

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of:	)	
	)	
Petition for Declaratory Ruling to Clarify	)	<b>WT Docket No. 08-165</b>
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	)	

To: The Commission

**COMMENTS OF THE  
TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

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**COMMENTS OF THE  
TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Telecommunications Industry Association (TIA) hereby submits comments to the Federal Communications Commission (Commission) in support of the Petition for Declaratory Ruling filed by CTIA – The Wireless Association (CTIA) in the above-captioned proceeding.<sup>1</sup> TIA, on behalf of its member companies, has a vested interest in the advancement of wireless broadband deployment, and respectfully offers these comments in an effort to work with the Commission to mitigate unreasonable delays in the deployment of wireless broadband products and services.

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<sup>1</sup>See *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, WT Docket No. 08-165 (filed July 11, 2008) (CTIA Petition).

The Telecommunications Industry Association (TIA) represents the global information and communications technology (ICT) industry through standards development, advocacy, tradeshows, business opportunities, market intelligence and world-wide environmental regulatory analysis. With roots dating back to 1924, TIA enhances the business environment for broadband, mobile wireless, information technology, networks, cable, satellite and unified communications. Members' products and services empower communications in every industry and market, including healthcare, education, security, public safety, transportation, government, the military, the environment and entertainment. TIA co-owns the SUPERCOMM® tradeshow and is accredited by the American National Standards Institute (ANSI).

## **DISCUSSION**

### **INTRODUCTION.**

Many of TIA's members manufacture or supply products and services used in the provision of wireless broadband services. Like the Commission, TIA places a high priority on developing regulatory policies that allow swift and affordable deployment of and access to these services. Market forecasts predict considerable growth in consumer use of wireless broadband data applications, sales of advanced wireless devices, and deployment of wireless facilities. However, the public and economic benefits of this predicted growth, aided by Commission action, can be significantly impaired by local municipalities. If local governments prevent the efficient siting of wireless facilities or collocation on an existing facility -- core elements of the delivery of wireless broadband services -- the growing market demand for these services will not be met, the ICT

industry's deployment of wireless broadband products will slow, and the FCC's goal of swift broadband deployment will be thwarted.

Accordingly, TIA supports CTIA's Petition to: a) establish that a failure to act on a wireless facility siting application involving collocation occurs if there is no final action within 45 days from the submission of a request, and on any other wireless siting facility application occurs if there is no final action within 75 days from submission of the request to the local zoning authority; b) find that a failure to act results in the granting of such an application; c) find that federal statute bars zoning decisions that prohibit an additional entrant from offering service in a given area; and d) preempt local ordinances and state laws that treat all wireless siting requests as requiring a variance.<sup>2</sup>

**I. THE COMMISSION'S CONTINUED PROMOTION OF BROADBAND SERVICE DEPLOYMENT CAN LEAD TO SIGNIFICANT GROWTH IN THE ICT AND WIRELESS SERVICES MARKETS**

**A. The Commission Prioritizes Widespread Wireless Broadband Service Provision.**

The FCC has made clear that it can and will use its authority under the 1996 Telecommunications Act<sup>3</sup> to ensure the swift deployment of broadband services. In its Triennial Review Order eliminating most unbundling requirements for broadband architectures serving the mass market, the Commission significantly increased investment in equipment and deployment of high speed Internet services.<sup>4</sup> Consistently, the

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<sup>2</sup> See CTIA Petition.

<sup>3</sup> See The Telecommunications Act of 1996, Pub. L. 104104, 110 Stat. 56 (1996) (1996 Act).

<sup>4</sup> See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01338, 9698,

Commission later classified broadband Internet access services provided by wireless providers as “information services” under the 1996 Act, reducing the regulatory burden on the provision of these services and again speeding wireless broadband deployment.<sup>5</sup> Further, as CTIA makes clear, the Commission has invariably stated that wireless broadband deployment is critical to the national goal of deploying multi-modal broadband services across the nation.<sup>6</sup>

**B. With the FCC’s Light Regulatory Touch, Wireless Broadband Service Provision, Devices, and Infrastructure are Growing Rapidly.**

In large part due to the Commission’s efforts to regulate in a manner that will effectively deploy wireless broadband absent unneeded regulatory mandates, the growth of the wireless broadband product and service industries could be very large in the coming years -- despite general uncertainties about our economy. Consumers have increased use of broadband wireless devices to search the Internet by 68 percent over the past year.<sup>7</sup> Consistently, industry revenues from wireless broadband data application services in the United States are forecast to grow by over 30 percent from 2008 to 2011.<sup>8</sup> The remarkable growth in demand for wireless broadband services should in turn result in

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98147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17145, ¶ 278 (2003) (Triennial Review Order), corrected by Errata, 18 FCC Rcd 19020 (2003) (Triennial Review Order Errata), vacated and remanded in part, affirmed in part, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (USTA II) cert. denied, 125 S.Ct. 313, 316, 345 (2004).

<sup>5</sup> See *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, *Declaratory Ruling*, 22 FCC Rcd 5901 ¶ 1 (2007).

<sup>6</sup> See CTIA Petition at 9-10.

<sup>7</sup> See Press Release, comScore, “comScore M:Metrics Reports Mobile Search Grew 68 Percent in the U.S. and 38 Percent in Western Europe During Past Year,” Se 15, 2008, available at: <http://www.comscore.com/press/release.asp?press=2469> (last visited Sep. 25, 2008).

<sup>8</sup> See 2008 TIA Market Review & Forecast, 168, Table IV-1.2 “Growth of Wireless Service Revenue in the United States by Category,” (“2008 TIA Market Review & Forecast”). Available at: <http://www.tiaonline.org/business/research/mrf/>.

rapid growth in the wireless device market. It is forecast that, as consumers increase demand for new wireless broadband applications, annual revenues in the United States from wireless devices will increase by \$4 billion in 2011, compared to 2007.<sup>9</sup> Sales of smartphones in the United States, most of which provide wireless broadband Internet access, should comprise over 30 percent of the mobile device sales in 2011 -- more than a 100 percent increase over 2007.<sup>10</sup> In addition, mobile computers with advanced multimode integrated wireless technology are expected to be widely deployed in early 2009, helping businesses increase productivity and profitability with a mobile workforce.<sup>11</sup> Further, the growing consumer demand for wireless broadband will drive the need for wireless infrastructure development; the number of wireless base stations is predicted to grow from 3.6 million in 2007 to 5.2 million in 2013.<sup>12</sup>

### **C. Increased Wireless Broadband Service Availability Hinges on Efficient Cellular Tower Construction.**

CTIA states effectively the need and Commission support for constructing wireless facilities and for service providers to collocate on an existing facility.<sup>13</sup> Such facilities are vital to commercial and federal regulatory efforts to rapidly deploy wireless

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<sup>9</sup> See *id.* at 172, Figure IV-1.5.

<sup>10</sup> See *id.* at 173.

<sup>11</sup> See Ken Dulaney, Leslie Fiering, "Changes Coming for Embedded 3G in Notebooks," Gartner RAS Core Research Note G00156891, Apr. 28, 2008, available at: <http://www.gobianywhere.com/Qualcomm2729.pdf> (last visited Sep. 25, 2008).

<sup>12</sup> See Press Release, ABI Research, "Network Infrastructure Spending Positions Carriers for 4G Services But Proves Competitive for Vendors," Sept. 15, 2008, available at: <http://www.abiresearch.com/press/1235-Network+Infrastructure+Spending+Positions+Carriers+for+4G+Services+But+Proves+Competitive+for+Vendors> (last visited Sep. 25, 2008).

<sup>13</sup> See CTIA Petition at 12.

broadband service that will spur the economy and provide support for public safety.<sup>14</sup>

However, as CTIA details, service providers can endure years of delay from unreasonable municipal approval processes for wireless facility siting applications.<sup>15</sup> Without Commission action consistent with past regulations designed to enhance wireless broadband availability, such delay could result in considerable reductions in estimated growth of wireless broadband accessibility and the projected economic benefits of this accessibility.

Similar to CTIA members, TIA members have been impacted by municipal tactics to prevent or unreasonably delay action on wireless collocation or siting requests, including those proposed for interoperable public safety communication networks. For example, in the Spring of 2000, a northern California county public safety communications authority worked with a TIA member to propose to a local municipality a wireless facility site needed to replace an obsolete public safety communication network with an interoperable network. The county performed an environmental impact study over six months, and proposed the site to municipal authorities. After the local planning commission staff endorsed the proposal, and after almost three months of delay, the planning commission rejected the county's application for construction. Approximately two years later, the county concluded a study of 17 alternative sites, finding that that the original site proposed was the only acceptable one. The county then received approval from a court to construct the facility on that site. Just prior to commencing construction, the local planning commission passed a resolution siting the facility in another location. The

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<sup>14</sup> See id.

<sup>15</sup> Id. at 12-13.

municipality used local police to stop the county's planned construction at the original site. Meanwhile, opponents of the planning commission's alternate location filed suit to stop construction, and the local municipality eventually joined the plaintiffs. After five years of delay, procedural obstruction, and costly litigation, a California Court of Appeals rejected the municipality's tactics and arguments, and allowed the county to construct a cell tower on the site originally proposed by the county.

This example and those referenced by CTIA reflect that some cities are attempting to prevent wireless providers -- including local public safety entities attempting to create interoperable public safety communications networks -- from placing wireless facilities in their jurisdictions. The consequences are equally clear: many local municipalities prohibit entities from providing wireless service in violation of Commission regulations and, thwarting Commission goals and policy precedent, prevent public safety and commercial entities from increasing the reach and quality of broadband networks.

**II. THE COMMISSION SHOULD ESTABLISH DEADLINES FOR ACTION AND LIMITATIONS ON AUTHORITY FOR LOCAL GOVERNMENT ENTITIES REVIEWING WIRELESS SITING APPLICATIONS.**

As CTIA demonstrated in its Petition, Congress limited the ability of local authorities to evaluate requests for siting wireless communications facilities. Section 332(c)(7)(B) of the Act grants municipal authorities the ability to evaluate wireless facilities siting proposals only if they do not frustrate the goal to develop a competitive, lightly-regulated marketplace for advanced wireless services.<sup>16</sup> Thus, Section 332(c)(7)(B) provides relief from tactics used by local municipalities that essentially halt wireless

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<sup>16</sup> 47 U.S.C. § 332(c)(7)(B); see CTIA Petition at 17-19.

facility development and broadband deployment. However, ambiguities in the statute require clarification to ensure swift local review of wireless facility siting applications and increase wireless broadband availability. Without such clarifications, the Commission's effort to promote market entry and broadband deployment will be chilled, and wireless services and products will slow their impressive growth rates.

**A. Clarification of “Failure to Act” Under Section 332(c)(7)(B).**

Section 332(c)(7)(B)(v) allows any party adversely affected by a final action or “failure to act” by a State or local government regarding wireless facility siting may bring suit within 30 days of the “action or failure to act.”<sup>17</sup> However, as CTIA cites, a “failure to act” is not defined in this Section, creating confusion over the ability to enforce one's right for judicial review of unreasonable municipal inactivity.<sup>18</sup>

To rectify such ambiguities, Congress granted the Commission authority to create rules needed to carry out the provisions of the Act.<sup>19</sup> This authority allows the Commission to establish time limits for local government entities to deliberate on matters relating to the Act.<sup>20</sup> Thus, to carry out Section 332(c)(7)(B), the Commission should set specific times after which a local entity is deemed to have “failed to act” under this Section, depending upon the type of approval sought.

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<sup>17</sup> 47 U.S.C. § 332(b)(v).

<sup>18</sup> See CTIA Petition at 18-19.

<sup>19</sup> 47 U.S.C. § 201(b); AT&T v. Iowa Utils. Bd., 525 U.S. 366, 378 (1999); see also CTIA Petition at 20-21.

<sup>20</sup> See Alliance for Community Media v. FCC, Nos. 07-3391 et al., 2008 U.S. A LEXIS 13628, \*26 (6th Cir. June 27, 2008); CTIA Petition at 22.

## **1. 45-Day Collocation Application Deadline.**

TIA supports CTIA’s proposal to find that a failure to act occurs under Section 332(c)(7)(B) when a government has not reached a final decision on a wireless provider’s application to collocate onto existing facilities after 45 days.<sup>21</sup> As CTIA details, while the need for government review of collocation applications is minimal, given prior approval of the wireless facility itself, governments may not address them for years.<sup>22</sup> It is difficult to imagine how the intent of Section 332(c)(7)(B) – to limit the ability of local entities to slow or prevent wireless service deployment – is served by such delays. Further, as CTIA states, a 45-day time limit for collocation requests is reasonable, given that such applications are very limited in scope and that many municipalities grant collocation applications within 45 days.<sup>23</sup>

## **2. Collocation Deadline for Siting Requests Broader in Scope.**

While wireless facility collocation applications can be addressed quickly, TIA agrees with CTIA that other wireless siting applications may entail longer review.<sup>24</sup> However, increased responsibility on the part of local authorities should not imply that inaction is an option. In order to ensure that local authorities have sufficient incentive to address broader siting applications, a “failure to act” should be found if a final decision on such an application is not rendered within 75 days after filing a request for approval.

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<sup>21</sup> See CTIA Petition at 24.

<sup>22</sup> See *id.* at 24-25.

<sup>23</sup> See *id.* at 25.

<sup>24</sup> See *id.* at 26.

### **3. Failure to Act Should Result in Application “Deemed Granted.”**

The Commission should further make clear that, in the event of a failure to act by a local entity reviewing a wireless facility application, a collocation or facilities siting request will be deemed granted. TIA agrees with CTIA’s assertion that federal and state precedent finds that Section 332(c)(7) authorizes an applicant to site facilities upon a failure to act.<sup>25</sup>

#### **B. Clarification That Section 332(c)(7)(B)(i)(II) Prohibits Zoning Decisions That Prevent Prohibiting a Specific Provider From Offering Service.**

As CTIA notes in its Petition, Section 332(c)(7)(B)(i)(II) clearly limits state and local zoning authorities by barring decisions that “prohibit or have the effect of prohibiting the provision of personal wireless services.”<sup>26</sup> As a “prohibition of service” is not defined, localities and courts have varying views on the meaning of this term.<sup>27</sup> CTIA notes that some courts find that denying a siting application of one carrier, when another provides service in a specific area, does not violate Section 332(c)(7)(B)(i)(II).<sup>28</sup> Such an interpretation cannot stand in the light of the pro-competitive policy goals in the Act, as the existence of a single provider of any service does not speed competition, increase investment in wireless services and products, or improve service. The specific language in Section 332(c)(7)(B)(i)(II) makes clear that any zoning decision precluding provision of a service by any carrier whose application has been denied is prohibited.<sup>29</sup>

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<sup>25</sup> See *id.* at 28-29.

<sup>26</sup> 47 U.S.C. § 332(c)(7)(B)(i)(II).

<sup>27</sup> See CTIA Petition at 31-32.

<sup>28</sup> See *id.*

<sup>29</sup> 47 U.S.C. § 332(c)(7)(B)(i)(II).

**C. Wireless Siting Requests Should not Require a Variance in All Circumstances.**

TIA agrees with CTIA that, under Section 253 of the Act, an ordinance establishing conditions that effectively require all wireless facilities siting requests to require a variance from the ordinance are prohibited. Section 253(a) preempts local ordinances that prohibit or have the effect of prohibiting any entity from providing a telecommunications service.<sup>30</sup> As CTIA notes, ordinances that impose onerous permit application processes are preempted by the Act.<sup>31</sup> Many local zoning height limitations, boundary restrictions, and other ordinances impose directly or indirectly unreasonable waiver requirements for any prospective service provider. Pursuant to the Act, the Commission should make clear that such laws are preempted by Section 253(a).

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<sup>30</sup> See Id. at 35-37.

<sup>31</sup> See Id.



**DECLARATION OF PATRICK SULLIVAN**

I, Patrick Sullivan, have reviewed the foregoing Comments on Petition for Declaratory Ruling and declare under penalty of perjury that the information is accurate to the best of my knowledge, information and belief.

September 26, 2008

/s/ Patrick Sullivan

Director,  
Technical and Government  
Affairs