered. Finally, the responses of many communities show the practical issues that will arise under the 30-Day Deadline which will, without reconsideration, ultimately slow the deployment of wireless facilities.

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The National Association of Telecommunications Officers and Advisors, The United States Conference of Mayors, National League of Cities, National Association of Counties, American Planning Association, and the City of Laredo, Texas (collectively “Local Government”), hereby submit these Reply Comments in response to the opposition to Local Governments’ Petition requesting that the Federal Communications Commission (“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”). The Petition specifically requests that the Commission reconsider the 30 day review for completeness deadline (the “30-Day Deadline”).¹ Although a significant number of entities filed comments in support of the Petition, a few parties

¹ Declaratory Ruling at ¶¶ 52-54.

expressed their opposition. As we show in these Reply Comments, the opponents fail to demonstrate why the Commission should not amend or repeal the 30-Day Deadline.

I. BACKGROUND

On December 17, 2009, Petitioners filed a Petition for Reconsideration or Clarification asking that the Commission amend the 30 day review for completeness deadline that was established as part of the Declaratory Ruling.² Despite the claims of some parties,³ the Petition does not challenge the Commission's underlying legal authority to issue the Declaratory Ruling,⁴ but does challenge the 30-Day Deadline. The Petition demonstrated that: (1) even under the Commission's interpretation of its authority, the 30-day Deadline exceeded that authority; and (2) the 30-Day Deadline will cause many practical problems that could undermine the Commission's goal of speeding deployment. As a result, the Petition called upon the Commission to reconsider its ruling.

II. OPPONENTS MISCHARACTERIZE LOCAL GOVERNMENT'S POSITION CONCERNING THE COMMISSION'S LEGAL AUTHORITY.

Opponents of the Petition mischaracterize Local Government's position regarding the Commission's legal authority. The Petition is clear that, accepting *arguendo*, the FCC's interpretation of its authority under Section 332(c)(7) in the Declaratory Ruling, the 30-Day Deadline would be improper.

² Petition of 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 for Reconsideration or Clarification, WT Docket No. 08-165 (filed Dec. 17, 2009) ("Petition").

³ See *infra* Section II.

⁴ Although Petitioners do not accept the Commission's interpretation of its legal authority, they have not sought Commission reconsideration of that issue. The City of Arlington, Texas, has filed a Petition for Review in the Court of Appeals for the Fifth Circuit. Petition for Review, *City of Arlington, Texas v. FCC*, Case No. 10-60039 (filed Jan. 14, 2010).

A. Local Government’s Petition Addresses Only the 30-Day Deadline and the Tolling of the Shot Clock.

The Petition is limited in scope: it does not challenge the Commission’s legal authority to issue the Declaratory Ruling or to develop the “shot clock” more generally.⁵ Instead, the Petition asserts that even under the Commission’s *own* interpretation of its authority,⁶ the Commission’s tolling rule is unlawful and problematic.

CTIA failed to appreciate this distinction.⁷ CTIA claims that “[t]he review period for . . . tolling is inextricably intertwined” with the interpretation of the Commission’s legal authority.⁸ We disagree. We believe, and state in the Petition, that even when the Commission’s interpretation of its legal authority is taken as a given, the 30-Day Deadline is problematic. Accordingly, the Petition urges the Commission to reconsider the tolling rules for both legal and practical reasons.

B. The Commission’s Own Interpretation of its Legal Authority Bars the 30-Day Deadline.

The 30-Day Deadline violates the Commission’s interpretation of its legal authority. In the Declaratory Ruling, the Commission accepted that Congress 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).”⁹ But, by adopting the 30-Day Deadline, the Commission then proceeded to impose precisely such an

⁵ See Petition at 4-5. Although the Petitioners do not concede that the Commission has the authority to develop the shot clock, the Commission’s authority under Section 332(c)(7) is not relevant to the resolution of Local Governments’ Petition.

⁶ Declaratory Ruling at ¶ 25.

⁷ See Opposition of CTIA – The Wireless Association[®] to Petition for Reconsideration or Clarification (filed Jan. 22, 2010) (CTIA Opposition) at 2.

⁸ *Id.*

⁹ Order at ¶ 25 (emphasis added).

additional limitation. Of course, nothing in Section 332(c)(7) requires a local government to review an application for completeness within a fixed time. As such, CTIA's claim that the Commission has "already rejected this argument" is incorrect.¹⁰

C. Opponents Mischaracterize the Petition's Procedural Argument.

Certain commenters also misconstrue the nature of the Petition's procedural objection. The Petition does not claim the Commission violated the Administrative Procedure Act in adopting the Declaratory Ruling.¹¹ Rather, the Petition highlights that the 30-Day Deadline suffers from many practical problems because such a deadline was not the central focus of the filed comments.¹² While Petitioners support the decision to permit the tolling of the "shot clock" when an incomplete application is submitted, Petitioners object to the specific contours of the tolling rule, which were not fully considered in the comment period.¹³ Because the Commission lacked the benefit of a full record on this issue, there is a serious risk that the Commission's rulings will result in significant unintended consequences that will ultimately hurt the rapid deployment of wireless facilities.¹⁴

III. THE RECORD DEMONSTRATES THAT THE 30-DAY DEADLINE IS NOT SOUND POLICY.

In the Petition, we stated that the 30-Day Deadline would result in many practical problems that would slow deployment of wireless services and conflict with the duty of local governments to their citizens to ensure proper siting. Although the opponents of the Petition

¹⁰ CTIA Opposition at 10.

¹¹ Petitioners take no position on this issue here.

¹² Many of these practical problems are highlighted below. *See, infra*, Part III-B.

¹³ For example, the Declaratory Ruling does not expressly allow for tolling beyond 30 days and does not allow for tolling for reasons beyond initial incompleteness.

¹⁴ *See, infra*, Part III.

generally disagreed,¹⁵ the numerous responses from local governments across the country, from large metropolises to small towns, show that the 30-Day Deadline is not sound policy. The Commission should reconsider this rule, and allow local governments to toll the shot clock for any valid reason that arises at any point during the process.

A. Opponents Mischaracterize Both the Incentives of Local Governments and the Power the 30-Day Deadline Would Give Applicants to Stone-Wall Information Requests.

Opponents to the Petition obscure the real issue when they claim that the 30-Day Deadline causes no real harm because “[t]he court will hear the zoning authority’s evidence concerning the individual circumstances” of a particular case.¹⁶ This position fails to appreciate the incentives that the Declaratory Ruling creates.

Petitioners understand that local governments do not lose the ability to request additional information after 30 days and that, in many cases, applicants will provide this information. Petitioners are concerned, however, that the Declaratory Ruling creates an incentive for *some* applicants to stonewall after 30 days because *some* local governments will not be in a position to risk litigation. These local governments may have no choice but to bend to the will of the applicant, even if the application poses serious problems under local law. Even if, as CTIA claims,¹⁷ applicants would only rarely litigate because litigation is inefficient, every instance that takes a local government to court is expensive and often unaffordable.

¹⁵ See CTIA Opposition at 15; T-Mobile Opposition at 7; PCIA Opposition at 8. Verizon Wireless did not directly dispute our claim that the Petition is in the public interest. Instead, the company simply stated that Petitioners should have brought a further Petition for a Declaratory Ruling to solve these problems rather than solving the issue efficiently in this proceeding. See Verizon Wireless Opposition at 8.

¹⁶ See *id.* at 19.

¹⁷ See *id.* at 18-19.

Certain comments are concerned with “gamesmanship” on the part of local governments.¹⁸ Such concerns are without merit. Local governments review applications with the understanding that the expansion and improvement of wireless services is in the best interest of our communities. If a local government was to act otherwise, the applicant could make such a showing to a court. A rigid 30-Day Deadline serves no real purpose.

B. The Record Shows the Practical Problems with the 30-Day Deadline.

Many local governments across the country filed comments in support of Local Governments’ Petition. In doing so, these communities highlighted the numerous, practical problems with the 30-Day Deadline.

The City of Philadelphia, Pennsylvania, pointed out that the Philadelphia Code requires, in many cases, that applications be reviewed by other City agencies.¹⁹ In historic cities, such as Philadelphia, it is often necessary to consider the “cultural and historical heritage” of sites and review processes often require significant negotiation.²⁰ Each round of negotiations often requires additional information that is “site specific and by their nature [requests] vary from case to case.”²¹ Philadelphia concluded that “the same rationales that guided the Commission’s determination that the deadline should be tolled for incomplete applications apply equally to any need for additional information that may be discovered subsequent to the initial review period: tolling the deadline creates incentives for the applicant to produce the information in a timely

¹⁸ See CTIA Opposition at 15-16.

¹⁹ Comments of the City of Philadelphia in Support of NATOA et al.’s Petition for Reconsideration, WT Docket 08-165, at 2 (filed Jan. 22, 2010).

²⁰ *Id.* at 3

²¹ *Id.*

manner and provides the local government with the benefit of the full 90 or 150 day period for final action.”²²

The City of Portland, Oregon, stated that the 30-Day Deadline “frustrates the local review process and is more likely to result in a denial than an approval of such an application.”²³

Portland points out that the 30-Day Deadline does not factor in the realities of the application negotiation process.²⁴ The process requires “incremental negotiations [that] take time and often require additional information from the applicant to address the applicable criteria, particularly when the wireless facility involves a building with significant architectural features.”²⁵ Often times, Portland explains, “the need for this additional information is not determined until more than 30 days after an application has been filed (and after the design has been revised).”²⁶

The Greater Metro Telecommunications Consortium (“GMTC”), an intergovernmental agency of local governments in Colorado, pointed out, among other things, that local ordinances require a public hearing on many applications.²⁷ GMTC stated that “each of our jurisdictions has experienced the need to postpone a public hearing on a land use matter, due to the fact that an error was made by an applicant in posting or publishing notice of an upcoming proceeding.”²⁸ GMTC also stated that “[t]hese issues never arise within 30 days of an application being filed.

²² *Id.*

²³ Comments of the City of Portland, Oregon in Support of NATOA et al.’s Petition for Reconsideration, WT Docket 08-165, at 3 (filed Jan. 22, 2010).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Comments of the Greater Metro Telecommunications Consortium in Support of NATOA et al.’s Petition for Reconsideration, WT Docket 08-165, at 3 (filed Jan. 22, 2010).

²⁸ *Id.* at 3-4.

To the contrary, they often do not come to light until the day of a scheduled hearing.”²⁹ GMTC concluded “that an unintended consequence of the Commission's decision will be to *increase* the period of time between the date an application is filed and final action.”³⁰

The City of Livonia, Michigan submitted comments in support of the Petition for Reconsideration and highlighted a problem it would face under the 30-Day Deadline as a result of local ordinance.³¹ Livonia’s review process (for the completeness of the application) requires that it be reviewed by two different bodies.³² The initial review is conducted by the Planning Department.³³ At this point, an application could potentially appear to be complete (when in fact it is incomplete) and be forwarded to the Planning Commission for review.³⁴ The Planning Commission must conduct its review at a public hearing which is only conducted once a month; therefore, depending on when the application is submitted, even if the Planning Department does an immediate review, it could be more than 30 days before the Planning Commission even has a chance to conduct a public review.³⁵ At that point, the Planning Commission would be unable to toll the shot clock because an application was incomplete. Livonia concludes that “[t]he threat of litigation expenses could result in rushed decision-making with respect to wireless facility siting applications that would not best serve the City or its residents simply to meet the time deadlines

²⁹ *Id.* at 4.

³⁰ *Id.*

³¹ Comments of the City of Livonia, Michigan in Support of NATOA et al.’s Petition for Reconsideration, WT Docket 08-165, at 2-3 (filed Jan. 22, 2010).

³² *Id.* at 2.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

imposed by the Order. Cities such as Livonia that have had to lay off employees this year simply do not have the funds to engage in litigation on these issues.”³⁶

These are simply some of the issues raised by local governments concerned about the 30-Day Deadline. These communities were joined by many others from large cities such as Los Angeles, California, to small towns such as Mentor, Ohio. Their message was clear: the 30-Day Deadline will create practical problems and likely do nothing but slow the deployment of wireless services.

VI. CONCLUSION

For the foregoing reasons, Petitioners request that the Commission alter or repeal the 30-Day Deadline. We urge the Commission to recognize the vital need for local governments to be able to toll the shot clock for valid reasons, beyond facial completeness, at any point during the review period. We believe that failing to do so will result in a significant rigidity in the application process that will ultimately slow the deployment of wireless services.

³⁶ *Id.* at 3.

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CERTIFICATE OF SERVICE


I, Matthew R. Johnson, herby certify that on February 8, 2010, copies of the attached Reply Comments were served via first-class U.S. mail to the following:

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