No. _____

IN THE
Supreme Court of the United States

CITY OF ARLINGTON, TEXAS; CITY OF LOS ANGELES, CALIFORNIA; COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF SAN ANTONIO, TEXAS; COUNTY OF SAN DIEGO, CALIFORNIA; AND TEXAS COALITION OF CITIES FOR UTILITY ISSUES,
Petitioners,

v.

UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS C. GOLDSTEIN
KEVIN K. RUSSELL
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Avenue, NW
Suite 404
Washington, DC 20015
(202) 362-0636

THOMAS D. BUNTON
SENIOR DEPUTY
COUNTY COUNSEL
COUNTY OF SAN DIEGO
1600 Pacific Highway
Room 355
San Diego, CA 92101
(619) 531-6456

Counsel for Petitioner County of San Diego, California

JOSEPH VAN EATON
Counsel of Record
JAMES R. HOBSON
MATTHEW K. SCHETTENHELM
BEST BEST & KRIEGER LLP
2000 Pennsylvania Avenue, NW
Suite 4300
Washington, DC 20006
(202) 785-0600
Joseph.VanEaton@bbklaw.com

Counsel for Petitioners City of Arlington, Texas; City of Los Angeles, California; County of Los Angeles, California; City of San Antonio, Texas; and Texas Coalition of Cities for Utility Issues

Questions Presented

This case involves a challenge to the FCC's jurisdiction to implement §332(c)(7) of the Communications Act of 1934, titled "Preservation of Local Zoning Authority." Section 332(c)(7) imposes certain limitations on State and local zoning authority over the placement of wireless service facilities, but authorizes the FCC to address only one of these limitations; it states that no other provision "in this Act" may "limit" or "affect" State and local authority over wireless facilities placement. The FCC concluded that other provisions "in this Act" authorize it to adopt national zoning standards to implement §332(c)(7). The Fifth Circuit deferred to the FCC's jurisdictional determination applying *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), but acknowledged that "[t]he Supreme Court has not yet conclusively resolved the question of whether *Chevron* applies in the context of an agency's determination of its own statutory jurisdiction, and the circuit courts of appeals have adopted different approaches to this issue."

The case presents two questions:

1. Whether, contrary to the decisions of at least two other circuits, and in light of this Court's guidance, a court should apply *Chevron* to review an agency's determination of its own jurisdiction; and

2. Whether the FCC may use its general authority under the Communications Act to limit or affect State and local zoning authority over the placement of personal wireless service facilities.

Parties to the Proceeding

Petitioners below are the City of Arlington, Texas, and the City of San Antonio, Texas. Intervenors supporting the Petitioners are the Cable and Telecommunications Committee of the New Orleans City Council; the City of Carlsbad, California; the City of Dallas, Texas; the City of Dubuque, Iowa; the County of Fairfax, Virginia; the City of Glendale, California; the City of Los Angeles, California; the County of Los Angeles, California; the City of Portland, Oregon; the City of San Antonio, Texas; the County of San Diego, California; the EMR Policy Institute; the International Municipal Lawyers Association; the National Association of Counties; the National Association of Telecommunications Officers and Advisors; the National League of Cities; the Texas Coalition of Cities for Utility Issues; and the United States Conference of Mayors.

Respondents are the United States of America and the FCC. Intervenors supporting the Respondents are CTIA-The Wireless Association and Cellco Partnership.

None of the Petitioners is a non-governmental corporation.

Table of Contents

APPENDIX

Table of Authorities

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Petition for a Writ of Certiorari

Petitioners respectfully seek a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Opinion and Order Below

The court's opinion (App. 1a-68a) is reported at 668 F.3d 229 (5th Cir. 2012). The FCC's Declaratory Ruling (App. 69a-171a) is reported at 24 FCC Rcd. 13994 (Nov. 18, 2009) ("Declaratory Ruling"), *reconsideration denied*, 25 FCC Rcd. 11157 (Aug. 3, 2010) (App. 172a-195a).

Jurisdiction

The court entered its judgment on January 23, 2012, and entered an order denying petitions for rehearing *en banc* on March 29, 2012. (App. 195a-196a). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Statutory Provisions Involved

Section 332(c)(7) of the Communications Act of 1934 provides:

Preservation of local zoning authority.

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

(B) Limitations.

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

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

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

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

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

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

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after

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

(C) Definitions. For purposes of this paragraph—

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

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

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) [47 U.S.C. §303(v)]).

* * *

Other relevant statutory provisions appear in the appendix.

Statement of the Case

This case concerns a dispute between local governments and the FCC over whether the federal agency may affect State and local authority over the placement of wireless communications facilities by, *inter alia,* establishing uniform FCC-mandated deadlines for State and local action on zoning appli-

cations. Petitioners claimed that Congress deliberately designed §332(c)(7) to prevent the FCC from interfering with State and local zoning decisions: Congress required State and local decisions to meet certain standards, subject only to exclusive judicial review (with one exception); it directed the FCC to address radio frequency (RF)-emissions matters; and it provided that "nothing" else "in this Act" may "limit or affect" local authority over wireless facility placement. The FCC claimed that it could establish federal policy implementing §332(c)(7)(B) by using four *other* provisions of the Act, 47 U.S.C. §§151, 154(i), 201(b), and 303(r).

Rather than resolve the dispute through *de novo* review, the Fifth Circuit deferred to the FCC's jurisdictional determination, and then upheld the FCC's Declaratory Ruling.

1. Added to the Communications Act by the Telecommunications Act of 1996,[1] §332(c)(7) establishes what several justices of this Court have described as an unusually "comprehensive" statutory scheme for balancing the interests of the federal, state, and local governments in deployment of wireless facilities. *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 131 (2005) (Stevens, J., concurring); *see also id.* at 129 (describing §332(c)(7) as "a comprehensive and exclusive remedial scheme") (Breyer, J., concurring).

---

[1] Pub. L. 104-104, 110 Stat. 56 (Feb. 8, 1996). The Telecommunications Act of 1996 is a series of amendments to the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. §151 *et seq.* (the "Communications Act" or the "Act").

The House of Representatives initially had passed language empowering the FCC to "prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or operation of facilities for the provision of commercial mobile services." H.R. Rep. No. 104-204 at 25, 1996 U.S.C.C.A.N. 10 (1995). App. 212a. The bill directed the FCC to adopt "policies" requiring a local government to act "within a reasonable period of time after the request is fully filed with such government or instrumentality." *Id.*

Congress, however, "ultimately rejected the national approach and substituted a system based on cooperative federalism." *Rancho Palos Verdes*, 544 U.S. at 128 (Breyer, J., concurring). In conference, Congress opted for the current §332(c)(7) titled "Preservation of Local Zoning Authority." The statute consists of a paragraph with five limitations on State and local zoning authority,[2] and an opening "general authority" clause stating that "[e]xcept as provided in this paragraph, nothing in this Act shall limit or affect" this State and local authority. 47 U.S.C. §332(c)(7)(A).

Section 332(c)(7) gives the FCC authority to address only one of the statute's limitations, the bar on State and local siting decisions based on the environmental effects of radio frequency ("RF") emis-

---

[2] 47 U.S.C. §332(c)(7)(B)(i)-(iv).

sions.[3] Otherwise, it directs courts to resolve issues arising under §332(c)(7) on an expedited basis. The Conference Report confirmed that except for the provisions concerning the effects of radio frequency ("RF") emissions, Congress intended for the courts to have "exclusive jurisdiction over all other disputes arising under this section." H.R. Rep. No. 104-458 (1996) (Cong. Rep.) at 207-208. The Report directed that "[a]ny pending [FCC] rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities should be terminated." *Id.* It further explained that the requirement that a local government act within a "reasonable period of time" is not intended "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." *Id.* The statute's generally-worded language was not an invitation for federal policymaking, but a direction to the court to consider State and local practices in light of local circumstances.

2. For the next 13 years, the FCC did not regulate State and local zoning authority under §332(c)(7), except to address RF-emissions matters. Section 332(c)(7) operated by allowing courts to apply the statute to local facts, in what one court described as a "refreshing experiment in federalism": Congress's effort to "produce (albeit at some cost and

---

[3] 47 U.S.C. §332(c)(7)(B)(iv),(v). Congress separately authorized the agency to make rules regarding RF emissions. Telecommunications Act of 1996, 110 Stat. 56 §704(b).

delay for the carriers) individual solutions best adapted to the needs and desires of particular communities." *Town of Amherst v. Omnipoint Communs. Enters., Inc.*, 173 F.3d 9, 17 (1st Cir. 1999).

3. In 2008, the wireless industry—led by CTIA-The Wireless Association—filed a petition for a declaratory ruling asking the FCC to, *inter alia*, adopt short, uniform deadlines for State and local action under §332(c)(7). States and local governments, including Petitioners, argued that the FCC had no jurisdiction to issue any ruling under §332(c)(7) other than a ruling related to RF emissions. In 2009, in the Declaratory Ruling, the FCC granted the industry its requested relief in significant part.

a. The FCC ruled that it had authority to implement §332(c)(7) pursuant to four provisions of the Act outside of §332(c)(7)—§§1, 4(i), 201(b), and 303(r). App. 87a (¶ 23). These provisions, with slight variations, generally permit the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. §201(b); App. 87a (¶ 23); the FCC's exercise of authority under these provisions gives rise to remedies under Title IV of the Communications Act, 47 U.S.C. §401 *et seq.*

The FCC claimed that §332(c)(7)(A)—the preservation clause stating that "nothing" else "in this Act" may "limit" or "affect" State and local authority—only forbids the agency from creating additional "limitations" beyond those that the statute enumerates. App. 90a, 134a (¶¶ 25, 64). The FCC did not

explain, however, how §332(c)(7)(A)'s preservation clause allows it to use §§1, 4(i), 201(b), and 303(r) to "affect" State and local authority. It recognized that its ruling did affect local authority, stating, *inter alia*, that State and local governments must act in accordance not only with the statute, but with limitations on local authority "as defined" by the agency. App. 90a (¶ 25).

b. The FCC's Declaratory Ruling adopted two basic rules.

First, the FCC addressed timing issues. Acknowledging a conflict with the standards in particular States and local governments, the FCC adopted national standards defining what constitutes a State or local government's "failure to act" if it does not release a decision within "a reasonable period of time after the request is duly filed . . . taking into account the nature and scope of such request." App. 116a-120a, ¶¶ 46-48. The FCC ruled that absent an applicant's agreement, if a State or local government does not release its decision 90 days after the applicant files a collocation application or within 150 days after the filing of all other applications, it automatically constitutes a "failure to act," and presumptively constitutes an unreasonable "period of time" on the merits. App. 72a, 106a-108a, 111a-112a (¶¶ 4, 37, 42). Unless the applicant agrees otherwise, this forces the State or local government into court on a fixed timetable (regardless of how reasonable its delay may be), and then requires the State or local government to overcome the presumption on the merits by explaining its delay. App. 111a-112a (¶ 42).

The FCC stated that while its policy choice would conflict with those of various States, its choices accommodated reasonable State and local processes "in most instances." App 114a (¶ 44).

- The FCC noted that of the eight State statutes discussed in its record, Connecticut law on its fact authorizes "a longer process" (180 days) than the FCC's rules permit. App. 118a (¶ 48).
- California requires applications to be processed within 60 days, after a 30-day review period for completeness, but only if no environmental review is required. App. 117a (citing Cal. Gov't Code §§65940 & 65943). The FCC chose not to provide for delays for environmental reviews.
- North Carolina has a "collocation" time period of 45 days for processing after a 45-day review period for application completeness, but only if the collocation does not increase the height of the facility. Otherwise, the time for action is tied to the time for action on other land use applications. App. 117a (citing N.C. Code Ann. §153A-349.53). The FCC applied a different test for determining whether the collocation deadline should apply.
- Minnesota requires applications to be processed within 60 days, which can be extended an additional 60 days upon written notice to the applicant. App. 117a (¶ 47, citing Minn. Stat. Ann. §15.99). Under the FCC's rules, times can be extended, but only with the consent of the applicant. App. 122a (¶ 49).

The FCC explained that a State's choice for a longer period for review would not preclude an applicant from suing the State or local government using the FCC's new, shorter timelines. App. 120a (¶ 50) (noting that the applicant "may bring suit under §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.").

Neither facet of the FCC's new timing rules—its fixed trigger for judicial review or its presumption against local governments on the merits—existed under §332(c)(7)(B)'s plain terms; the FCC pointed to no court that had adopted them. In addition, because the rules apply to only one class of zoning application (those for the placement of "personal wireless service facilities"), they have the effect of requiring a State or local government to prioritize wireless applications over other zoning matters.

Second, the FCC adopted a ruling under §332(c)(7)(B)(i)(II), which provides that a State or local government "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." The agency ruled that a State or local government violates this provision if it denies an application "solely because 'one or more carriers serve a given geographic market.'" App. 127a-128a (¶ 56).

4. On January 14, 2010, the City of Arlington, Texas, filed a petition for review with the Fifth Circuit, which had jurisdiction pursuant to 47 U.S.C.

§402(a) and 28 U.S.C. §2344. The court initially deferred review, then ruled after the FCC considered petitions for reconsideration.[4]

A central question was whether the FCC had jurisdiction to implement §332(c)(7). While the Fifth Circuit expressly acknowledged that this Court had not resolved the issue and that other circuits had adopted conflicting approaches, it ruled that *Chevron* required it to defer to the FCC's own assessment of its jurisdiction. App. 37a. The court recognized that §332(c)(7)(A) limited the FCC's authority, but ruled that if it were ambiguous, the court "must defer" to the FCC's permissible interpretation. App. 40a. The court proceeded to deem the statute ambiguous in various ways. App. 41a-45a. The court reasoned that since the FCC's general authority under these other sections would ordinarily apply to a Communications Act amendment, Congress must "specifically restrict" the agency's general authority, and "clearly remove" the agency's authority to apply these other Act provisions to §332(c)(7). App. 42a.

The Fifth Circuit did not ask whether Congress would intend the FCC to clarify any ambiguity in this jurisdictional provision (or whether the FCC had any special expertise to evaluate zoning decisions); it did not apply any traditional statutory presumptions

---

[4] App. 10a. The City of San Antonio, Texas, joined a number of other parties in intervening in support of this petition, and also later filed its own petition for review after the agency's denial of reconsideration.

for interpretations of exceptions; and it did not examine §332(c)(7)(A) in the context of other provisions of the Communications Act, or of §332(c)(7) itself. It proceeded to rule that "none of the cities' arguments convince us that the FCC's interpretation of its statutory authority is impermissible." App. 51a.

Reasons for Granting the Writ

The decision below sharpens a significant divergence among the circuit courts about *Chevron*'s application to an agency's determination of its own jurisdiction. The Fifth Circuit's approach—effectively that statutory ambiguity alone allows an agency to claim broad new authority—raises important questions that this Court should resolve. The court's analysis inverts the doctrine that an agency has only the authority Congress grants it, and contravenes the principles underlying *Chevron*.

This case illustrates the problem with a standard of review that transforms textual ambiguity into a jurisdictional grant. Section 332(c)(7) represented Congress's careful and comprehensive effort to balance the State and local interests in managing land use—a quintessential State function—with the federal interests in encouraging national deployment of wireless facilities. Through this "complex and novel statutory scheme," Congress rejected an FCC-guided "national approach" to zoning, and instead adopted a system of "cooperative federalism." *Rancho Palos Verdes*, 544 U.S. at 123 (Breyer, J., concurring).

Section 332(c)(7)'s language, context, and unusually clear legislative history all indicate that the FCC's role under the statute is not general, but specific: it extends only to a narrow, technical issue (RF-emissions). Yet by applying *Chevron* to defer to the FCC's determination that it has general authority to make rules governing the State and local zoning process under §332(c)(7), the decision below adopts the very "national approach" that Congress considered and rejected. This has significant consequences for State and local governments, including for communities that have made different policy choices about the appropriate time for local review.[5]

I. The Lower Courts Are Divided Over *Chevron's* Application to Jurisdictional Questions.

A. *There Is a Conflict Among the Circuits as to Chevron's Application.*

The Fifth Circuit correctly observed that its decision implicates a circuit conflict:

> The Supreme Court has not yet conclusively resolved the question of whether *Chevron* applies in the context of an agency's determination of its own statutory jurisdiction, and the circuit courts of appeals have adopted different approaches to the issue. Some circuits apply *Chevron* deference to disputes over the scope of an

---

[5] *See, e.g., supra,* at 9 (discussing Connecticut, California, North Carolina, and Minnesota).

> agency's jurisdiction, some do not, and some circuits have thus far avoided taking a position. In this circuit, we apply *Chevron* to an agency's interpretation of its own statutory jurisdiction.

App. 37a-38a (internal notes omitted). There is little prospect that the conflict will be resolved without this Court's intervention.

1. The Seventh Circuit and Federal Circuit review an agency's determination of its statutory jurisdiction *de novo*. The Seventh Circuit has repeatedly declined to apply a deferential standard to jurisdictional questions. *N. Ill. Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 847 (7th Cir. 2002); *United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.*, 183 F.3d 606, 612 (7th Cir. 1999). The court has explained that "[a]lthough agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" *Durable Mfg. Co. v. United States DOL*, 578 F.3d 497, 501 (7th Cir. 2009) (quoting *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990)).[6] The Federal Circuit applies the same standard. *Bolton v. Merit Sys. Prot. Bd.*, 154 F.3d 1313, 1316 (Fed. Cir. 1998).

2. The Fifth Circuit joins the Third, Eighth, and Tenth Circuit at the opposite extreme. These courts

---

[6] The Seventh Circuit has recognized that "the Supreme Court has not definitively ruled on the issue." *N. Ill. Steel Supply Co.*, 294 F.3d at 847.

resolve jurisdictional questions by applying *Chevron*; they do not independently analyze Congress's jurisdictional decisions. *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 355 (3d Cir. 2001) citing *Puerto Rico Mar. Shipping Auth. v. Valley Freight Sys.*, Inc., 856 F.2d 546, 552 (3d Cir. 1988); *Lyon County Bd. of Comm'rs v. EPA*, 406 F.3d 981, 983 (8th Cir. 2005); *Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1145-1146 (10th Cir. 2010).

3. No court's decisions more clearly demonstrate the lower courts' long struggle here than the D.C. Circuit's. While the court has applied *Chevron* to jurisdictional questions, *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1284 (D.C. Cir. 1994); *Brotherhood of Locomotive Eng'rs v. United States*, 101 F.3d 718, 726 (D.C. Cir. 1996), it has also declined to do so. *New York Shipping Asso. v. Federal Maritime Com.*, 854 F.2d 1338, 1362-1363 (D.C. Cir. 1988); *N. Am. Van Lines Inc. v. NLRB*, 869 F.2d 596, 598 (D.C. Cir. 1989). In some cases, the court has attempted to draw a distinction based on the nature of the question before it. *See, e.g., Am. Library Ass'n v. FCC*, 406 F.3d 689, 699 (D.C. Cir. 2005) (noting that the FCC's "self-serving invocation of *Chevron* leaves out a crucial threshold consideration, *i.e.*, whether the agency acted pursuant to delegated authority."); *accord ACLU v. FCC*, 823 F.3d 1554, 1567 n.32 (D.C. Cir. 1987). Most recently, Judge Janice Rogers Brown authored a concurring opinion in *AKM LLC v. Sec'y of Labor*, 675 F.3d 752, 766 (D.C. Cir. 2012), explaining that regardless of the court's "general" rule requiring *Chevron* deference, it is improper on jurisdictional questions that present

"undisputed jurisdictional facts," at least absent "some clear indication from Congress that it has delegated jurisdiction-defining authority."

B. Chevron *Should Not Apply to an Agency's Jurisdictional Determinations.*

Both scholars and this Court's teachings confirm that *Chevron* should not apply automatically to an agency's jurisdictional determinations.

1. Addressing what a leading article has called "the most important—and vexing—question" involving *Chevron*'s domain, many legal scholars have concluded that *Chevron* should not apply when an agency interprets a statute to determine its own jurisdiction.[7] They recognize that a no-deference rule is "implicit in *Chevron*" and follows from the fact that agencies "can act only to the extent that Congress has delegated them the power to do so." Sales, 2009 U. Ill. L. Rev. at 1532; *see also* Merrill, 89 Geo. L.J. at 912-13. The scholars have noted that agencies "have no comparative advantage in reading statutes" over courts; Gellhorn, 20 Cardozo L. Rev. at 1009; that an agency's self-interest "may cloud its judg-

---

[7] Thomas W. Merrill, *Chevron's Domain*, 89 Geo. L.J. 833, 909-911 (2009); Nathan A. Sales & Jonathan H. Adler, *The Rest is* Silence: *Chevron Jurisdiction, Agency Deference, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497 (2009); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1786-87 (2012); Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 Cardozo L. Rev. 989, 1008-09 (1999); Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 Cornell J.L. & Pub. Pol'y 203 (2004).

ment," *id.,* and that independent judicial review furthers due process and enhances fairness and the perception of fairness. Chapman, 121 Yale L.J. at 1786-87; Armstrong, 13 Cornell J.L. & Pub. Pol'y at 268-285. Perhaps above all else, independent review ensures that Congress's judgments about the scope of an agency's authority will be honored: "Just as foxes should not guard henhouses, agencies should not be entrusted to police the limits on their own regulatory authority." Sales, 2009 U. Ill L. Rev. at 1533.

This case demonstrates that these scholars have it right, at least in cases like this one. Here, the FCC has an interest in facilitating its own policy interests by expanding its jurisdiction. Yet both Petitioners and the FCC agree that Congress intended to limit FCC authority in some respects; the question is how much. Resolving this pure legal issue does not touch on the agency's specialized or technical expertise over communications matters. Yet reading *Chevron* to grant the agency discretion to make the jurisdictional determination essentially allows the agency to re-balance Congress's careful statutory structure to further its own interests.

2. While this Court has not definitely resolved the issue, its cases at least suggest that the Fifth Circuit approach—mechanically deferring to agency jurisdictional determinations unless Congress has "clearly removed" the authority to make those determinations— as highly questionable.

a. Pre-*Chevron,* in *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944), the Court re-

fused to defer to a statutory interpretation of the Administrator of the Fair Labor Standards Act because "[t]he determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested." *Id.* at 616; *see also Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 369 (1946) (deciding the limits of agency authority is a judicial function.").

b. In *Chevron* itself, jurisdiction was not in doubt. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). The decision does, however, shed important light on the scope of the doctrine it announced. *Chevron* concerned a provision of the Clean Air Act that required certain States to establish a permit program regulating "stationary sources" of air pollution. *Id.* at 840. The EPA defined "stationary source" plantwide, rather than adopting a definition tied to each pollution-emitting device at a plant. *Id.* at 856. Reviewing the agency's order, the D.C. Circuit decided that the purposes of the non-attainment program required it to set-aside the agency's policy choice. *Natural Resources Defense Council v. Gorsuch*, 685 F.2d 718, 727 (D.C. Cir. 1982).

Adopting its now well-known test,[8] the Court reversed, and upheld the EPA's rule. *Id.* at 728. The Court explained that it had applied this deferential approach whenever the "meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge." *Id.* at 844. As discussed above, however, discerning the limits of an agency's jurisdiction involves a purely legal, not a policy, question that does not implicate agency expertise.

c. In *Chevron*'s immediate aftermath, individual Justices disputed whether the Court's deference on this policy question should also extend to basic questions of the agency's own jurisdiction, particularly where the issue does not turn on matters within an agency's expertise.

In *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 380-82 (1988), Justice Scalia wrote a

---

[8] *Chevron, U.S.A., Inc.*, 467 U.S. at 842-843 ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.") (internal footnotes omitted).

concurring opinion claiming that *Chevron*'s "rule of deference applies even to an agency's interpretation of a statute designed to confine its authority" because there is no "discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority." *Id.* at 381.

Justice Brennan disagreed. *Id.* at 387. He explained that "this Court has never deferred to an agency's interpretation of a statute designed to confine the scope of its jurisdiction." *Id.* Instead, he said that "[o]ur agency deference cases have always been limited to statutes the agency was 'entrusted to administer'" and "[a]gencies do not 'administer' statutes confining the scope of their jurisdiction, and such statutes are not 'entrusted' to agencies." *Id.* He explained that the normal reasons for agency deference do not apply in this setting.

d. While the Court has still not resolved this fundamental debate, it has established that a court does not owe *Chevron* deference automatically, or "merely because [a] statute is ambiguous and an administrative official is involved." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). Instead, a court must first scrutinize whether "the agency's generally conferred authority and other statutory circumstances" make apparent "that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001);

Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 714 (2011).[9]

* * *

The Fifth Circuit's automatic application of *Chevron* to the FCC's interpretation of this statutory limit on its authority cannot be squared with *Mead,* which requires a more searching examination of Congress's intent, particularly "where an unusually basic legal question is at issue." *NCTA v. Brand X Internet Servs.,* 545 U.S. at 1004 (2005) (Breyer, J., concurring); *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). Had the Court considered the jurisdictional issue *de novo* (as at least the Seventh and Federal Circuits would), or engaged in a more careful and searching examination of the statute, the court would have found that the FCC lacks authority to adopt the Declaratory Ruling. *See, infra*, Part II.

II. Applying *Chevron* Led the Court To Expand the FCC's Authority and To Upset Congress's Careful Jurisdictional Balance.

Under the Fifth Circuit's analysis of whether §332(c)(7)(A) bars the FCC from using its general authority in the Act to regulate the State and local siting process under §332(c)(7), *Chevron* deference played a decisive role.

---

[9] *See also United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 182 L. Ed. 2d 746, 759 (2012) (Scalia, J., concurring) (noting that "a pre-*Chevron* determination that language is ambiguous does not alone suffice; the pre-*Chevron* Court must in addition have found that Congress wanted the particular ambiguity in question to be resolved by the agency.")

1. Because the court accorded *Chevron* deference to the FCC's jurisdictional determination, it did not seek the statute's best reading; it asked only whether the FCC's interpretation was permissible. The court deemed the statute ambiguous in various ways,[10] then applied *Chevron*'s second step to rule that "none of the cities' arguments convince us that the FCC's interpretation of its statutory authority is impermissible." App. 51a.

2. If the court had itself conducted a complete statutory analysis applying traditional tools of statutory construction, it would have found that Congress did not intend for the FCC to make policy affecting State and local authority in this area.

a. Section 332(c)(7)'s subject matter (local land use processes) and the entities that implement these processes (State and local governments) are not the subjects of the Communications Act. 47 U.S.C. §152. The FCC has no experience in managing zoning, nor is there an obvious national standard to which the agency could look (or did look) in deciding how much time is required to process applications in particular States or local communities. It is unlikely that Congress would authorize the FCC to intrude into

---

[10] App. 41a (§332(c)(7)(A) does not "unambiguously preclude" FCC action); App. 41a ("§332(c)(7)(A) itself does not provide a clear answer"); App. 42a (issue "remains unresolved"); App. 42a (noting that Congress "did not clearly remove" FCC's ability to implement §332(c)(7)(A)); App. 42a-43a (Congress's "silence" leaves §332(c)(7)(A)'s effect on the FCC's authority to administer §332(c)(7)(B)'s limitations ambiguous) App. 43a (noting that "one could read" §332(c)(7)(A) as the FCC does).

these areas without saying so expressly. Yet rather than say so expressly, Congress granted the FCC authority to act in one area (RF emissions) while granting the courts exclusive jurisdiction to address all other disputes arising under §332(c)(7).

b. The consequence of FCC regulation of State and local land use processes is significant, as this case illustrates. If the FCC deadlines pass (without extension by mutual agreement), an applicant must file a complaint within 30 days, triggering expedited judicial review. The State or local government's decision is presumptively unreasonable, and the State or local government must expend resources to defend its action. It must do so even if (to take an example) the time was required to comply with State environmental laws or to implement other policies reflected in State and local deadlines. *See, supra*, at 9 (discussing State laws). The review and the expense are triggered not because the State and local policies are unreasonable, but because the FCC created a federal zoning policy. That is something that the courts could not do, and have never done under their case-specific approach to §332(c)(7).

It is unlikely that Congress intended to undercut State and local laws without some indication it intended to do so. Congress's emphasis on judicial review in §332(c)(7), while not determinative, certainly cuts against finding that Congress intended the FCC to establish federal policies in this area. Likewise, the conference report explains that §332(c)(7)(B)(ii)'s requirement that a local government act within a "reasonable period of time" is not intended "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" zoning time frames. H.R. Rep. No. 104-204 at 25, 1996 U.S.C.C.A.N. 10 (1995). Yet, even if no cases are actually filed, the inevitable effect of a policy that threatens States and local governments with litigation if they do not meet FCC deadlines is that State and local governments must give precedence and special treatment to wireless applicants at the expense of other zoning applicants and policies.

2. a. Read in this context, the plain language of §332(c)(7)(A)'s preservation clause is clear: it prevents any other provision of the Communications Act from "affect[ing]" or "limit[ing]" State or local authority. Section 332(c)(7), it follows, is both comprehensive and self-contained: the FCC may act where §332(c)(7) gives it a role (to address RF matters), but not elsewhere. The FCC therefore may not use §§1, 4(i), 201(b), and 303(r) to assert jurisdiction over State and local zoning processes with respect to matters that are addressed in §332(c)(7), *e.g.*, to define what constitutes "substantial evidence," what constitutes a "written record," what constitutes a "reasonable time" for action, and so on. As the FCC itself recognized, its use of §§1, 4(i), 201(b), and 303(r) to create national standards necessarily "affects" and is intended to "affect" State and local authority. App. 90a (¶ 25) (noting that State and local governments must comply with §332(c)(7) "as defined herein"); *see also* App. 133a (¶ 62) (noting that certain State and local decisions are "unaffected" by its Declaratory Ruling).

b. The FCC's reading cannot be squared with §332(c)(7)(A)'s plain language. The FCC contends that §332(c)(7)(A)'s preservation clause only forbids it from creating "additional limitations" beyond those enumerated in §332(c)(7)(B). The agency therefore concludes that it may use §§1, 4(i), 201(b), and 303(r) to establish national rules for local zoning that are binding on States, local governments, and the courts, if the rules relate to some matter mentioned in §332(c)(7)(B). Pet. App. 87a-91a (¶¶ 23-25). But the "limits" created by the FCC's rules—the specific federal deadlines—are "additional limitations" that appear nowhere in the Act. Moreover, the FCC's claim that the statute only prevents it from creating additional "limits" reads the word "affect" out of the statute. By selecting its preferred reading of §332(c)(7) to advance its own policies, the FCC necessarily affects State and local authority. Indeed, the agency's creation of an overriding federal standard "independent" of state standards, see *supra*, has an additional "[e]ffect" on State law beyond the court review contemplated by §332(c)(7) itself. Likewise, the agency's presumption that State and local governments have acted unreasonably—which appears nowhere in §332(c)(7)'s text—"affects" State and local authority.

The FCC's reading of §332(c)(7) cannot be justified simply because §332(c)(7) appears in the Communications Act, which the FCC generally implements. The Court's decision in *Louisiana PSC v. FCC*, 476 U.S. 355, 373 (1986) is analogous, and to the contrary. The case concerned a preservation clause stating that "except as provided" in certain

sections, "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to" certain matters related to intrastate service. The Court ruled that this clause forbids the FCC from using another Act provision (47 U.S.C. §220) to preempt intrastate depreciation practices. The Court explained that the "nothing in this Act" clause "fences off" intrastate matters "from FCC reach or regulation." *Id.* at 370. Likewise, §332(c)(7)(A) fences off State and local authority from "limits" or "affects" caused by §§1, 4(i), 201(b), and 303(r)—and by any other provision of the Act.[11]

Unless §332(c)(7) is read to have this "fencing off" effect, it is hard to imagine its purpose. If Congress had added §332(c)(7)'s limitations to the Act without the "nothing in this Act" language, the FCC could still only implement the limitations that Congress established; it could not create new ones out of whole cloth. The FCC (and Fifth Circuit applying *Chevron*) thus reads §332(c)(7) as if the limiting language did not exist. Tellingly, the FCC (and the Fifth Circuit) found support for the FCC's action in the Sixth Circuit's decision in *Alliance v. Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008). There, the court

---

[11] The Fifth Circuit seems to have found it significant that the Congress did not use the phrase "jurisdiction" in Section 332(c)(7)(A). App. 42a n.104. However, the logical reading of Section 332(c)(7) is that it is broader, not narrower than the clause at issue in *Lousiana PSC,* and seals off an entire subject matter area from FCC action, direct or indirect. By contrast, in *Lousiana PSC,* no one doubted that the FCC had authority to address depreciation practices, so long as it did not assert jurisdiction over intrastate depreciation rates.

found that the FCC could rely on its general rulemaking authority to implement §621(a)(1) of the Communications Act, a provision that contains *no* language limiting the applicability of "other provisions" of the Communications Act. 47 U.S.C. §541(a)(1).

The Fifth Circuit's approach here misconstrues the Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). *AT&T* endorsed Justice Breyer's recognition that "'Congress enacted [the] language [of §201(b)] in 1938,' and . . . whether it confers 'general authority to make rules implementing the more specific terms of a later enacted statute *depends upon what that later enacted statute contemplates*.' *AT&T Corp.*, 525 U.S. at 420 (emphasis added); *id.* at 378 n.5 (finding Justice Breyer's statement "assuredly true."). Section 332(c)(7)(A) indicates what it "contemplates" expressly: "nothing in this Act" may "limit" or "affect" the State and local authority that §332(c)(7) addresses. That Congress may enact such a limitation is well-established: "An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress." *La. Pub. Serv. Comm'n*, 476 U.S. at 374-75. Requiring Congress to do more to shield an area from FCC policymaking—as the Fifth Circuit would—turns this fundamental principle on its head.

c. Other interpretive tools indicate that Congress intended to prevent the FCC from adopting national regulations to implement §332(c)(7).

First, Petitioners' statutory interpretation has direct support in the statute's legislative history; the FCC's has none. As explained, Congress rejected a provision that would have granted the FCC the very authority it exercised here in favor of §332(c)(7). The conference report directs that the FCC must terminate "[a]ny pending [FCC] rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities." H.R. Rep. No. 104-458 at 207-208 (1996) (Conf. Report).

Second, this Court has indicated that courts should avoid statutory interpretations that would render other statutory language superfluous. *Duncan v. Walker*, 533 U.S. 167, 174 (2001). The FCC's reading defies this canon. If the FCC is correct that Congress intended and expected the FCC to use §§1, 4(i), 201(b), and 303(r) to address any matter mentioned in §332(c)(7), the specific grant of authority to the FCC to address RF issues in §332(c)(7)(B) is surplusage.

Third, this Court has instructed that "[i]n construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision." *Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989). The FCC's interpretation defies this canon. It requires a court to read the "except as provided in this paragraph" broadly so that State and local authority may be "limit[ed]" and "affect[ed]" not only by the language "provided" in §332(c)(7)(B), but also by the

FCC's implementation of this provided language using §§1, 4(i), 201(b), and 303(r).

Finally, the Fifth Circuit's approach—requiring an unambiguous statement of Congressional intent—requires it to ignore basic presumptions that this Court has established. This Court has adopted a presumption against preemption instructing that a court must "begin . . . 'with the assumption that the historic police powers of the states [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Altria Group Inc. v. Good*, 555 U.S. 70, 77 (2008), citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added). This assumption "applies with particular force when Congress has legislated in a field traditionally occupied by the States." *Id.* This presumption supports Petitioners'—not the FCC's—interpretation, because only Petitioners' reading would prevent federal preemption by agency action where it is not Congress's "clear and manifest" intent.

* * *

In sum, the court's resolution of this case turned on its abbreviated and piecemeal *Chevron* analysis, and its deference to an FCC jurisdictional determination that is inconsistent with the best reading of §332(c)(7) considered as a whole. Review is appropriate to ensure that §332(c)(7) is applied as Congress intended.

III. This Case Allows the Court To Settle Recurring Issues of National Importance.

This case presents recurring issues with serious national ramifications both as a matter of administrative law, and under the Communications Act.

1. As a matter of administrative law, it is critical that the Court clarify the recurring issue of whether and how *Chevron* applies when an agency determines its own statutory jurisdiction. This very issue is central in other important cases now pending in the courts. *See, e.g.,* Daniel A. Lyons*, Tethering the Administrative State: The Case Against Chevron Deference for FCC Jurisdictional Claims*, 36 Iowa J. Corp. L. 823 (2011) (discussing FCC's claim of authority over the Internet).

But deferring to an agency's jurisdictional conclusion is especially intolerable when the courts of appeals fail to do so uniformly. This permits an agency's jurisdictional claim and ensuing rules to be binding in one circuit but not in others—a result especially problematic because agency cases are often assigned to courts of appeals randomly. 28 U.S.C. §2112. This creates a patchwork of "federal" rules, where results are determined by lottery. This case presents a particularly strong vehicle for resolving this issue given the strong indicia of Congress's intent, and the non-technical, purely legal nature of the jurisdictional issue.

2. Resolving the FCC's proper role with respect to §332(c)(7) is of continuing and growing importance.

Allowing the FCC to interject itself into local zoning processes and to make every local government subject to federally-established zoning rules has a direct effect on State and local governments. The effect is legal (States and their processes would be subject to federal administrative regulation); financial (federal rules and processes increase costs and raise the spectre of increased litigation); and consequential (the federal rules necessarily require local governments that wish to avoid litigation to give precedence to wireless zoning applications over other applications). In *Rancho Palos Verdes,* these factors were significant in determining that a §1983 remedy was inconsistent with §332(c)(7)'s statutory scheme. These factors also warrant granting the petition here, to maintain Congress's balance.

The issue is likely growing in importance. The cellular industry estimates that there were approximately 10,000 cell sites at year end 2002. By year end 2010, the number of cell sites had grown to approximately 253,000, and the number continues to grow—about 30,000 sites were added between 2010 and year end 2011.[12] The wireless industry has already returned to the FCC and asked it to adopt

---

[12] CTIA's Semi-Annual Wireless Industry Survey, *available at* http://files.ctia.org/pdf/CTIA_Survey_Year_End_2011_Graphics.pdf (last accessed June 26, 2011); *see also In re Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Mobile Services, Fifteenth Report*, WT Docket No. 10-133, FCC 11-103 at ¶ 310 (June 27, 2011) (noting that one provider alone, Verizon, would need to add between 17,400 and 27,400 sites to its network).

stricter rules. The agency recently released a far-reaching Notice of Inquiry aimed at "[i]mproving policies [r]egarding . . . [w]ireless [f]acilities [s]iting." *In re Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, 26 FCC Rcd. 5384 (2011). The FCC cited the Declaratory Ruling (¶¶ 13, 48 n.45), and stated its belief that "the Commission has broad general rulemaking authority that would allow it to issue rules interpreting section[ ] . . . 332." *Id.* at ¶ 57; *see also id.* at ¶ 51. Therefore, the FCC is likely to use the Fifth Circuit's decision to assert broad and sweeping authority to regulate all types of State, local, and private property.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Joseph Van Eaton
Counsel of Record
James R. Hobson
Matthew K. Schettenhelm
BEST BEST & KRIEGER, LLP
2000 Pennsylvania Avenue NW, Suite 4300
Washington, DC 20006
(202) 785-0600
joseph.vaneaton@bbklaw.com
Counsel for Petitioners City of Arlington, Texas; City of Los Angeles, California; County of Los Angeles, California; City of San Antonio, Texas, and Texas Coalition of Cities for Utilities Issues

Thomas C. Goldstein
Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Avenue NW, Suite 404
Washington, DC 20015
(202) 362-0636

Thomas D. Bunton
Senior Deputy County Counsel
COUNTY OF SAN DIEGO
1600 Pacific Highway
Room 355
San Diego, CA 92101
(619) 531-6456
Counsel for Petitioner
County of San Diego, California

June 27, 2012

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-60039

CITY OF ARLINGTON, TEXAS; CITY OF SAN ANTONIO, TEXAS,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,
Respondents.

On Petitions for Review of an Order of the Federal Communications Commission

---

Before DAVIS, PRADO, and OWEN, Circuit Judges.

PRISCILLA R. OWEN, Circuit Judge:

The City of Arlington, Texas and the City of San Antonio, Texas seek review of a Declaratory Ruling and subsequent Order on Reconsideration that the Federal Communications Commission (FCC or Commission) issued in response to a petition for a declaratory ruling by a trade association of wireless telephone service providers, CTIA—The Wireless Association® (CTIA). In the proceeding before the FCC, CTIA sought clarification of Sections 253 and 332(c)(7) of the Communications Act of 1934, as amended,[1] regarding local review of wireless facility

[1] 47 U.S.C. §§ 253, 332(c)(7).

siting applications. We deny Arlington's petition for review on the merits. We dismiss San Antonio's petition for review because we lack jurisdiction to consider it.

I

As part of the Telecommunications Act of 1996 (TCA or the Act),[2] Congress amended the Communications Act of 1934 by adding Section 332(c)(7). That provision, codified as 47 U.S.C. § 332(c)(7), restricts the authority of state and local governments with respect to decisions regarding the placement and construction of wireless communications facilities. It provides:

> (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–

[2] Pub. L. No. 104–104, 110 Stat. 56.

(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.

Section 332(c)(7) seeks to reconcile two competing interests—Congress's desire to preserve the traditional role of state and local governments in regulating land use and zoning and Congress's interest in encouraging the rapid development of new telecommunications technologies by removing the ability of state and local governments to impede the construction and modification of wireless communications facilities through delay or irrational decisionmaking.[3] Section 332(c)(7)(A), by providing that

---

[3] *See City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 115 (2005) ("Congress enacted the [TCA] to promote competition and higher quality in American telecommunications services and to encourage the rapid deployment of new telecommunications technologies. One of the

"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," acts to protect state and local government authority. Section 332(c)(7)(B), on the other hand, imposes "several substantive and procedural limitations that subject [state and local governments] to an outer limit upon their ability to regulate personal wireless services land use issues."[4]

In 2008, CTIA filed a petition for a declaratory ruling with the FCC in which it requested that the FCC clarify certain provisions of the Communica-

---

means by which it sought to accomplish these goals was reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers." (internal quotation marks and citations omitted)); *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte Cnty., Kan. City, Kan.*, 546 F.3d 1299, 1306 (10th Cir. 2008) ("Congress adopted the TCA in order to promote competition and higher quality in telecommunications services and to encourage the rapid deployment of new telecommunications technologies. The TCA furthered these goals by reducing the impediments that local governments could impose to defeat or delay the installation of wireless communications facilities such as cell phone towers, and by protecting against irrational or substanceless decisions by local authorities." (internal citations and quotation marks omitted)).

[4] *Sw. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 57 (1st Cir. 2001) (internal quotation marks and citations omitted); *see also U.S. Cellular Corp. v. City of Wichita Falls, Tex.*, 364 F.3d 250, 253 (5th Cir. 2004) (observing that § 332(c)(7)(B) imposes substantive and procedural limits on local governments' exercise of zoning authority).

tions Act of 1934, including several of § 332(c)(7)(B)'s limitations. The petition asserted that ambiguities in the statute had allowed local governments to impede the placement and construction of wireless facilities, harming consumers' access to wireless services. CTIA's petition made four specific requests.

First, CTIA requested that the FCC provide guidance on what constitutes a "failure to act" for purposes of § 332(c)(7)(B)(v). The FCC was requested to clarify the time periods within which a state or locality must act on wireless facility siting applications. The petition suggested that the Commission find that there has been a failure to act if there is no final action within 45 days from the submission of a wireless facility application and within 75 days from submission of other wireless siting facility applications.

Second, CTIA asked the FCC to find that, in the event no final action was taken within the suggested 45- and 75-day time periods, the application would be deemed granted. Alternatively, CTIA proposed that the FCC establish a presumption that, if a zoning authority could not explain a failure to act within the time frames, a reviewing court should find a violation of § 332(c)(7)(B)(ii) and issue an injunction granting the underlying application.

Third, CTIA requested that the FCC interpret § 332(c)(7)(B)(i), which bars state and local governments from taking action that would "prohibit or have the effect of prohibiting the provision of per-

sonal wireless services."[5] CTIA noted that federal courts had split on the question of whether that provision prevented state and local governments from barring entry of additional wireless service providers into a given market based solely on the existence of another provider within that market.[6] CTIA suggested that the FCC declare that the existence of one or more other carriers in a given geographic market is not by itself a sufficient defense against a suit seeking to enforce § 332(c)(7)(B)(i)(II).

Fourth and finally, CTIA requested the FCC to declare that the TCA preempts any ordinance that automatically requires a wireless carrier to seek a variance, regardless of the type and location of the wireless siting proposal. As support for this request, CTIA pointed to 47 U.S.C. § 253, which provides in pertinent part: "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."[7]

---

[5] 47 U.S.C. § 332(c)(7)(B)(i)(II).

[6] *Compare, e.g.*, *Metheny v. Becker*, 352 F.3d 458, 461 n.2 (1st Cir. 2003) (observing that in the First Circuit "a provider is not precluded from obtaining relief under the Act simply because some other provider services the gap in question"), *with AT&T Wireless PCS, Inc. v. City Council of City of Va. Beach*, 155 F.3d 423, 428 (4th Cir. 1998) (concluding that the statute "only applies to 'blanket prohibitions' and 'general bans or policies,' not to individual zoning decisions").

[7] 47 U.S.C. § 253(a).

The FCC issued a public notice seeking comment on CTIA's petition, and the record reflects that, in response to the notice, the FCC received dozens of comments from wireless service providers, local zoning authorities, and other interested parties. In 2009, the FCC issued the Declaratory Ruling, in which it granted in part and denied in part CTIA's petition.[8]

With respect to CTIA's request that the FCC establish time frames in which state and local governments must act on zoning requests, the FCC declared that "a reasonable period of time" for purposes of § 332(c)(7)(B)(ii) presumptively would be 90 days for personal wireless service facility siting applications requesting collocations[9] and 150 days for all other applications.[10] The FCC further determined that a lack of decision within these time frames would constitute a failure to act under § 332(c)(7)(B)(v).[11] The FCC stated, however, that personal wireless service providers and state or local governments could, by mutual consent, extend the prescribed time frames.[12] In addition, the FCC concluded that, if an applicant submits an incomplete application, the time it takes for the applicant to respond to a state or local government's request for

---

[8] 24 FCC Rcd. 13994 (2009).

[9] Collocations involve modifications to already existing wireless facilities.

[10] 24 FCC Rcd. 13994 ¶ 32 (2009).

[11] *Id.*

[12] *Id.* at ¶ 32.

additional information would not count toward the 90- or 150-day time frame if the state or local government notified the applicant that the application was incomplete within 30 days of receiving the application.[13]

The FCC rejected CTIA's proposal that the FCC deem as granted applications on which final action was not taken within the prescribed time frames.[14] The FCC observed that § 332(c)(7)(B)(v)'s provision for a cause of action in a court of competent jurisdiction based on a state or local government's "failure to act" indicated Congress's "intent that courts should have the responsibility to fashion appropriate case-specific remedies."[15] Accordingly, the FCC concluded that, although the 90- and 150-day time frames established by the Declaratory Ruling were presumptively reasonable, state or local authorities would have the opportunity in any given case to rebut that presumption in court.[16]

Finally, the FCC addressed CTIA's request that the FCC interpret § 332(c)(7)(B)(i) and 47 U.S.C. § 253. With respect to § 332(c)(7)(B)(i), the FCC determined "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' has engaged

---

[13] *Id.* at ¶ 53.

[14] *Id.* at ¶ 39.

[15] *Id.*

[16] *Id.* at ¶ 42.

in unlawful regulation" that violates § 332(c)(7)(B)(i)(II)'s prohibition on regulation that "prohibits or ha[s] the effect of prohibiting the provision of personal wireless services."[17] With respect to § 253, the FCC rejected CTIA's request that the FCC should rely upon that provision to preempt state laws and local ordinances that require wireless service providers to obtain a variance before siting facilities.[18] The FCC noted that CTIA was not seeking the preemption of any particular ordinance and "that any further consideration of blanket variance ordinances should occur within the factual context of specific cases."[19]

Several organizations subsequently filed a petition for reconsideration, which the FCC ultimately rejected in its Reconsideration Order. After the FCC issued the Declaratory Ruling, but before it issued the Reconsideration Order, the City of Arlington filed a petition for review of the Declaratory Ruling in this court. We issued an order holding Arlington's petition for review in abeyance pending the outcome of the above-referenced petition for reconsideration. After the FCC issued the Reconsideration Order, the City of San Antonio, which had also intervened in support of Arlington's petition for review, filed its own petition seeking review of both the Declaratory Ruling and the Reconsideration Order. We have also

---

[17] *Id.* at ¶ 55.

[18] *Id.* at ¶ 67.

[19] *Id.*

allowed several parties to intervene in support of or in opposition to the petitions.

II

We first address an issue involving this court's jurisdiction. As we noted above, this case involves two separate petitions for review—Arlington's petition and San Antonio's petition. Many of the issues Arlington and San Antonio raise are the same. Both cities claim (1) the FCC lacked statutory authority to establish the 90- and 150-day time frames; (2) the FCC's 90- and 150-day time frames conflict with the language of § 332(c)(7)(B)(ii) and (v); (3) the FCC's actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; and (4) the FCC violated the Administrative Procedure Act (APA) because its establishment of the 90- and 150-day time frames constituted a rulemaking subject to the APA's notice-and-comment requirements.

Each city also raises issues unique to its own petition. Arlington raises a procedural due process claim. San Antonio presents two additional issues: (1) a challenge to the FCC's interpretation of § 332(c)(7)(B)(i), and (2) a claim that the FCC failed to comply with the Regulatory Flexibility Act.[20] The FCC contends, however, that we lack jurisdiction to consider San Antonio's additional arguments because San Antonio did not timely file its petition for review. Before we address the merits of the cities'

---

[20] 5 U.S.C. § 601 *et seq.*

arguments, we must address the issue of our jurisdiction.

A

San Antonio filed its petition for review pursuant to 47 U.S.C. § 402(a), which provides that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission . . . shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28." Chapter 158 of Title 28 grants this court jurisdiction over "all final orders of the Federal Communications Commission made reviewable by section 402(a) of Title 47."[21] Chapter 158 also states that a party seeking review of "a final order reviewable under this chapter" must file a petition for review of the order within 60 days after entry of the order.[22] This 60-day period "'is jurisdictional and cannot be judicially altered or expanded.'"[23]

The FCC issued the Declaratory Ruling on November 18, 2009. Arlington filed its petition for review of the Declaratory Ruling on January 14, 2010, within the 60-day period set forth in 28 U.S.C. § 2344. We have jurisdiction to consider that petition and the issues Arlington raises. San Antonio, however, did not file its petition until October 1, 2010, well beyond the expiration of the 60-day period. Nev-

---

[21] 28 U.S.C. § 2342(1).

[22] *Id.* at § 2344.

[23] *Brazoria Cnty., Tex. v. EEOC*, 391 F.3d 685, 688 (5th Cir. 2004) (quoting *Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985)).

ertheless, San Antonio argues that its petition for review of the Declaratory Ruling is timely because it was filed within 60 days of the FCC's issuance of the Reconsideration Order.

It is the general rule that filing a petition for reconsideration with the FCC will toll the 60-day period for filing a petition for review of the agency's action in this court.[24] As the FCC notes, however, San Antonio did not file a petition for reconsideration of the Declaratory Ruling. Rather, other parties affected by the Declaratory Ruling filed the petition for reconsideration that culminated in the Reconsideration Order, and San Antonio simply submitted comments in support of that petition. The issue here, then, is whether a petition for reconsideration filed by one party to an agency action tolls § 2344's 60-day period for a party that did not file its own petition for reconsideration.

We conclude that a petition for reconsideration filed by one party does not toll § 2344's 60-day period for parties that do not file petitions for reconsideration. We reach this decision because "finality with respect to agency action is a party-based concept."[25] It is well-established that "a petition for

---

[24] *See Sw. Bell Tel. Co. v. FCC*, 116 F.3d 593, 596-97 (D.C. Cir. 1997); *Bellsouth Corp. v. FCC*, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994) ("[O]nce a party petitions the agency for reconsideration of an order or any part thereof, the entire order is rendered nonfinal as to that party.").

[25] *Bellsouth Corp.*, 17 F.3d at 1489 (internal quotation marks and citations omitted); *see also W. Penn Power Co. v. EPA*, 860 F.2d 581, 587 (3d Cir. 1988) ("[A]n agency action can be final

agency reconsideration by one party does not affect the right of other parties to seek judicial review."[26] In other words, the petition for reconsideration filed in this case did not affect San Antonio's right to file a petition for review in this court as of the date the FCC issued the Declaratory Ruling, and we would have been able to exercise jurisdiction over such a petition for review so long as San Antonio itself did not file a petition for reconsideration. Because "there is no principled way to distinguish between the concept of finality for purposes of triggering the running of a time limit for appeals and the concept of finality for the purpose of appellate court jurisdiction,"[27] we conclude that San Antonio's failure to petition for reconsideration of the Declaratory Ruling rendered the Declaratory Ruling a final agency decision with respect to San Antonio both for purposes of conferring jurisdiction on this court and for purposes of triggering § 2344's time period. San Antonio thus

---

for one party and nonfinal for another."); *Winter v. ICC*, 851 F.2d 1056, 1062 (8th Cir. 1988) ("[I]n multi-party proceedings one party may seek judicial review of an agency decision while another party seeks administrative reconsideration, resulting in both tribunals having jurisdiction. An agency decision may thus be final for one purpose yet nonfinal for another purpose.").

[26] *Cal. Dep't of Water Res. v. FERC*, 361 F.3d 517, 521 (9th Cir. 2004); *see also W. Penn Power Co.*, 860 F.2d at 586 ("It is well established, for example, that when two parties are adversely affected by an agency's action, one can petition for reconsideration before the agency at the same time that the other seeks judicial redetermination.").

[27] *W. Penn Power Co.*, 860 F.2d at 585-86.

had 60 days from November 18, 2009, to file a petition for review in this court of the Declaratory Ruling. The city did not file its petition until October 1, 2010, months after its 60-day period to file a petition for review had expired, and we lack jurisdiction to consider the petition insofar as it challenges the Declaratory Ruling.

B

San Antonio also argues we can consider its petition, notwithstanding the fact that it was untimely with respect to the Declaratory Ruling, because the petition also challenges the FCC's Reconsideration Order. There is no doubt that San Antonio's petition for review is timely insofar as it challenges the FCC's Reconsideration Order. The Reconsideration Order is not a reviewable order, however, because it merely denied rehearing of matters decided in the Declaratory Ruling. It contained no new or additional determinations. San Antonio did not petition for reconsideration of the Declaratory Ruling, and in such a situation, San Antonio cannot challenge the rulings in the Declaratory Order by challenging only the Reconsideration Order. As the Supreme Court explained in *ICC v. Brotherhood of Locomotive Engineers*: "where a party petitions an agency for reconsideration on the ground of 'material error,' *i.e.*, on the same record that was before the agency when it rendered its original decision, 'an order which merely denies rehearing of . . . [the prior] order is not itself reviewable.'"[28] Here, the argu-

[28] 482 U.S. 270, 280 (1987) (quoting *Microwave Commc'ns, Inc. v. FCC*, 515 F.2d 385, 387 n.7 (D.C. Cir. 1974)).

ments San Antonio raises in its petition for review, and the arguments it submitted in support of the petition for reconsideration, all were originally presented to the agency during the proceedings leading up to the issuance of the Declaratory Ruling. Accordingly, in addition to lacking jurisdiction to review San Antonio's petition insofar as it challenges the Declaratory Ruling, we also lack jurisdiction to consider the petition as a challenge to the Reconsideration Order.

C

San Antonio maintains that we can consider all of its arguments, even if we lack jurisdiction over its petition for review, because it intervened in support of Arlington's timely petition for review in this court. Our precedent compels us to disagree. In *Brazoria County, Texas v. EEOC*, [29]we held that a party could not rely on her timely intervention with respect to another party's petition for review to raise matters outside the scope of the other party's petition.[30] We arrived at this holding because motions to intervene must be filed within 30 days after filing of the petition for review[31] —which itself must be filed within 60 days after the agency's final action[32]—thus creating a situation in which intervenors can request review of issues as late as 90 days after the agency's

---

[29] 391 F.3d 685 (5th Cir. 2004).

[30] *Id.* at 688-89.

[31] *See* Fed. R. App. P. 15(d).

[32] 28 U.S.C. § 2344.

final action. Because permitting an intervenor to raise additional issues for review would contravene § 2344's 60-day time period for filing petitions for review, we observed that intervenors "are bound by the issues raised in the petitions for review."[33] Thus, we generally limit intervenors to raising arguments addressing only those issues presented in the petitions for review.[34]

As discussed above, Arlington has raised five issues. San Antonio's argument that the FCC failed to comply with the Regulatory Flexibility Act and its challenge to the FCC's interpretation of § 332(c)(7)(B)(i) do not relate to those issues, and we lack jurisdiction to consider them. Accordingly, we will limit our discussion to only those issues Arlington has raised. We will, however, consider the arguments of San Antonio and other intervenors that relate to those issues.

III

The cities contend the FCC violated the APA when it established the 90- and 150-day time frames. The APA identifies three types of agency proceedings—rulemaking, adjudication, and licensing—and

---

[33] *Brazoria Cnty., Tex.*, 391 F.3d at 689 (quoting *United Gas Pipe Line Co. v. FERC*, 824 F.2d 417, 437 (5th Cir. 1987)).

[34] *Id. But see Kan. City S. Indus., Inc. v. ICC*, 902 F.2d 423, 434-35 (5th Cir. 1990) (exercising jurisdiction over an issue raised by an intervenor when the intervenor "filed its motion for leave to intervene in the proceedings in this Court not only within Rule 15(d)'s thirty-day filing requirement for intervention motions but also within section 2344's sixty-day filing requirement for petitions for review of ICC orders").

prescribes specific procedures applicable to those proceedings.[35] When an agency engages in rulemaking it must, subject to certain statutory exceptions, satisfy the APA's familiar notice-and-comment requirements.[36] Adjudications, by contrast, are not subject to those requirements.[37] The cities argue the FCC violated the APA because the time frames constitute new rules subject to the APA's notice-and-comment requirements for rulemaking and the FCC failed to comply with the those requirements.

The FCC makes two arguments in response. First, the FCC notes the Declaratory Ruling was the product of adjudication, not rulemaking, and thus was not subject to the APA's notice-and-comment requirements. Alternatively, the FCC suggests that any new rules included in the Declaratory Ruling were interpretive rules excepted from the notice-and-comment requirements.

A

We first consider whether the 90- and 150-day time frames were not subject to the APA's notice-and-comment requirements because the Declaratory Ruling was the product of adjudication rather than rulemaking. It is well-established that agencies can choose to announce new rules through adjudication

---

[35] *See Sierra Club v. Peterson*, 185 F.3d 349, 366 (5th Cir. 1999).

[36] 5 U.S.C. § 553.

[37] *Id.* at § 554; *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 627 (5th Cir. 2001) ("There is no notice and comment requirement for an agency adjudication.").

rather than rulemaking.[38] Agencies typically enjoy "very broad discretion [in deciding] whether to proceed by way of adjudication or rulemaking."[39] The notice-and-comment requirements for rulemaking would ordinarily not apply to the FCC's decision to establish the time frames if the FCC exercised its discretion to issue the Declaratory Ruling pursuant to its adjudicative powers.

We examine two aspects of an agency action when determining whether an agency action was a rulemaking or an adjudication. First, we consider the agency's characterization of its own action.[40] Second, we must examine the ultimate product of the agency action.[41] Both of these considerations

---

[38] *See, e.g.*, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (observing that an agency "is not precluded from announcing new principles in an adjudicative proceeding"); *Mobil Exploration & Producing N. Am., Inc. v. FERC*, 881 F.2d 193, 198 (5th Cir. 1989) (stating that an agency "may establish rules of general application in either a statutory rulemaking procedure or an individual adjudication").

[39] *Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126, 1141 (D.C. Cir. 2001); *see also Bell Aerospace Co.*, 416 U.S. at 294 (observing that "the choice between rulemaking and adjudication lies in the first instance within the Board's discretion"); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."); *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 797 (5th Cir. 2000) ("Agencies have discretion to choose between adjudication and rulemaking as a means of setting policy.").

[40] *Am. Airlines, Inc.*, 202 F.3d at 797.

[41] *Id.*

lead us to agree with the FCC that the Declaratory Ruling was the result of an adjudication and not a rulemaking.

First, the FCC itself claims it was engaging in adjudication when it issued the Declaratory Ruling. As we have previously recognized, we "accord significant deference to an agency's characterization of its own action."[42] This deference is not absolute, however. Otherwise, an agency would be able to escape the APA's notice-and-comment requirements simply by labeling a rulemaking an adjudication.[43] Whether the FCC's action here constituted an adjudication or a rulemaking ultimately turns on the attributes of the Declaratory Ruling itself.

The Declaratory Ruling is designated as a "Declaratory Ruling," and it was issued pursuant to 47 C.F.R. § 1.2. Section 1.2 grants the FCC the power to issue declaratory orders and is derivative of § 554(e) of the APA.[44] Section 554(e) provides: "The

---

[42] *Id.*

[43] *Cf. Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) ("It is well established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation.").

[44] C.F.R. § 1.2(a) ("The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."); *see also Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 397 n.4 (9th Cir. 1996) ("Because 5 U.S.C. § 554(e) grants the FCC authority to issue 'declaratory orders,' and because 47 C.F.R. § 1.2 is derived from § 554(e), it appears that the terms 'declaratory order' and 'declaratory

agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." Because § 554(e) is a subsection of the provision in the APA governing formal adjudication, we have held that declaratory rulings issued pursuant to its grant of authority are informal adjudications under the APA.[45] We see no reason to treat the Declaratory Ruling differently: it was the product of adjudication.[46]

B

Our conclusion that the Declaratory Ruling resulted from adjudication does not end our review of the FCC's purported non-compliance with the APA. Although, as noted above, agencies enjoy broad discretion in choosing whether to establish a rule

---

ruling' are used interchangeably.").

[45] *See Am. Airlines, Inc.*, 202 F.3d at 796-98 (treating a declaratory order issued pursuant to § 554(e) as an informal adjudication); *Texas v. United States*, 866 F.2d 1546, 1555 (5th Cir. 1989) (same); *see also Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007) ("[T]here is no question that a declaratory ruling can be a form of adjudication." (internal citation omitted)).

[46] *See Am. Airlines, Inc.*, 202 F.3d at 798; *Radiofone, Inc. v. FCC*, 759 F.2d 936, 939 (D.C. Cir. 1985) ("There is no doubt that the Commission's action in this case was an adjudication and not a rulemaking. It is captioned 'Declaratory Ruling,' a category of action which, according to the Commission's rules, is taken 'in accordance with section 5(d) of the Administrative Procedure Act,' 47 C.F.R. § 1.2 (1984). That subsection, now codified at 5 U.S.C. § 554(e) (1982), pertains to adjudication." (internal footnote omitted)).

through adjudication or rulemaking,[47] that discretion is not unlimited. The agency ultimately remains subject to the constraints of the APA, which requires courts to review the agency's action to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[48] The Ninth Circuit, for example, has identified certain situations in which an agency's reliance on adjudication instead of rulemaking constitutes an abuse of discretion.[49] Even though we conclude the Declaratory Ruling was the product of an adjudication, we will consider whether the FCC abused its discretion or otherwise violated the law by promulgating the 90- and 150-day time frames through adjudication rather than rulemaking.[50] On this point,

---

[47] *Am. Airlines, Inc.*, 202 F.3d at 797.

[48] 5 U.S.C. § 706(2)(A).

[49] *See MacLean v. Dep't of Homeland Sec.*, 543 F.3d 1145, 1151 (9th Cir. 2008) ("An agency adjudication may require a notice and comment period if it constitutes de facto rulemaking that affects the rights of broad classes of unspecified individuals." (internal quotation marks and citations omitted)); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 950 (9th Cir. 2007) ("Of course, in certain circumstances an agency may abuse its discretion by announcing new rules through adjudication rather than through rulemaking, such as when the rule operates retroactively and disturbs settled expectations.").

[50] *See Am. Airlines, Inc.*, 202 F.3d at 798 (reviewing agency's decision to proceed by adjudication rather than rulemaking for abuse of discretion); *see also NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("[T]here may be situations where [an agency's] reliance on adjudication would amount to an abuse of discretion . . . .").

we harbor serious doubts as to the propriety of the FCC's choice of procedures.

Specifically, we note that the Declaratory Ruling's 90- and 150-day time frames bear all the hallmarks of products of rulemaking, not adjudication. Adjudications typically "resolve disputes among specific individuals in specific cases, whereas rulemaking affects the rights of broad classes of unspecified individuals."[51] In *American Airlines, Inc. v. Department of Transportation*, we held that the Department of Transportation properly used § 554(e)'s declaratory ruling mechanism to resolve a dispute involving the application of the federal law governing airline service at Love Field airport.[52] In that case we specifically observed that "because DOT's order interpreted the rights of a small number of parties properly before it, DOT did not abuse its discretion by acting through an adjudicatory proceeding."[53]

Similarly, in *Mobil Exploration & Producing North America, Inc. v. FERC*,[54] we reviewed an agency's decision to institute a new one-year time limit for successors in interest in gas-producing properties to obtain a new certificate of public con-

---

[51] *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994); *see also Providence Yakima Med. Ctr. v. Sebelius*, 611 F.3d 1181, 1187-88 (9th Cir. 2010) (per curiam); *San Juan Cable LLC v. P.R. Tel. Co., Inc.*, 612 F.3d 25, 33 n.3 (1st Cir. 2010).

[52] 202 F.3d at 797-98.

[53] *Id.* at 798.

[54] 881 F.2d 193 (5th Cir. 1989).

venience and necessity.[55] The agency instituted the new limit in the course of reviewing a particular successor's application for a certificate.[56] Petitioners challenged the limit on a number of grounds, including that the limit should have been instituted using the formal rulemaking procedure in the APA, and we held that the agency did not abuse its discretion in choosing to establish the limit through adjudication rather than rulemaking.[57] In doing so, we specifically noted that the new time limit was "a relatively minor procedural requirement with limited effect" due to the fact that there were "fewer than 250 large producers that would be subject to the one-year successor filing requirement."[58] Here, the FCC established the 90- and 150-day time frames, not in the course of deciding any specific dispute between a wireless provider and a state or local government, but in a proceeding focused exclusively on providing an interpretation of § 332(c)(7)(B) that would apply prospectively to every state and local government in the United States.

It is true that an agency need not be presented with a specific dispute between two parties in order to use § 554(e)'s declaratory ruling mechanism, because § 554 does not limit an agency's use of declaratory rulings to terminating controversies between parties. Section 554 also empowers agencies to

---

[55] *Id.* at 195-96.

[56] *Id.* at 196.

[57] *Id.* at 198-99.

[58] *Id.* at 199.

use declaratory rulings to "remove uncertainty," and there are cases suggesting an agency may use a declaratory ruling to issue interpretations of law that are both general and prospective in their application and divorced from a specific dispute between parties. In *Qwest Services Corp. v. FCC*,[59] the District of Columbia Circuit upheld the FCC's use of a declaratory ruling to announce that certain types of prepaid calling cards were telecommunications services and that their providers were subject to regulation under the TCA.[60] In *Chisholm v. FCC*,[61] the District of Columbia Circuit similarly upheld the FCC's use of a declaratory ruling to determine the application of the Communication Act's equal-time provision to specific types of appearances by political candidates.[62] Nevertheless, even these cases involved concrete and narrow questions of law the resolutions of which would have an immediate and determinable impact on specific factual scenarios. Here, by contrast, the FCC has provided guidance on the meaning of § 332(c)(7)(B)(ii) and (v) that is utterly divorced from any specific application of the statute. The time frames' effect with respect to any particular dispute arising under § 332(c)(7)(B)(ii) will only become clear after adjudication of the dispute in a court of competent jurisdiction. This is classic rulemaking.[63]

---

[59] 509 F.3d 531 (D.C. Cir. 2007).

[60] *Id.* at 536-37.

[61] 538 F.2d 349 (D.C. Cir. 1976).

[62] *Id.* at 364-66.

[63] *See Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442,

Nevertheless, we need not decide whether the FCC abused its discretion by failing to use notice-and-comment rulemaking to establish the time frames. We also do not address the FCC's argument that, even if it did engage in rulemaking, the rulemaking was interpretative rulemaking of the type excepted from the APA's notice-and-comment requirements.[64] We need not decide these questions because any failure by the FCC to comply with the APA in this case was harmless.[65]

"[T]he harmless error rule requires the party asserting error to demonstrate prejudice from the error."[66] An agency's failure to comply with the APA

---

448 (9th Cir. 1994) ("Rulemaking, in contrast, is prospective, and has a definitive effect on individuals only after the rule subsequently is applied.").

[64] 5 U.S.C. § 553(d)(2).

[65] *See United States v. Johnson*, 632 F.3d 912, 930 (5th Cir. 2011) ("The APA demands that courts reviewing agency decisions under the Act '[take] due account . . . of the rule of prejudicial error.'" (alteration in original) (quoting 5 U.S.C. § 706)); *Jicarilla Apache Nation v. U.S. Dep't of the Interior*, 613 F.3d 1112, 1121 (D.C. Cir. 2010) ("The harmless error rule applies to agency action because '[i]f the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration.'" (alteration in original) (quoting *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004)).

[66] *Air Can. v. Dep't of Transp.*, 148 F.3d 1142, 1156 (D.C. Cir. 1998); *see also Shinseki v. Sanders*, 129 S. Ct. 1696, 1706 (2009) ("[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination.").

is harmless when the agency's mistake "clearly had no bearing on the procedure used or the substance of decision reached."[67] In conducting the harmless error inquiry, we inform our analysis with a number of potentially relevant factors, including (1) "an estimation of the likelihood that the result would have been different"; (2) "an awareness of what body (jury, lower court, administrative agency) has the authority to reach that result"; (3) "a consideration of the error's likely effects on the perceived fairness, integrity, or public reputation of judicial proceedings"; and (4) "a hesitancy to generalize too broadly about particular kinds of errors when the specific factual circumstances in which the error arises may well make all the difference."[68]

The APA's notice-and-comment procedures are familiar:

> Under the APA, agencies issuing rules must publish notice of proposed rulemaking in the *Federal Register* and shall give interested persons an opportunity to participate in the rule making by allowing submission of comments. In addition, the APA requires that publication of a substantive rule shall be made not less than 30 days before its effective date.[69]

---

[67] *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 215 (5th Cir. 1979) (quoting *Braniff Airways v. Civil Aeronautics Bd.*, 379 F.3d 453, 466 (D.C. Cir.1967)) (internal quotation marks omitted).

[68] *Shinseki*, 129 S. Ct. at 1707; *see also Johnson*, 632 F.3d at 930.

[69] *Johnson*, 632 F.3d at 927 (internal quotation marks and

When an agency fails to comply with the APA's notice and comment procedures, the touchstone is "whether it is clear that the lack of notice and comment did not prejudice the petitioner."[70] In this case, there is no indication that any failure of the FCC to comply with the APA's notice-and-comment procedures prejudiced Arlington or the intervenors.

As an initial matter, the FCC published notice of CTIA's petition in the *Federal Register*, and the notice requested comments on CTIA's request that the FCC "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."[71] The notice also referenced CTIA's requests that the FCC establish specific time frames and implement a system under which an application would be deemed granted if a zoning authority failed to act within the applicable time frame.[72] It is true that the FCC labeled its published notice as a request for comment on a "Petition for Declaratory Ruling" rather than as a "Notice of Proposed Rulemaking," but, as the District of Columbia Circuit has repeatedly held, such a deficiency is not fatal because "'to remand solely because the Commission labeled the action a declara-

---

citations omitted); *see also* 5 U.S.C. § 553(b)-(d).

[70] *Johnson*, 632 F.3d at 931.

[71] *See* Wireless Telecommunications Bureau seeks Comment on Petition for Declaratory Ruling by CTIA, 73 Fed. Reg. 50972, 50972 (Aug. 29, 2008).

[72] *Id.* at 50972-73.

tory ruling would be to engage in an empty formality.'"[73]

We also cannot ignore the fact that, after publishing the notice in the *Federal Register*, the FCC received and considered comments from dozens of interested parties, including several of the cities involved in this litigation. Many of those comments raised the very issues now raised before this court, and the FCC addressed those issues in its Declaratory Ruling. Indeed, we are not aware of a single argument the cities now present to this court that was not considered by the FCC in the agency proceedings below. These facts call to mind our recent observations in *United States v. Johnson*:

> The purpose of notice-and-comment rulemaking is to assure fairness and mature consideration of rules having a substantial impact on those regulated. The process allows the agency to educate itself before adopting a final order. In addition, public notice requires the agency to disclose its thinking on matters that will affect regulated parties. These goals, however, may be achieved in cases where the agency's decision-making process centered on the identical substantive claims as those proposed by the party asserting error, even if there were APA deficiencies. It follows that when a party's claims were considered, even if

---

[73] *See, e.g.*, *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 40 (D.C. Cir. 2005) (quoting *N.Y. State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984)).

notice was inadequate, the challenging party may not have been prejudiced.[74]

Finally, to the extent the FCC might have failed to comply with the APA's 30-day waiting period before an adopted rule becomes effective, the cities have suggested no reason why any such waiting period was needed in this case or demonstrated any prejudice resulting from the FCC's failure to delay the effective date of the Declaratory Ruling. We note that "the purpose of the thirty-day waiting period is to give affected parties a reasonable time to adjust their behavior before the final rule takes effect."[75] On this point, the Declaratory Ruling itself recognized the need "to give State and local governments an additional period to review currently pending applications before an applicant might file suit."[76] The FCC determined that, for all zoning applications that had been pending for less than 90 days (with respect to collocation applications) or 150 days (with respect to all other applications) at the time of the issuance of the Declaratory Ruling, state or local governments would have an additional 90- or 150-day period before their inaction would be presumed unreasonable under the time frames.[77] For those applications that had been pending for longer than the applicable time frame at the time of the Declaratory

---

[74] *Johnson*, 632 F.3d at 931 (internal quotation marks, brackets, and citations omitted).

[75] *Omnipoint Corp. v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996).

[76] 24 FCC Rcd. 13994 ¶ 51 (2009).

[77] *Id.*

Ruling, the FCC determined state or local governments would have 60 days from the provision of notice by the applicant before the applicant would be able to seek judicial relief.[78] The cities have not demonstrated that the FCC's approach here burdened them in any way. Nor have they pointed to zoning applications they were forced to address earlier due to the FCC's failure to comply with the 30-day waiting period.

We conclude that any error in the FCC's choice to establish the time frames in the Declaratory Ruling instead of through notice-and-comment rulemaking was plainly harmless. The cities received notice of the issues pending before the FCC and had the ability to comment on CTIA's petition in the agency proceedings. More than sixty cities, towns, and villages, and scores of other governmental entities or their representatives submitted comments in response to the FCC's notice. The FCC considered and addressed all of the substantive issues the cities now raise. Any deficiencies in the procedures leading to the Declaratory Ruling do not justify vacating and remanding the order.

IV

The cities also argue the FCC violated due process when it issued the Declaratory Ruling. The cities base this argument on their assertion that the FCC failed to comply with 47 C.F.R. § 1.1206(a) when it considered CTIA's petition. A note to that regulation provides:

---

[78] *Id.*

> In the case of petitions for declaratory ruling that seek Commission preemption of state or local regulatory authority and petitions for relief under 47 U.S.C. 332(c)(7)(B)(v), the petitioner must serve the original petition on any state or local government, the actions of which are specifically cited as a basis for requesting preemption. Service should be made on those bodies within the state or local governments that are legally authorized to accept service of legal documents in a civil context. Such pleadings that are not served will be dismissed without consideration as a defective pleading and treated as a violation of the ex parte rules unless the Commission determines that the matter should be entertained by making it part of the record under § 1.1212(d) and the parties are so informed.[79]

The cities claim CTIA did not serve its petition on the state and local governments whose delays served as the impetus for CTIA's petition. According to the cities, CTIA's failure to serve the petition necessitated its dismissal and the FCC's failure to do so resulted in a denial of due process.

The FCC responds that its decision not to dismiss CTIA's petition was justified by its own interpretation of § 1.1206(a). In the Declaratory Ruling, the FCC concluded: "By its terms, the service requirement does not apply to a petition that cites examples of the practices of unidentified jurisdic-

---

[79] 47 C.F.R. § 1.1206(a) note 1.

tions to demonstrate the need for a declaratory ruling interpreting provisions of the Communications Act."[80] The FCC notes that CTIA's petition did not identify specific municipalities and that nothing in its rules required the petition to do so.

Reduced to its essence, the cities' claim is that the FCC violated due process by failing to ensure that CTIA's petition was served on the specific state and local governments whose delays caused CTIA to petition the FCC for the Declaratory Ruling. We do not believe that due process required such individual service in this case because the FCC, in issuing the Declaratory Ruling, was not adjudicating the legality of the actions of those state and local governments. The FCC was not confronted with a concrete dispute the resolution of which would have an immediate effect on specific individuals.[81] As noted above, in this sense the Declaratory Ruling was more akin to a rulemaking than the typical adjudication, and we have observed that "[w]hen a rule is established through statutory rulemaking, public notice and hearing provide the necessary protection. . . . Such notice is provided by publication of the proposed rulemaking in the Federal Register, and all parties who will be affected by the rule are given an opportunity to challenge [the agency's] action."[82] Here, the

---

[80] 24 FCC Rcd. 13994 ¶ 68 (2009).

[81] *See Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994) ("[B]ecause adjudications involve concrete disputes, they have an immediate effect on specific individuals (those involved in the dispute).").

[82] *Mobil Exploration & Producing N. Am., Inc. v. FERC*, 881

FCC provided notice of CTIA's petition in the *Federal Register* and allowed all interested parties to provide comments on CTIA's petition. Under the circumstances of this case, those procedures were adequate to satisfy due process.

V

Regarding the determinations in the FCC's Declaratory Ruling, we begin with the cities' suggestion that the FCC lacked the statutory authority to adopt the 90- and 150-day time frames. As noted above, those time frames represent the FCC's construction of language in § 332(c)(7)(B)(ii) and (v). The cities argue, however, that § 332(c)(7)(A) precludes the FCC from exercising authority to implement that language. The cities also note that § 332(c)(7)(B)(v) places jurisdiction over disputes arising under § 332(c)(7)(B)(ii) in the courts and suggests that this jurisdictional provision supports its proposed reading of § 332(c)(7)(A).

The FCC, on the other hand, contends that it possessed statutory authority to adopt the 90- and 150-day time frames pursuant to its general authority to make such rules and regulations as may be necessary to carry out the Communication Act's provisions.[83] The FCC argues that § 332(c)(7)(A) does not bar the FCC from exercising this authority because the FCC interprets § 332(c)(7)(A) as merely precluding the FCC from imposing additional limita-

---

F.2d 193, 199 (5th Cir. 1989); *see also Fla. Gas Transmission Co. v. FERC*, 876 F.2d 42, 44 (5th Cir. 1989).

[83] *See, e.g.*, 47 U.S.C. §§ 151, 154(i), 201(b), 303(r).

tions on state and local government authority over the wireless facility zoning process beyond those already provided for in § 332(c)(7)(B). Under the FCC's interpretation, the FCC retains the authority to implement the limitations already set forth in § 332(c)(7)(B).

A

We ordinarily review an agency's interpretation of the statutes it is charged with administering using the *Chevron* two-step standard of review.[84] Under *Chevron*, we first ask "whether Congress has directly addressed the precise question at issue."[85] If Congress has addressed the question, "we must give effect to the unambiguously expressed intent of Congress."[86] If we determine that the statute is silent or ambiguous with respect to the precise question at issue, however, we then "consider whether the agency's answer is based on a permissible construction of the statute."[87] "As long as the agency's construction of an ambiguous statute is permissible, it

---

[84] *See Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 796 (5th Cir. 2000).

[85] *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 711 (2011) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984)) (internal quotation marks omitted).

[86] *Med. Ctr. Pharmacy v. Mukasey*, 536 F.3d 383, 393 (5th Cir. 2008) (quoting *Chevron*, 476 U.S. at 843) (internal quotation marks omitted).

[87] *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 749 (5th Cir. 2011) (quoting *Chevron*, 476 U.S. at 483) (internal quotation marks omitted).

must be upheld."[88] Although we engage in the *Chevron* analysis when reviewing an agency's interpretation of a statute it is charged with administering, we do not use *Chevron* when reviewing an agency's interpretation of a statute it is not charged with administering.[89]

The issue in the instant case is whether the FCC possessed statutory authority to administer § 332(c)(7)(B)(ii) and (v) by adopting the 90- and 150-day time frames. Although it is clear that *Chevron* review does not apply once it is determined that an agency lacks authority to interpret a statute, the parties dispute whether *Chevron* review should apply when we determine the extent of the agency's jurisdiction. The FCC argues that an agency's interpretation of its own statutory authority is subject to review under *Chevron*. The cities, on the other hand, argue the issue presents "a pre-*Chevron* question of law regarding the scope of the FCC's authority" and that such a question of law is subject to de novo review.

The Supreme Court has not yet conclusively resolved the question of whether *Chevron* applies in the context of an agency's determination of its own statutory jurisdiction,[90] and the circuit courts of ap-

---

[88] *Am. Airlines, Inc.*, 202 F.3d at 796.

[89] *Id.*

[90] *See Pruidze v. Holder*, 632 F.3d 234, 237 (6th Cir. 2011) (collecting cases and observing that the Supreme Court has yet to resolve the debate over whether *Chevron* applies to disputes about the scope of an agency's jurisdiction).

peals have adopted different approaches to the issue. Some circuits apply *Chevron* deference to disputes over the scope of an agency's jurisdiction,[91] some do not,[92] and some circuits have thus far avoided taking a position.[93] In this circuit, we apply *Chevron* to an agency's interpretation of its own statutory jurisdiction, and therefore, we will apply the *Chevron* framework when determining whether the FCC possessed the statutory authority to establish the 90- and 150-day time frames.[94]

---

[91] *See, e.g.*, *Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1145-46 (10th Cir. 2010) (en banc) ("Of course, courts afford considerable deference to agencies interpreting ambiguities in statutes that Congress has delegated to their care, . . . including statutory ambiguities affecting the agency's jurisdiction . . . ." (internal citations omitted)); *P.R. Mar. Shipping Auth. v. Valley Freight Sys., Inc.*, 856 F.2d 546, 552 (3d Cir. 1988) ("When Congress has not directly and unambiguously addressed the precise question at issue, a court must accept the interpretation set forth by the agency so long as it is a reasonable one. . . . This rule of deference is fully applicable to an agency's interpretation of its own jurisdiction." (internal citation omitted)).

[92] *See, e.g.*, *N. Ill. Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 846-47 (7th Cir. 2002) (concluding that de novo review is appropriate for questions involving an agency's determination of its own jurisdiction); *Bolton v. Merit Sys. Prot. Bd.*, 154 F.3d 1313, 1316 (Fed. Cir. 1998) (reviewing agency's legal conclusion regarding the scope of its own jurisdiction without deference to the agency's determination).

[93] *See Pruidze*, 632 F.3d at 237 (leaving the question unanswered); *O'Connell v. Shalala*, 79 F.3d 170, 176 (1st Cir. 1996) (same).

[94] *Texas v. United States*, 497 F.3d 491, 501 (5th Cir. 2007) (observing that *Chevron* step one applies to "challenges to an

B

"At the first step of a *Chevron* analysis, we must determine whether Congress has directly spoken in a manner that reveals its expressed intent."[95] "We use the traditional tools of statutory construction to determine whether Congress has spoken to the precise point at issue,"[96] and "[t]here is no better or more authoritative expression of congressional intent than the statutory text."[97] We determine the plainness or ambiguity of the statutory text by referencing "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[98] "'[W]here the statutory language is unambiguous and the statutory scheme is coherent and consistent,' the language of the stat-

---

agency's interpretation of a statute, as well as whether the statute confers agency jurisdiction over an issue"); *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 440-46 (5th Cir. 1999) (applying *Chevron* to a question concerning the scope of the FCC's statutory authority to provide universal service support for schools, libraries, and rural health-care providers); *First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 901 (5th Cir. 1995) (per curiam) ("[T]his circuit has accorded deference to an agency's determination of its own statutory authority.").

[95] *Med. Ctr. Pharmacy v. Mukasey*, 536 F.3d 383, 394 (5th Cir. 2008) (quoting *Chevron*, 476 U.S. at 843) (internal quotation marks omitted).

[96] *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 749 (5th Cir. 2011) (citing *Tex. Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Bd.*, 201 F.3d 551, 554 (5th Cir. 2000)).

[97] *Med. Ctr. Pharm.*, 536 F.3d at 394.

[98] *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

ute is usually where we end."[99] If the statutory language is susceptible to more than one reasonable interpretation, however, it is ambiguous and we must proceed to *Chevron* step two.[100]

As noted above, the FCC argues that its general authority to make rules and regulations to carry out the Communications Act includes the power to implement § 332(c)(7)(B)(ii) and (v). One express grant is found at 47 U.S.C. § 201(b), which provides that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter." The Supreme Court has held the FCC's rulemaking authority under § 201(b) extends to provisions added by the TCA because Congress passed the TCA as an amendment to the Communications Act.[101] Congress

---

[99] *Med. Ctr. Pharm.*, 536 F.3d at 394 (quoting *Robinson*, 519 U.S. at 340).

[100] *See United States v. Hoang*, 636 F.3d 677, 682 (5th Cir. 2011) ("It is familiar learning that '[a] statute is ambiguous if it is susceptible to more than one reasonable interpretation or more than one accepted meaning.'" (quoting *In re Condor Ins. Ltd.*, 601 F.3d 319, 321 (5th Cir. 2010)); *Comacho v. Tex. Workforce Comm'n*, 408 F.3d 229, 234 (5th Cir. 2005) ("Generally, a statute is ambiguous if it is 'capable of being understood in two or more possible senses or ways.'" (quoting *Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001)).

[101] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) ("We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996."); *see also AT&T Commc'ns v. BellSouth Telecomms. Inc.*, 238 F.3d 636, 641 (5th Cir. 2001).

retains the ability to restrict its grant of power to an agency, though, and the cities argue Congress included language in the TCA precluding the FCC from using the Communication Act's grant of general authority to implement § 332(c)(7)(B)'s limitations.[102] The cities point to § 332(c)(7)(A), which provides: "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." The cities also claim that § 332(c)(7)(B)(v)'s vesting of jurisdiction in the courts to review disputes arising under § 332(c)(7)(B)(ii) evinces Congress's intent to remove jurisdiction over § 332(c)(7)(B)(ii) from the FCC.

The question we confront under *Chevron* is whether these provisions unambiguously indicate Congress's intent to preclude the FCC from implementing § 332(c)(7)(B)(ii) and (v). If they do, the FCC lacked statutory authority to issue the 90- and 150-day time frames. If the provisions are ambiguous, however, we must defer to the FCC's interpretation—an interpretation under which the FCC possessed authority to issue the 90- and 150-day time frames—so long as the FCC's interpretation represents a reasonable construction of their terms. For

---

[102] *Cf. First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 901 (5th Cir. 1995) (per curiam) ("As part of its legislative powers, Congress designates the scope of agency authority, and if Congress so chooses, it can subsequently restrict or limit that delegation of power to the agency.").

the following reasons, we conclude neither § 332(c)(7)(A) nor § 332(c)(7)(B)(v) unambiguously preclude the FCC from establishing the 90- and 150-day time frames.

First, we note that § 332(c)(7)(A), when it states "[e]xcept as provided in this paragraph," removes § 332(c)(7)(B)'s limitations from its reach and recognizes those limitations as legitimate intrusions into state and local governments' traditional authority over zoning decisions. The fundamental question then, is whether § 332(c)(7)(A), in restricting the TCA's limitations on state or local zoning authority to only those contained in § 332(c)(7)(B), also precludes the FCC from implementing those limitations by relying on its general rulemaking authority under the Communications Act. This is a question to which § 332(c)(7)(A) itself does not provide a clear answer. Section 332(c)(7)(A) states Congress's desire to make § 332(c)(7)(B)'s limitations the only limitations confronting state and local governments in the exercise of their zoning authority over the placement of wireless services facilities, and thus certainly prohibits the FCC from imposing restrictions or limitations that cannot be tied to the language of § 332(c)(7)(B). Whether the FCC retains the power of implementing those limitations, however, remains unresolved.

Congress's silence on this point is not without implication. Had Congress intended to insulate § 332(c)(7)(B)'s limitations from the FCC's jurisdiction, one would expect it to have done so explicitly because Congress surely recognized that it was legislating against the background of the Communica-

tions Act's general grant of rulemaking authority to the FCC. The FCC's general grant of authority would ordinarily extend to amendments to the Communications Act, like § 332(c)(7)(B)'s limitations, in the absence of specific statutory limitations on that authority,[103] and Congress certainly knew how to specifically restrict the FCC's general authority over the Communications Act as it clearly restricted the FCC's ability to use that authority in other contexts.[104] Here, however, Congress did not clearly remove the FCC's ability to implement the limitations set forth in § 332(c)(7)(B), and this Congressional silence leaves § 332(c)(7)(A)'s effect on the FCC's authority to administer § 332(c)(7)(B)'s limitations ambiguous.

Moreover, the cities' reliance on § 332(c)(7)(B)(v) does not resolve § 332(c)(7)(A)'s ambiguity. The cities contend that, by establishing jurisdiction in the courts over specific disputes arising under § 332(c)(7)(B)(ii), Congress indicated its intent to remove that provision from the scope of the FCC's general authority to administer the Communications Act. The cities read too much into § 332(c)(7)(B)(v)'s terms, however. Although § 332(c)(7)(B)(v) does clearly establish jurisdiction in the courts over disputes arising under § 332(c)(7)(B)(ii), the provision

---

[103] *See AT&T Corp.*, 525 U.S. at 378.

[104] *See, e.g.*, 47 U.S.C. § 152(b) (listing specific exceptions to the FCC's authority over the Communications Act); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369-76 (1986) (holding § 152(b) "denies the FCC the power to preempt state regulation of depreciation for intrastate ratemaking purposes").

does not address the FCC's power to administer § 332(c)(7)(B)(ii) in contexts other than those involving a specific dispute between a state or local government and persons affected by the government's failure to act. Accordingly, one could read § 332(c)(7) as a whole as establishing a framework in which a wireless service provider must seek a remedy for a state or local government's unreasonable delay in ruling on a wireless siting application in a court of competent jurisdiction while simultaneously allowing the FCC to issue an interpretation of § 332(c)(7)(B)(ii) that would guide courts' determinations of disputes under that provision.

The Sixth Circuit recently addressed a similar statutory scheme in *Alliance for Community Media v. FCC*.[105] That decision involved provisions of the Communications Act that delegated to municipalities, in the form of local franchising authorities (LFAs), the power to award cable franchises.[106] The provisions at issue further provided that an LFA could not "unreasonably refuse to award an additional competitive franchise,"[107] and "endowed potential entrants with a judicial remedy by entitling them to commence an action in a federal or state court within 120 days after receiving a final, adverse decision from an LFA."[108] After the FCC promulgated rules delineating situations that would consti-

---

[105] 529 F.3d 763 (6th Cir. 2008).

[106] *Id.* at 768.

[107] *Id.*

[108] *Id.*

tute an unreasonable refusal to award a cable franchise, petitioners claimed (among other arguments) that the statute's identification of courts as the forum for aggrieved cable operators to obtain relief deprived the FCC of statutory authority to exercise its rulemaking power. The court rejected that argument, 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)."[109] The decision in *Alliance for Community Media* supports the conclusion that there is nothing inherently unreasonable about reading § 332(c)(7) as preserving the FCC's ability to implement § 332(c)(7)(B)(ii) while providing for judicial review of disputes under § 332(c)(7)(B)(ii) in the courts.[110] Section 332(c)(7)(B)(v)'s vesting in the courts of jurisdiction over disputes arising under § 332(c)(7)(B)(ii) thus does not unambiguously preclude the FCC from taking the action at issue in this case.

In sum, we conclude that § 332(c)(7) is ambiguous with respect to the FCC's authority to estab-

---

[109] *Id.* at 775.

[110] *Id.* at 776 ("[W]e believe that courts can grant deference to the Order while maintaining their Congressionally-granted authority to make factual determinations and provide relief to aggrieved cable operators."). *Cf. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999) ("While it is true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements and granting exemptions to rural LECs, these assignments . . . do not logically preclude the [FCC's] issuance of rules to guide the state-commission judgments." (internal citations omitted)).

lish the 90- and 150-day time frames. Although the statute clearly bars the FCC from using its general rulemaking powers under the Communications Act to create additional limitations on state and local governments beyond those the statute provides in § 332(c)(7)(B), the statute is silent on the question of whether the FCC can use its general authority under the Communications Act to implement § 332(c)(7)(B)'s limitations. We proceed to *Chevron* step two.

C

Once we determine that a statute is silent or ambiguous with respect to a question at issue, we must defer to the agency's resolution of the question if the agency's interpretation is based on a permissible construction of the statute.[111] In addition to arguing that the plain text of § 332(c)(7) precludes the FCC from establishing the 90- and 150-day time frames, the cities make a number of other arguments that seemingly attack the permissibility of any construction of the statute that would allow the FCC to exercise the power that it did in this case. First, the cities claim § 332(c)(7)'s legislative history supports their proposed reading of § 332(c)(7) and not the FCC's. Second, they suggest that a construction of § 332(c)(7) that would grant the FCC authority to implement § 332(c)(7)(B)'s limitations on state and local government would conflict with the principle that

---

[111] *See, e.g.*, *Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 775 (5th Cir. 2010) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984)).

"if Congress intends to preempt a power traditionally exercised by a state or local government, it must make its intention to do so unmistakably clear in the language of the statute."[112] Finally, they suggest the FCC itself had long recognized that it lacked jurisdiction with respect to § 332(c)(7)(B)'s limitations. These arguments are not persuasive.

Regarding the legislative history surrounding the passage of § 332(c)(7), the cities note Congress considered but ultimately did not enact a version of the statute that directed the FCC to "prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or operation of facilities for the provision of commercial mobile services."[113] The cities also point to the Conference Report from the passage of the TCA, which provides in pertinent part:

> The conference agreement creates a new section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement. The conference agreement also provides a mechanism for judicial relief from zoning decisions that fail to comply with the provisions of this section. It is

---

[112] *City of Dallas, Tex. v. FCC*, 165 F.3d 341, 347-48 (5th Cir. 1999) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)) (internal quotation marks and citations omitted).

[113] H.R. REP. NO. 104-204, pt. 1, at 25 (1995).

> the intent of the conferees that other than under section 332(c)(7)(B)(iv) of the Communications Act of 1934 as amended by this Act and section 704 of the Telecommunications Act of 1996 the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities should be terminated.[114]

The cities argue the FCC's construction of § 332(c)(7) contravenes this legislative history. The implication, then, is that this legislative history clarifies any ambiguity in § 332(c)(7)'s plain text and indicates Congress's intent to remove from the FCC the authority to implement § 332(c)(7)(B)(ii) and (v).

This argument fails, however, because the legislative history itself is ambiguous. Although the legislative history surrounding the passage of § 332(c)(7) indicates Congress intended the provision to remove from the FCC the authority to make new rules limiting or affecting state and local government authority over wireless zoning decisions, the legislative history, like the statute itself, is silent as to the FCC's ability to use its general rulemaking power to provide guidance with respect to the limitations § 332(c)(7)(B) expressly imposes on state and local governments. In other words, the legislative history does no more than indicate Congress's intent

---

[114] H.R. REP. NO. 104-458, at 207-08 (1996) (Conf. Rep.).

to bar the FCC from imposing additional limitations on state and local government authority. It does not indicate a clear intent to bar FCC implementation of the limitations already expressly provided for in the statute. Under these circumstances, we cannot conclude that the legislative history "is so clear and compelling . . . that it leaves no doubt as to Congress's intent."[115]

The cities also suggest that interpreting § 332(c)(7) in a way that would allow the FCC to implement § 332(c)(7)(B)(ii) and (v) conflicts with the principle that "if Congress intends to preempt a power traditionally exercised by a state or local government, it must make its intention to do so unmistakably clear in the language of the statute."[116] The cities assert that the FCC's new 90- and 150-day time frames displace state laws establishing different time frames.

The cities' argument is unconvincing because those state laws are already preempted, at least to the extent that the state time limits violate § 332(c)(7)(B)(ii)'s requirement that state and local authorities rule on zoning requests in a reasonable amount of time. That section already acts to preempt these state laws by creating a federal time frame defined through reference to reasonableness. No one

---

[115] *Med. Ctr. Pharmacy v. Mukasey*, 536 F.3d 383, 396 (5th Cir. 2008).

[116] *City of Dallas, Tex.*, 165 F.3d at 347-48 (quoting *Gregory*, 501 U.S. at 460) (internal quotation marks and citations omitted).

could plausibly argue, for example, that if a state passed a law stating that local governments had ten years to rule on such applications, § 332(c)(7)(B)(ii) would not have the effect of preempting that law insofar as an aggrieved party would likely be able to petition a court for relief under § 332(c)(7)(B)(v) well before the expiration of the state's time frame. FCC action interpreting what amount of time is "reasonable" under § 332(c)(7)(B)(ii) only further refines the extent of the preemption that Congress has already explicitly provided. We thus see no conflict between the FCC's ability to interpret § 332(c)(7)(B)'s limitations on state and local government authority and the principle that Congress must unmistakably indicate its intent to preempt a power traditionally exercised by state or local governments because Congress has indicated a preference for federal preemption of state and local laws governing the time frames for wireless zoning decisions.[117]

Finally, the cities argue that "[u]ntil its dramatic shift in the [Declaratory Ruling], the FCC had long recognized the statutory limits on its jurisdiction under Section 332(c)(7)." The cities claim the FCC's exercise of authority to interpret § 332(c)(7)(B)(ii) and (v) conflicts with the FCC's own longstanding interpretation of its jurisdiction. The cities note that the Supreme Court, in *New Process*

---

[117] *Cf. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999) ("This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew.").

Steel, L.P. v. NLRB,[118] made the following observation when interpreting the statute establishing the NLRB's quorum requirements: "That our interpretation of the delegation provision is consistent with the Board's longstanding practice is persuasive evidence that it is the correct one, notwithstanding the Board's more recent view."[119]

We are not persuaded by this argument in this case, however, because the FCC interpretations to which the cities direct us do not adopt the position that the FCC lacks authority to implement § 332(c)(7)(B)'s limitations. For example, in *In re Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, the FCC did observe that "Section 332(c)(7) generally preserves local authority over land use decisions, and limits the Commission's authority in this area,"[120] but a review of that order makes clear that the limitation to which the FCC was referring was § 332(c)(7)(B)(v)'s grant of exclusive jurisdiction to the courts over most disputes arising under § 332(c)(7)(B).[121] The FCC's order in *In re Cingular Wireless L.L.C.*[122] and a letter from the chief of the FCC's Wireless Telecommunications Bu-

---

[118] 130 S. Ct. 2635 (2010).

[119] *Id.* at 2641-42.

[120] 19 FCC Rcd. 24084 ¶ 123 (2004).

[121] *Id.* at n.368.

[122] 18 FCC Rcd. 13126 ¶ 21 (2003).

reau[123] similarly contained observations on the limits of the FCC's authority to consider petitions challenging specific state or local government action. As already discussed, that § 332(c)(7)(B)(v) vests exclusive jurisdiction in the courts to consider specific disputes arising under § 332(c)(7)(B) does not limit the FCC's ability to implement § 332(c)(7)(B)'s limitations. Thus, the FCC's acknowledgment of this limitation hardly suggests that the FCC also recognized a limit on its authority under § 201(b).

D

For the above reasons, we conclude the FCC is entitled to deference with respect to its exercise of authority to implement § 332(c)(7)(B)(ii) and (v). The language of § 332(c)(7) is silent with respect to the FCC's power to exercise this authority, and none of the cities' arguments convince us that the FCC's interpretation of its statutory authority is impermissible. The FCC thus did not lack statutory authority to establish the 90- and 150-day time frames.

VI

We now consider whether the 90- and 150-day time frames themselves also pass muster under *Chevron*. The time frames represent the FCC's attempt to implement § 332(c)(7)(B)(ii) and (v). Section 332(c)(7)(B)(ii) requires state and local governments to "act on any request for authorization to place, construct, or modify personal wireless service facilities

---

[123] Letter from Michele C. Farquhar to Mr. Thomas E. Wheeler (Jan. 13, 1997), 1997 WL 14744.

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." Section 332(c)(7)(B)(v) provides that any person adversely affected by a state or local government's "failure to act" may "within 30 days after such . . . failure to act, commence an action in any court of competent jurisdiction." In the Declaratory Ruling, the FCC defined "a reasonable period of time" for purposes of § 332(c)(7)(B)(ii) as, presumptively, "90 days to process personal wireless service facility siting applications requesting collocations, and . . . 150 days to process all other applications."[124] The FCC also concluded that a lack of decision within these time frames would constitute a failure to act that would be actionable under § 332(c)(7)(B)(v).[125]

A

As usual, we begin with the statutory text. The FCC claims that § 332(c)(7)(B)(ii) and § 332(c)(7)(B)(v) are ambiguous and subject to FCC interpretation. We agree. Specifically, we note that the phrase "a reasonable period of time," as it is used in § 332(c)(7)(B)(ii), is inherently ambiguous.[126] More-

---

[124] 24 FCC Rcd. 13994 ¶ 32 (2009).

[125] *Id.*

[126] *See Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 777 (6th Cir. 2008) (observing that descriptors such as "reasonable" and "unreasonable" are subject to multiple constructions); *Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003) ("[T]he generality of these terms—unjust, unreasonable—opens a rather large area for the free play of agency discretion." (internal quotation

over, because the phrase "a reasonable period of time" serves as a standard for determining when a "failure to act" has occurred under § 332(c)(7)(B)(v), the ambiguity in the phrase leaves room for agency guidance on the amount of time state and local governments have to act on wireless facility zoning applications before their delay constitutes a failure to act under the statute that would trigger § 332(c)(7)(B)(v)'s 30-day limitations period on filing an action in court. We thus owe substantial deference to the FCC's interpretation of these terms, and we will disturb the FCC's interpretation only if it represents an impermissible construction of § 332(c)(7)(B)(ii) and (v).[127]

B

The cities raise a number of arguments relevant to the reasonableness of the FCC's establishment of the 90- and 150-day time frames. They claim the FCC's time frames represent unreasonable in-

---

marks omitted)); *Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) ("Because 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them.").

[127] *See, e.g.*, *Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 775 (5th Cir. 2010); *U.S. Telecom Ass'n v. FCC*, 227 F.3d 450, 457-58 (D.C. Cir. 2000) ("If we find the statute silent or ambiguous with respect to the precise question at issue, we proceed to the second step of *Chevron* analysis, asking whether the agency's answer is based on a permissible construction of the statute. At this stage of *Chevron* analysis, we afford substantial deference to the agency's interpretation of statutory language." (internal quotation marks and citations omitted)).

terpretations of the statute because they: (1) shift the burden to state and local governments to demonstrate in court that a delay in acting on a wireless facility zoning application was reasonable, thus reversing the presumption against preemption; (2) seek to force state or local government action by creating a heightened threat of litigation; (3) impose new application completeness requirements; (4) create a national standard for what constitutes a "reasonable period of time"; and (5) contravene Congressional intent by giving preferential treatment to the wireless industry in the processing of zoning applications. After considering these arguments, however, we conclude that the FCC's 90- and 150-day time frames are based on a permissible construction of § 332(c)(7)(B)(ii) and (v) and are thus entitled to *Chevron* deference.

1

First, the cities observe that courts addressing actions brought pursuant to § 332(c)(7)(B)(v) have placed the burden on the plaintiff to prove that a state or local government has failed to comply with one of § 332(c)(7)(B)'s requirements.[128] They claim the FCC's time frames reverse this burden by creating a presumption that a state or local government that fails to act on a zoning application within the applicable 90- or 150-day time frame has "failed to

---

[128] *See, e.g.*, *U.S. Cellular Corp. v. City of Wichita Falls, Tex.*, 364 F.3d 250, 256 (5th Cir. 2004) ("The plaintiff carries the burden of proving that no substantial evidence supports the local government's decision [in an action challenging the decision under § 332(c)(7)(B)(iii)].").

act" under § 332(c)(7)(B)(v). The result, they argue, is that "the 'presumption against preemption' is replaced with a presumption *for* preemption" because the burden of proof rests on state and local governments to prove the reasonableness of their delay in cases in which they have failed to act within the time frames.

We disagree with this characterization of the effect of the FCC's presumption because it misstates the typical effect of a presumption in a civil proceeding. Federal Rule of Evidence 301, for example, describes the effect of presumptions in civil proceedings in federal court. It provides:

> In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.[129]

We have held that Rule 301 adopts a "bursting-bubble" theory of presumption, under which "the *only* effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact."[130] "If the party against whom the presumption operates produces evidence challenging the presumed fact, the presumption simply disappears from the case."[131] In other words, once a party introduces

---

[129] FED. R. EVID. 301.

[130] *Pennzoil Co. v. FERC*, 789 F.2d 1128, 1136 (5th Cir. 1986).

[131] *Id.* at 1136-37.

rebuttal evidence sufficient to support a finding contrary to the presumed fact, the presumption evaporates, and the evidence rebutting the presumption, and its inferences, must be "judged against the competing evidence and its inferences to determine the ultimate question at issue."[132] The burden of persuasion with respect to the ultimate question at issue remains with the party on whom it originally rested.[133]

We see no reason why this general theory of presumptions does not also apply to the presumption created by the FCC's Declaratory Ruling. In an action seeking to enforce § 332(c)(7)(B)(ii) against a state or local government, the ultimate burden of persuasion remains with the wireless facilities provider to demonstrate that the government unreasonably delayed action on an application. True, the

---

[132] *McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 288 (3d Cir. 2006) (internal quotation marks omitted).

[133] *See* FED. R. EVID. 301 (noting "the burden of persuasion . . . remains on the party who had it originally"); *cf. St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993) ("It is important to note, however, that although the *McDonnell Douglas* presumption shifts the burden of production to the defendant, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. In this regard it operates like all presumptions, as described in Federal Rule of Evidence 301." (internal quotation marks, brackets, and citations omitted)).

wireless provider would likely be entitled to relief if it showed a state or local government's failure to comply with the time frames and the state or local government failed to introduce evidence demonstrating that its delay was reasonable despite its failure to comply. But, if the state or local government introduced evidence demonstrating that its delay was reasonable, a court would need to weigh that evidence against the length of the government's delay—as well as any other evidence of unreasonable delay that the wireless provider might submit—and determine whether the state or local government's actions were unreasonable under the circumstances.

2

The cities also argue that the 90- and 150-day time frames represent unreasonable interpretations of the statute because the time frames subject state and local governments to a heightened risk of litigation by wireless service providers. The cities suggest that this heightened risk "affects" state or local governments and thus violates § 332(c)(7)(A). This argument is not convincing, however, because, although the FCC's time frames do provide some amount of certitude as to when a state or local government has unreasonably failed to act under § 332(c)(7)(B)(ii), the time frames do not create any new risk of litigation independent from the risk state or local governments have always faced as a result of § 332(c)(7)(B)(v)'s vesting of jurisdiction in the courts to hear disputes arising under § 332(c)(7)(B)(ii). As we have already discussed, § 332(c)(7)(A) does not

apply to § 332(c)(7)(B)'s restrictions on state and local governments.

3

The cities also take issue with the FCC's determination that the 90- and 150-day time frames do not start to run with respect to an application if the application is incomplete and the state or local government alerts the applicant to the application's incompleteness within 30 days of its submission. The effect of this determination, they argue, is the imposition of a new "completeness requirement" that has no basis in § 332(c)(7)(B)(ii).

We disagree. The FCC's decision to toll the time frames when a state or local government confronts an incomplete application accounts for the fact that the completeness of an application affects the ability of a decisionmaker to act on that application. The FCC recognized that in such cases, a state or local government could not be presumed to have acted unreasonably simply because the government failed to act on an application within the time frames. The FCC also recognized, however, that a state or local government that confronted an incomplete application, but delayed alerting the applicant to the deficiencies in the application, should be presumed to have acted unreasonably if the government ultimately did not act on the application within the time frames. Thus, the FCC allowed for tolling of the 90- and 150-day time frames in cases of incompleteness, but also imposed a separate time frame for state and local governments to notify applicants of incompleteness in order to prevent state and local govern-

ments from manipulating the process. This does not strike us as an unreasonable application of § 332(c)(7)(B)(ii).[134]

To the extent the cities argue that state and local governments often will not become aware of a need for more information with respect to an application until after the FCC's 30-day tolling period has expired, we again emphasize the limited effect of the FCC's 90- and 150-day time frames. The time frames represent the FCC's interpretation of what would generally constitute an unreasonable delay under § 332(c)(7)(B)(ii), but a court will ultimately decide whether state or local government action is unreasonable in a particular case. Accordingly, if a state or local government fails to meet the applicable time frame because deficiencies in an application become apparent more than 30 days after the application was filed, the government would remain free to argue that it acted reasonably under the circumstances.

4

Fourth, the cities contend the 90- and 150-day time frames are not reasonable interpretations of § 332(c)(7)(B)(ii) because the time frames apply nationwide and thus cannot be squared with §

---

[134] *Cf. Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 780 (6th Cir. 2008) ("Courts are 'generally unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem.'" (alteration in original) (quoting *Covad Comm. Co. v. FCC*, 450 F.3d 528, 541 (D.C. Cir. 2006))).

332(c)(7)(B)(ii)'s command that what constitutes a "reasonable period of time" should be determined by taking into account "the nature and scope of such request." This is an individualized determination, the argument goes, and a national standard is incompatible with such a scheme. We cannot agree with the cities on this point, however, because, as we have already made clear, the 90- and 150-day time frames do not eliminate the individualized nature of an inquiry into the reasonableness of a state or local government's delay. The time frames do provide the FCC's guidance on what periods of time will generally be "reasonable" under the statute, of course, and they might prove dispositive in the rare case in which a state or local government submits no evidence supporting the reasonableness of its actions. But in a contested case, courts must still determine whether the state or local government acted reasonably under the circumstances surrounding the application at issue.

5

Finally, the cities claim the FCC's time frames are unreasonable interpretations of § 332(c)(7)(B) because they will require state and local governments to give wireless service providers preferential treatment in the form of prioritized review of wireless zoning applications. They claim this result clearly conflicts with Congress's intent, and for support, point to the following passage from the Conference Report: "It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to

subject their requests to any but the generally applicable time frames for zoning decision[s]."[135] However, nothing in the FCC's time frames necessarily requires state and local governments to provide greater preference to wireless zoning applications than is already required by § 332(c)(7)(B)(ii) itself. The statute provides a clear directive that state and local governments must rule on wireless zoning applications in a "reasonable amount of time," and that directive inherently preferences the personal wireless service industry because other types of state and local zoning decisions are not subject to such a standard.[136] Moreover, as already noted, a state or local government that fails to act on an application within the FCC's time frames remains free to argue that it acted diligently with respect to the application, and such an argument might include reference to the inability of the government to address the wireless zoning application within the time frames without neglecting its other business.[137]

---

[135] H.R. REP. NO. 104-458, at 208 (1996) (Conf. Rep.).

[136] *Cf. Med. Ctr. Pharmacy v. Mukasey*, 536 F.3d 383, 396 (5th Cir. 2008) (observing that appeals to statutory purpose only overcome an agency's interpretation of a statute's text when "the statute's purpose is so clear and compelling, despite tension with its plain text, that it leaves no doubt as to Congress's intent").

[137] *Cf. SNET Cellular, Inc. v. Angell*, 99 F. Supp. 2d 190, 198-99 (D.R.I. 2000) (concluding that a zoning board was not dilatory in its treatment of an application because the board considered applications in the order in which they were filed, hearings on the application were postponed due to the protracted nature of hearings on a different application, and the zoning board tried

In short, we believe the cities' challenges to the reasonableness of the 90- and 150-day time frames stem from a misunderstanding of the time frames' effect on the wireless zoning application process. We do not read the Declaratory Ruling as creating a scheme in which a state or local government's failure to meet the FCC's time frames constitutes a *per se* violation of § 332(c)(7)(B)(ii). The time frames are not hard and fast rules but instead exist to guide courts in their consideration of cases challenging state or local government inaction. It is true that courts considering such cases will owe deference to the FCC's determination that a state or local government's failure to comply with the time frames constitutes unreasonable delay. In the rare case in which a state or local government fails to submit any evidence demonstrating the reasonableness of its inaction, the government's failure to comply with the FCC's time frames will likely be dispositive of the question of the government's compliance with § 332(c)(7)(B)(ii). The more likely scenario, however, is that a state or local government that has failed to act within the time frames will attempt to rebut the presumption of unreasonableness by pointing to reasons why the delay was reasonable. It might do so by pointing to extenuating circumstances, or to the applicant's own failure to submit requested information. Or it might note that it was acting diligently in

---

to expedite matters by supplementing its monthly meetings with several special meetings regarding the application).

its consideration of an application,[138] that the necessity of complying with applicable state or local environmental regulations occasioned the delay,[139] or that the application was particularly complex in its nature or scope.[140] All of these factors might justify the conclusion that a state or local government has acted reasonably notwithstanding its failure to comply with the FCC's time frames. We do not list these possibilities to establish a definitive list of the circumstances that might cause a state or local government to have acted reasonably, however, as adjudications of specific disputes under the statute will ultimately determine how specific circumstances relate to the FCC's time frames. Our point here is simply to note both that a variety of circumstances can affect the consideration and determination of a wireless facility zoning application, and that these circumstances remain relevant even after the FCC issued its time frames.

VII

The cities also claim the FCC's establishment of the 90- and 150-day time frames was "arbitrary,

---

[138] *See id.*

[139] *See N.Y. SMSA Ltd. P'ship v. Town of Riverhead*, 45 F. App'x 24, 26-27 (2d Cir. 2002) (unpublished).

[140] *See Omnipoint Commc'ns Enters., Inc. v. Town of Amherst, N.H.*, 74 F. Supp. 2d 109, 122 (D.N.H. 1998) ("The [Zoning Board of Adjustment] chairman noted that the ZBA had received more information relating to the plaintiff's applications than any previous applications. In addition, the volume of public response to the applications was extremely high.").

capricious, an abuse of discretion, or otherwise not in accordance with law."[141] Agency action is arbitrary and capricious

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[142]

Our scope of review under the arbitrary and capricious standard is narrow, and we cannot substitute our own judgment for that of the agency.[143] "We limit our review to whether the agency articulated a rational connection between the facts found and the decision made, and it is well-settled that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."[144] "Our mandate is not to 'weigh the evidence pro and con but to determine whether the agency decision was based on a consid-

---

[141] *See* 5 U.S.C. § 706; *Defensor v. Meissner*, 201 F.3d 384, 386 (5th Cir. 2000) ("Under the Administrative Procedure Act, agency action is reviewed solely to determine whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

[142] *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[143] *Id.*

[144] *Hayward v. U.S. Dep't of Labor*, 536 F.3d 376, 380 (5th Cir. 2008) (internal quotation marks and citations omitted).

eration of relevant factors and whether there was a clear error of judgment.'"[145] "[I]f the agency considers the factors and articulates a rational relationship between the facts found and the choice made, its decision is not arbitrary or capricious."[146]

We cannot conclude that there has been a clear error of judgment in this case. The record reflects the FCC issued the Declaratory Ruling only after receiving dozens of comments from wireless service providers, local zoning authorities, and other interested parties, and many of those comments supported the FCC's conclusion that wireless service providers often face lengthy delays in the consideration of collocation and new wireless facility zoning applications. CTIA's petition, for example, claimed that a survey of its members indicated that of the 3,300 wireless siting applications currently pending before local governments, 760 had been pending for more than one year and 180 had been pending for over three years. Comments from wireless services providers supported CTIA's claims. T-Mobile USA, Inc., for example, submitted comments indicating that over thirty percent of T-Mobile's currently pending proposals involving new wireless facilities had been pending for more than one year and that nearly one-third of its currently pending collocation applications had been pending for more than one year. Verizon Wireless submitted comments claiming that, of

---

[145] *Id.* (quoting *Delta Found., Inc. v. United States*, 303 F.3d 551, 563 (5th Cir. 2002)).

[146] *Harris v. United States*, 19 F.3d 1090, 1096 (5th Cir. 1994).

the over 350 non-collocation zoning requests it currently had pending, over half had been pending for more than six months and nearly 100 had been pending for more than one year. Alltel Communications, LLC, submitted comments indicating a number of Alltel's collocation and new facility applications had been pending with local zoning authorities for over one year.

The cities argue that this evidence exaggerates the proportion of applications that face significant delay with local zoning boards because, by comparing the number of applications facing significant delays to the number of applications currently pending with local zoning authorities, the evidence fails to account for the applications that local zoning authorities have already approved. The cities also seize on comments by wireless service providers indicating that the vast majority of local governments act on wireless zoning applications in a timely manner. Taken together, the cities argue that this evidence demonstrates that there was no real need for agency action in this case.

We believe the cities' argument is an invitation for this court to independently weigh the evidence before the agency, an undertaking that would exceed the scope of our judicial review. Whether the FCC's decision in this case was ideal, or even necessary, is irrelevant to the question of whether it was arbitrary and capricious "so long as the agency gave at least minimal consideration to the relevant facts as contained in the record."[147] Here, the administra-

---

[147] *Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 775 (5th

tive record demonstrates that wireless service providers in many areas of the country face significant delays with respect to their facilities zoning applications, and we believe the FCC properly considered this information and determined that both wireless service providers and zoning authorities would benefit from FCC guidance on what lengths of delay would generally be unreasonable under § 332(c)(7)(B)(ii). This conclusion was not arbitrary and capricious.

VIII

Finally, one of the intervenors in Arlington's petition for review, the EMR Policy Institute (EMR), presents the claim that the FCC acted arbitrarily and capriciously when it dismissed a cross-petition that EMR filed during the agency proceedings. In its petition, EMR claimed FCC regulations concerning the radio frequency emissions of personal wireless facilities were inadequate and requested that the FCC interpret § 332(c)(7)(B)(iv) to allow state and local governments to restrict the siting of personal wireless facilities on the basis of environmental factors that EMR claimed the FCC failed to address in its regulations.[148] We decline to consider EMR's argument for the same reason we refuse to consider the additional arguments raised by San Antonio—as

---

Cir. 2010).

[148] Section 332(c)(7)(B)(iv) preempts state or local regulation of the placement of personal wireless 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."

an intervenor, EMR cannot present issues that are not raised in Arlington's petition for review.[149]

* * *

For the above reasons, we DENY Arlington's petition for review. We DISMISS San Antonio's petition for review because we lack jurisdiction to consider it.

---

[149] *Brazoria Cnty., Tex. v. EEOC*, 391 F.3d 685, 689 (5th Cir. 2004).

APPENDIX B

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

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

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

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] Accordingly, today we define timeframes for State and local action on wireless facilities siting requests, while also preserving the authority of

[1] 47 U.S.C. § 332(c)(7)(B)(ii).

[2] *See* para. 33, *infra.*

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

---

[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

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

---

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.

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 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 per-

[7] 47 U.S.C. § 332(c)(7)(B)(ii).

sonal 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

---

[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).

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

---

[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).

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-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

---

[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 Ranchos Palos Verdes v. Abrams*, 544 U.S. 113, 128 (2005) (Breyer, J., concurring)).

[22] *Id.* at 19.

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

---

[23] *Id.* at 20-23.

[24] *Id.* at 24.

[25] *Id.* at 25-26.

[26] *Id.* at 27-29.

[27] *Id.* at 29-30.

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 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

---

[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.

[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

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 gov-

---

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.

ernments 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

---

[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-

further argue that both "reasonable period of time" and "failure to act" have clear meanings, and that Congress deliberately used these general terms to 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)

3; Coalition for Local Zoning Authority Comments at 10-11; NATOA et al. Reply Comments at 7-9.

[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

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 par-

---

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 Rcd 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

ticularly 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 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

---

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.

[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).

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 comment-

[54] Petition at 20-24.

ers 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

---

[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)

State and local government commenters assert that because the courts have exclusive jurisdiction over all disputes 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 "prohibiti[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

---

(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.

[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).

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

---

[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.

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 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

---

[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).

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 in-

---

[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.

terpreting 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

---

[73] *Id.* at 774.

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

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 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 other-

---

[75] 47 U.S.C. § 332(c)(7)(B)(iii).

[76] 47 U.S.C. § 332(c)(7)(B)(v).

wise 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

---

[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).

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 au-

---

[81] Id.

[82] Petition at 20-24.

[83] *Id.* at 20.

[84] *Id.* at 27-28.

[85] *Id.* at 28-29.

thority 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 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

---

[86] *See id.* at 29-30.

[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.

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

---

[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.

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

---

[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 Rcd 5101, 5139 (2007)).

[98] CTIA Reply Comments at 26.

impeding the deployment of advanced and 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]

---

[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*.

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

---

[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.

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]

---

[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 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-

Verizon Wireless notes that in 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

---

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

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

---

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

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]

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

---

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 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.

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

---

[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).

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

---

[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-I (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. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules, WT Docket

delay the siting of personal wireless service 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 1996[119] 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

---

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.

> 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

---

[121] NENA Comments at 1-2.

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 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.

---

[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.

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 injunc-

---

[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).

tions 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]

---

[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.

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]

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

---

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

[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

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 time-

---

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).

frames 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

[131] *See infra* paras. 49-53.

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 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,

---

[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.

[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

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 La-Grande, 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, gener-

---

(*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.

ally 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]

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

---

[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.

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

---

[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

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-

---

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.

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 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]

---

[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.

[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,

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

---

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.

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 statutes or ordinances. Thus, where the review pe-

---

[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).

riod 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

---

[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).

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 business days for determining whether it is complete;[158] the State of Washington requires review within 28 days;[159] the

---

[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.

[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

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 regu-

---

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).

lation 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 technolo-

---

[162] Petition at 30-35.

[163] *Id.* at 30.

[164] *Id.* at 31.

[165] *Id.* at 31-32.

[166] *Id.* at 32.

gies 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 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

---

[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.

[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.

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

---

[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*

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 zon-

---

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").

ing authority, that a State or local government regulation of personal wireless facilities "shall not 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 mooting a subsequent examination of whether the locality has improperly blocked personal wireless services ignores the possibility that the first carrier

---

[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.

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

---

[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.*

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 wireless provider's service area and, in turn, diminish the service provided to their customers.[182]

---

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

[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).

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 Peti-

---

[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.

tioner 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 structures[189] that potentially can endanger air navigation, including those

---

[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).

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 lighted[191] 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 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"

---

[190] *See* 47 C.F.R. § 17.7.

[191] *See* 47 C.F.R. § 17.21.

[192] *See* 47 C.F.R. § 17.23.

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

[194] 47 U.S.C. § 332(c)(7)(A).

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.

---

[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)).

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 Petition's request and assert, for example, that Section 332(c)(7) is the exclusive authority in the Act on matters in-

---

[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.

volving 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

---

[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

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

---

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.

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 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 gov-

---

[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).

[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).

ernments 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

---

[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).

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 per-

---

[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).

sonal 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 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 be-

fore 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 authori-

ties 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 gov-

ernments – 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 facili-

ties. 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.

APPENDIX C

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

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

ORDER ON RECONSIDERATION

Adopted: August 3, 2010 Released: August 4, 2010

By the Commission:

I. INTRODUCTION

1. Last November, the Commission in a Declaratory Ruling established timeframes for State and local governments to act on wireless facility siting applications. Five organizations representing local governments requested that we reconsider a portion of that ruling relating to the suspension of these time periods when an application is incomplete as filed. Today, we reaffirm our decision that the

timeframes – 90 days for collocations and 150 days for other wireless facility siting applications – are automatically tolled only when the reviewing government notifies the applicant of the incompleteness within the first 30 days after receipt. In so doing, we promote the timely deployment of innovative broadband and other wireless services while preserving the legitimate authority of State and local governments, in furtherance of the goals of our initial decision and consistent with the recommendations of the National Broadband Plan.

II. BACKGROUND

2. On July 11, 2008, CTIA–The Wireless Association® (CTIA) filed a petition requesting that the Commission issue a declaratory ruling clarifying the provisions of the Communications Act that provide for State and local review of personal wireless facility siting applications.[1] Principally, CTIA sought clarification of provisions in Section 332(c)(7) of the Communications Act that it contended were ambiguous and had been interpreted in a manner that allowed zoning authorities to impose unreasonable impediments to wireless facility siting and the provision of wireless services.

---

[1] 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, *Petition for Declaratory Ruling* of CTIA–The Wireless Association®, WT Docket No. 08-165, filed July 11, 2008 (CTIA Petition).

3. Section 332(c)(7) of the Communications Act generally preserves State and local authority over wireless facility siting, while also placing important limitations on that authority. Section 332(c)(7)(B)(ii) states that State or local governments must act on requests for personal wireless service facility sitings "within a reasonable period of time."[2] Section 332(c)(7)(B)(v) provides that "[a]ny person adversely affected by any final action or failure to act" 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."[3]

4. On August 14, 2008, the Wireless Telecommunications Bureau (WTB) requested comment on the Petition.[4] Hundreds of comments and replies were filed in response to WTB's *Public Notice*, including comments from wireless service providers, tower owners, local and State government entities, and airport authorities.[5] In the Commission's *Rul-*

---

[2] 47 U.S.C. § 332(c)(7)(B)(ii).

[3] 47 U.S.C. § 332(c)(7)(B)(v). *See also Ruling*, 24 FCC Rcd at 14008-10 ¶¶ 37-42.

[4] 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) (*Public Notice*).

[5] *See generally* WT Docket No. 08-165.

ing,[6] in response to record evidence of "lengthy and unreasonable delays" involving zoning authority review of tower and antenna siting applications,[7] the Commission, among other things, clarified provisions of Section 332(c)(7) relating to the timeliness of action on these applications.[8] The Commission found that unreasonable delays in a significant number of cases had obstructed the provision of wireless services.[9] Such delays, the Commission concluded, impede advances in coverage, deployment of advanced wireless communications services, and competition that Congress has deemed critical.[10]

5. To address these findings, the Commission interpreted what constitutes a "reasonable pe-

---

[6] 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, *Declaratory Ruling*, 24 FCC Rcd 13994 (2009) (*Ruling*).

[7] *Ruling*, 24 FCC Rcd at 14004-06 ¶¶ 32-33.

[8] *See* 47 U.S.C. § 332(c)(7)(B)(ii),(v); *see also Ruling*, 24 FCC Rcd at 14010-15 ¶¶ 43-53. The Commission also found 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 wireless service facility siting application because service is available from another provider. *See id.* at 14015-19 ¶¶ 54-65. In addition, the Commission denied a request to 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. *See id.* at 14019-20 ¶¶ 66-67.

[9] *Id.* at 14005-06 ¶¶ 33-34.

[10] *Id.* at 14007-08 ¶ 35.

riod of time" and a "failure to act" under Section 332(c)(7) of the Communications Act. The Commission found that 90 days for processing collocation applications and 150 days for processing applications other than collocations are generally reasonable timeframes.[11] The Commission further determined that failure to meet the applicable timeframe presumptively constitutes a failure to act under Section 332(c)(7)(B)(v), enabling an applicant to pursue judicial relief within the next 30 days.[12] The Commission defined these time periods as rebuttable presumptions and acknowledged that more time may be needed in individual cases.[13] In particular, in the event an applicant pursues a judicial remedy, the Commission stated that the State or local authority has the opportunity to rebut the presumption that a delay was unreasonable.[14] Ultimately, the Commission stated, the court in each case will find whether the delay was in fact unreasonable under the circumstances of the case.[15] Thus, the Commission's *Ruling* reduces delays in the construction and improvement of wireless networks while preserving the authority of States and localities to make the ultimate determination on local zoning and land use policies.

---

[11] *See Ruling*, 24 FCC Rcd at 14012 ¶ 45.

[12] *See id.*; *see also* 47 U.S.C. § 332(c)(7)(B)(v).

[13] *See, e.g.,* Ruling, 24 FCC Rcd at 14004-05, 14010, 14011 ¶¶ 32, 42, 44.

[14] *See id.* at 14004-05 ¶ 32.

[15] *See id.* at 13995 ¶ 4.

6. The Commission also defined certain circumstances that would warrant adjustments to the presumptive deadlines, including when the applicant fails to submit a complete application or to file necessary additional information in a timely manner.[16] Specifically, the Commission stated 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."[17] This automatic tolling, however, applies only if a zoning authority notifies an applicant within the first 30 days that its application is incomplete.[18] The Commission concluded that allowing for such tolling balances the need for a State or local government to have sufficient time to review an application for completeness with the interests of the applicant against a last-minute decision finding its application incomplete.[19] In addition, the Commission clarified that the presumptive deadlines for acting on siting applications could be extended beyond 90 or 150 days by mutual consent, and that such agreements serve to toll the commencement of the 30-day period for filing suit.[20]

7. On December 17, 2009, a Petition for Reconsideration or Clarification ("Petition") was filed by the National Association of Telecommunications

---

[16] *See id.* at 14010 ¶ 42.

[17] *Id.* at 14014 ¶ 52.

[18] *Id.* at 14014-15 ¶ 53.

[19] See id.

[20] *See id.* at 14013 ¶ 49.

Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association ("Petitioners").[21] In their Petition:

> 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

---

[21] 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, *Petition for Reconsideration or Clarification* 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, WT Docket No. 08-165, filed Dec. 17, 2009. Also on December 17, 2009, Petitioners filed an Emergency Motion for Stay pending Commission action on their petition. 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, *Emergency Motion for Stay* 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, WT Docket No. 08-165, filed Dec. 17, 2009. On January 29, 2010, WTB denied this Stay Request. *Order*, 25 FCC Rcd 1215 (WTB 2010).

> 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.[22]

Petitioners further state that while they do not agree with the Commission's interpretation of its authority under Section 332 of the Act, the Petition does not challenge that interpretation.[23] The Commission issued a Public Notice on December 23, 2009, asking for comments in response to the Petition on or before January 22, 2010, and reply comments on or before February 8, 2010.[24] The Commission received a total

---

[22] Petition at 4.

[23] *See* Petition at 2.

[24] Wireless Telecommunications Bureau Seeks Comment on Petition for Reconsideration or Clarification of the Commission's Declaratory Ruling Clarifying Provisions in Section 332(c) of the Communications Act, WT Docket No. 08-165, *Public Notice*, 24 FCC Rcd 14703 (WTB 2009). Reply

of 21 comments, oppositions and replies in response to the Petition.[25]

8. On January 12, 2010, the City of Arlington, Texas, filed a petition for review in the United States Court of Appeals for the Fifth Circuit arguing, *inter alia,* that the Ruling generally exceeds the Commission's authority.[26] On February 19, 2010, the Commission filed a motion to hold the case in abeyance pending a decision on the Petition for Reconsideration. The City of Arlington, NATOA *et al.*, and other local government representatives opposed the motion. On March 4, 2010, the Court of Appeals granted the Commission's motion.[27]

III. DISCUSSION

A. Legal Authority to Impose a 30-Day Period for the Automatic Triggering of Tolling

9. Petitioners first contend that the Commission exceeded its own interpretation of its authority under Section 332(c)(7) of the Act.[28] In the *Ruling*, the Commission found that while Congress intended "to preclude the Commission from main-

---

comments were not actually required to be filed until February 12, 2010, due to federal government snow closures.

[25] Commenters are listed in the Appendix.

[26] *City of Arlington v. FCC*, No. 10-60039 (5th Cir. filed Jan. 12, 2010).

[27] *City of* Arlington *v. FCC*, No. 10-60039 (5th Cir. order issued March 4, 2010).

[28] Petition at 4.

taining a rulemaking proceeding to impose additional limitations on the personal wireless service facility siting process beyond those stated in Section 332(c)(7)," the Commission retains the authority to interpret the limitations that Congress imposed in Section 332(c)(7).[29] Nevertheless, Petitioners argue, by allowing State and local governments to toll the timeframe for acting on an application only within 30 days after the application is filed, the Commission created an internal deadline for completeness of an application; and because this deadline is not contained within the Communications Act, petitioners claim, it constitutes a "new limitation" on State and local governments in violation of the Commission's interpretation of its own authority.[30]

10. We disagree with Petitioners' argument that by defining the period within which the timeframe for acting on an application may be tolled automatically, the Commission established a new limitation on State and local governments that was

---

[29] *Ruling*, 24 FCC Rcd at 14002 ¶ 25. The Commission was interpreting the Conference Report on the Telecommunications Act, which provides 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." H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 208 (1996).

[30] *See* Petition at 5. Government entities that commented on Petitioners' legal argument that the 30-day period exceeded the Commission's interpretation of its own authority uniformly supported Petitioners' analysis. *See*, *e.g.*, Los Angeles Comments at 2; San Antonio Comments at 2; Philadelphia Comments at 2; Livonia Comments at 2.

not within the statute. The Commission determined that the timeframe may be tolled due to an application's incompleteness, and then specified the circumstances under which this tolling may occur, in order to define how the 90- and 150-day time periods established in the *Ruling* are to be counted in interpreting "a reasonable period of time." In other words, both the tolling provision and the conditions for its application address to what extent "a reasonable period of time" includes or excludes the time for completing an application upon notification by the State or local government. The period for tolling is an integral part of the Commission's interpretation of what constitutes a "reasonable period of time," and thus is consistent with the Commission's interpretation of its statutory authority.

11. Moreover, the Commission is under no statutory obligation to adopt any provision for automatic tolling of the presumptively reasonable time periods. Petitioners argue that the specification of a time period for automatic tolling is a "new limitation" on State and local governments, and that the absence of such a period would allow a State or local government to unilaterally toll the applicable timeframe at any point in the process. However, the Commission would have been within its discretion to define a "reasonable period of time" without allowing for any automatic tolling. The Commission included the automatic tolling provision to address concerns raised by State and local governments in their comments.[31] CTIA's Petition proposed firm timeframes

[31] *See Ruling*, 24 FCC Rcd at 14014 ¶ 52, n.155.

and did not contemplate any circumstances under which those timeframes would be tolled.[32]

12. In addition, we note that although Petitioners assume for the purposes of their Petition that the Commission has the authority to interpret what is a "reasonable period of time," their challenge to the tolling period undercuts this assumption. Were State and local governments able unilaterally to toll the decisionmaking period at any time, the Commission's authority to define the presumptively reasonable period in which the statute requires them to act, which Petitioners assert they are not challenging here, would be rendered meaningless.

B. Policy Considerations for the 30-Day Limitation on the Automatic Triggering of Tolling

13. In addition to their legal argument against the 30-day limitation on the automatic triggering of tolling, Petitioners offer three policy arguments for modifying this limitation. First, Petitioners argue that there are legitimate reasons for tolling the applicable shot clock period that the *Ruling* does not address.[33] Petitioners note that sometimes, local governments must get approval or other information from governmental or quasi-governmental entities, such as the Federal Aviation Administration (FAA), Federal or State environmental authorities, and power utilities, before an application can be

---

[32] *See generally*, CTIA Petition at 24-27.

[33] *See* Petition at 6.

approved, and that the local government has no control over the time it takes for these entities to complete their review processes.[34] Petitioners contend that under such circumstances, the applications are not "incomplete," nor is the local authority at fault for the delay.[35] Petitioners also argue that in some instances, the applicant's action or inaction in completing obligations related to the review process can prevent that process from being completed within the applicable time period.[36] As an example, Petitioners note that many jurisdictions require the applicant to follow publication and notice requirements before public hearings are convened on a zoning application. Petitioners state that if the applicant makes a mistake in this process, the local government has no legal power to proceed with the hearing.[37]

14. Second, Petitoners predict that the 30-day tolling period will cause various undesirable changes in the way zoning authorities process tower siting applications. They contend that when areas of concern become known after the 30-day period for tolling has passed, many State and local governments will now deny the applications because they will have insufficient time to engage in necessary fol-

---

[34] *See id.*; Mentor Comments at 2-3; Fairfax Reply Comments at 4.

[35] *See* Petition at 6.

[36] *See id.* at 7.

[37] *See id. See also* GMTC Comments at 3-4.

low-up exchanges and modifications.[38] In addition, because State and local governments will not want to find themselves in need of additional information after the 30-day period for tolling has lapsed, they will be forced to adhere to rigid application processes instead of the more informal zoning processes that are used for other types of applications.[39] Further, many State and local governments will seek additional information in the initial filing, even though such information would be unnecessary for most applications.[40] Petitioners also express concern that in some instances, rather than face the risk and expense of litigation, a zoning authority with limited resources may grant an application that it could not process within the 90- or 150-day timeframe due to a delay caused by the applicant or a third party, even though the State or local government would likely prevail on the merits.[41]

15. Third, Petitioners argue that due process and fairness require that the rule be reconsidered because the 30-day completeness rule was not contained in CTIA's Petition for Declaratory Ruling, and was developed without public notice and without prior discussions with interested parties.[42] Petition-

---

[38] *See id.* at 7-8. *See also*, *e.g.*, Portland Comments at 4; Albuquerque Comments at 2; Philadelphia Comments at 4-5.

[39] *See* Petition at 8-9. *See also* Hoffmann Estates Comments at 4-5.

[40] *See* Petition at 8-9.

[41] *See* Petition at 7.

[42] *See* Petition at 10. *See also* Albuquerque Comments at 3;

ers clarify in their Reply that they take no position on whether the Commission's decision to create a 30-day period for automatically triggering tolling violated the Administrative Procedure Act; rather, their concern is that the absence of a full record allegedly created unintended consequences.[43]

16. We find Petitioners' policy arguments unpersuasive. Fundamentally, the concerns Petitioners assert are addressed by the framework established in the *Ruling*. In particular, the *Ruling* provides both that the parties may agree to extend the presumptive deadline,[44] and that the reasonableness of delay in any case shall be considered by the court.[45] Thus, a State or local government may seek a tolling agreement with the applicant when a delay outside the control of the State or local government occurs, either due to the applicant or to a third party. Similarly, the State or local government may request extension of the review period when it needs to ask an applicant for additional information or

---

Fairfax Reply Comments at 2.

[43] Petitioners Reply Comments at 4.

[44] *See Ruling*, 24 FCC Rcd at 14013 ¶ 49 ("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 . . . in such instances, the commencement of the 30-day period for filing suit will be tolled").

[45] *See id.* at 14010 ¶ 42 ("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.").

analysis after the 30-day period for automatically triggering tolling has passed. Should an applicant refuse and instead take the matter to court, the court will be able to consider whether and to what extent the particular circumstances justify a determination that "a reasonable period of time" under the statute is longer than the presumptively reasonable 90- or 150-day period. A court may conclude, for example, that a local government's request for additional information on Day 40 that the applicant did not fully answer until Day 145 was reasonable and warrants a longer "reasonable period of time" than the presumptive deadline provides. Thus, applicants "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 determines that additional time was, in fact, reasonable under the circumstances."[46]

17. For similar reasons, we are unpersuaded that State and local governments will find it necessary to adopt rigidly formal review processes, or to require unnecessary information as part of the application, in response to the 30-day period for automatically triggering tolling. As discussed above, the regime described in the *Ruling* incorporates flexibility to address unanticipated situations. Given this flexibility, we expect that governments and applicants alike will recognize the costs of unnecessarily formal procedures and avoid them where possible. Similarly, all parties will have incentives

[46] *Ruling*, 24 FCC Rcd at 14008-09 ¶ 38.

to avoid the uncertainty of litigation that may result from the unnecessary denial of an application.[47]

18. We recognize that defending litigation imposes costs, and that in some instances a State or local government may choose to grant an application rather than incur those costs. At the same time, an overly broad tolling regime would risk countenancing delays under circumstances where they would not be reasonable. Moreover, it is impractical to create in advance a comprehensive list of circumstances that would or would not reasonably merit delay. Therefore, any automatic tolling regime must necessarily balance the risks of engendering litigation and condoning excessive delay. In the *Ruling*, the Commission determined that in the common case of an incomplete application that is discovered within 30 days, a delay should be presumed reasonable and the review period should be automatically tolled in order to avoid unnecessary litigation. Where the delay is due to other causes or the incompleteness is identified after more than 30 days, case-by-case consideration, in the first instance by the parties, and then by the court if necessary, is more prudent. Nothing in the record on reconsideration causes us to revisit this balance.

19. With respect to Petitioners' assertion that the Commission did not seek or receive sufficient information on which to base its decision to limit the period for automatic tolling, we find that the record demonstrates otherwise, and that the *Rul-*

---

[47] *See id.* at 14008-09 ¶ 39.

ing reflects this. Various government entities raised the issue that rigid timeframes do not account for incomplete filings.[48] MetroPCS proposed a three-day review period for a State or local government to determine whether an application is complete, a proposal that CTIA supported.[49] Later, PCIA proposed a 10-day period for tolling,[50] and then a 10-business-day period.[51] While the specific length of 30 days was not proposed in the record, the Commission reviewed state statutes that were submitted into the record in selecting that time period, concluding that 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."[52] To the extent Petitioners are concerned that any lack of comment impeded the Commission from taking into account the ramifications of the 30-

---

[48] *See id.* at 14014 ¶ 52 n.155.

[49] *See id.* at 14014 ¶ 52, nn. 156-157.

[50] *See Ex Parte* Letter from Michael D. Saperstein, Jr., Esq., Public Policy Analyst, PCIA – The Wireless Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 08-165, Att. at 7 (filed Dec. 5, 2008).

[51] *See Ex Parte* Letter from Michael Fitch, Esq., President and CEO, PCIA – The Wireless Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 08-165, at 3-4 (filed Oct. 23, 2009).

[52] *Ruling*, 24 FCC Rcd at 14015 ¶ 53.

day period for tolling,[53] our review of the issues raised here addresses this concern.

C. Other Issues

20. Several commenters raise issues that are beyond the scope of the Petition. San Antonio asserts that "*all* of the *CTIA Ruling's* interpretations of Section 332(c)(7)(B)(i), (ii) and (v) exceed the Commission's authority. . ." and that the decision is "a rulemaking in disguise" that "fails to comply with the Regulatory Flexibility Act."[54] Los Angeles claims that the 90-day period for collocation applications is too short.[55] Because these matters are outside the scope of the Petition, they should have been raised through timely Petitions for Reconsideration, and not for the first time in comments on Petitioners' Petition for Reconsideration. Accordingly, we do not consider them here.

21. In Comments to the Petition, Albuquerque raises a new issue, requesting that the Commission "clarify" that the 90- or 150-day review period is reset to zero whenever a State or local government receives new material submitted to remedy a facially deficient application.[56] The *Ruling*, however, expressly states that where an application is found to be incomplete as filed during the 30-day review period, "the timeframes do not include the time that

---

[53] *See* Petitioners Reply Comments at 4.

[54] San Antonio Comments at 2.

[55] Los Angeles Comments at 3.

[56] Albuquerque Comments at 2.

applicants take to respond to State and local governments' requests for additional information."[57] This means that when the information is requested, the clock stops, and when the applicant provides the additional information, the clock resumes (thereby reflecting the passage of time equivalent to the time from the initial filing of the siting application to the date that the additional information was requested). Because Albuquerque's request for clarification proposes – for the first time after the deadline for filing petitions for reconsideration – to alter this approach, the proposal is, in fact, an untimely request for reconsideration of this part of our decision. In any event, we are not persuaded that resuming the clock where it left off is inappropriate in this situation. The time spent determining that the application is incomplete is time spent reviewing the application, and therefore reasonably counts toward the 90 or 150 days.

22. IMLA argues that Congress's use of the term "final action" in Section 332(c)(7)(B)(v), and the absence of "final" in the requirement in Section 332(c)(7)(B)(ii) that the State or local government "shall act," create a distinction between the trigger for a lawsuit based on State or local government action and the trigger for a lawsuit based on a failure to act. IMLA contends that, accordingly, the Commission must modify the *Ruling* to expressly provide that the 90- and 150-day time periods only apply to initial zoning actions, and not to the time period from the initial decision until completion of final ac-

[57] *Ruling*, 24 FCC Rcd at 14014 ¶ 52.

tion on an administrative appeal.[58] In addition to arguing that IMLA's request is beyond the scope of the issues raised in the Petition for Reconsideration, CTIA contends that the statutory reference to "final action" is irrelevant when there has been no action.[59] IMLA's request is outside the scope of the Petition, and we decline to render the ruling that IMLA requests. Given the many variations that are possible in local procedures and factual circumstances, it is appropriate for the court to determine whether the decisionmaking body has failed to act within the specified timeframe and whether the presumptive timeframe for action is reasonable in each case.

IV. CONCLUSION

23. We conclude that in interpreting Section 332(c)(7), the Commission has the authority to define a 30-day period after an application for wireless facility siting is filed during which a State or local government may toll the presumptive deadline for review due to the application's incompleteness, and that this 30-day period is both reasonable and supported by the record. We therefore deny the Petition.

V. ORDERING CLAUSE

24. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), 332(c)(7), and 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r),

---

[58] *See* IMLA Comments at 7-10.

[59] *See* CTIA Reply Comments at 9-10.

332(c)(7), 405(a), and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Reconsideration or Clarification filed by 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 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

List of Commenters

Oppositions and Comments

Charter Township of Waterford, Michigan (Waterford)
City of Albuquerque, New Mexico (Albuquerque)
City of Centerville, Minnesota, Member of the North Metro Telecommunications Commission (Centerville)
City of Livonia, Michigan (Livonia)
City of Los Angeles, California (Los Angeles)
City of Mentor, Ohio (Mentor)
City of Philadelphia, Pennsylvania (Philadelphia)
City of Portland, Oregon (Portland)
City of San Antonio, Texas (San Antonio)
CTIA – The Wireless Association (CTIA)
Greater Metro Telecommunications Consortium (GMTC)
International Municipal Lawyers Association (IMLA)
PCIA – The Wireless Infrastructure Association (PCIA)
T-Mobile USA, Inc. (T-Mobile)
Verizon Wireless
Village of Hoffman Estates, Illinois (Hoffman Estates)

Reply Comments

CTIA
Fairfax County, Virginia (Fairfax)
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 (Petitioners)
PCIA

Late-Filed Reply Comment
Kiku Lani Iwata

APPENDIX D

Date Filed: 3/29/2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-60039

CITY OF ARLINGTON, TEXAS, CITY OF SAN ANTONIO, TEXAS
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA,
Respondents

Petition for Review of an Order of the
Federal Communications Commission

ON PETITION FOR REHEARING EN BANC

(Opinion ___, 5 Cir., ____, ____, F.3d ____)

Before DAVIS, PRADO, and OWEN, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc filed by **Intervenors City of Dubuque, Iowa; City of Los Angeles, California; Los Angeles**

County, California; Texas Coalition of Cities for Utility Issues, and Petitioner City of Arlington, Texas as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

(x) Treating the Petition for Rehearing En Banc filed by **Intervenor Cable and Telecommunications Committee of the New Orleans City Council** as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
/s/ Priscilla A. Owen
United States Circuit Judge

APPENDIX E

STATUTES AND LEGISLATIVE HISTORY

FEDERAL STATUTES

LEGISLATIVE HISTORY

Section 1 of the Communications Act, 47 U.S.C. § 151

Purposes of Act; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make avail-able, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nationwide, and world-wide wire and radio communication service with ade-quate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional author-ity with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commis-sion to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

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

Federal Communications Commission

. . .

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

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

Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to fur-nish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commis-sion, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the pub-lic interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby

declared to be unlawful: Provided, That communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: Provided further, That nothing in this Act or in any other provision of law shall be construed to prevent a common car-rier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the pub-lic interest: Provided further, That nothing in this Act or in any other provision of law shall prevent a common carrier subject to this Act from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.

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

General Powers of Commission

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the

provisions of this Act, or any international radio or wire communications treaty or conven-tion, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

Sections 401 of the Communciations Act, 47 U.S.C. § 401

Enforcement provisions

(a) Jurisdiction. The district courts of the United States shall have jurisdiction, upon application of the Attorney Gen-eral of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this Act by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this Act.

(b) Orders of Commission. If any person fails or neglects to obey any order of the Commission other than for the pay-ment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobe-dience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, man-datory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from

further dis-obedience of such order, or to enjoin upon it or them obedience to the same.

(c) Duty to prosecute. Upon the request of the Commission it shall be the duty of any district attorney [United States Attorney] of the United States to whom the Commission may apply to institute in the proper court and to prosecute un-der the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the pro-visions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

Section 621 of the Communications Act, 47 U.S.C. § 541

General franchise requirements

(a) Authority to award franchises; public rights-of-way and easements; equal access to service; time for provision of service; assurances.

(1) A franchising authority may award, in accordance with the provisions of this title [47 USCS §§ 521 et seq.], 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions

of section 635 [47 USCS § 555] for failure to comply with this subsection.

(2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure--

(A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

(C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

(3) In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.

(4) In awarding a franchise, the franchising authority--

(A) shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area;

(B) may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support; and

(C) may require adequate assurance that the cable operator has the financial, technical, or legal qualifications to provide cable service.

(b) No cable service without franchise; exception under prior law.

(1) Except to the extent provided in paragraph (2) and subsection (f), a cable operator may not provide cable service without a franchise.

(2) Paragraph (1) shall not require any person lawfully providing cable service without a franchise on July 1, 1984, to obtain a franchise unless the franchising authority so requires.

(3) (A) If a cable operator or affiliate thereof is engaged in the provision of telecommunications services--

(i) such cable operator or affiliate shall not be required to obtain a franchise under this title [47 USCS §§ 521 et seq.] for the provision of telecommunications services; and

(ii) the provisions of this title [47 USCS §§ 521 et seq.] shall not apply to such cable operator or

affiliate for the provision of telecommunications services.

(B) A franchising authority may not impose any requirement under this title [47 USCS §§ 521 et seq.] that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof.

(C) A franchising authority may not order a cable operator or affiliate thereof--

(i) to discontinue the provision of a telecommunications service, or

(ii) to discontinue the operation of a cable system, to the extent such cable system is used for the provision of a telecommunications service, by reason of the failure of such cable operator or affiliate thereof to obtain a franchise or franchise renewal under this title [47 USCS §§ 521 et seq.] with respect to the provision of such telecommunications service.

(D) Except as otherwise permitted by sections 611 and 612 [47 USCS §§ 531 and 532], a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.

(c) Status of cable system as common carrier or utility. Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.

(d) Informational tariffs; regulation by States; "State" defined.

(1) A State or the Commission may require the filing of informational tariffs for any intrastate communications service provided by a cable system, other than cable service, that would be subject to regulation by the Commission or any State if offered by a common carrier subject, in whole or in part, to title II of this Act [47 USCS §§ 201 et seq.]. Such informational tariffs shall specify the rates, terms, and conditions for the provision of such service, including whether it is made available to all subscribers generally, and shall take effect on the date specified therein.

(2) Nothing in this title [47 USCS §§ 521 et seq.] shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis.

(3) For purposes of this subsection, the term "State" has the meaning given it in section 3 [47 USCS § 153].

(e) State regulation of facilities serving subscribers in multiple dwelling units. Nothing in this title [47 USCS §§ 521 et seq.] shall be construed to affect the authority of any State to license or otherwise regulate any facility or combination of facilities which serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management and which does not use any public right-of-way.

(f) Local or municipal authority as multichannel video programming distributor. No provision of this Act shall be construed to--

(1) prohibit a local or municipal authority that is also, or is affiliated with, a franchising authority from operating as a multichannel video programming distributor in the franchise area, notwithstanding the granting of one or more franchises by such franchising authority; or

(2) require such local or municipal authority to secure a franchise to operate as a multichannel video programming distributor.

Section 704(b) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (Feb. 8, 1996)

Facilities Siting; Radio Frequency Emission Standards.

. . .

(b) Radio Frequency Emissions. Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

H.R. Rep. No. 104-458, at 207-208 (1996) (Conf. Report)

The conference agreement creates a new section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land

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

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

commercial district, it must also grant a permit for a competitor's 50 foot tower in a residential district.

Actions taken by State or local governments shall not prohibit or have the effect of prohibiting the placement, construction or modification of personal wireless services. It is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-case basis.

Under subsection (c)(7)(B)(ii), decisions are to be rendered in a reasonable period of time, taking into account the nature and scope of each request. If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision.

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

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

pursuant to section 704(b) concerning such emissions.

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

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

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

It should be noted that the provisions relating to telecommunications facilities are not limited to commercial mobile radio licensees, but also will include other Commission licensed wireless common carriers such as point to point microwave in the

extremely high frequency portion of the electromagnetic spectrum which rely on line of sight for transmitting communication services.

H.R. Rep. No. 104-204,
1996 U.S.C.C.A.N. 10, 25 (1995)

Facilities Siting; Radio Frequency Emission Standards.

(a) National Wireless Telecommunications Siting Policy.—Section 332(c) of the Act (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

(7) Facilities siting policies.—(A) Within 180 days after enactment of this paragraph, the Commission shall prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or operation of facilities for the provision of commercial mobile services.

(B) Pursuant to subchapter III of chapter 5, title 5, United States Code, the Commission shall establish a negotiated rulemaking committee to negotiate and develop a proposed policy to comply with the requirements of this paragraph. Such committee shall include representatives from State and local governments, affected industries, and public safety agencies. In negotiating and developing such a policy, the committee shall take into account—

(i) the desirability of enhancing the coverage and quality of commercial mobile services and fostering competition in the provision of such services;

(ii) the legitimate interests of State and local governments in matters of exclusively local concern;

(iii) the effect of State and local regulation of facilities siting on interstate commerce; and

(iv) the administrative costs to State and local governments of reviewing requests for authorization to locate facilities for the provision of commercial mobile services.

(C) The policy prescribed pursuant to this paragraph shall ensure that—

(i) regulation of the placement, construction, and modification of facilities for the provision of commercial mobile services by any State or local government or instrumentality thereof—

(I) is reasonable, nondiscriminatory, and limited to the minimum necessary to accomplish the State or local government's legitimate purposes; and

(II) does not prohibit or have the effect of precluding any commercial mobile service; and

(ii) a State or local government or instrumentality thereof shall act on any request for authorization to locate, construct, modify, or operate facilities for the provision of commercial mobile services within a reasonable period of time after the request is fully filed with such government or instrumentality; and

(iii) any decision by a State or local government or instrumentality thereof to deny a request for authorization to locate, construct, modify, or operate facilities for the provision of commercial mobile

services shall be in writing and shall be supported by substantial evidence contained in a written record.

(D) The policy prescribed pursuant to this paragraph shall provide that no State or local government or any instrumentality thereof may regulate the placement, construction, modification, or operation of such 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.

(E) In accordance with subchapter III of chapter 5, title 5, United States Code, the Commission shall periodically establish a negotiated rulemaking committee to review the policy prescribed by the Commission under this paragraph and to recommend revisions to such policy.".

(b) Radio Frequency Emissions.—Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

(c) Availability of Property.—Within 180 days of the enactment of this Act, the Commission shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for the placement of new telecommunications facilities by duly licensed providers of telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. These

procedures may establish a presumption that requests for the use of property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency's mission, or the current or planned use of the property, rights-of-way, and easements in question. Reasonable cost-based fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.