MEMORANDUM

To: Cell Tower Right-of-Way Task Force Members
Florida Association of County Attorneys (FACA)

From: Jessica M. Icerman, Esq., Member, Cell Tower Right-of-Way Task Force

Date: October 18, 2016

Subject: Temporary Moratorium on Placement of Wireless Communication Towers and Facilities in Public Rights-of-Way

Pursuant to the matters discussed during the Cell Tower Right-of-Way Task Force conference calls on August 22 and September 26, 2016, this memorandum will review various considerations pertaining to the necessity to impose a temporary moratorium so counties may consider and develop regulations on the placement of wireless communication towers and facilities in public rights-of-way. In short, a moratorium is deemed necessary due to the Federal "Shot Clock" time limits applicable to a local government's review of a personal wireless service facility application.

By way of background, new technologies in wireless communications are emerging, such as Distributed Antenna Systems (DAS) and small cell systems, and may entail requests to place smaller communication towers and/or facilities in public rights-of-way in order to improve wireless connectivity and coverage. In response to these new technologies, cities and counties in Florida are imposing, or are considering the imposition of, a temporary moratorium on applications for, and approval of, permits or development orders to place wireless communications facilities in the public rights-of-way, to allow staff sufficient time to study the issues and develop appropriate regulations. The time period set for the temporary moratorium typically varies from six months up to eighteen months.

Additionally, this memorandum considers to what extent local government regulations may be preempted. In summary, Florida law imposes greater restrictions than federal law on the types of regulations a local government can impose on communication services utilizing public rights-of-way.

FEDERAL CONSIDERATIONS

47 U.S.C. § 332

Section 704(a) of the Telecommunications Act of 1996, codified at 47 U.S.C. § 332(c)(7), is entitled "Preservation of Local Zoning Authority"; It preserves state and local authority over decisions concerning the placement, construction, and modification of "personal wireless service facilities," with some limitations.[1] The regulations must not unreasonably discriminate among providers of

[1] "Personal wireless service facilities" is defined as facilities for the provision of personal wireless services. "Personal

functionally equivalent services, and must not prohibit, or have the effect of prohibiting, the provision of "personal wireless services."[2]

Section 332(c)(7)(B)(ii) provides that any state or local government shall act on a request for authorization to place, construct, or modify personal wireless service facilities "within a reasonable period of time" after the request is duly filed. In addition, any denial of a request for authorization must be in writing and supported by substantial evidence in a written record.[3] Finally, 47 U.S.C. § 332(c)(7)(B)(iv) provides that no state or local government 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 the emissions comply with the FCC's regulations concerning same.

In 2009, the Federal Communications Commission ("FCC") issued a Declaratory Ruling that addressed what constituted a "reasonable period of time" for a state or local government to act on a request for authorization to place, construct, or modify a personal wireless service facility.[4] In the Declaratory Ruling, known as the "Shot Clock Ruling," the FCC declared that state or local authorities must process collocation applications within 90 days and all other application must be processed in 150 days. The shot clock begins when an application is filed, and state and local governments have a 30-day window to review the application for completeness and request additional information.

Two circuit courts have analyzed 47 U.S.C. § 332(c)(7)(B) to determine the extent of preemption intended by the Legislature. In Omnipoint Communications, Inc. v. City of Huntington Beach, 738 F.3d 192 (9th Cir. 2013), T-Mobile challenged the City of Huntington Beach's charter requirement providing for voter approval before T-Mobile could construct a cell tower on city-owned property. The Ninth Circuit Court held that Section 332(c)(7) has the following preemptive scope:

> (1) it preempts local land use authorities' ***regulations*** if they violate the requirements of § 332(c)(7)(B)(i)[5] and (iv)[6]; and (2) it preempts local land use authorities'

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wireless services" is defined as commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services. 47 U.S.C. § 332(c)(7)(C).

[2] 47 U.S.C. § 332(c)(7)(B).

[3] 47 U.S.C. § 332(c)(7)(B)(iii).

[4] WT Docket No. 08-165, FCC 09-99. Petition for reconsideration denied, FCC 10-144.

[5] "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."

47 U.S.C. § 332(C)(7)(B)(i).

[6] "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." 47 U.S.C. § 332(C)(7)(B)(iv).

> ***adjudicative decisions*** if the procedures for making such decisions do not meet the minimum requirements of § 332(c)(7)(B)(ii)[7] and (iii)[8].[9]

The Court held that the voter-approval requirement imposed by the charter was "outside the City's framework for land use decision making because it does not implicate the regulatory and administrative structure established by the City's general plans and zoning and subdivision code."[10] Overall, the Telecommunications Act "applies only to local zoning and land use decision and does not address a municipality's property rights as a landowner."[11] The charter provision was not preempted by the Act and T-Mobile was required to obtain voter approval.

The Second Circuit Court also held in Sprint Spectrum L.P. v. Mills, 283 F.3d 404 (2d Cir. 2002), that a school district could impose stricter RF emission standards than the federal standards through a lease with Sprint in the school district's capacity as a property owner. The Court viewed the actions of the school district entering a lease as "plainly proprietary."[12] The Court stated the "School District has the same right in its proprietary capacity as property owner to refuse to lease the High School roof for the construction of such a facility."[13]

To conclude, while a local government can impose certain conditions in its capacity as the land owner, regulations must conform to the federal requirements (non-discriminatory, cannot prohibit or have the effect of prohibiting, cannot regulate RF emissions), and local governments must adhere to the Federal "Shot Clock Ruling" in their consideration of applications for cell towers within the rights-of-way.

47 U.S.C. § 253

Pursuant to 47 U.S.C. § 253(a), no local regulation may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. However, Section 253(c) notes that nothing in this section affects the authority of the local government to manage the public rights-of-way on a competitively neutral and nondiscriminatory basis. In BellSouth Telecommunications, Inc. v. Town of Palm Beach, 252 F.3d 1169 (11th Cir. 2001), the Eleventh Circuit Court held that Section 253(a) contains the only substantive limitation on local government regulation (within this section of federal law) and subsection (c) is a "safe harbor"

[7] "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." 47 U.S.C. § 332(C)(7)(B)(ii).
[8] "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." 47 U.S.C. § 332(C)(7)(B)(iii).
[9] Omnipoint at 196. Emphasis added.
[10] Id. at 200-01.
[11] Id. at 201.
[12] Sprint Spectrum at 420.
[13] Id. at 421.

functioning as an affirmative defense to preemption of local regulation that would otherwise violate subsection (a).[14] In other words, a telecommunications company would first need to show a violation of subsection (a) then the burden would shift to the local government to show the regulation is permitted under subsection (c).[15]

The BellSouth Court also held that a private cause of action in federal court exists under Section 253 to seek preemption of a local ordinance or regulation when that ordinance or regulation addresses the management of the public rights-of-way.[16]

47 U.S.C. § 1445

In 2012, Congress enacted the Middle Class Tax Relief and Job Creation Act which contained a provision concerning wireless facilities deployment, codified at 47 U.S.C. § 1445(a). This provision pertains to requests for modifications to an existing wireless facility, and provides that a state or local government shall approve, and ***may not deny***, any eligible facilities request for modification of an existing wireless tower or base station so long as the physical dimensions of the tower or base station are not substantially changed.[17] If wireless facilities are permitted within the rights-of-way, is important to remember that the facilities can be altered.

Pursuant to 47 C.F.R. § 1.40001, a "substantial change" for towers in the public rights-of-way and base stations "involves installation of any new equipment cabinets on the ground if there are no pre-existing ground cabinets associated with the structure, or else involves installation of ground cabinets that are more than 10% larger in height or overall volume than any other ground cabinets associated with the structure."[18] The local government shall approve an application for an eligible facilities request within 60 days from the date of submission.[19] The timeframe for review cannot be tolled by a moratorium on a review of applications.[20]

STATE CONSIDERATIONS

[14] There is a Circuit Court split on the interpretation of the extent of the preemption and the relationship between Sections 253(a) and 253(c). See Level 3 Communs., LLC v. City of St. Louis, 477 F.3d 528 (8th Cir. 2007) and TCG Detroit v. City of Dearborn, 206 F.3d 618 (6th Cir. 2000).
[15] BellSouth at 1192.
[16] BellSouth at 1191. There is a Circuit Court split on whether § 253 authorizes a private right of action. The Sixth and Eleventh Circuits have held that § 253 implies a private cause of action. The Second, Fifth, Eight, Ninth, and Tenth Circuits have reached the opposite conclusion. Spectra Communications Group, LLC v. City of Cameron, 806 F.3d 1113 (8th Cir. 2015).
[17] "Eligible facilities request" means any request for modification of an existing wireless tower or base station that involves collocation of new transmission equipment; removal of transmission equipment; or replacement of transmission equipment. 47 U.S.C. § 1455(a)(2)(A)-(C).
[18] Other terms, such as "eligible support structure" and "existing" are defined in 47 C.F.R. § 1.40001.
[19] 47 C.F.R. § 1.40001(2).
[20] 47 C.F.R. § 1.40001(3).

Section 337.401, Florida Statutes (2016), entitled "Use of right-of-way for utilities subject to regulation; permit; fees," provides that local governmental entities are authorized to prescribe and enforce reasonable rules or regulations for the placing and maintaining across, on, or within the right-of-way limits of any road under their respective jurisdictions any telephone or other communications services lines, pole lines, poles, or other structures referred to as the "utility."[21] However, any rules or regulations adopted by a municipality or county pertaining to the occupation of its roads or rights-of-way by providers of communications services must be related to the placement or maintenance of facilities in such roads or rights-of-way, must be reasonable and nondiscriminatory, and may include only those matters necessary to manage the roads or rights-of-way of the municipality or county.[22]

Mobilitie

Several local governments have received applications for the placement of towers within the public rights-of-way from Mobilitie. A search of regulated entities on the Public Service Commission's website indicates that Mobilitie, LLC, and Mobilitie Management, LLC, are both regulated entities.[23] Mobilitie, LLC, was certified to provide Alternative Access Vendor services pursuant to Section 364.337, Florida Statutes, in 2006 under certificate number 8655. The Alternative Access Vendor statute and associated regulatory rules were redacted in 2011 and 2012, respectively. However, Mobilitie, LLC, is still claiming this status and the PSC is still indicating the company is "regulated".

Mobilitie Management, LLC, received a Certificate of Authority to provide telecommunications service on August 8, 2016, via certificate number 8895. In the application for the Certificate of Authority, Mobilitie Management, LLC, acknowledged that it shares an officer with Mobilitie, LLC, and that Mobilitie, LLC, was granted a certificate to provide Alternative Vendor Access in 2006.

[21] "Communications services" is defined as means the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals, including video services, to a point, or between or among points, by or through any electronic, radio, satellite, cable, optical, microwave, or other medium or method now in existence or hereafter devised, regardless of the protocol used for such transmission or conveyance. The term includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether such service is referred to as voice-over-Internet-protocol services or is classified by the Federal Communications Commission as enhanced or value-added. The term does not include: (a) Information services; (b) Installation or maintenance of wiring or equipment on a customer's premises; (c) The sale or rental of tangible personal property; (d) The sale of advertising, including, but not limited to, directory advertising; (e) Bad check charges; (f) Late payment charges; (g) Billing and collection services; or (h) Internet access service, electronic mail service, electronic bulletin board service, or similar online computer services. Fla. Stat. § 202.11(1).

[22] Fla. Stat. § 337.401(3)(b).

[23] http://www.psc.state.fl.us/UtilityRegulation/CompaniesRegulatedByPSC.

CONCLUSION

The Federal "Shot Clock" Rule applies to local governments. This leads to the conclusion that a temporary moratorium is necessary so local governments may consider and develop regulations on the placement of wireless communication towers and facilities in public rights-of-way. The moratorium must only prohibit consideration of communications towers within the rights-of-way. If a moratorium is drafted so broadly as to prohibit all communications towers within the local government's jurisdiction, it may be in violation of federal and state law. The reasons provided for the moratorium should be reasonable and not be the product of open and vocal hostility.

Local governments are permitted to impose regulations regarding the use of the rights-of-way by providers of communications services if such regulations are "related to the placement or maintenance of facilities in such roads or rights-of-way, . . . reasonable and nondiscriminatory, and may include only those matters necessary to manage the roads or rights-of-way of the municipality or county."[24] Further, in their capacity as a property owner, local governments may be able to impose additional conditions on a case-by-case, site-by-site basis. Arguably, Section 337.401 only speaks to limiting local government's ***regulations***. The same preemption arguments used in Omnipoint Communications and Sprint Spectrum discussed above could be employed in arguing the extent of preemption of Section 337.401, Florida Statutes.

Attachments:

1. 47 U.S.C. § 332(c)(7)(B)
2. Federal "Shot Clock Ruling"
3. Omnipoint Communications, Inc. v. City of Huntington Beach
4. Sprint Spectrum L.P. v. Mills
5. 47 U.S.C. § 253
6. BellSouth Telecommunications, Inc. v. Town of Palm Beach
7. 47 U.S.C. § 1445(a)
8. 47 C.F.R. § 1.40001
9. Fla. Stat. § 337.401
10. Mobilitie, LLC Documents
11. Mobilitie Management, LLC Documents

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[24] Fla. Stat. § 337.401(3)(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.

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Heading Paragraph #

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]

[1] 47 U.S.C. § 332(c)(7)(B)(ii).

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

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

[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 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.

[7] 47 U.S.C. § 332(c)(7)(B)(ii).

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 personal 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 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 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-

[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).

[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).

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 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 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

[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.

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

[24] *Id.* at 24.

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

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

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

[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.

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

[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 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.

[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 2-3; Coalition for Local Zoning Authority Comments at 10-11; NATOA et al. Reply Comments at 7-9.

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) 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 particularly 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

[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 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 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.

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

[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).

[54] Petition at 20-24.

[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) (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.

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 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 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

[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).

[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.

[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).

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 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 interpreting 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 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

[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.

[73] *Id.* at 774.

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

[75] 47 U.S.C. § 332(c)(7)(B)(iii).

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 otherwise 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 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 authority 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

[76] 47 U.S.C. § 332(c)(7)(B)(v).

[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).

[81] *Id.*

[82] Petition at 20-24.

[83] *Id.* at 20.

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

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

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

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 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 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 impeding the deployment of advanced and

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[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.

[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.

[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.

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]

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 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] Verizon Wireless notes that in

[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*.

[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.

[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

(continued....)

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 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 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]

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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-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 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 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
(continued....)

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 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 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 delay the siting of personal wireless service

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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.

[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).

[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.
(continued....)

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 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 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

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

[121] NENA Comments at 1-2.

[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.

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.

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 injunctions 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] 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]

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[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).

[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.

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

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 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 timeframes 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 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

[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 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).

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

[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.

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, 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 LaGrande, 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, generally 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]

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[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 (*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.

[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.

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 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 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-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

[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 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.

[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.

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] 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 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

[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, 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.

[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).

statutes or ordinances. Thus, where the review period 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 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

[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).

[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.

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

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[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 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).

[162] Petition at 30-35.

[163] *Id*. at 30.

[164] *Id*. at 31.

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

[166] *Id*. at 32.

[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.

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 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 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 zoning authority, that a State or local government regulation of personal wireless facilities "shall not

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[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.

[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 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").

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 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 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

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[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.

[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.*

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

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

[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).

[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.

[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).

[190] *See* 47 C.F.R. § 17.7.

[191] *See* 47 C.F.R. § 17.21.

[192] *See* 47 C.F.R. § 17.23.

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" 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.

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

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

[194] 47 U.S.C. § 332(c)(7)(A).

[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)).

[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.

the exclusive authority in the Act on matters involving 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 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 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

[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 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.

[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).

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 governments 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 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 personal 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

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[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).

[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).

[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).

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 before 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 authorities 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 governments – 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 facilities. 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.

738 F.3d 192
United States Court of Appeals,
Ninth Circuit.

OMNIPOINT COMMUNICATIONS, INC., a Delaware corporation, DBA T–Mobile, Plaintiff–Appellee/ Cross–Appellant,
v.
CITY OF HUNTINGTON BEACH a public entity organized and existing under the laws of the State of California, City Council of the City of Huntington Beach, Defendants–Appellants/ Cross–Appellees.

Nos. 10–56877, 10–56944.
|
Argued Nov. 6, 2012.
|
Resubmitted Dec. 11, 2013.

Synopsis
Background: Cellular telephone service provider brought action seeking to enjoin city from requiring voter approval prior to construction of mobile telephone antennae. The United States District Court for the Central District of California, R. Gary Klausner, J., ruled that the Telecommunications Act preempted the voter approval requirement but denied the provider's request for permanent injunctive relief. Both parties appealed.

Holdings: The Court of Appeals, Ikuta, Circuit Judge, held that:

[1] provision of Telecommunications Act preserving local zoning authority functions to preserve local land use authorities' legislative and adjudicative authority subject to certain substantive and procedural limitations, and

[2] initiative measure limiting city's ability to lease or sell city-owned property without voter approval, by requiring provider to obtain voter approval before constructing antennae on city-owned park property, was not preempted.

Reversed and remanded.

Attorneys and Law Firms

***193** Jennifer McGrath, City Attorney, and Scott F. Field (argued), Assistant City Attorney, Huntington Beach, CA, for Defendants–Appellants/Cross–Appellees.

Martin L. Fineman (argued), Davis Wright Tremaine LLP, San Francisco, CA; John J. Flynn III and Benjamin Z. Rubin, Nossaman LLP, Irvine, CA, for Plaintiff–Appellee/Cross–Appellant.

Before: SUSAN P. GRABER, SANDRA S. IKUTA, and ANDREW D. HURWITZ, Circuit Judges.

OPINION

IKUTA, Circuit Judge:

The City of Huntington Beach appeals the district court's determination that the Telecommunications Act of 1996, Pub.L. No. 104–104, 110 Stat. 56 (codified as amended at U.S.C. Titles 15, 18, and 47) (the TCA), preempted its decision to require Omnipoint Communications, Inc. (doing business as "T–Mobile"), to obtain voter approval before constructing mobile telephone antennae on city-owned park property. T–Mobile cross-appeals the district court's denial of permanent injunctive relief. We conclude that the City's decision was not preempted and consequently reverse the district court.

I

[1] **[2]** We first consider the preemptive scope of the TCA. Because congressional intent "is the ultimate touchstone of preemption analysis," when "Congress adopts a statute that provides a reliable indication of Congressional intent regarding preemption, the scope of federal preemption is determined by the statute." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1040 (9th Cir.2007) (internal quotation marks omitted). Although congressional intent "primarily is discerned from the language of the preemption statute and the statutory framework surrounding it," also relevant are "the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect ... the law" and parties whose

actions are affected by the statute. ***194** *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 486, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (internal quotation marks and citations omitted); *see also Cipollone v. Liggett Grp., Inc.,* 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (explaining that Congress's intent to preempt "may be explicitly stated in the statute's language or implicitly contained in its structure and purpose" (internal quotation marks omitted)). Therefore, we begin by assessing the text of the relevant provisions of the TCA and their historical and statutory context.

[3] In 1996, Congress passed the TCA to encourage the development of telecommunications technologies, including wireless telephone services. *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 115, 125 S.Ct. 1453, 161 L.Ed.2d 316 (2005). Among other means to this end, Congress enacted 47 U.S.C. § 332(c)(7), entitled "[p]reservation of local zoning authority," which "was intended to minimize federal interference with State and local land use decisions," *Kay v. City of Rancho Palos Verdes,* 504 F.3d 803, 813 (9th Cir.2007), while still reducing "the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers," *Abrams,* 544 U.S. at 115, 125 S.Ct. 1453.

As suggested by the title of § 332(c)(7), an understanding of the mechanics of local governments' zoning and land use decision making is necessary to discern the section's preemptive scope. *See Kay,* 504 F.3d at 813. In general, local governmental authorities, such as cities and counties, establish local zoning boards, planning commissions, or analogous entities to promulgate and enforce zoning and other land use restrictions within their jurisdiction. Patrick J. Rohan, *Zoning and Land Use Controls* § 1.02[1]-[2] (2012); Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Development Regulation Law* § 3.1 (3d ed.2013); *see also Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 176, 180–81, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Local land use decisions fall into two general categories. *See Dolan v. City of Tigard,* 512 U.S. 374, 385, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994) (contrasting "[t]he sort of land use regulations" that "involved essentially legislative determinations classifying entire areas of the city," with a city's "adjudicative decision to condition petitioner's application for a building permit on an individual parcel"). First, local land use authorities may recommend or enact plans and zoning maps that affect the classification and use of property generally. Juergensmeyer & Roberts, *supra,* at § 2:7. This is primarily a legislative function. *See* Rohan, *supra,* at § 1.03[2][a]; Cal. Gov't Code § 65301.5 (classifying the adoption of a general plan as a legislative act). Second, local land use authorities may exercise an adjudicative function that involves applying land use rules to individual property owners, including the consideration of requests for waivers and variances. Juergensmeyer & Roberts, *supra,* at §§ 5:1, 5:3.

In addressing land use regulations and decisions related to the installation of wireless communication facilities, the TCA closely tracks the typical division of land use decision making. *See Kay,* 504 F.3d at 814 (noting that the text used in § 332(c)(7) "closely mirrors" state laws relating to zoning and permitting agency decisions). Congress began by enunciating a general principle of preservation of local authority:

> Except as provided in this paragraph [§ 332(c)(7)] nothing in this chapter[1] ***195** 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.

47 U.S.C. § 332(c)(7)(A).

This preservation principle is subject to the limitations set forth in the subsections of § 332(c)(7)(B). Two of the four subsections, § 332(c)(7)(B)(i) and (iv), relate to the promulgation of generally applicable legislative regulations. Thus, § 332(c)(7)(B)(i) provides that the "regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof shall not unreasonably discriminate among providers of functionally equivalent services" and "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." *Id.* § 332(c)(7)(B)(i)(I)-(II). Section 332(c)(7)(B)(iv) 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" where the facilities otherwise comply with federal requirements. *Id.* § 332(c)(7)(B)(iv).

The other two subsections, § 332(c)(7)(B)(ii) and (iii), refer to the procedures used by local land use authorities in making adjudicative decisions. *See Cellular Tel. Co. v. Town of Oyster Bay,* 166 F.3d 490, 494 (2d Cir.1999) (noting that the TCA "clearly establishes procedural requirements that local boards must comply with in evaluating cell site applications"). These subsections provide:

> (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.

Id. § 332(c)(7)(B)(ii)-(iii). Under these subsections, local zoning authorities must adopt administrative procedures requiring timely, written decisions when adjudicating an application for approval of a development project involving "personal wireless service facilities." *Id.* § 332(c)(7)(B)(ii); *see Kay,* 504 F.3d at 814–15.

[4] **[5]** We conclude that § 332(c)(7)(A) functions to preserve local land use authorities' legislative and adjudicative authority subject to certain substantive and procedural limitations. This conclusion clarifies the scope of § 332(c)(7)(A)'s preemptive effect. Section 332(c)(7) does not have a typical preemption clause that expressly preempts state law, followed by a savings provision excepting certain types of state enactments from preemption. *Cf.* 29 U.S.C. § 1144(a), (b)(2)(A) (stating that the provisions of ERISA "shall supersede any and all State laws" as specified, except as provided in the savings clause). Rather, § 332(c)(7) takes the opposite approach: it begins with a savings clause, and then makes the savings clause subject to exceptions. Thus § 332(c)(7) expressly preserves local land use decisions, such as decisions regarding "placement, construction, and modification" of wireless facilities, ***196** and then makes this preservation principle subject to a proviso: "[*e*]*xcept* as provided" in the rest of § 332(c)(7). *Id.* § 332(c)(7)(A) (emphasis added). Although this approach reverses the order of a typical preemption clause, it accomplishes the same goal: by logical inference, Congress intended the proviso section to preempt local land use authority that does not comply with the requirements in § 332(c)(7)(B), while preserving local zoning authority that complies with such requirements. *See MetroPCS v. City of S.F.,* 400 F.3d 715, 735–36 (9th Cir.2005) (holding that the TCA preempts only those local zoning decisions that conflict with the TCA's "antidiscrimination and anti-prohibition provisions" and not decisions that are harmless to the FCC's regulatory scheme). Accordingly, we conclude that § 332(c)(7) has the following preemptive scope: (1) it preempts local land use authorities' regulations if they violate the requirements of § 332(c)(7)(B)(i) and (iv); and (2) it preempts local land use authorities' adjudicative decisions if the procedures for making such decisions do not meet the minimum requirements of § 332(c)(7)(B)(ii) and (iii).

II

We next consider the facts of this case, including the pertinent legal framework for the City's decisions.

A

This case implicates two different aspects of municipal authority: the City's authority to enter into licenses of city-owned property, and the City's responsibility for making and implementing planning and zoning decisions. First, as a charter city under California law, the City has plenary authority to control municipal property. The California constitution reserves to charter cities the authority to "make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters." Cal. Const. art. 11, § 5(a); *see also Simons v. City of L.A.,* 63 Cal.App.3d 455, 467–68, 133 Cal.Rptr. 721 (1976). In 1990, an initiative known as Measure C amended the city charter to impose certain limits on the City's ability to authorize use of city-owned property. This provision states:

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> No ... structure costing more than $100,000.00 may be built on or in any park or beach or portion thereof ... unless authorized by the affirmative votes of at least a majority of the total membership of the City Council and by the affirmative vote of at least a majority of the electors voting on such proposition at a general or special election at which such proposition is submitted. [2]

According to the voter information pamphlet, which is "a proper extrinsic aid" to interpreting an initiative, *People v. Lester,* 220 Cal.App.4th 291, 301, 162 Cal.Rptr.3d 907 (2013), the purpose of Measure C was to allow "the citizens of Huntington Beach to have a direct vote in any future commercial development or sale of the city's parks and beaches," so as to put control of public park lands into the hands of the voters "and out of the reach of developers and special interest groups." By giving the voters authority over construction on public lands, Measure C operates as a limitation on the City's otherwise plenary authority over these lands.

Second, the City has obligations under state and local law for making and implementing ***197** land use decisions. Although charter cities are also exempt from many of the state local planning and zoning regulations provisions, *see* Cal. Gov't Code §§ 65700, 65803, their legislative bodies "adopt general plans which contain the mandatory elements" set by state law. *Id.* § 65300; *see also id.* §§ 65302, 65700(b). The City has established such a general plan, *see* Huntington Beach, Cal., Code § 201.06, and has also promulgated regulations to implement its own zoning and subdivision code, *id.* § 201.02. The City delegated the preparation and recommendation of legislative land use determinations, such as amendments to the general plan and zoning map, to a planning commission, *id.* §§ 2.34.020, 202.10(D); *see also id.* §§ 247.08, 247.10, subject to the City Council's final authority to approve or deny legislative determinations, *id.* § 202.10(A). The City delegated its adjudicative land use decision-making authority to administrative bodies, primarily the planning commission and a zoning administrator. *See id.* § 202.10(D)-(E). These administrative bodies adjudicate land use applications subject to the City Council's authority to act as a board of appeals. *Id.* § 202.10(A).

The City's decision-making process is subject to typical administrative procedural requirements. As relevant here, the planning commission, zoning administrator, or City Council must render its decision on an application or appeal "in the form of a written statement, minute order or resolution," which "shall be accompanied by reasons sufficient to inform as to the basis for the decision." *Id.* § 248.10(A). Further, "[t]he reviewing body shall formulate its written findings within five calendar days after the decision" and must provide notice of its decision to the applicant and any other party that requests such notice. *Id.* § 248.10(B), (C).

At the time of T–Mobile's application in 2007, the City Council had in place an ordinance establishing a procedure for the adjudication of applications to construct and modify wireless communication facilities within city limits. *See id.* § 230.96(C). [3] Under the regulations, a person wishing to install and operate a wireless communication facility, such as an antenna, must submit a permit application to the Planning and Building Department. *Id.* § 230.96(E)(1). [4] After the department confirms that the application is complete, the applicant must obtain a wireless permit from the director of the department or a conditional use permit from the zoning administrator. *Id.* § 230.96(E)(2)-(3). The applicant can appeal a denial of the permit to the planning commission. *Id.* § 230.96(E)(2)(d), (3)(c). [5] The City Council is the final arbiter of any appeal of the planning commission's adjudication of a permit application. *Id.* § 202.10(A).

B

In July 2007, T–Mobile submitted two applications to the City's Planning and Building Department for wireless permits ***198** to construct wireless antennae in Harbour View Park and Bolsa View Park. The applications identified the City as the property owner of the parcel where the antennae would be located. Under the director's authority, *see* Huntington Beach, Cal., Code § 230.96(E)(2), the Planning and Building Department approved T–Mobile's requests for the two wireless permits shortly thereafter, in August and September 2007.

After obtaining these permits, T–Mobile commenced lease negotiations with the City, and ultimately entered into Site License Agreements to lease space in each park for the antennae. The agreements were executed by the City's mayor in December 2008 and approved unanimously by the City Council in January 2009. Under the Site License Agreements, the City, as owner of the property, authorized T–Mobile to install and maintain its wireless facility on the City's premises, for which T–Mobile would pay a licensing fee.

After obtaining the Site License Agreements, T–Mobile applied to the City's Building and Safety Department for building permits to begin construction of the facilities. In its applications, T–Mobile reported that the "Total Construction Valuation" of the Bolsa View and Harbour View antennae were $80,000 and $60,000, respectively. After the department issued these building permits in April 2009, T–Mobile began to construct the Harbour View site antenna.

After construction commenced at Harbour View, local residents who opposed the construction commenced aggressive protests that blocked activities at the site. T–Mobile agreed to stop construction temporarily pending the City's efforts to resolve this unexpected public opposition. In subsequent communications between T–Mobile and City representatives, the City learned that the "total construction value" of the projects that T–Mobile had reported on the applications for building permits did not reflect the total construction *costs,* which would substantially exceed $100,000 for each antenna.

In April 2009, the City held a special meeting of the City Council, at which residents spoke against the construction of an antenna at the Harbour View location. At a subsequent closed session, the City Council determined that, although T–Mobile had valid land use and building permits and valid Site License Agreements, T–Mobile still was required to obtain voter approval under Measure C before it could proceed with construction. Accordingly, on July 23, 2009, the City Attorney sent T–Mobile a letter stating that the City "continues to recognize the validity of the Site Licenses and the Wireless Permits," but because the construction costs for each wireless facility exceeded $100,000, the City was obliged to enforce Measure C. Therefore, the City Attorney directed the Building and Safety Department to suspend the building permits until T–Mobile obtained voter approval.

Instead of seeking voter approval, T–Mobile filed a complaint in federal district court in May 2009 and moved for preliminary injunctive relief to prevent the City from requiring compliance with Measure C. T–Mobile argued that the TCA barred the City from applying Measure C to T–Mobile's proposed projects. The City filed a motion to dismiss on the ground that it had acted as a participant in the market, rather than as a regulator, and therefore the "market participant doctrine" shielded its decisions regarding the use of its own property from federal preemption.

In October 2009, the district court denied the pretrial motions submitted by T–Mobile and the City. First, it denied T–Mobile's motion for preliminary injunctive relief because T–Mobile had not sufficiently ***199** demonstrated a likelihood of irreparable harm. The court also rejected the City's argument that it could avoid the TCA's preemptive effect because it had acted as a market participant and not as a regulator, holding that Measure C was a regulation in both form and substance.

T–Mobile and the City then filed cross-motions for partial summary judgment. In July 2010, the district court denied the City's motion and granted T–Mobile's motion in part. The court held that the TCA required the City to process T–Mobile's applications for building permits within a reasonable period of time, and to explain the reason for denial of the applications in writing, supported by substantial evidence. 47 U.S.C. § 332(c)(7)(B)(ii)-(iii). Because the voter approval process required by Measure C did not meet these procedural requirements, the court concluded that the City could not use Measure C as a reason to deny T–Mobile's applications or to delay making a decision. The court gave the City sixty days either to grant T–Mobile's permit applications, or to deny the applications in a manner that complied with the procedural requirements of the TCA.

On remand from the district court, the City Council followed the procedures set forth in the TCA to revoke the permits for both antennae in August 2010. [6] T–Mobile challenged this permit revocation in a separate action, *Omnipoint Commc'ns d/b/a T–Mobile v. Huntington Beach,* C.D.Cal. Case No. CV 10–1471–RGK ("*T–Mobile II* "), which resulted in a settlement in March 2012 solely as to T–Mobile's application to construct an antenna at the Harbour View site. The parties agreed that this action

would proceed with respect to T–Mobile's application to construct an antenna at the Bolsa View site.

On appeal, the City claims that the district court erred in prohibiting it from delaying its decision on T–Mobile's permit applications until T–Mobile had obtained the approval of the voters pursuant to Measure C. As it argued before the district court, the City asserts that the TCA did not preempt its decision to require compliance with Measure C, because the market participant doctrine shields the City's decisions about use of its own property from federal preemption. In the alternative, the City contends that its application of Measure C is not preempted because it is consistent with the TCA's procedural requirements. On cross-appeal, T–Mobile claims that the district court should have issued a permanent injunction ordering the City to let T–Mobile resume construction, and should not have remanded the case to the City for reconsideration of T–Mobile's permits. We have jurisdiction under 28 U.S.C. § 1291.

III

Given our conclusion that the TCA preempts a local land use authority's legislative regulations if they fail to incorporate the requirements of § 332(c)(7)(B)(i) and (iv), and preempts its adjudicative decisions if the procedures for making such decisions do not meet the minimum requirements of § 332(c)(7)(B)(ii) and (iii), we begin with the threshold question whether Measure C is such a regulation or decision.

[6] On its face, Measure C is not the sort of local land use regulation or decision ***200** that is subject to the limitations of § 332(c)(7), but rather is a voter-enacted rule that the City may not lease or sell city-owned property for certain types of construction unless authorized by a majority of the electors. *Cf. Simons,* 63 Cal.App.3d at 468, 133 Cal.Rptr. 721; Cal. Const. art. 11, § 5(a). Unlike a legislative land use regulation, Measure C does not classify public and private property or impose design and use restrictions on the different classifications. Indeed, Measure C does not prevent the City from agreeing to any sort of construction or use of public land, provided that the City obtains public approval. Nor was Measure C promulgated by the local governmental authorities (i.e., the City Council or Planning Commission) that are authorized by law to engage in such legislative land use decision making. Measure C simply provides a mechanism for the City, through the voters, to decide whether to allow construction on its own land. It does not regulate or impose generally applicable rules on "the placement, construction, and modification of personal wireless service facilities," § 332(c)(7)(B)(i) and (iv), and so the substantive limitations imposed by these subsections are inapplicable.

Second, Measure C is not the sort of local land use decision that fulfills an adjudicative function and that therefore must meet the procedural constraints of § 332(c)(7)(B)(ii) and (iii). Rather, Measure C gives the voters an unconstrained right to approve or disapprove a proposed construction project on city-owned park lands, and thus serves as a constraint on the City's plenary power to control the use of public lands. The voters need not consider whether the project meets any particular criteria, and their determination is not subject to review or appeal, unlike adjudicative decisions by the City's Planning Commission and zoning administrator. Because Measure C merely restrains the City's actions as a property owner and does not affect the City's administrative procedures for approving or denying a request "to place, construct, or modify personal wireless service facilities," § 332(c)(7)(B)(ii) and (iii), the minimum procedural requirements established by these sections are likewise inapplicable.

That the requirements imposed by Measure C are not part of a local government's zoning and land use decision-making process is clear from the facts of this case. The City's adjudicative decision making in response to T–Mobile's applications was fully compliant with the TCA: both the City's Planning and Building Department and its Building and Safety Department approved T–Mobile's applications in writing within a reasonable period of time. The City's July 2009 letter to T–Mobile affirmed the validity of these administrative decisions. But a building permit does not give a builder the authority to begin construction on property belonging to a third party; rather, the builder must secure the third party's permission. Here, the City's authority to give such permission via the Site License Agreement was limited by Measure C. The Site License Agreement itself required T–Mobile's compliance with all "ordinances and regulations of general application now in effect or subsequently enacted" (which would include Measure C) as a condition of the license. Thus, once it became clear that T–Mobile's proposed project triggered Measure C, T–Mobile lacked

the necessary land owner permission until Measure C's requirements were discharged. In other words, Measure C had an effect on landowner approval, not on the City's adjudicative process.

In sum, the voter-approval requirement imposed by Measure C is outside the City's framework for land use decision making because it does not implicate the ***201** regulatory and administrative structure established by the City's general plans and zoning and subdivision code. By its terms, the TCA applies only to local zoning and land use decisions and does not address a municipality's property rights as a landowner. Because the requirements imposed by Measure C fall outside the TCA's preemptive scope, the city charter provision is not preempted by § 332(c)(7)(B).

The Second Circuit reached a similar conclusion in *Sprint Spectrum L.P. v. Mills,* 283 F.3d 404, 407 (2d Cir.2002). In that case, a school district entered into a lease agreement permitting Sprint to build an antenna on the roof of a public high school, subject to specified limitations on levels of radio emissions. *Id.* at 407–08. After Sprint informed the school district that it would install equipment that exceeded those limits, the district barred Sprint from commencing construction. *Id.* at 410. Sprint sued, arguing that the school district's decision was preempted by § 332(c)(7)(B)(iv), which prohibits local authorities from "regulat[ing] the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions." 47 U.S.C. § 332(c)(7)(B)(iv).

The Second Circuit disagreed, holding that "the language and structure of the TCA implicitly recognize that some governmental decisions are not regulatory," and thus are not preempted by the TCA. *Sprint Spectrum,* 283 F.3d at 420. Because § 332(c)(7)(B)(iv) does not preempt governmental actions that involve the management of its own property, the court concluded that the school district's decisions relating to leasing its roof was not preempted. *Id.* at 417–21.

As in *Sprint Spectrum,* the City's exercise of its property rights in accordance with Measure C here was non-regulatory and non-adjudicative behavior akin to an action by a private land owner. *See id.* Because the City's determination that it could not license T–Mobile's use of the city-owned Bolsa View Park without voter approval is not the type of zoning and land use decision covered by § 332(c)(7), we conclude that it was not preempted by that section.[7] We reverse and remand for proceedings consistent with this opinion.[8]

REVERSED AND REMANDED.

All Citations

738 F.3d 192, 13 Cal. Daily Op. Serv. 13,306, 2013 Daily Journal D.A.R. 16,058, 59 Communications Reg. (P&F) 759

Footnotes

1 Section 332(c)(7) is codified within chapter five of Title 47 of the United States Code, which is entitled: "Wire or Radio Communication." *See* 47 U.S.C. §§ 151 et seq.

2 Measure C is now codified in § 612(b) of the City's charter, although the cost of a structure that triggers the provision's applicability has increased to $161,000 and continues to be adjusted annually. *See* Huntington Beach, Cal., Charter § 612(b).

3 At the time of T–Mobile's application, an earlier version of the ordinance, Huntington Beach, Cal., Ordinance 3568, § 10 (Aug. 5, 2002), was in effect. Because the subsequent amendments to this ordinance do not change our analysis, we cite the current version of the ordinance to avoid confusion.

4 The requirement that an application first be submitted to the Planning and Building Department did not appear in the original ordinance. *See id.*

5 In the earlier version of the ordinance, § 202.10(D) of the zoning and subdivision code established the planning commission's authority to hear appeals from the decisions of the director and zoning administrator. *See* Huntington Beach, Cal., Code § 202.10(D).

6 In the November 2010 general election, the voters of Huntington Beach disapproved construction of T–Mobile's proposed antennae. On November 12, 2010, the district court entered a final judgment granting T–Mobile's request for declaratory

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relief and denying its request for injunctive relief pursuant to the July 9, 2010 order. The court also dismissed T–Mobile's remaining claims as moot.

7 Because we decide on this basis, we need not address the City's argument that Measure C is not subject to preemption due to a freestanding "market participant exception." *See Am. Trucking Ass'ns v. City of L.A.,* —— U.S. ——, 133 S.Ct. 2096, 2102 n. 4, 2103–05, 186 L.Ed.2d 177 (2013) (holding that the Court did not need to address whether "a freestanding 'market-participant exception' " limited the express terms of a preemption clause, because the appellants had abandoned that argument, and concluding that the regulation at issue was preempted by the plain terms of the federal preemption clause).

8 Our disposition of the City's appeal renders T–Mobile's cross-appeal seeking a permanent injunction moot.

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283 F.3d 404
United States Court of Appeals,
Second Circuit.

SPRINT SPECTRUM L.P. d/b/
a Sprint PCS, Plaintiff–Appellee,
v.
Richard P. MILLS, individually and as Commissioner of the New York State Department of Education, Charles A. Szuberla, individually and as Coordinator, Facilities Management and Information Services of the New York State Department of Education, and Carl T. Thurnau, individually and as Acting Supervisor of the New York State Department of Education, Office of Facilities Planning, Defendants,
Board of Education of the Ossining Union Free School District, Appellant.

Docket No. 01–7116.
|
Argued May 3, 2001.
|
Decided March 5, 2002.

Provider of wireless telecommunication services brought a motion pursuant to the All Writs Act, seeking to compel a school district to permit the placement of a cellular communications tower on a high school roof pursuant to an existing, but disputed, lease agreement. The United States District Court for the Southern District of New York, Barrington D. Parker, Jr., J., 124 F.Supp.2d 211, issued an injunction, and the school district appealed. The Court of Appeals, Kearse, Circuit Judge, held that: (1) the district court did not err in exercising jurisdiction over the board of education under the All Writs Act; (2) school district's attempt to enforce the radio frequency (RF) emissions limitations in its lease was not preempted by the Telecommunications Act; but (3) whether the lease limited RF emissions to the levels specified in a lease addendum, when the provider sought to install new equipment allegedly needed by reason of evolutions in technology, presented a question of fact, precluding summary judgment.

Affirmed in part, reversed in part, vacated in part, and remanded.

Attorneys and Law Firms

***406** David L. Snyder, Tarrytown, New York (Frederick W. Turner, Snyder & Snyder, Tarrytown, New York, on the brief), for Plaintiff–Appellee.

Lawrence W. Reich, Northport, New York (Gus Mountanos, Ingerman Smith, Northport, New York, on the brief), for Appellant.

Before: MESKILL, KEARSE, and McLAUGHLIN, Circuit Judges.

Opinion

KEARSE, Circuit Judge.

This litigation centers on the efforts of plaintiff Sprint Spectrum L.P. ("Sprint" or ***407** "SSLP") to install a telecommunications facility, to wit, a cellular communications tower to facilitate wireless telephone communications, atop the Ossining, New York high school (the "High School"). The Board of Education of the Ossining Union Free School District ("School District" or "District"), which in 1998 entered into a lease agreement with Sprint permitting the installation of such an antenna on the High School roof, appeals from an injunction entered in the United States District Court for the Southern District of New York, Barrington D. Parker, Jr., then-*District Judge,* requiring the District to allow Sprint to install the antenna. Although this action began as a suit by Sprint solely against officials of the New York State Department of Education ("DOE" or the "Department") to compel the issuance of New York State ("State") permits needed for construction of the antenna in accordance with the lease agreement, *see Sprint Spectrum L.P. v. Mills,* 65 F.Supp.2d 148 (1999) ("*Sprint I* ") (granting injunction against State officials), the present injunction, entered by the district court under the All Writs Act, 28 U.S.C. § 1651 (1994), prohibits the School District from interfering with Sprint's rights under the lease and under the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* ("TCA" "Telecommunications Act" or "Act"), *see Sprint Spectrum L.P. v. Mills,* 124 F.Supp.2d 211 (2000) ("*Sprint II* "). On appeal, the School District contends principally that the district court erred (a) in exercising jurisdiction over it, (b) in applying the TCA, and (c) in interpreting the lease agreement. For the reasons that follow, we conclude that the district

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court could properly assume jurisdiction over the School District in this matter under the All Writs Act; but we disagree with the court's interpretation of the Act, and we conclude that there are factual issues to be resolved with respect to the meaning of the lease agreement.

I. BACKGROUND

Many of the facts are not in dispute and were discussed in *Sprint I.* Sprint is a provider of cellular telephone service in the New York–New Jersey area. In 1995, Sprint was the highest bidder at an auction, conducted by the Federal Communications Commission ("FCC"), for a license to broadcast wireless telephone communications in an area defined by the FCC as the New York–New Jersey Major Trading Area ("MTA"), employing personal communication service technology ("PCS"). PCS uses digital, rather than analog, transmission to improve wireless communications by, *inter alia,* providing clearer connections and fewer dropped calls. *See Sprint I,* 65 F.Supp.2d at 150.

> As an FCC-licensee, Sprint is obligated to provide wireless communication service to at least 33% of the population located in an area defined by the FCC as the New York–New Jersey Major Trading Area ("MTA") within five years from the date the license was granted.... The license has a term of ten years. In order to meet its obligation under the FCC license, Sprint must create a network of individual "cell sites," which are facilities consisting of a radio antenna and attached equipment which send and receive radio signals to and from customers' portable wireless communication handsets and mobile telephones. The antenna feeds low power radio signals received from mobile phones through the attached electronic equipment and into ordinary phone lines so calls can be routed anywhere in the world.

Id.

A. *The Lease Between Sprint and the School District*

The MTA includes Ossining, New York. In September 1998, Sprint and the School ***408** District entered into a five-year lease agreement (the "Lease"), automatically renewable for four additional five-year terms at Sprint's option, permitting Sprint to locate a cell site on the roof of the High School. In exchange for this right to erect and maintain the antenna on the High School, Sprint was to pay the School District an annual rent of $30,000, escalating by at least three percent per year, and to provide, free of charge, three Sprint PCS wireless telephones to the School District. Sprint agreed to disguise the antenna as a flagpole, similar to the one already on the High School roof, in order that the Sprint facility be aesthetically and structurally unobtrusive. The Lease also allowed Sprint to make such periodic technological improvements at the cell site as it deemed necessary:

> 7. Improvements. SSLP may, at its expense, make such improvements on the Site as it deems necessary from time to time for the operation of the PCS system. Owner agrees to cooperate with SSLP with respect to obtaining any required zoning approvals for the Site and such improvements.

(Lease ¶ 7.)

In October 1998, Sprint and the School District agreed to incorporate into the Lease a one-page addendum (the "Addendum" or "Lease Addendum"), dealing with density of radio emissions from the proposed antenna in terms of the number of microwaves ("μw") per square centimeter. The Addendum stated that

> it is hereby agreed that during the entire term of the agreement between Ossining Union Free School District and Sprint PCS, the following maximum levels for the proposed PCS antenna shall not exceed:
>
> 1. 6 feet above grade power density ($\mu w/cm^2$)<0.07
>
> 2. 16 above grade power density ($\mu w/cm^2$)<0.09
>
> The foregoing operating specification applies only to the Sprint Spectrum, L.P. antenna configuration, as originally installed. The Board of Education shall have

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> the right to test said power density at its discretion to determine the maximum power density as set forth above, using the FCC OET Bulletin 65, IEEE or NCRP approved methodology. In the event the power density should exceed the aforementioned calculations, Sprint will reimburse the district for said testing and in addition correct said power density to or below the maximums....

(*Id.*)

B. *The Injunction in Favor of Sprint Against the State* (Sprint I)

Under State regulations, because the cost of constructing the cell tower on the High School was to exceed $10,000, Sprint needed approval from DOE. The requisite application was filed in December 1998. In January 1999, DOE refused to grant the necessary permit, stating (a) that the State Constitution prohibits the School District from leasing public property to a private party if the lease primarily benefits the private party, and that the primary benefit of the Lease would accrue to the private benefit of Sprint; (b) that it was not certain that "the property ... is not currently needed for school district purposes"; and (c) that the School District lacked the authority to contract with Sprint. (Letter dated January 12, 1999, from DOE to attorney for Sprint.)

Unable to resolve its conflict with DOE, Sprint commenced the present action in February 1999, naming as defendants the pertinent DOE officials. The complaint requested principally a judgment (a) declaring that DOE's refusal to grant approval for construction of the antenna violated the Telecommunications Act, and (b) ***409** ordering the defendants to issue the necessary approvals.

In *Sprint I,* issued on August 27, 1999, the district court ruled in favor of Sprint. First, it found that the Lease did not violate the State Constitution, noting that the State has accorded cellular telephone companies the status of public utilities, and that "Congress has expressly emphasized that providing wireless telephone services furthers an important public purpose," *Sprint I,* 65 F.Supp.2d at 155.

> The statute creating the Federal Communications Commission directs the commission to issue wireless communications licenses,
>
> to make available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication....

Id. (quoting 47 U.S.C. § 151). Thus, the court rejected DOE's contention that the Sprint–School District Lease was solely for the private benefit of Sprint, finding that "the lease is in furtherance of a public purpose." 65 F.Supp.2d at 155–56.

Second, the court rejected DOE's view that the School District lacked authority to enter into the Lease agreement:

> Because [a] the portion of the roof that would house Sprint's cell site is not currently needed for school district purposes, [b] Sprint's cell site would serve a public purpose, and [c] the District determined that the leasing of such property is in the best interest of the District, defendants' argument that the school district lacked authority to enter into the lease has no merit.

Sprint I, 65 F.Supp.2d at 156–57.

Finally, the court found that DOE's invocation of its regulations to withhold approval violated the TCA in various ways. The Act prohibits state laws that unreasonably discriminate against particular telecommunications providers or constitute barriers to entry. *See* 47 U.S.C. § 332(c)(7)(B)(i) ("[t]he regulation of the placement[or] construction ... of personal wireless service facilities by any State or local government or instrumentality thereof ... shall not unreasonably discriminate among providers of functionally equivalent services"). The district court found that DOE's denial "unreasonably discriminated against Sprint" by

> making it much more difficult for Sprint to compete with other wireless services. First, the Department's action serves to frustrate the primary purpose of the Act to increase competition in the telecommunications industry.... The Department's rejection of Sprint's

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> application either denies Sprint the opportunity to compete in the licensed area, or, at the very least, significantly increases Sprint's costs by forcing it to find an alternative site....
>
> Second, because the Department's denial was not supported by substantial evidence, ... its action amounts to unreasonable discrimination.

Sprint I, 65 F.Supp.2d at 157 (internal quotation marks omitted); *see* 47 U.S.C. § 332(c)(7)(B)(iii) (governmental entity's denial of a request to place, construct, or modify personal wireless service facilities must be "in writing and supported by substantial evidence contained in a written record").

Further, the court found that DOE's withholding of approval on the ground that allowing a telecommunications company to ***410** install a cell site on school property invariably constitutes an impermissible use of public property solely for the benefit of a private party violated a TCA provision that 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." 47 U.S.C. § 332(c)(7)(B)(i)(II). The court stated that

> defendant's position, if accepted, would bar telecommunications companies from installing facilities on any public school property and, contrary to explicit congressional policy, would frustrate rapid deployment of the new digital PCS technology.

Sprint I, 65 F.Supp.2d at 158.

Lastly, the court noted that the Act, in a section entitled "Removal of barriers to entry," provides that

> [n]o 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.

47 U.S.C. § 253(a). Although subsection (b) of that section "permits states to adopt 'competitively neutral' regulations 'necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers,' " *Sprint I,* 65 F.Supp.2d at 159, the district court found that

> [t]he Department ha[d] not presented any evidence showing that its decision protects the public safety and welfare, particularly in light of the fact that it has not shown that Sprint failed to comply with Office of Facilities Planning Regulations and construction requirements.

Id.

Accordingly, the district court "order[ed] the New York State Department of Education to issue the required permits allowing Sprint to install at the Ossining High School a telecommunications facility in the form of a flagpole." *Id.* at 161. DOE initially appealed; but it issued the building permit on or about October 1, 1999, and it shortly withdrew its appeal.

C. *The Present Dispute as to Emissions Levels*

On March 28, 2000, Sprint informed the School District that changes in available equipment required it to modify its original installation plan. One of the changes would increase the levels of radio frequency emissions ("RF Emissions") generated by the facility, although the levels nonetheless would remain in compliance with federal safety standards.

On July 5, 2000, when a Sprint construction crew attempted to begin work on the antenna, the School District barred the crew from access to the High School. Citing its concerns for the health and safety of the school's students, the School District took the position that it would not permit Sprint to install the facility unless Sprint agreed to operate the facility at or below the RF Emissions levels set out in the Lease Addendum.

Sprint pointed out to the School District that the RF Emissions levels stated in the Addendum are 13,000 times below the maximum levels set by the applicable federal

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safety standards. It also stated that in the period after the Lease Addendum was executed, technological advances had made Sprint's originally planned equipment obsolete. With the new technology, Sprint could not operate at the low RF Emissions levels outlined in the Addendum. ***411** Although Sprint guaranteed the School District that the new antenna would operate at levels below the maxima set by the federal safety standards, the School District insisted that it would not allow construction unless Sprint operated at or below the levels set forth in the Addendum.

Unable to resolve this conflict with the School District, Sprint returned to the district court. It filed a petition under the All Writs Act, 28 U.S.C. § 1651, for an order that would compel the School District to allow Sprint to install the antenna on the High School, asserting that the District's actions "frustrate the August 27, 1999 Order of this Court which permitted 'Sprint to install at the Ossining High School a telecommunications facility in the form of a flagpole.' " (Petition for Expedited Relief Under the *All Writs Act,* dated August 1, 2000, at 9.)

D. *The Decision in* Sprint II

In *Sprint II,* rendered in December 2000, the district court found that it had jurisdiction over the School District under the All Writs Act, and it granted Sprint's request for an injunction requiring the District to allow installation of the antenna. The court found that it was appropriate to exercise jurisdiction over the School District under the All Writs Act in light of Congress's intent "that the new wireless technology be disseminated nationally as rapidly as possible, ... that lawsuits arising under the TCA be resolved expeditiously and, most importantly, that local efforts to frustrate the implementation of this national policy be curtailed." *Sprint II,* 124 F.Supp.2d at 216.

Recounting the facts involved in *Sprint I,* the court stated that the present dispute between Sprint and the School District was part of a larger dispute involving Sprint and various state and local governmental officials and that the School District had known about the litigation at all times. The court noted that more than two years had passed since Sprint and the School District agreed on the Lease, and that the purpose of the August 1999 order in *Sprint I* had been to facilitate construction of the cell tower notwithstanding DOE's earlier refusal to issue the necessary permit and notwithstanding the "skittishness of parents and local officials about ad [a]pting to new technology, typified by concerns—almost to the point of superstition—about RF Emission levels." *Sprint II,* 124 F.Supp.2d at 216. The court concluded that exercise of ancillary jurisdiction under the All Writs Act was necessary in order to prevent opponents of the new technology from engaging in waves of litigation resulting in interminable delays and the frustration of Congressional policies underpinning the TCA.

As to the merits of Sprint's petition, the court held that the School District's refusal to allow Sprint to install the antenna equipment breached the terms of the Lease because the Lease expressly allowed Sprint to update its equipment:

> The Lease committed Sprint to comply with all current FCC regulations pertaining to RF Emissions (paragraph 1b [*sic:* Lease Rider ¶ 16]). The October 21, 1998 Addendum committed Sprint to an RF level 13,000 [times] below federal standards, but only in regards to equipment "as originally installed." Sprint was also permitted under the Lease to make "such improvements on the site as it deems necessary from time to time for the operation of Sprint's system" (paragraph 7). These provisions, taken together, allow Sprint to install new equipment to recognize evolutions in technology so long as the new equipment complied with federal RF Emissions standards. Neither party disputes ***412** that the equipment Sprint proposes to install will comply with this standard.

Sprint II, 124 F.Supp.2d at 216–17.

The district court went on to hold that even if the Lease agreement required Sprint to operate its facility at RF Emissions levels 13,000 times below the federal maxima throughout the Lease term, such a requirement would be preempted by § 704 of the Telecommunications Act, which prohibits "state and local governments and municipalities from regulating the 'placement, construction or modification' of wireless services on the bas[i]s o[f] the health [e]ffects of RF Emissions where the facilities would operate within the levels determined by the FCC to be safe." *Sprint II,* 124 F.Supp.2d at 217 (quoting 47 U.S.C. 332(c)(7)(B)(iv)). The School District argued that this section was inapplicable because in agreeing to the Lease, it was acting as a private property owner, rather than as a municipality in a regulatory capacity. The district court rejected this contention. It noted that the School District

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is an instrumentality of the state, citing *City of New York v. State,* 86 N.Y.2d 286, 631 N.Y.S.2d 553, 655 N.E.2d 649 (1995), and that the TCA does not "contain language supporting or implying a distinction between a local instrumentality acting in a regulatory capacity and a local government acting as a property owner." *Sprint II,* 124 F.Supp.2d at 217. Thus, given that " 'regulate' means 'to fix the time, amount, degree or rate of (as by adjusting, rectifying),' " *id.* (quoting *Webster's Third New International Dictionary* 1913, def. 3 (1976)), the court found it "clear that the District is undertaking to regulate RF emissions." *Sprint II,* 124 F.Supp.2d at 217.

The court held that the TCA preempted state and local governments from regulating the construction of personal wireless services on the basis of health concerns where the RF Emissions were within the safety levels determined by the FCC. The district court cited two Second Circuit cases, *Cellular Phone Taskforce v. FCC,* 205 F.3d 82, 88 (2d Cir.2000), *cert. denied,* 531 U.S. 1070, 121 S.Ct. 758, 148 L.Ed.2d 661 (2001), and *Freeman v. Burlington Broadcasters,* 204 F.3d 311, 320 (2d Cir.), *cert. denied,* 531 U.S. 917, 121 S.Ct. 276, 148 L.Ed.2d 201 (2000), for that proposition:

> When the FCC established the Federal RF Safety Standard in 1996, it "announced, *inter alia,* a rule that prohibited state and local governments from regulating any personal wireless service facilities based upon perceived health risks posed by RF emissions as long as the facilities conformed to the FCC Guidelines regarding such emissions." *Cellular Phone Taskforce,* 205 F.3d at 88. When the Second Circuit examined the scope and pre-emptive effect of the Federal RF Safety Standard, it held:
>
> > the Act preempted state and local governments from regulating the placement, construction or modification of personal wireless service facilities on the basis of the health effects of RF radiation where the facilities would operate within the levels determined by the FCC to be safe. *See* 47 U.S.C. § 332(c)(7)(B)(iv). *Id.*
>
> More recently, the Court considered regulatory preemption under the TCA in *Freeman v. Burlington Broadcasters,* 204 F.3d 311, 320 (2d Cir.2000), and held that the Federal RF Safety Standards totally pre-empt conflicting attempts to regulate RF emissions[.]

Sprint II, 124 F.Supp.2d at 217–18. The district court concluded that, because Sprint's facility would comply with the FCC's safety standards, the TCA preempted the School District's attempt to impose on Sprint more stringent standards, even by contract. The district ***413** court stated that "[w]hen private contractual provisions intrude upon matters regulated by Congress, they are not enforceable. Regardless of intent or convenience, private parties may not agree to alter statutory duties imposed by Congress." *Id.* at 219.

Having reached these conclusions, the district court permanently enjoined the School District

> from seeking to require in any forum, except on direct appeal in this case, an order, finding, or judgment which would require [Sprint] to operate the facility which is the subject of the Petition, at any radio frequency emission level, except the level authorized by the federal Telecommunications Act of 1996,

Judgment and Order, filed January 9, 2001 ("2001 Injunction"), at 1–2, and to "take no action to impede, frustrate or interfere with the relief granted," *id.* at 2. The 2001 Injunction also ordered the School District to meet with Sprint "promptly ... to establish a timely schedule for the construction contemplated and approved by this Judgment and Order." *Id.*

The School District appealed. The 2001 Injunction has been stayed pending resolution of this appeal.

II. DISCUSSION

On appeal, the School District contends principally that the district court erred (a) in exercising jurisdiction over the School District under the All Writs Act, (b) in holding that the District's attempt to enforce the Lease violated the Telecommunications Act, and (c) interpreting the Lease. We reject the School District's first contention, but find merit in the second and third.

A. *Jurisdiction Under the All Writs Act*

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[1] The All Writs Act ("Writs Act") provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). This provision, while not conferring an independent basis of jurisdiction, "provides a tool courts need in cases over which jurisdiction is conferred by some other source," *United States v. Tablie,* 166 F.3d 505, 506–07 (2d Cir.1999), and in such cases the Writs Act "authorize[s] a federal court 'to issue such commands ... as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained,' " *Pennsylvania Bureau of Correction v. United States Marshals Service,* 474 U.S. 34, 40, 106 S.Ct. 355, 88 L.Ed.2d 189 (1985) (quoting *United States v. New York Telephone Co.,* 434 U.S. 159, 172, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977)). The Writs Act is designed to provide a "source of procedural instruments designed to achieve the rational ends of law," *id.* at 172, 98 S.Ct. 364 (internal quotation marks omitted), when necessary in the federal court's "sound judgment to achieve the ends of justice entrusted to it," *id.* at 173, 98 S.Ct. 364 (internal quotation marks omitted). The Writs Act is to be applied "flexibly in conformity with these principles." *Id.* at 173, 98 S.Ct. 364.

[2] The actions that a district court may take pursuant to the Writs Act include the assertion of jurisdiction "under appropriate circumstances, [over] persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice." *Association for Retarded Citizens of Connecticut, Inc. v. Thorne,* 30 F.3d 367, 370 (2d Cir.1994) (internal quotation marks omitted), *cert. denied,* 513 U.S. 1079, 115 S.Ct. 727, 130 L.Ed.2d 631 (1995). Such jurisdiction may "encompass[***414**] even those who have not taken any affirmative action to hinder justice." *Id.*

[3] The court's exercise of ancillary jurisdiction under the Writs Act is reviewable under an abuse-of-discretion standard. *See, e.g., United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO,* 266 F.3d 45, 49 (2d Cir.2001). In *New York Telephone,* for example, the Supreme Court held that, without any express grant of jurisdiction to the district court, that court had discretionary jurisdiction under the Writs Act to compel a telephone company to install pen registers needed by federal law enforcement agents to monitor certain of the company's telephone lines where there was probable cause to believe those lines were being used in an illegal gambling operation. The Supreme Court stated, "we do not think that the Company was a third party so far removed from the underlying controversy that its assistance could not be permissibly compelled." *Id.* at 174, 98 S.Ct. 364. The Court also noted that the Company's assistance was essential, that the Company was to be reimbursed at prevailing rates for assisting the agents, that the Company itself at times used pen registers, and that use of pen registers was far less intrusive than other surveillance methods Congress had authorized courts to approve.

[4] In the present case too there was a sound basis for the district court's exercise of ancillary jurisdiction. The court indisputably had jurisdiction over Sprint's Telecommunications Act claims against DOE in *Sprint I.* The School District, though not a party to that action, was integrally involved because there would have been no controversy between Sprint and DOE if the District had not granted to Sprint the right to erect and maintain an antenna on the High School. The court had noted in *Sprint I* that federal law expresses a strong interest in establishing national wireless communications service " 'for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication,' " 65 F.Supp.2d at 155 (quoting 47 U.S.C. § 151); that "[t]he Act is designed to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technology and services to all Americans and by opening all telecommunications markets to competition," 65 F.Supp.2d at 160–61 (internal quotation marks omitted); and that the Act "mandate[s] that aggrieved parties be granted relief on an expedited basis," *id.* at 161. Having determined in *Sprint I,* in light of these federal policies, that DOE's actions impeding the School District's performance of its contractual obligations under the Lease violated the Telecommunications Act and should be promptly enjoined, the district court did not abuse its discretion in concluding that the swift exercise of ancillary jurisdiction over the School District—without whose entry into the Lease there would have been no *Sprint I*—was appropriate.

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Accordingly, we turn to the merits of the district court's ruling that the School District's attempt to require Sprint to operate its facility at RF Emissions levels below the maxima set by federal standards is preempted by the Telecommunications Act.

B. *The Telecommunications Act and Principles of Preemption*

[5] **[6]** **[7]** The foundation of preemption doctrines is "the Supremacy Clause, U.S. Const., Art. VI, cl. 2, [which] invalidates state laws that 'interfere with, or are contrary ***415** to,' federal law." *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 712, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985) (quoting *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 211, 6 L.Ed. 23 (1824)). Such preemption may be express or implied. Express preemption occurs to the extent that a federal statute expressly directs that state law be ousted to some degree from a certain field. *See, e.g., Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977); *Association of International Automobile Manufacturers, Inc. v. Abrams,* 84 F.3d 602, 607 (2d Cir.1996); *Motor Vehicle Manufacturers Association of the United States, Inc. v. Abrams,* 899 F.2d 1315, 1318 (2d Cir.1990), *cert. denied,* 499 U.S. 912, 111 S.Ct. 1122, 113 L.Ed.2d 230 (1991). Implied preemption occurs "either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, ... or when state law is in actual conflict with federal law." *Freightliner Corp. v. Myrick,* 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995). The Supreme Court "ha[s] found implied conflict pre-emption where it is impossible for a private party to comply with both state and federal requirements, ... or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (internal quotation marks omitted).

[8] **[9]** A federal statute may preempt an area of regulation either in whole, *see, e.g., Campbell v. Hussey,* 368 U.S. 297, 300–02, 82 S.Ct. 327, 7 L.Ed.2d 299 (1961); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447, (1947), or in part, *see, e.g., Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Board,* 467 U.S. 461, 469, 104 S.Ct. 2518, 81 L.Ed.2d 399 (1984). "[I]f Congress has not displaced state regulation entirely, it may nonetheless pre-empt state law to the extent that the state law actually conflicts with federal law." *Id.* The inclusion in a federal statute of an express provision regarding preemption does not necessarily foreclose the possibility that aspects of a state law not expressly within the federal preemption provision may be preempted by implication. *See, e.g., Freightliner Corp. v. Myrick,* 514 U.S. at 287–89, 115 S.Ct. 1483 (discussing *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992)); *Association of International Automobile Manufacturers, Inc. v. Abrams,* 84 F.3d at 607. Thus, "a finding of implied preemption (which enlarges the field of preemption beyond what is covered by an express provision) is not *automatically* foreclosed by the existence of a preemption clause...." *Toy Manufacturers of America, Inc. v. Blumenthal,* 986 F.2d 615, 623 (2d Cir.1992) (emphasis in original); *see generally Freightliner Corp. v. Myrick,* 514 U.S. at 287–89, 115 S.Ct. 1483. However, where the federal statute contains "a provision explicitly addressing [preemption], and when that provision provides a reliable indicium of congressional intent with respect to state authority," preemption is restricted to the terms of that provision. *Id.* at 288, 115 S.Ct. 1483 (internal quotation marks omitted); *see, e.g., Association of International Automobile Manufacturers, Inc. v. Abrams,* 84 F.3d at 607; *Vango Media, Inc. v. City of New York,* 34 F.3d 68, 72 (2d Cir.1994); *Toy Manufacturers of America, Inc. v. Blumenthal,* 986 F.2d at 623. In *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.,* 507 U.S. 218, 224, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993) (commonly referred to as "*Boston Harbor* "), the Supreme Court reviewed the "settled pre-emption principles" and noted that when a federal statute does not contain an express preemption provision,

> ***416** we should not find [the local governmental entity's action] pre-empted " ' "unless it conflicts with federal law or would frustrate the federal scheme, or unless [we] discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." ' " *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 747–748, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985) (citations omitted). We are reluctant to infer pre-emption. See *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981).

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Boston Harbor, 507 U.S. at 224, 113 S.Ct. 1190; *see also Cipollone v. Liggett Group, Inc.,* 505 U.S. at 516, 112 S.Ct. 2608 (Congressional intent is the "ultimate touchstone" (internal quotation marks omitted)).

[10] When federal law preempts state law, it prohibits a state or local governmental entity "from regulating within a protected zone, whether it be a zone protected and reserved for market freedom ... or for [federal agency] jurisdiction." *Boston Harbor,* 507 U.S. at 226–27, 113 S.Ct. 1190. Federal regulation of interstate and foreign communications plainly preempts much of the field of wireless broadcasting. As we recently discussed in *Freeman v. Burlington Broadcasters, Inc.,* 204 F.3d 311, 320 (2d Cir.) ("*Freeman* "), *cert. denied,* 531 U.S. 917, 121 S.Ct. 276, 148 L.Ed.2d 201 (2000), the Federal Communications Act ("FCA") was designed "to 'centraliz[e] authority heretofore granted by law to several agencies' in the FCC, and to 'grant [ ] additional authority with respect to interstate and foreign commerce in wire and radio communication' to the FCC." *Freeman,* 204 F.3d at 320 (quoting 47 U.S.C. § 151). In *Freeman,* which dealt solely with a local attempt to regulate radio transmission interference, we noted that the FCA empowered the FCC to, *inter alia,*

> "[d]etermine the location of classes of stations or individual stations [,]" ... "[r]egulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein[,]" ... "[m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter[,]" ... [and] "... establish areas or zones to be served by any station."

204 F.3d at 320 (quoting 47 U.S.C. § 303(d), (e), (f), and (h)). We found that "[t]hese statutory provisions make it clear that Congress intended the FCC to possess exclusive authority over technical matters related to radio broadcasting," and we concluded that "federal law has preempted the field of RF interference regulation." *Freeman,* 204 F.3d at 320.

[11] With respect to wireless telephone communications, the Telecommunications Act, which is part of the FCA, has similarly given the FCC "broad," albeit "somewhat" more "circumscribed," preemption authority. *Cellular Phone Taskforce v. FCC,* 205 F.3d 82, 96 (2d Cir.2000), *cert. denied,* 531 U.S. 1070, 121 S.Ct. 758, 148 L.Ed.2d 661 (2001); *see generally City of New York v. FCC,* 486 U.S. 57, 108 S.Ct. 1637, 100 L.Ed.2d 48 (1988); *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 698–700, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984). To the extent pertinent here, the TCA section dealing with "[r]egulatory treatment of mobil services," 47 U.S.C. § 332(c), in its paragraph (7) entitled ***417** "Preservation of local zoning authority," *id.* § 332(c)(7), provides as follows:

> **(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.
>
> ....
>
> (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.

47 U.S.C. § 332(c)(7); *see also id.* §§ 337(c)(7)(B)(ii) and (iii) (requiring a governmental entity to act reasonably promptly on any request to place, construct, or modify personal wireless service facilities, and requiring that any denial of such a request be "in writing and supported by substantial evidence contained in a written record").

In *Cellular Phone Taskforce,* we dealt with, *inter alia,* the contention of various groups and individuals that state regulation of the operations of wireless service

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facilities with respect to their RF emissions levels was not preempted by FCC guidelines that, *inter alia,* set health and safety standards for "Maximum Permissible Exposure" to radio frequency radiation, *see Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation,* 11 F.C.C. Rcd. 15123, 1996 WL 926565 (1996) ("*FCC Guidelines*"). In rejecting the contention that state regulation was not preempted, we noted that § 332(c)(7)(B)(iv)

> preempt[s] state and local governments from regulating the placement, construction or modification of personal wireless service facilities on the basis of the health effects of RF radiation where the facilities would operate within levels determined by the FCC to be safe.

Cellular Phone Taskforce, 205 F.3d at 88.

[12] Not all actions by state or local government entities, however, constitute regulation, for such an entity, like a private person, may buy and sell or own and manage property in the marketplace.

> A State does not regulate ... simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the [federal statute], because pre-emption doctrines apply only to state *regulation.*

Boston Harbor, 507 U.S. at 227, 113 S.Ct. 1190 (emphasis in original). Our decision in *Cellular Phone Taskforce* dealt with a generalized contention that, despite the FCC Guidelines, state regulation of RF emissions levels was permissible; it did not address the matter of whether a governmental entity or instrumentality could enforce a contractual provision dealing with such levels. In determining whether such local action constitutes forbidden regulation, or instead constitutes permissible proprietary action, we find the Supreme Court's decisions in *Boston Harbor* and ***418** *Wisconsin Department of Industry, Labor and Human Relations v. Gould Inc.,* 475 U.S. 282, 286, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986) ("*Gould* "), both of which involved the preemptive reach of the National Labor Relations Act ("NLRA"), to be instructive.

In *Gould,* the Court dealt with a Wisconsin "debarment" statute that forbade state procurement agents, for a three-year period, to purchase products manufactured or sold by any entity that had been found, in judicially enforced orders of the National Labor Relations Board, to have violated the NLRA three times within five years. *See* 475 U.S. at 283–84, 106 S.Ct. 1057. Under this statute, "firms adjudged to have violated the NLRA three times [we]re automatically deprived of the opportunity to compete for the State's business." *Id.* at 287–88, 106 S.Ct. 1057. Noting that "on its face the debarment statute serves plainly as a means of enforcing the NLRA," *id.* at 287, 106 S.Ct. 1057, and "that the point of the statute is to deter labor law violations and to reward fidelity to the law," *id.* (internal quotation marks omitted), the Supreme Court held that the Wisconsin statute was preempted, *see id.* at 289–91, 106 S.Ct. 1057. The Court stated that the fact

> [t]hat Wisconsin has chosen to use its spending power rather than its police power does not significantly lessen the inherent potential for conflict when two separate remedies are brought to bear on the same activity.... To uphold the Wisconsin penalty simply because it operates through state purchasing decisions therefore would make little sense. It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern.

Id. at 289, 106 S.Ct. 1057 (internal quotation marks omitted).

Though noting a distinction between a state's acts performed as a regulator and those performed in a purely proprietary role, the *Gould* Court rejected Wisconsin's argument that, in adopting its procurement restrictions, the state was in fact acting not as a regulator but as a proprietor:

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> Wisconsin notes correctly that state action in the nature of "market participation" is not subject to the restrictions placed on state regulatory power by the Commerce Clause. See *White v. Massachusetts Council of Constr. Employers, Inc.,* 460 U.S. 204, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983); *Reeves, Inc. v. Stake,* 447 U.S. 429, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980); *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976). We agree with the Court of Appeals, however, that by flatly prohibiting state purchases from repeat labor law violators Wisconsin "simply is not functioning as a private purchaser of services," 750 F.2d, at 614; for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation.

Gould, 475 U.S. at 289, 106 S.Ct. 1057.

In *Boston Harbor,* the Court dealt with labor contract terms dictated by a Massachusetts agency ("MWRA") in connection with its task of cleaning up Boston Harbor following a federal court adjudication that the state had failed to prevent the pollution of the harbor. "The cleanup project was expected to cost $6.1 billion over 10 years.... The District Court required construction to proceed without interruption, making no allowance for delays from causes such as labor disputes." *Boston Harbor,* 507 U.S. at 221, 113 S.Ct. 1190. In order to carry out this project, the MWRA authorized its project manager to negotiate an agreement with the pertinent labor organization that would assure labor stability over the life of the project. The terms of the agreement ("Massachusetts Agreement") included

> ***419** use of specified methods for resolving all labor-related disputes; a requirement that all employees be subject to union-security provisions compelling them to become union members within seven days of their employment; the primary use of [the labor organization's] hiring halls to supply the project's craft labor force; a 10–year no-strike commitment; and a requirement that all contractors and subcontractors agree to be bound by the Agreement.

Boston Harbor, 507 U.S. at 221–22, 113 S.Ct. 1190. Bidders on contracts relating to the project were required to subscribe to these terms. The Massachusetts Agreement was challenged by a contractors' association and by nonunion employers on the ground, *inter alia,* that it was preempted by the NLRA. The Supreme Court disagreed.

In concluding that the Massachusetts Agreement was not preempted by the NLRA, the *Boston Harbor* Court emphasized the "conceptual distinction between regulator and purchaser," *id.* at 229, 113 S.Ct. 1190, and distinguished *Gould* on the bases that the Wisconsin statute addressed employer conduct unrelated to the employer's performance of its contractual obligations to the state and had no credible purpose other than enforcement of the NLRA, *see Boston Harbor,* 507 U.S. at 228–29, 113 S.Ct. 1190, whereas the Massachusetts Agreement, which had no relationship to labor performance on any job other than the harbor cleanup, was designed simply "to ensure an efficient project ... would be completed as quickly and effectively as possible at the lowest cost," *Boston Harbor,* 507 U.S. at 232, 113 S.Ct. 1190. The *Boston Harbor* Court stated that Supreme Court

> decisions in this area support the distinction between government as regulator and government as proprietor. We have held consistently that the NLRA was intended to supplant state labor *regulation,* not all legitimate state activity that affects labor.

Id. at 227, 113 S.Ct. 1190 (emphasis in original). It pointed out that in *Gould,* it had "emphasized that [it was] 'not say[ing] that state purchasing decisions may never be influenced by labor considerations,' " *Boston Harbor,* 507 U.S. at 229, 113 S.Ct. 1190 (quoting *Gould,* 475 U.S. at 291, 106 S.Ct. 1057); but

> [w]hen the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role, boycotts notwithstanding. Moreover, as regulator of private conduct, the State is more powerful than private parties. These distinctions are far

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> less significant when the State acts as a market participant with no interest in setting policy,

Boston Harbor, 507 U.S. at 229, 113 S.Ct. 1190. The Court stated that "a State may act without offending the pre-emption principles of the NLRA when it acts as a proprietor and its acts therefore are not tantamount to regulation or policymaking." *Id.* (internal quotation marks omitted). It concluded that

> [t]o the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity *as purchaser* should be permitted to do the same. Confronted with such a purchaser, those contractors who do not normally enter such agreements are faced with a choice. They may alter their usual mode of operation to secure the business opportunity at hand, or seek business from purchasers whose perceived needs do not include a project labor agreement. *In the absence of any express or implied indication by Congress* [in the NLRA] *that a State may not manage its own property when it pursues its purely* ***420** *proprietary interests, and where analogous private conduct would be permitted,* this Court will not infer such a restriction.

507 U.S. at 231–232, 113 S.Ct. 1190 (first emphasis in original; subsequent emphasis ours). *See also Cardinal Towing & Auto Repair, Inc. v. City of Bedford,* 180 F.3d 686, 693 (5th Cir.1999) (in order to determine, under *Boston Harbor,* whether "a class of government interactions with the market [is] so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out," a court must consider (1) whether "the challenged action essentially reflect[s] the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances," and (2) whether "the narrow scope of the challenged action defeat[s] an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem").

[13] In the present case, these principles lead us to the conclusion that the School District's stance with respect to its Lease with Sprint is not preempted. First, we see nothing in the TCA to suggest that Congress meant to preempt a governmental entity's conduct that does not amount to regulation; and the structure and language of the TCA suggest precisely the contrary intent. To begin with, the structure of § 332(c)'s paragraph (7) indicates that Congress meant preemption to be narrow and preservation of local governmental rights to be broad, for subparagraph (A) states that "*nothing* " in the FCA is to "limit or affect" local governmental decisions "*[e]xcept* as provided in this paragraph." 47 U.S.C. § 332(c)(7)(A) (emphases added). Thus, unless a limitation is provided in § 332(c)(7), we must infer that Congress's intent to preempt did not extend so far.

Further, the language of paragraph (7) suggests that Congress did not mean to eliminate the distinction between acts that are regulatory and those that are proprietary, for the language in subparagraph (7)(A), preserving to local governmental entities authority except as limited in paragraph (7), refers broadly to governmental "decisions," whereas the prohibition set out in subparagraph (B)(iv) refers only to regulations. The latter states the limitation that, to the extent that a facility complies with FCC standards governing RF emissions, "[n]o State or local government or instrumentality thereof may *regulate* " facility construction, placement, or modification. 47 U.S.C. § 332(c)(7)(B)(iv) (emphasis added). The contrasting terms used in (A) and (B)(iv) reveal that the preemption provision with respect to RF emissions expressly provided by Congress in (B)(iv) carves out of subparagraph (A) only such decisions as constitute "regulat[ion]."

Thus, the language and structure of the TCA implicitly recognize that some governmental decisions are not regulatory and reveal that Congress meant "nothing" in the FCA to limit or affect the authority of a governmental entity "over decisions" as to the construction, placement, or modification of personal wireless service facilities on the basis of RF emissions "[e]xcept" to the extent that those decisions constitute "regulat[ion]."

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Second, we view the actions of the School District in entering into the Lease agreement as plainly proprietary. There is no state or local statute or ordinance or guideline with respect to the RF Emissions levels at issue here. The School District entered into a single lease agreement with respect to a single building. The District did not purport to punish Sprint for any past conduct or to impose any condition with respect to any Sprint ***421** tower other than that to be located on the High School. Indeed, as originally negotiated, the Lease did not impose on Sprint any condition with respect to RF Emissions except to require that it supply an expert's certification "that the PCS will be in compliance will [*sic*] all current FCC regulations pertaining to radio frequency emissions." (Lease Rider ¶ 16.) We see in this record no basis for an inference that the School District sought to establish any general municipal policy.

Third, as Sprint has no right of eminent domain, a private individual, if approached by Sprint for permission to erect a cellular tower on his private property, would plainly have the right simply to refuse to enter into such a contract. The School District has the same right in its proprietary capacity as property owner to refuse to lease the High School roof for the construction of such a facility. Under *Boston Harbor,* such a refusal by the District would not have been preempted.

[14] Further, a private party who has the right to refuse outright to lease his property also has the right to decline to lease the property except on agreed conditions (assuming those conditions would not violate law or public policy). Since, so far as we are aware, nothing in the law requires a communications company to operate at the FCC Guidelines maximum permissible radiation exposure levels, the private owner could elect not to grant a communications company a lease for the construction and operation of a cellular tower unless the company agreed to limit its RF emissions to a lower level. To the same extent, the School District as a public entity, sought out by the company only in the District's capacity as property owner, is permitted to do the same. And if the property owner, public or private, declines to enter into a lease without such a condition, the communications company is faced with a choice: the company may agree to the requested condition, or, if it is unwilling to do so, it may seek a lease elsewhere from a property owner who does not insist on such a condition. There is nothing in the conduct of the School District here that prevents Sprint from negotiating a lease on other property whose owner does not request conditions on emissions.

[15] Finally, a lessee who agreed to the lease conditions requested by the owner of private property could not thereafter compel performance of the lease agreement by the private owner while the lessee refused to perform the agreed conditions. We see no indication that Congress meant the TCA to apply any different set of principles to a telecommunications company's negotiated agreement with a public property owner.

In sum, we conclude that the Telecommunications Act does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity; that the School District acted in a proprietary capacity, not a regulatory capacity, in entering into the Lease agreement with Sprint; that the conditions to which Sprint agreed at the request of the District are conditions that a private property owner would be free to demand; and that such a private owner would not be compelled to perform obligations imposed on him by the contract if the communications company refused to perform the conditions agreed to by it in the contract. Accordingly, the School District's attempt to enforce the RF Emissions provisions in the Lease agreement, as the District interprets those provisions, is not preempted by the Telecommunications Act.

C. *The Proper Interpretation of the Lease*

[16] Our conclusion that there is no preemption here does not end the inquiry, ***422** however, for we find the terms of the Lease, as amended by the Addendum, to be ambiguous. The Lease Addendum sets out the maximum RF Emissions levels to which the parties agreed, and it states that those levels are to apply "during the entire term of the agreement between Ossining Union Free School District and Sprint PCS." The Addendum also states, however, that "[t]he foregoing operating specification applies only to the Sprint Spectrum, L.P. antenna configuration, as originally installed." The proper reading of this combination of provisions—either by themselves or in the context of the entire Lease agreement—is hardly clear.

The district court found that the phrase "as originally installed," in conjunction with other language in the Lease allowing Sprint to make "improvements on the Site as it deems necessary from time to time" (Lease ¶

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7), permits "Sprint to install new equipment to recognize evolutions in technology so long as the new equipment complie[s] with federal RF Emissions standards." *Sprint II,* 124 F.Supp.2d at 216–217. While this is a reasonable reading, it is not the only permissible interpretation. The School District argues that the phrase "only to the Sprint Spectrum, L.P. antenna configuration, as originally installed" refers to the contingency that the school district might later wish to lease space at the High School to an additional cell phone service provider to erect an antenna, which would require higher overall RF Emission levels. Such a contingency was expressly provided for in the Lease (*see, e.g.,* Lease Rider ¶¶ 14, 16), and the District presented, *inter alia,* affidavits of the Assistant Superintendent of Schools for Business and the former President of the District's Board of Education, along with letters and reports, to support this interpretation.

As the interpretation of ambiguous contract language in such circumstances is a question of fact to be resolved by the factfinder, *see, e.g., Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Incorporated,* 232 F.3d 153, 158 (2d Cir.2000), we conclude that the present controversy could not properly be decided on summary judgment and that the matter must be returned to the district court for trial as to the meaning of the Lease and Addendum.

CONCLUSION

We have considered all of Sprint's arguments in support of the district court's rulings on the merits and have found them unpersuasive. The judgment of the district court is affirmed to the extent that the court exercised jurisdiction over the School District in this matter pursuant to the All Writs Act, and is reversed to the extent that it ruled that the Telecommunications Act preempts the School District from seeking enforcement of the terms of the Lease as interpreted by the District. The 2001 Injunction is vacated, and the matter is remanded for trial with respect to the contract interpretation issues.

All Citations

283 F.3d 404

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United States Code Annotated
Title 47. Telecommunications (Refs & Annos)
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter II. Common Carriers (Refs & Annos)
Part II. Development of Competitive Markets (Refs & Annos)

47 U.S.C.A. § 253

§ 253. Removal of barriers to entry

Effective: February 8, 1996
Currentness

(a) In general

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.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets

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It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply--

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

CREDIT(S)

(June 19, 1934, c. 652, Title II, § 253, as added Pub.L. 104-104, Title I, § 101(a), Feb. 8, 1996, 110 Stat. 70.)

47 U.S.C.A. § 253, 47 USCA § 253
Current through P.L. 114-229.

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252 F.3d 1169
United States Court of Appeals,
Eleventh Circuit.

BELLSOUTH TELECOMMUNICATIONS, INC., Plaintiff–Counter–Defendant–Appellee–Cross–Appellant,
v.
TOWN OF PALM BEACH, a Florida municipal corporation, Defendant–Counter–Claimant–Appellant–Cross–Appellee.
Bellsouth Telecommunications, Inc., Plaintiff–Counter–Defendant–Appellee–Cross–Appellant,
v.
Coral Springs, City Of, Defendant–Counter–Claimant–Appellant–Cross–Appellee.

Nos. 99–14272, 99–14292.
|
May 25, 2001.

Telecommunications company sued two cities for declaratory and injunctive relief, alleging that their telecommunications ordinances were preempted by state and federal law. Cities counterclaimed for failure to perform or pay fees under their ordinances and, in one case, for breach of contract. On motions for summary judgment, the United States District Court for the Southern District of Florida, No. 97-07010-CV-WPD, William P. Dimitrouleas, J., 42 F.Supp.2d 1304, and No. 98-08232-CV-WPD, 127 F.Supp.2d 1348, upheld some sections of the ordinances, but found that others were preempted by state or federal law, or both, and granted summary judgment on cities' counterclaims. Cities appealed and company cross-appealed. The Court of Appeals, Birch, Circuit Judge, held that: (1) specific subsections of the ordinances were preempted by Florida statutes, but others were valid exercises of local authority under the Florida scheme; (2) section of the Telecommunications Act of 1996 titled "Removal of Barriers to Entry" creates a private right of action only for parties seeking preemption of a state or local statute, ordinance, or other regulation that purports to be a management of the public rights-of-way; and (3) the district court erred when it failed to consider whether the ordinances violated the first subsection of the section of Act titled "Removal of Barriers to Entry," and considered only whether the individual provisions of the ordinances fell within the Act's safe harbor.

Affirmed in part, reversed in part, and remanded.

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Appeals from the United States District Court for the Southern District of Florida.

Before BIRCH and BLACK, Circuit Judges, and NESBITT [*], District Judge. [**]

Opinion

BIRCH, Circuit Judge:

This appeal requires us, as a matter of first impression in this circuit, to answer two questions pertaining to § 253 of the Telecommunications Act of 1996: (1) what is the preemptive scope of § 253; and (2) who may seek enforcement of the provisions of § 253? Because we disagree with the district court's interpretation and application of § 253, and also, in part, because amendments were made to relevant state laws after the district court rendered judgment, we AFFIRM the district court's judgment in part, REVERSE in part, and REMAND to the district court for further proceedings.

I. BACKGROUND

In the preamble to the Telecommunications Act of 1996[1] ("the Act"), Congress announced that it was passing "[a]n Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 110 Stat. at 56. The provisions of the Act were intended to supplement and amend the statutory framework established in the Communications Act of 1934, 47 U.S.C. § 151, et seq., and the end result has been described as a "fundamental[ ] restructur[ing of the] local telephone markets." *AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366, 371, 119 S.Ct. 721, 726, 142 L.Ed.2d 835 (1999). The City of Coral Springs and the Town of Palm Beach (collectively, "the Cities") perceived that the Act mandated changes in the way they regulated telecommunications services providers; in response, Coral Springs passed ordinance 97–114 and Palm Beach passed ordinance 16–97, both of which purported to restructure the Cities' franchising and licensing of telecommunications service providers' use of the public rights-of-way in accordance with the new federal law. The Cities' ordinances were similar in many respects, but they adopted different approaches to several significant issues.

***1176** BellSouth was the incumbent local telephone service provider in both of the Cities at the time the Act, and subsequently when the ordinances, were passed. BellSouth first brought suit in federal district court against Coral Springs, seeking a declaratory judgment that ordinance 97–114 was preempted both by Florida state law and by § 253 of the Act. Coral Springs filed a counterclaim for breach of contract in which it sought to enforce an ordinance passed in 1965 that gave it the option to purchase BellSouth's facilities. BellSouth moved for summary judgment on its preemption claims and on Coral Springs's counterclaim, and Coral Springs moved for summary judgment on BellSouth's preemption claim. The district court upheld some sections of the ordinance, but found that others were preempted by state or federal law, or both. The district court also granted BellSouth summary judgment on Coral Springs's counterclaim.

After filing suit against Coral Springs, but before that case was resolved, BellSouth filed a similar suit against Palm Beach, seeking a declaratory judgment that its ordinance 16–97 was preempted. Palm Beach filed a counterclaim seeking compensation under the terms of the ordinance. Both parties moved for summary judgment, and the district court, employing the same analysis it had utilized in its summary-judgment order in the Coral Springs case, upheld parts of the ordinance while striking down others on a mixture of federal and state preemption grounds. In its motion for summary judgment in this case, BellSouth had argued that if a substantial portion of the ordinance were preempted, the entire ordinance should fall. The district court, however, found that the preempted sections were severable, and allowed the non-preempted sections of the ordinance to stand. Because one of the sections of the ordinance that the district court struck down was that governing compensation for use of the rights-of-way, the district court *sua sponte* granted BellSouth summary judgment on Palm Beach's counterclaim.

The Cities appealed, challenging the district court's findings of preemption and dismissal of their counterclaims. BellSouth cross-appealed, claiming that the district court erred in upholding sections of the ordinances, or, in the alternative, that the preempted sections were not severable, and, therefore, the ordinances should have been struck down in their entirety.

II. DISCUSSION

[1] [2] [3] [4] "We apply the same legal standards in our preemption analysis that the district court was required to apply in its order granting summary judgment; therefore, we review the district court's decision *de novo.*" *Lewis v. Brunswick Corp.,* 107 F.3d 1494, 1498 (11th Cir.1997). Because federal preemption of a state or local law is premised on the Supremacy Clause of the United States Constitution, *see Bosarge v. United States Dep't of Educ.,* 5 F.3d 1414, 1419 (11th Cir.1993), and because of the longstanding principle that federal courts should avoid reaching constitutional questions if there are other grounds upon which a case can be decided, *Santamorena v. Ga. Military Coll.,* 147 F.3d 1337, 1343 (11th Cir.1998), we first decide whether the ordinances are preempted by Florida state law before considering whether they are federally preempted by the Act. Further, because each City has included a severability clause in its ordinance

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stating it is the City's intention that the remainder of the ordinance remain in effect if part of the ordinance is invalidated, we must address each relevant section of each ordinance in turn, reserving judgment on the preemption of the ordinances as a whole until both the state and federal preemption analyses have been completed.

***1177** A. *Preemption by Florida State Law*

Under Florida Statutes § 364.01(2), the Florida Public Service Commission ("FPSC") has jurisdiction over the regulation of telecommunications companies within the state. Local governments are preempted from regulating telecommunications companies except to the extent provided in § 337.401, which is the provision of state law that historically has governed municipalities' power to regulate and tax telecommunications companies' use of the public rights-of-way. Our analysis of § 337.401 in this case is complicated somewhat by the fact that the statute has been amended twice since these lawsuits were filed, and future amendments are scheduled. When these lawsuits were initiated in August 1997 and April 1998, the text of § 337.401 had stood unaltered since 1994. In May 1998, however, § 337.401 was substantially amended. *See* 1998 Fla. Laws ch. 98–147. The district court duly took the 1998 amendments to § 337.401 into account when deciding the state-law preemption question in its summary-judgment orders, which issued in January and September of 1999. After the district court had entered its final judgment in both cases, the Florida legislature amended § 337.401 again with the passage of the Communications Services Tax Simplification Law ("Simplification Law"), 2000 Fla. Laws ch. 00–260. In order to understand the changes envisioned in the Simplification Law, we must begin with an assessment of the law that predated it.

Under the version of § 337.401 as amended in 1998, it was clear that municipalities were prohibited from exercising their authority to manage the public rights-of-way in such a way as to exert regulatory control over matters that fell under the exclusive jurisdiction of the FPSC or the Federal Communications Commission ("FCC"). Fla. Stat. § 337.401(6) (Supp.1998). Municipalities could, however, require telecommunications companies to pay fees of up to "one percent of the gross receipts on recurring local service revenues for services provided within the corporate limits of the municipality" as consideration for the right to occupy the public rights-of-way. *Id.* at § 337.401(3). Municipalities also had the power to enter into agreements with telecommunications companies requiring them to pay fees based on the number of miles of cable laid in the public rights-of-way, as well as certain other fees as compensation for the direct, physical use of the rights-of-way and the administrative costs of regulating the rights-of-way. *Id.* at § 337.401(4).

The impetus for the Simplification Law appears to have been, in large part, the need to bring Florida law into compliance with the Telecommunications Act of 1996. To this end, the Simplification Law mapped out a complicated schedule of amendments to the Florida Statutes, including "transitional" amendments to § 337.401, which took effect on 1 January 2001. 2000 Fla. Laws ch. 00–260, § 50; Fla. Stat. § 337.401 (Supp.2001). The transitional version of § 337.401 severely curtails municipal authority over telecommunications companies by prohibiting municipalities from requiring telecommunications companies to enter into a "license, franchise, or other agreement" as a condition of using the public rights-of-way, *id.* at § 337.401(3)(a), and by requiring that any municipal regulations pertaining to telecommunications companies' use of the public rights-of-way "must be related to the placement or maintenance of facilities in such roads or rights-of-way, must be reasonable and nondiscriminatory, and may include only those matters necessary to manage the roads or rights-of-way," *id.* at § 337.401(3)(b).

The other significant feature of the transitional version of § 337.401, and the feature ***1178** that indicates why a transitional provision is necessary, is the requirement that each municipality make an election that will affect the rate it will be able to charge if the local communications services tax ("LCST"), authorized under § 11 of the Simplification Law, takes effect on 1 October 2001. Section 337.401(3)(c)(1) requires municipalities to choose whether they will collect certain limited permit fees from communications providers for use of the public rights-of-way; if a municipality chooses to charge permit fees, it must reduce the rate of its LCST by 0.12%, but if it chooses not to charge such fees, it may increase the rate by 0.12%. Because the LCST does not take effect until 1 October 2001, if it takes effect at all, the transitional § 337.401 carries over, in subsections (3)(e) and (3)(f), the language of the 1998 version's subsections (3) and (4) pertaining to taxes and fees that may be levied on telecommunications companies in the meantime. Section 337.401 is scheduled to be amended again on 1 October 2001, removing the

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language in subsections (3)(e) and (3)(f) entirely to reflect the implementation of the new LCST scheme. *See* 2000 Fla. Laws ch. 00–260, § 51.

The LCST is intended to replace the patchwork system by which each municipality had set its own formula (within the bounds of prior versions of § 337.401) for how it would tax telecommunications companies' use of the public rights-of-way. In § 12 of the Simplification Law, codified at Fla. Stat. § 202.20 (Supp.2001), the Florida legislature delegated to the Revenue Estimating Conference ("REC") the responsibility of determining, based on the factors prescribed in that section, what the local communications tax rate should be for each municipality and county in the state. Recognizing the difficulties inherent in this task, the Florida legislature structured the Simplification Law to prepare for the contingency that the REC would not be able to establish acceptable rates for the LCSTs: unless the Florida legislature acts before 30 June 2001, on that date section 58 of the Simplification Law will repeal the transitional amendments to § 337.401, as well as the 1 October 2001 amendments to § 337.401 and the other sections implementing the LCST, and § 59 will reinstate the 1998 version of § 337.401 (with only minor changes) on the same day. Presumably, if the REC is successful in setting the rates for the LCSTs, the Florida Legislature will repeal §§ 58 and 59 before 30 June 2001 so that the October amendments, which comprise the essence of the Simplification Law, will go into effect as scheduled. [2]

[5] **[6]** That is the overall plan under the Simplification Law; however, "[w]here a statute is amended after the entry of judgment in the trial court, but before the decision of the appellate court, the appellate court must 'review the judgment of the district court in light of [the] law as it now stands, not as it stood when the judgment below was entered'." *Naturist Soc'y, Inc. v. Fillyaw,* 958 F.2d 1515, 1519–20 (11th Cir.1992) (quoting *Diffenderfer v. Cent. Baptist Church,* 404 U.S. 412, 414, 92 S.Ct. 574, 575, 30 L.Ed.2d 567 (1972)). Accordingly, we can only conduct our state-law preemption analysis under the version of the statute that is currently in effect—the transitional version of § 337.401. [3]

***1179** 1. Preemption of Specific Sections of Coral Springs Ordinance 97–114 by the Transitional Version of § 337.401

As a preliminary matter, it is necessary to define some of the key terms as they are used in the state law and in the ordinance. Section 337.401 addresses municipal regulation of "telecommunications companies," which are defined in § 364.02(12) as "every corporation, partnership, and person ... offering two-way telecommunications service to the public for hire," but explicitly not including "[a]n entity which provides a telecommunications facility exclusively to a certificated telecommunications company" or "[a] private computer data network company not offering service to the public for hire." Ordinance 97–114, however, refers to "telecommunications facilities," which it defines in section 20–1(20) as "facilit[ies] that [are] used to provide one or more telecommunications services, any portion of which occupies public rights of way." "Telecommunications services" are defined in section 20–1(21) as "the transmission for hire, of information in electronic or optical form, including, but not limited to, voice, video, or data ... but does not include over-the-air broadcasts to the public-at-large from facilities licensed by the Federal Communications Commission or any successor thereto, cable service or open video service." Telecommunications facilities are distinguished from "private communications systems," which are defined in section 20–1(15) as "facilit[ies] placed in whole or in part in the public right of way for the provision of communications in connection with a person's business, but not encompassing in any respect the provision of telecommunications services." The ordinance uses the term "communications facility," defined in section 20–1(5), to refer to both telecommunications facilities and private communications systems.

It is clear from these definitions that provisions of ordinance 97–114 governing "telecommunications facilities" are subject to preemption by § 337.401's limitations on municipal power to regulate "telecommunications companies." Provisions of the ordinance regulating "private communications systems," however, do not fall within the penumbra of § 337.401. Because no section of the ordinance is preempted by state law as it pertains to private communications systems, our preemption analysis is conducted exclusively in terms of its effect on telecommunications facilities, as that term is defined in the ordinance.

We address each relevant section of the ordinance in turn.

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[7] *Section 20–2. Franchise Required:* This section requires the operators of telecommunications facilities to obtain franchises prior to providing telecommunications services within Coral Springs. The franchise requirements in subsections (1) and (2) and the license requirements for telecommunications facilities in subsection (3) are flatly preempted by § 337.401(3)(a), which prohibits municipalities from requiring telecommunications companies to enter licenses, franchises, or other agreements as a condition of using the public right-of-way to provide telecommunications services.

[8] *Section 20–3. Compensation Required:* This section requires the operators of telecommunications facilities to pay the greater of an occupancy fee or a franchise fee to Coral Springs as compensation for the use of the public rights-of-way. ***1180** The franchise fee, which is established in section 20–21(5)(A) as 10% of the gross revenues generated by the operator of the telecommunications facility's use of the public rights-of-way, is obviously preempted by the prohibition of franchises in § 337.401(3)(a). Section 20–3 states that the occupancy fee, however, "is intended to recover ongoing right-of way costs to the City caused by burdens users place upon the right-of-way," and is to be established on a per-linear-foot basis for telecommunications facilities located in the rights-of-way. This type of a fee is specifically authorized by state law, but § 337.401(3)(f) establishes several factors that limit the maximum permissible amount of the fee. Thus, the occupancy fee is not facially void under state law, but there remains a question as to whether Coral Springs has in fact limited the rate of the occupancy tax it exacts to comply with the state-law limits outlined in § 337.401(3)(f). Because neither party has presented evidence of whether the actual amount of the occupancy fee Coral Springs has charged exceeds that permitted in § 337.401(3)(f), neither party is entitled to summary judgment on the issue of whether the occupancy tax, as applied, is preempted by state law.

[9] **[10]** *Section 20–4. General Conditions Upon Use of Rights–of–Way:* The district court upheld most of this section, finding it to be a "reasonable regulation of what happens on the ground within the rights-of-way," as it consists primarily of straightforward provisions governing the installation, construction, relocation, and maintenance of telecommunications facilities. We find, with the exception of two subsections, that section 20–4 is not preempted by state law because its provisions fall within the ambit of § 337.401(3)(b), which reserves to municipalities the right to adopt rules or regulations governing the roads and rights-of-way, so long as they are "related to the placement or maintenance of facilities in such roads or rights-of-way, [are] reasonable and nondiscriminatory, and ... include only those matters necessary to manage the roads or rights-of-way."

[11] The first problem is the second sentence in subsection (4) to section 20–4, which reads: "Each operator must respond to requests for information regarding its system and plans for the system as the City may from time to time issue, including requests for information regarding its plans for construction, operation and repair and the purposes for which the plant is being constructed, operated or repaired." As stated previously, under § 364.01(2), local governments are preempted from regulating telecommunications companies except to the extent provided in § 337.401. While Coral Springs's reservation of the power to request information from operators of telecommunications facilities regarding their future plans for use of the rights-of-way constitutes a reasonable regulation of the rights-of-way under § 337.401(3)(b), the second sentence of subsection (4), by its terms, "includes," but is not limited to, requests for information concerning the rights-of-way. Because it is not limited to matters involving the rights-of-way, this provision exceeds the municipality's grant of authority from the state, and is preempted. [4]

[12] The second problem with section 20–4 is found in subsection (7), titled "No discrimination." Under this subsection, Coral Springs requires that telecommunications ***1181** facility operators not discriminate against "subscribers, programmers, or residents of the City on the basis of race, color, creed, national origin, sex, age, conditions of physical handicap, religion, ethnic background, marital status, or sexual orientation," and that they comply with federal, state, and local equal employment laws. This subsection also prohibits telecommunications facility operators from discriminating or retaliating against individuals or the City for the exercise of any legally protected right. The requirements in subsection (7) clearly exceed the municipality's authority under § 337.401(3)(b) to issue regulations "related to the placement or maintenance of facilities in [its] roads or rights-of-way." This subsection includes a "savings clause," however, which states that these provisions are "[s]ubject to State and Federal law

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limitations ... on the City's authority." Thus, we need not strike down this subsection on a facial challenge because it is effectively "self-preempting." [5] Essentially, this subsection stands as a reservation-of-rights clause in the event that Coral Springs is granted the authority to regulate these matters in the future.

[13] *Section 20–5. Protection of the City and Residents:* Under this section, Coral Springs establishes standards for indemnification, insurance, performance bonds, and a security fund that are required of telecommunications companies seeking to use the public rights-of-way. These are reasonable regulations directly related to the management of the rights-of-way, and are therefore authorized under § 337.401(3)(b).

Section 20–6. Enforcement and Remedies: Subsections (1) "Administration," (7) "Remedies Cumulative," (13) "Reservation of authority," and (15) "Ordinance not a contract," are "housekeeping" provisions that are necessary to the enforcement of the ordinance but do not actually regulate telecommunications providers; these sections are not preempted by state law.

Subsections (2), (3), (5), (6), (12), and (14) of section 20–6 pertain to licenses and franchises, and are therefore preempted by § 337.401(3)(a), which prohibits these arrangements to the extent they apply to telecommunications companies.

[14] Subsection (4) "Penalties" provides for a fine to be levied against any person who violates the ordinance. While the fine may not be used to enforce any section of the ordinance that has been found to be preempted, the power to fine is a police power, and therefore is reserved to the municipality under § 337.401(3)(b).

[15] Subsection (8) "Access to books and records" grants Coral Springs access to all books and records in a telecommunications company's possession pertaining to "the construction, operation, or repair of the communications facility," and "to the extent that the franchise fees or license fees are based upon gross revenue or gross receipts," Coral Springs claims access to "all books and records related to revenues derived from the operation of the communications facility." Coral Springs's power to access documents pertaining to the construction and repair of communications facilities is necessary to its direct regulation of the rights-of-way, and is therefore authorized under § 337.401(3)(b); however, under state law it does not have a right to access books and records relating to "operations," as that term extends far beyond those matters directly related to the rights-of-way. Further, because the franchise and license fee as applied to telecommunications companies is preempted under § 337.401(3)(a), ***1182** Coral Springs's ability to request financial information for the purpose of determining compliance with such a fee is also preempted.

[16] Subsection (9) "Retention of Records," and subsection (10) "Reports," require the operators of telecommunications facilities to retain records and prepare reports as requested to aid Coral Springs in determining if the facilities are in compliance with the ordinance. These requirements are valid under § 337.401(3)(b) as they are necessary to Coral Springs's regulation of the rights-of-way.

Subsection (11) "Maps" requires operators of telecommunications facilities to "maintain accurate maps and improvement plans which show the location, size, and a general description of all facilities installed in the rights-of-way." This requirement is valid under § 337.401(3)(b) as a reasonable means by which the City can ensure that future construction in the rights-of-way does not interfere with or damage existing communications lines and facilities.

[17] *Section 20–7. Transitional Provisions:* Subsection (1) addresses the process by which persons operating telecommunications facilities without a franchise or license at the time of the ordinance's enactment should file for a franchise or license, and subsection (2) states that persons holding franchises or licenses at the time of the ordinance's enactment may continue to operate under the terms of the franchise or license until its expiration. These subsections are preempted by § 337.401(3)(a), which prohibits municipalities from requiring telecommunications companies to enter franchises or licenses. Subsection (3), which states that the passage of the ordinance does not affect persons with existing leases of property in the rights-of-way, is not preempted.

[18] *Section 20–21. Application for a Franchise:* This section sets out the process an applicant must undergo and the criteria an applicant must meet in order to obtain a franchise to operate a telecommunications facility in

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the rights-of-way in Coral Springs, and also sets out the formula for the calculation of the franchise fee. While Coral Springs does have the right under § 337.401(3)(a) to request some of the information and credentials from a telecommunications company that it requests under section 20–21, it clearly may not do so in the context of a franchise application, and it may not charge a franchise fee. This section is preempted in its entirety.

2. Preemption of Specific Sections of Palm Beach Ordinance 16–97 by the Transitional Version of § 337.401

The scope of ordinance 16–97 is significantly broader than that of ordinance 97–114, as it regulates telecommunications facilities and services, private communications systems, cable systems, and open video systems. The only provisions of the ordinance subject to preemption by § 337.401, however, are those pertaining to the regulation of telecommunications facilities and services, as those terms are defined in the ordinance, [6] and so our analysis of the ordinance is limited to its effects on those areas.

***1183** *Title I, Section 2. Franchise Required:* This section requires the operators of telecommunications facilities to obtain franchises prior to providing telecommunications services within Palm Beach. It is preempted by § 337.401(3)(a), which explicitly prohibits municipalities from requiring telecommunications companies to enter licenses, franchises, or other agreements as a condition of using the public right-of-way to provide telecommunications services.

Title I, Section 3. Compensation Required: This section requires the operators of telecommunications facilities to pay the following fees: (i) a fee for applying for a franchise; (ii) additional compensation should Palm Beach's expenses in evaluating the franchise application exceed the initial application fee; (iii) the costs of any experts or consultants used in evaluating the application; (iv) an annual occupancy fee; and (v) a franchise fee, established in title II of the ordinance.

[19] All of the fees associated with a franchise would be preempted by § 337.401(3)(a), which prohibits municipalities from imposing franchise agreements on telecommunications companies. Subsection 3.4, however, includes a savings clause, stating that the franchise fees need not be paid if "State law ... requires otherwise." Thus, while Palm Beach cannot currently charge any of the fees associated with the franchise provisions of the ordinance, we need not strike down this section on a facial challenge because it is "self-preempting." This subsection stands as a reservation-of-rights clause in the event that Palm Beach is granted the authority to require franchises of telecommunications companies in the future. [7]

[20] The ordinance does not elaborate on the terms of the annual occupancy fee, other than to state in subsection 3.3 that it "may be charged on a gross revenue or per-linear-foot basis." Subject to limitations, an occupancy fee based on gross revenues is permitted under state law in § 337.401(3)(e), and a fee based on distance of cable laid is permitted in § 337.401(3)(f). The occupancy fee, therefore, is not facially preempted, but may be preempted if the actual fees charged by Palm Beach exceed the limitations in § 337.401. Because neither party has presented evidence of the actual amount of the occupancy fee Palm Beach has charged, neither party is entitled to summary judgment on the issue of whether the occupancy tax, as applied, is preempted by state law.

Title I, Section 4. General Conditions Upon Use of Rights–of–Way: This section consists primarily of straightforward provisions governing the installation, construction, relocation, and maintenance of telecommunications facilities. With three exceptions, section 4 is not preempted by state law because its provisions are reasonable rules or regulations "related to the placement or maintenance of facilities in such roads or rights-of-way" permitted under § 337.401(3)(b).

[21] The first preempted provision is subsection 4.2.6, which reads:

> Every operator of a communications facility shall make available to other franchisees or licensees any of its conduits that is excess, so long as it is excess, at a reasonable, non-discriminatory rental fee.... The Town may require as a condition of issuing any right-of-way permit for underground conduit the installation of which requires excavation ***1184** ... that the franchisee, licensee, or holder

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> of the right-of-way permit emplace conduit in excess of its present and reasonably foreseeable requirements for the purpose of accommodating other franchisees and licensees for a reasonable charge.

This requirement places a potentially substantial burden on telecommunications companies that, while perhaps furthering Palm Beach's policies for the development of its technological infrastructure, goes far beyond the authority allotted it in § 337.401(3)(b) to regulate "only those matters necessary to manage the roads or rights-of-way."

[22] The second preempted subsection, 4.4, states:

> Every communications facility shall be subject to the right of periodic inspection and testing by the Town to determine compliance with the provisions of this Ordinance, a franchise or license agreement, or other applicable law. The Town shall have the right, upon request, to be notified and present when the communications facility is tested by the operator. Each operator must respond to requests for information regarding its system and plans for the system as the Town may from time to time issue, including requests for information regarding its plans for construction, operation and repair and the purposes for which the plant is being constructed, operated or repaired.

While Palm Beach does have certain rights to inspect the telecommunications facilities and request information relating to them, under § 337.401(3)(b) it may only do so with respect to matters concerning the physical use and management of the rights-of-way. Because this subsection is not so limited, it is preempted.

[23] The third preempted subsection is 4.7, titled "No discrimination." Under this subsection, Palm Beach requires that telecommunications facility operators not discriminate "on the basis of race, color, creed, national origin, sex, age, conditions of physical handicap, religion, ethnic background, marital status, or sexual orientation," in both its provision of service and its employment practices. This subsection also prohibits telecommunications facility operators from discriminating or retaliating against individuals or the City for the exercise of any legally protected right. Finally, the subsection requires that telecommunications facilities operators not deny access or levy different rates on customers based on income. The requirements in subsection 4.7 go far beyond matters necessary to regulate the physical rights-of-way, and therefore exceed the municipality's authority under § 337.401(3)(b).

Title I, Section 5. Protection of the Town and Residents: Under this section, Palm Beach establishes standards for indemnification, insurance, performance bonds, and a security fund that are required of telecommunications companies seeking to use the public rights-of-way. These are reasonable regulations directly related to the management of the rights-of-way, and are therefore authorized under § 337.401(3)(b).

Title I, Section 6. Enforcement and Remedies: Subsections 6.1 "Town Manager responsible for administration," 6.7 "Remedies Cumulative," 6.13 "Reservation of Authority," 6.14 "No waiver," and 6.15 "Ordinance not a contract," are "housekeeping" provisions that are necessary to the enforcement of the ordinance but do not actually regulate telecommunications providers; these sections are not preempted by state law.

Subsections 6.2, 6.3, 6.5, 6.6, and 6.12 pertain to licenses and franchises, and are therefore preempted by § 337.401(3)(a), which prohibits these arrangements to the ***1185** extent they apply to telecommunications companies.

Subsection 6.4 "Penalties" provides for a fine to be levied against any person who violates the ordinance. While the fine may not be used to enforce any section of the ordinance that has been found to be preempted, the power to fine is a police power, and therefore is reserved to the municipality under § 337.401(3)(b).

Subsection 6.8 "Access to books and records" grants Palm Beach access to all books and records in a telecommunications company's possession "related to the construction, operation, or repair of the communications facility," as well as all books and

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records "related to revenues derived from the operation of the communications facility." Palm Beach's power to access documents pertaining to the construction and repair of communications facilities is necessary to its direct regulation of the rights-of-way, and is therefore authorized under § 337.401(3)(b); however, under state law it does not have a right to access books and records relating to operations or revenues, as those matters are not directly related to the rights-of-way.

Subsection 6.9 "Retention of Records," and subsection 6.10 "Reports," require the operators of telecommunications facilities to retain records and prepare reports as requested to aid Palm Beach in determining if the facilities are in compliance with the ordinance. These requirements are valid under § 337.401(3)(b) as they are necessary to Palm Beach's regulation of the rights-of-way.

Subsection 6.11 "Maps" requires operators of telecommunications facilities to "maintain accurate maps and improvement plans which show the location, size, and a general description of all facilities installed in the public rights-of-way." This requirement is valid under § 337.401(3)(b) as a reasonable means by which the City can ensure that future construction in the rights-of-way does not interfere with or damage existing communications lines and facilities.

Title I, Section 7. Transitional Provisions: Subsection 7.1 addresses the process by which persons operating telecommunications facilities without a franchise or license at the time of the ordinance's enactment should file for a franchise or license, and subsection 7.2 states that persons holding franchises or licenses at the time of the ordinance's enactment may continue to operate under the terms of the franchise or license until its expiration. These subsections are preempted by § 337.401(3)(a), which prohibits municipalities from requiring telecommunications companies to enter franchises or licenses. Subsection 7.3, which states that the passage of the ordinance does not affect persons with existing leases of property in the rights-of-way, is not preempted.

Title II, Section 1. Application for a Franchise: This section sets out the process an applicant must undergo and the criteria an applicant must meet in order to obtain a franchise to operate a telecommunications facility in the rights-of-way in Palm Beach, and also sets out the formula for the calculation of the franchise fee. While Palm Beach does have the right under § 337.401(3)(a) to request some of the information and credentials from a communications company that it requests under this section, it clearly may not do so in the context of a franchise application, and it may not charge a franchise fee. This section is preempted in its entirety.

B. *Preemption by § 253 of the Telecommunications Act of 1996*

Because sections of both ordinances remain that were not preempted by state law, it is necessary for us to consider BellSouth's claim that the ordinances are preempted by § 253 of the Act, titled "Removal ***1186** of Barriers to Entry." [8] Section 253 reads, in relevant part:

> (a) In general
>
> 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.
>
> (b) State regulatory authority
>
> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) State and local government authority
>
> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
>
> (d) Preemption

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> If, after notice and an opportunity for public comment, the [Federal Communications] Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

[24] As has been observed by other federal courts, the language and structure of § 253 raise two difficult questions of statutory interpretation: (1) what is the preemptive scope of § 253; and (2) who may seek enforcement of the provisions of § 253? *See TCG Detroit v. City of Dearborn,* 206 F.3d 618, 623 (6th Cir.2000); *Cablevision of Boston, Inc. v. Public Improvement Comm'n,* 184 F.3d 88, 98–99 (1st Cir.1999). We must answer these issues of first impression before we can consider whether the remaining sections of the ordinances are preempted by federal law. [9]

1. Substantive Limits on State and Local Authority in § 253

The heart of § 253 is subsection (a), which prohibits state and local governments from passing laws or other regulations that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). It is beyond dispute that subsection (a) imposes a substantive limitation on the authority of state and local governments to regulate telecommunications.

***1187** **[25]** The difficult question here pertains to the function of subsections (b) and (c). Several federal district courts, including the district court in these cases, have interpreted subsections (b) and (c) as imposing substantive limitations on state and local authority in the telecommunications field. Primarily in the context of interpreting subsection (c), these courts have held that the *only* regulatory authority retained by the state and local governments is the authority to perform the functions specifically reserved in those subsections. *See Bell Atlantic–Md., Inc. v. Prince George's County, Md.,* 49 F.Supp.2d 805, 814 (D.Md.1999) (*rev'd on other grounds,* 212 F.3d 863 (4th Cir.2000)); *AT&T Communications of the Southwest, Inc. v. City of Dallas,* 8 F.Supp.2d 582, 591 (N.D.Tex.1998); *TCG Detroit v. City of Dearborn,* 977 F.Supp. 836, 841 (E.D.Mich.1997) (*aff'd,* 206 F.3d 618 (6th Cir.2000)). At least one district court, however, has interpreted (b) and (c) not as limiting state and local authority, but as defining the "safe harbors," that is, the exceptions to the general prohibition stated in subsection (a). *See TCG New York, Inc. v. City of White Plains, N. Y.,* 125 F.Supp.2d 81, 87 (S.D.N.Y.2000).

The confusion arises because of perceived inconsistencies within the structure of the statute. Subsection (a) states the general limitations on state and local government regulation of telecommunications. Subsections (b) and (c) are structurally identical to one another: (b) begins with the phrase "Nothing in this section shall affect ...", and (c) begins with the phrase "Nothing in this section affects ..."; thus, (b) and (c) are couched not in terms of limitation, but of exception to the general rule set forth in (a). Subsection (d), however, states that the FCC shall preempt any state or local statute or regulation "that violates subsection (a) or (b) of this section." It would seem that if an entity could "violate" subsection (b), then subsection (b) must impose some sort of substantive limitations, and because they are structured similarly, if (b) imposes separate limitations, so must (c). Therein lies the apparent conflict. Based on four factors, however, we find that subsection (a) contains the only substantive limitations on state and local government regulation of telecommunications, and that subsections (b) and (c) are "safe harbors," functioning as affirmative defenses to preemption of state or local exercises of authority that would otherwise violate (a).

[26] **[27]** When interpreting a statute, "it is axiomatic that a court must begin with the plain language of the statute." *United States v. Prather,* 205 F.3d 1265, 1269 (11th Cir.2000). The first and most basic reason for interpreting (b) and (c) as safe harbor provisions is that, reading (a), (b), and (c) together, it is the only interpretation supported by the plain language of the statute; unless one omits the opening phrase in subsections (b) and (c) completely or otherwise inflicts some grave injustice on the rules of English grammar, it is not possible to read these subsections as pronouncing separate limitations that a state or local government could "violate." [10] Because they begin with the phrase "Nothing in this section shall affect ...," it is clear that subsections (b) and (c) are defining exceptions to (a), and that whatever language follows that initial phrase, it derives meaning only through its relationship ***1188** to (a). Latent in the opinions of the courts that have

read subsections (b) and (c) as independent limitations on state and local authority is the maxim that *inclusion unis est exclusion alterius,* that is, that by expressly reserving certain powers to the state and local governments in (b) and (c), Congress must have intended that only those powers be reserved. While this argument may have some appeal at first blush, we note that if we were to read (b) and (c) as delineating the absolute boundaries of state and local regulatory authority in the field of telecommunications, the limitation set forth in subsection (a) would be superfluous. Settled principles of statutory construction counsel against such a reading, *see Mears Transp. Group v. Florida,* 34 F.3d 1013, 1019 (11th Cir.1994), particularly when it would violate the plain meaning of the statute.

[28] Our second reason for viewing subsection (a) as the only limitation on state and local governments in § 253 and interpreting subsections (b) and (c) as exceptions to (a) is that that is how the FCC has interpreted the statute.[11] In 1998, the FCC issued its "Suggested Guidelines for Petitions for Ruling under Section 253 of the Communications Act." *Available at* http://www.fcc.gov/Bureaus/Common_Carrier/Public_Notices/1998/fcc98295.txt. In these guidelines, the FCC stated:

> In preparing their submissions, parties should address as appropriate all parts of section 253. In particular, parties should first describe whether the challenged requirement falls within the proscription of section 253(a); if it does, parties should describe whether the requirement nevertheless is permissible under other sections of the statute, specifically sections 253(b) and (c).

Id. Thus, it is clear that (b) and (c) are exceptions to (a), rather than separate limitations on state and local authority in addition to those in (a). Consistent with this interpretation, if a party seeking preemption fails to make the threshold showing that a state or local statute or ordinance violates (a) because it "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," the FCC has found it unnecessary to consider whether the statute or ordinance is "saved" by the exceptions in (b) or (c). *See, e.g., In re Missouri Municipal League,* 16 FCC Rec. 1157, 2001 WL 28068 (2001); *In re Minnesota,* 14 FCC Rec. 21,697, 21,730 (1999); *In re American Communications Servs., Inc.,* 14 FCC Rec. 21,579, 21,587–88 (1999); *In re Cal. Payphone Ass'n,* 12 FCC Rec. 14,191, 14,203 (1997).

The third factor bolstering our conclusion that Congress intended subsections (b) and (c) to be used defensively by state and local governments comes from the legislative history. The remarks of Senator Hollings during the Senate debate explain how (b) and (c) were written into the Act:

> When we provided that [subsection (a)], the States necessarily came and said, wait a minute, that sounds good, but we have the responsibilities over the public safety and welfare. We have a responsibility along with you with respect to universal service. So what about that? How are we going to do our job with that overencompassing [sic] general section ***1189** (a) that you have there. So we [added subsection (b)]. We did not want and had no idea of taking away that basic responsibility for protecting the public safety and welfare and also providing and advancing universal service. So that was written in at the request of the States, and they like it. The mayors came, as you well indicate, and they said we have our rights of way ... and every mayor must control the rights of way. So we wrote [subsection (c)] in there.... We have had experience here with the mayors coming and asking us. And this is the response. That particular section (c) is in response to the request of the mayors.

141 Cong. Rec. S8174 (daily ed. June 12, 1995). Put in context, it is clear that subsections (b) and (c) were added to the statute to preserve, rather than to limit, state and local government authority.

The final factor supporting our reading of § 253 is the legislative history surrounding subsection (d). This history, for reasons that are fully addressed *infra* in our discussion of whether there is a private cause of action

under § 253, makes it clear that subsection (d) was not intended to affect the interrelationship of subsections (a), (b), and (c), but that its apparent inconsistency with the scheme set forth in those subsections was the result of a late amendment that was intended only to designate the forum in which challenges to statutes or ordinances governing particular matters were brought.

2. Private Cause of Action

[29] Our touchstone in determining whether a federal statute implies a private cause of action remains the four-part test handed down by the Supreme Court in *Cort v. Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). [12] Opinions refining the *Cort* analysis have indicated that the focal point of the inquiry is the second factor, evidence of Congressional intent, and that a court should search for such evidence primarily within the language and structure of the statute, as well as in the legislative history. *See Thompson v. Thompson,* 484 U.S. 174, 179, 108 S.Ct. 513, 516, 98 L.Ed.2d 512 (1988); *Ayres v. Gen. Motors Corp.,* 234 F.3d 514, 522–23 (11th Cir.2000).

[30] In this case, an analysis of the statutory language creates more questions than it answers about what causes of action Congress intended to create and who it intended to enforce them. Subsection (d), titled "Preemption," is the enforcement provision, and it expressly obligates the FCC to preempt statutes that "violate" subsections (a) and (b). If the FCC is to enforce (a) and (b), this suggests that the enforcement of (c) is left to private parties. But, as we have demonstrated, subsections (b) and (c) are safe harbor provisions that cannot be violated, and therefore cannot form the basis of a cause of action against a state or local government. In this case, we must go beyond the plain language of the statute to reconcile the apparent conflicts when subsections (a) through (d) are read literally.

[31] Fortunately, the legislative history pertaining to subsection (d) clearly indicates Congress's intentions when it drafted subsection (d). The Act began as Senate ***1190** Bill 652 in the 104th Congress. In its initial form, subsection (d) read:

> PREEMPTION.—If, after notice and an opportunity for public comment, the [Federal Communications] Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency. [13]

Under this version, it was clear that preemption under this section was a purely administrative procedure, with jurisdiction vesting in the FCC.

Senators Feinstein and Kempthorne, the former mayors of San Francisco and Boise, respectively, were troubled by the impact that subsection (d) would have on city governments. Senator Feinstein stated why she and Senator Kempthorne felt FCC jurisdiction over preemption was improper:

> That means that cities will have to send delegations of city attorneys to Washington to go before a panel of telecommunications specialist[s] at the FCC, on what may be [a] very broad question of State or local government rights. In reality, this preemption provision is an unfunded mandate because it will create major new costs for cities and for States.

141 Cong. Rec. S8170 (daily ed. June 12, 1995). Senators Feinstein and Kempthorne felt that the proper venue for resolving these disputes was the local federal district courts. *See id.* at S8171. Together, they sponsored amendment No. 1270 to the bill, for the purpose of "strik[ing] the authority of the Federal Communications Commission to preempt State or local regulations that establish barriers to entry for interstate or intrastate telecommunications services." 141 Cong. Rec. S8305 (daily ed. June 14, 1995). The Feinstein–Kempthorne amendment was met with opposition from those who felt that the FCC remained the proper body to resolve these issues. *See* 141 Cong. Rec. S8173 (daily ed. June 12, 1995) (remarks of Senator Pressler), S8174 (remarks of Senator Hollings).

In response, Senator Gorton proposed amendment No. 1277, a second-degree amendment to the Feinstein–Kempthorne amendment, which was intended to be a compromise provision. First, Senator Gorton noted that the Feinstein–Kempthorne amendment, and therefore his own second-degree amendment to it, was limited: "It does not impact the substance of the first three subsections at all, but it does shift the forum in which a question about these three subsections is decided." 141 Cong. Rec. S8212 (daily ed. June 13, 1995). Senator Gorton then explained precisely the scope and purpose of his amendment:

> I join with the two sponsors of the Feinstein amendment in agreeing that the rules that a city or a county imposes on how its street rights of way are going to be utilized, whether there are to be above-ground wires or underground wires, what kind of equipment ought to be used in excavations, what hours the excavations should take place, are a matter of primarily local concern and, of course, they are exempted by subsection (c) of this section.
>
> So my modification of the Feinstein amendment says that in the case of these purely local matters dealing with rights of way, there will not be a jurisdiction ***1191** on the part of the FCC immediately to enjoin the enforcement of those local ordinances. But if, under section (b), a city or county makes quite different rules relating to universal service or the quality of telecommunications services—the very heart of this bill—then there should be a central agency at Washington, DC, which determines whether or not that inhibits the competition and the very goals of this bill.
>
> ...
>
> [The Gorton amendment] retains not only the right of local communities to deal with their rights of way, but their right to meet any challenge on home ground in their local district courts. The Feinstein amendment itself ... would deprive the FCC of any jurisdiction over a State law which deliberately prohibited or frustrated the ability of any telecommunications entity to provide competitive service. It would simply take that right away from the FCC, and each such challenge would have to be decided in each of the various Federal district courts around the country.
>
> The States retain the right under subsection (d) to pass all kinds of legislation that deals with telecommunications providers, subject to the provision that they cannot impede competition. The determination of whether they have impeded competition, not by the way they manage trees or rights of way, but by the way they deal with substantive law dealing with telecommunications entities. That conflict should be decided in one central place, by the FCC. The appropriate balance is to leave purely local concerns to local entities, but to make decisions on the natural concerns which are at the heart of this bill in one central place so they can be consistent across the country.

141 Cong. Rec. S8306, S8308 (daily ed. June 14, 1995). The Senate voted down the Feinstein–Kempthorne amendment and then adopted the Gorton amendment by a voice vote, *id.* at S8308, and consequently subsection (d) was amended to the form in which it exists today.

[32] With the benefit of Senator Gorton's remarks, it is clear that subsection (d), despite its less-than-clear language, serves a single purpose—it establishes different forums based on the subject matter of the challenged statute or ordinance. Accordingly, we hold that a private cause of action in federal district court exists under § 253 to seek preemption of a state or local statute, ordinance, or other regulation only when that statute, ordinance, or regulation purports to address the management of the public rights-of-way, thereby potentially implicating subsection (c).[14] All other challenges brought under § 253 must be addressed to the FCC.

3. Application of § 253 to BellSouth's Claims

[33] **[34]** **[35]** BellSouth brought these lawsuits against the Cities, alleging that their ordinances violated §§ 253(a) and (c). These ordinances specifically state that their purpose is to set out the rules governing the Cities' management of their rights-of-way, and so the district court is the proper forum for BellSouth's complaints. In both cases, the district court considered whether the individual sections of the ordinances fell within the parameters of (c), but never addressed, in the first instance, whether the ordinances violated subsection (a). Accordingly, we remand these cases to the district court for further ***1192** proceedings to determine whether the sections of the ordinances that are not preempted by Florida state law violate subsection (a) because they "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." If the district court finds that any of these provisions do violate (a), then the Cities

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shall have an opportunity to establish that the provisions are nevertheless not preempted because they fall within the safe harbor provided in (c).[15] The district court should reconsider the issue of severability after it has determined the full extent to which the ordinances are preempted by state and federal law.

C. *The Cities' Counterclaims*

Both Cities appeal the district court's grants of summary judgment in favor of BellSouth on the issue of the Cities' individual counterclaims. Palm Beach had sought payment of fees under the provisions of its ordinance, and Coral Springs had sought to enforce an ordinance that gave it the option of purchasing the telecommunications facilities that BellSouth had built in its rights-of-way. The district court summarily found these counterclaims to have been preempted by state and federal law. We remand these counterclaims to the district court for reconsideration in light of our clarification of the preemptive scope of the relevant state and federal laws. We, however, express no opinion on the merits of these counterclaims.

III. CONCLUSION

In this appeal, the Cities challenge the district court's finding that sections of their ordinances were preempted by Florida state law and by § 253 of the Telecommunications Act of 1996. BellSouth cross-appeals the district court's decisions not to find the ordinances preempted in their entirety. We hold that specific subsections of the ordinances are preempted by § 337.401 of the Florida Statutes, but that others are valid exercises of local authority under the Florida scheme. We also hold that § 253 of the Act creates a private right of action only for parties seeking preemption of a state or local statute, ordinance, or other regulation that purports to be a management of the public rights-of-way. We further hold that the district court erred when it failed to consider whether the ordinances violated § 253(a). For these reasons, we AFFIRM the district court's judgments in part, REVERSE in part, and REMAND to the district court for further proceedings.[16]

All Citations

252 F.3d 1169, 14 Fla. L. Weekly Fed. C 717

Footnotes

* Honorable Lenore C. Nesbitt, U.S. Senior District Judge for the Southern District of Florida, sitting by designation.

** Judge Nesbitt did not participate in this decision. This decision is rendered by a quorum. 28 U.S.C. § 46(d).

1 Pub.L. No. 104–104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

2 On 2 May 2001, the Florida Legislature passed S.B. 1878, which provides that the LCST and the other October amendments envisioned in the Simplification Act will take effect on 1 October 2001, with certain changes and clarifications. As of the date of this opinion's issuance, this bill has not yet been signed into law by the Governor of Florida.

3 While it is possible for the post-judgment amendment of a challenged statute to render the appeal of that judgment moot, *see Fillyaw,* 958 F.2d at 1519–20, in this case, a live controversy remains as to whether the Cities' ordinances are preempted under the Simplification Law's transitional amendments to § 337.401.

4 We decline to apply a limiting construction to save the valid portions of the information request provision, because "as a federal court, we must be particularly reluctant to rewrite the terms of a state statute." *Dimmitt v. City of Clearwater,* 985 F.2d 1565, 1572 (11th Cir.1993) (emphasis omitted).

5 BellSouth has not claimed that Coral Springs is, in fact, enforcing the terms of this subsection in a manner inconsistent with § 337.401.

6 Title I, section 1.23 defines "telecommunications facility" as "a facility that is used to provide one or more telecommunications services, any portion of which occupies the public rights of way." Section 1.24 defines "telecommunications services" as "the transmission for hire, of information in electronic or optical form, including, but not limited to, voice, video, or data," and includes "telephone service but does not include over-the-air broadcasts to the public-at-large from facilities licensed by the Federal Communications Commission."

7 BellSouth has not claimed that Palm Beach is, in fact, currently charging it the franchise fee and associated costs.

8 *Codified at* 47 U.S.C. § 253.

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9 The Sixth Circuit has held that the question of whether § 253 creates a private cause of action is a question affecting our subject-matter jurisdiction. *TCG Detroit,* 206 F.3d at 622. If it were a jurisdictional matter, we would be required to address it first, before proceeding to the issue of § 253's preemptive scope. *See Garcia–Mir v. Smith,* 766 F.2d 1478, 1486 (11th Cir.1985) (per curiam). The Supreme Court, however, has flatly stated that "[t]he question whether a federal statute creates a claim for relief is not jurisdictional." *Northwest Airlines, Inc. v. County of Kent, Mich.,* 510 U.S. 355, 365, 114 S.Ct. 855, 862, 127 L.Ed.2d 183 (1994). Therefore, not being compelled to address the question of whether § 253 creates a private cause of action first, we address these closely entwined issues in the most analytically manageable order.

10 Of course, this is not to say that a state statute or regulation may not meet the criteria of subsection (b), and a local ordinance may not meet the criteria of subsection (c). But if the statute or ordinance in question does not meet these criteria, the state or local government has not "violated" the subsections; rather, the particular regulation is not immune from preemption as an exception to the general prohibition in (a).

11 As the federal agency charged with implementing the Act, the FCC's views on the interpretation of § 253 warrant respect. "We need not inquire whether the degree of deference described in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), is in order; it is enough to observe that the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Olmstead v. Zirming,* 527 U.S. 581, 598, 119 S.Ct. 2176, 2186, 144 L.Ed.2d 540 (1999) (internal citations omitted).

12 The *Cort* factors are: (1) whether "the plaintiff one of the class for whose *especial* benefit the statute was enacted;" (2) whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one;" (3) whether it is "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff;" and (4) whether the cause of action is "one traditionally relegated to state law, in an area basically the concern of the States." *Id.* at 78, 95 S.Ct. at 2088.

13 At this point in the legislation's development, the provisions that eventually became § 253 were designated as § 254.

14 "When an examination of one or more of the *Cort* factors unequivocally reveals congressional intent, there is no need for us to trudge through all four of the factors." *Ayres,* 234 F.3d at 524 (punctuation and citations omitted).

15 We are not requiring that a district court always make findings under § 253(a) before addressing the § 253(c) question. Judicial economy may best be served by initially conducting the § 253(c) analysis in cases in which the court can easily determine that the ordinance is not preempted because it falls within the § 253(c) safe harbor. However, before declaring an ordinance preempted, a court must conduct both the § 253(a) and the § 253(c) analyses. Here, the district court erred when it declared the ordinances preempted without first determining that BellSouth had established its prima facie case under § 253(a).

16 Should the relevant Florida law change between the date of this opinion's issuance and the date on which the district court issues its order, the district court is instructed to reevaluate the state-law preemption question in light of the new law, guided by the approach we have taken here.

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United States Code Annotated
Title 47. Telecommunications (Refs & Annos)
Chapter 13. Public Safety Communications and Electromagnetic Spectrum Auctions
Subchapter IV. Spectrum Auction Authority

47 U.S.C.A. § 1455

§ 1455. Wireless facilities deployment

Effective: February 22, 2012
Currentness

(a) Facility modifications

(1) In general

Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104-104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

(2) Eligible facilities request

For purposes of this subsection, the term "eligible facilities request" means any request for modification of an existing wireless tower or base station that involves--

(A) collocation of new transmission equipment;

(B) removal of transmission equipment; or

(C) replacement of transmission equipment.

(3) Applicability of environmental laws

Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969.

(b) Federal easements and rights-of-way

(1) Grant

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If an executive agency, a State, a political subdivision or agency of a State, or a person, firm, or organization applies for the grant of an easement or right-of-way to, in, over, or on a building or other property owned by the Federal Government for the right to install, construct, and maintain wireless service antenna structures and equipment and backhaul transmission equipment, the executive agency having control of the building or other property may grant to the applicant, on behalf of the Federal Government, an easement or right-of-way to perform such installation, construction, and maintenance.

(2) Application

The Administrator of General Services shall develop a common form for applications for easements and rights-of-way under paragraph (1) for all executive agencies that shall be used by applicants with respect to the buildings or other property of each such agency.

(3) Fee

(A) In general

Notwithstanding any other provision of law, the Administrator of General Services shall establish a fee for the grant of an easement or right-of-way pursuant to paragraph (1) that is based on direct cost recovery.

(B) Exceptions

The Administrator of General Services may establish exceptions to the fee amount required under subparagraph (A)--

(i) in consideration of the public benefit provided by a grant of an easement or right-of-way; and

(ii) in the interest of expanding wireless and broadband coverage.

(4) Use of fees collected

Any fee amounts collected by an executive agency pursuant to paragraph (3) may be made available, as provided in appropriations Acts, to such agency to cover the costs of granting the easement or right-of-way.

(c) Master contracts for wireless facility sitings

(1) In general

Notwithstanding section 704 of the Telecommunications Act of 1996 or any other provision of law, and not later than 60 days after February 22, 2012, the Administrator of General Services shall--

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(A) develop 1 or more master contracts that shall govern the placement of wireless service antenna structures on buildings and other property owned by the Federal Government; and

(B) in developing the master contract or contracts, standardize the treatment of the placement of wireless service antenna structures on building rooftops or facades, the placement of wireless service antenna equipment on rooftops or inside buildings, the technology used in connection with wireless service antenna structures or equipment placed on Federal buildings and other property, and any other key issues the Administrator of General Services considers appropriate.

(2) Applicability

The master contract or contracts developed by the Administrator of General Services under paragraph (1) shall apply to all publicly accessible buildings and other property owned by the Federal Government, unless the Administrator of General Services decides that issues with respect to the siting of a wireless service antenna structure on a specific building or other property warrant nonstandard treatment of such building or other property.

(3) Application

The Administrator of General Services shall develop a common form or set of forms for wireless service antenna structure siting applications under this subsection for all executive agencies that shall be used by applicants with respect to the buildings and other property of each such agency.

(d) Executive agency defined

In this section, the term "executive agency" has the meaning given such term in section 102 of Title 40.

CREDIT(S)

(Pub.L. 112-96, Title VI, § 6409, Feb. 22, 2012, 126 Stat. 232.)

47 U.S.C.A. § 1455, 47 USCA § 1455
Current through P.L. 114-229.

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Code of Federal Regulations
Title 47. Telecommunication
Chapter I. Federal Communications Commission (Refs & Annos)
Subchapter A. General
Part 1. Practice and Procedure (Refs & Annos)
Subpart CC. State and Local Review of Applications for Wireless Service Facility Modification (Refs & Annos)

47 C.F.R. § 1.40001

§ 1.40001 Wireless Facility Modifications.

Effective: May 18, 2015
Currentness

(a) Purpose. These rules implement section 6409 of the Spectrum Act (codified at 47 U.S.C. 1455), which requires a State or local government to approve any eligible facilities request for a modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station.

(b) Definitions. Terms used in this section have the following meanings.

(1) Base station. A structure or equipment at a fixed location that enables Commission-licensed or authorized wireless communications between user equipment and a communications network. The term does not encompass a tower as defined in this subpart or any equipment associated with a tower.

(i) The term includes, but is not limited to, equipment associated with wireless communications services such as private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.

(ii) The term includes, but is not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration (including Distributed Antenna Systems and small-cell networks).

(iii) The term includes any structure other than a tower that, at the time the relevant application is filed with the State or local government under this section, supports or houses equipment described in paragraphs (b)(1)(i) through (ii) of this section that has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, even if the structure was not built for the sole or primary purpose of providing such support.

(iv) The term does not include any structure that, at the time the relevant application is filed with the State or local government under this section, does not support or house equipment described in paragraphs (b)(1)(i)-(ii) of this section.

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(2) Collocation. The mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.

(3) Eligible facilities request. Any request for modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station, involving:

(i) Collocation of new transmission equipment;

(ii) Removal of transmission equipment; or

(iii) Replacement of transmission equipment.

(4) Eligible support structure. Any tower or base station as defined in this section, provided that it is existing at the time the relevant application is filed with the State or local government under this section.

(5) Existing. A constructed tower or base station is existing for purposes of this section if it has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, provided that a tower that has not been reviewed and approved because it was not in a zoned area when it was built, but was lawfully constructed, is existing for purposes of this definition.

(6) Site. For towers other than towers in the public rights-of-way, the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site, and, for other eligible support structures, further restricted to that area in proximity to the structure and to other transmission equipment already deployed on the ground.

(7) Substantial change. A modification substantially changes the physical dimensions of an eligible support structure if it meets any of the following criteria:

(i) For towers other than towers in the public rights-of-way, it increases the 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; for other eligible support structures, it increases the height of the structure by more than 10% or more than ten feet, whichever is greater;

(A) Changes in height should be measured from the original support structure in cases where deployments are or will be separated horizontally, such as on buildings' rooftops; in other circumstances, changes in height should be measured from the dimensions of the tower or base station, inclusive of originally approved appurtenances and any modifications that were approved prior to the passage of the Spectrum Act.

(ii) For towers other than towers in the public rights-of-way, it involves 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; for other eligible support structures, it involves

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adding an appurtenance to the body of the structure that would protrude from the edge of the structure by more than six feet;

(iii) For any eligible support structure, it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets; or, for towers in the public rights-of-way and base stations, it involves installation of any new equipment cabinets on the ground if there are no pre-existing ground cabinets associated with the structure, or else involves installation of ground cabinets that are more than 10% larger in height or overall volume than any other ground cabinets associated with the structure;

(iv) It entails any excavation or deployment outside the current site;

(v) It would defeat the concealment elements of the eligible support structure; or

(vi) It does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment, provided however that this limitation does not apply to any modification that is non-compliant only in a manner that would not exceed the thresholds identified in § 1.40001(b)(7)(i) through (iv).

(8) Transmission equipment. Equipment that facilitates transmission for any Commission-licensed or authorized wireless communication service, including, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply. The term includes equipment associated with wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.

(9) Tower. Any structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities, including structures that are constructed for wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul, and the associated site.

(c) Review of applications. A State or local government may not deny and shall approve any eligible facilities request for modification of an eligible support structure that does not substantially change the physical dimensions of such structure.

(1) Documentation requirement for review. When an applicant asserts in writing that a request for modification is covered by this section, a State or local government may require the applicant to provide documentation or information only to the extent reasonably related to determining whether the request meets the requirements of this section. A State or local government may not require an applicant to submit any other documentation, including but not limited to documentation intended to illustrate the need for such wireless facilities or to justify the business decision to modify such wireless facilities.

(2) Timeframe for review. Within 60 days of the date on which an applicant submits a request seeking approval under this section, the State or local government shall approve the application unless it determines that the application is not covered by this section.

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(3) Tolling of the timeframe for review. The 60–day period begins to run when the application is filed, and may be tolled only by mutual agreement or in cases where the reviewing State or local government determines that the application is incomplete. The timeframe for review is not tolled by a moratorium on the review of applications.

(i) To toll the timeframe for incompleteness, the reviewing State or local government must provide written notice to the applicant within 30 days of receipt of the application, clearly and specifically delineating all missing documents or information. Such delineated information is limited to documents or information meeting the standard under paragraph (c)(1) of this section.

(ii) The timeframe for review begins running again when the applicant makes a supplemental submission in response to the State or local government's notice of incompleteness.

(iii) Following a supplemental submission, the State or local government will have 10 days to notify the applicant that the supplemental submission did not provide the information identified in the original notice delineating missing information. The timeframe is tolled in the case of second or subsequent notices pursuant to the procedures identified in this paragraph (c)(3). Second or subsequent notices of incompleteness may not specify missing documents or information that were not delineated in the original notice of incompleteness.

(4) Failure to act. In the event the reviewing State or local government fails to approve or deny a request seeking approval under this section within the timeframe for review (accounting for any tolling), the request shall be deemed granted. The deemed grant does not become effective until the applicant notifies the applicable reviewing authority in writing after the review period has expired (accounting for any tolling) that the application has been deemed granted.

(5) Remedies. Applicants and reviewing authorities may bring claims related to Section 6409(a) to any court of competent jurisdiction.

Credits

[80 FR 28203, May 18, 2015]

SOURCE: 56 FR 57598, Nov. 13, 1991; 57 FR 187, Jan. 3, 1992; 58 FR 27473, May 10, 1993; 59 FR 22985, May 4, 1994; 61 FR 45618, Aug. 29, 1996; 61 FR 46561, Sept. 4, 1996; 61 FR 52899, Oct. 9, 1996; 62 FR 37422, July 11, 1997; 63 FR 67429, Dec. 7, 1998; 63 FR 71036, Dec. 23, 1998; 64 FR 63251, Nov. 19, 1999; 65 FR 10720, Feb. 29, 2000; 65 FR 19684, April 12, 2000; 65 FR 31281, May 17, 2000; 69 FR 77938, Dec. 29, 2004; 71 FR 26251, May 4, 2006; 74 FR 39227, Aug. 6, 2009; 75 FR 9797, March 4, 2010; 76 FR 43203, July 20, 2011; 77 FR 71137, Nov. 29, 2012; 78 FR 10100, Feb. 13, 2013; 78 FR 15622, March 12, 2013; 78 FR 41321, July 10, 2013; 78 FR 50254, Aug. 16, 2013; 79 FR 48528, Aug. 15, 2014; 80 FR 1268, Jan. 8, 2015; 80 FR 1269, Jan. 8, 2015; 81 FR 40821, June 23, 2016; 81 FR 52362, Aug. 8, 2016, unless otherwise noted.

AUTHORITY: 47 U.S.C. 151, 154(i), 155, 157, 225, 303(r), 309, 1403, 1404, 1451, and 1452.

Notes of Decisions (1)

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Current through October 13, 2016; 81 FR 70906.

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West's Florida Statutes Annotated
Title XXVI. Public Transportation (Chapters 334-349)
Chapter 337. Contracting; Acquisition, Disposal, and Use of Property (Refs & Annos)

West's F.S.A. § 337.401

337.401. Use of right-of-way for utilities subject to regulation; permit; fees

Effective: March 10, 2016
Currentness

(1)(a) The department and local governmental entities, referred to in this section and in ss. 337.402, 337.403, and 337.404 as the "authority," that have jurisdiction and control of public roads or publicly owned rail corridors are authorized to prescribe and enforce reasonable rules or regulations with reference to the placing and maintaining across, on, or within the right-of-way limits of any road or publicly owned rail corridors under their respective jurisdictions any electric transmission, telephone, telegraph, or other communications services lines; pole lines; poles; railways; ditches; sewers; water, heat, or gas mains; pipelines; fences; gasoline tanks and pumps; or other structures referred to in this section and in ss. 337.402, 337.403, and 337.404 as the "utility." The department may enter into a permit-delegation agreement with a governmental entity if issuance of a permit is based on requirements that the department finds will ensure the safety and integrity of facilities of the Department of Transportation; however, the permit-delegation agreement does not apply to facilities of electric utilities as defined in s. 366.02(2).

(b) For aerial and underground electric utility transmission lines designed to operate at 69 or more kilovolts that are needed to accommodate the additional electrical transfer capacity on the transmission grid resulting from new base-load generating facilities, the department's rules shall provide for placement of and access to such transmission lines adjacent to and within the right-of-way of any department-controlled public roads, including longitudinally within limited access facilities where there is no other practicable alternative available, to the greatest extent allowed by federal law, if compliance with the standards established by such rules is achieved. Without limiting or conditioning the department's jurisdiction or authority described in paragraph (a), with respect to limited access right-of-way, such rules may include, but need not be limited to, that the use of the right-of-way for longitudinal placement of electric utility transmission lines is reasonable based upon a consideration of economic and environmental factors, including, without limitation, other practicable alternative alignments, utility corridors and easements, impacts on adjacent property owners, and minimum clear zones and other safety standards, and further provide that placement of the electric utility transmission lines within the department's right-of-way does not interfere with operational requirements of the transportation facility or planned or potential future expansion of such transportation facility. If the department approves longitudinal placement of electric utility transmission lines in limited access facilities, compensation for the use of the right-of-way is required. Such consideration or compensation paid by the electric utility in connection with the department's issuance of a permit does not create any property right in the department's property regardless of the amount of consideration paid or the improvements constructed on the property by the utility. Upon notice by the department that the property is needed for expansion or improvement of the transportation facility, the electric utility transmission line will be removed or relocated at the electric utility's sole expense. The electric utility shall pay to the department reasonable damages resulting from the utility's failure or refusal to timely remove or relocate its transmission lines. The rules to be adopted by the department may also address the compensation methodology and removal or relocation. As used in this subsection, the term "base-load generating facilities" means electric power plants that are certified under part II of chapter 403.

(2) The authority may grant to any person who is a resident of this state, or to any corporation which is organized under the laws of this state or licensed to do business within this state, the use of a right-of-way for the utility in accordance

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with such rules or regulations as the authority may adopt. No utility shall be installed, located, or relocated unless authorized by a written permit issued by the authority. However, for public roads or publicly owned rail corridors under the jurisdiction of the department, a utility relocation schedule and relocation agreement may be executed in lieu of a written permit. The permit shall require the permitholder to be responsible for any damage resulting from the issuance of such permit. The authority may initiate injunctive proceedings as provided in s. 120.69 to enforce provisions of this subsection or any rule or order issued or entered into pursuant thereto.

(3)(a) Because of the unique circumstances applicable to providers of communications services, including, but not limited to, the circumstances described in paragraph (e) and the fact that federal and state law require the nondiscriminatory treatment of providers of telecommunications services, and because of the desire to promote competition among providers of communications services, it is the intent of the Legislature that municipalities and counties treat providers of communications services in a nondiscriminatory and competitively neutral manner when imposing rules or regulations governing the placement or maintenance of communications facilities in the public roads or rights-of-way. Rules or regulations imposed by a municipality or county relating to providers of communications services placing or maintaining communications facilities in its roads or rights-of-way must be generally applicable to all providers of communications services and, notwithstanding any other law, may not require a provider of communications services to apply for or enter into an individual license, franchise, or other agreement with the municipality or county as a condition of placing or maintaining communications facilities in its roads or rights-of-way. In addition to other reasonable rules or regulations that a municipality or county may adopt relating to the placement or maintenance of communications facilities in its roads or rights-of-way under this subsection, a municipality or county may require a provider of communications services that places or seeks to place facilities in its roads or rights-of-way to register with the municipality or county and to provide the name of the registrant; the name, address, and telephone number of a contact person for the registrant; the number of the registrant's current certificate of authorization issued by the Florida Public Service Commission, the Federal Communications Commission, or the Department of State; and proof of insurance or self-insuring status adequate to defend and cover claims.

(b) Registration described in paragraph (a) does not establish a right to place or maintain, or priority for the placement or maintenance of, a communications facility in roads or rights-of-way of a municipality or county. Each municipality and county retains the authority to regulate and manage municipal and county roads or rights-of-way in exercising its police power. Any rules or regulations adopted by a municipality or county which govern the occupation of its roads or rights-of-way by providers of communications services must be related to the placement or maintenance of facilities in such roads or rights-of-way, must be reasonable and nondiscriminatory, and may include only those matters necessary to manage the roads or rights-of-way of the municipality or county.

(c) 1. It is the intention of the state to treat all providers of communications services that use or occupy municipal or charter county roads or rights-of-way for the provision of communications services in a nondiscriminatory and competitively neutral manner with respect to the payment of permit fees. Certain providers of communications services have been granted by general law the authority to offset permit fees against franchise or other fees while other providers of communications services have not been granted this authority. In order to treat all providers of communications services in a nondiscriminatory and competitively neutral manner with respect to the payment of permit fees, each municipality and charter county shall make an election under either sub-subparagraph a. or sub-subparagraph b. and must inform the Department of Revenue of the election by certified mail by July 16, 2001. Such election shall take effect October 1, 2001.

a. (I) The municipality or charter county may require and collect permit fees from any providers of communications services that use or occupy municipal or county roads or rights-of-way. All fees permitted under this sub-subparagraph must be reasonable and commensurate with the direct and actual cost of the regulatory activity, including issuing and

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processing permits, plan reviews, physical inspection, and direct administrative costs; must be demonstrable; and must be equitable among users of the roads or rights-of-way. A fee permitted under this sub-subparagraph may not: be offset against the tax imposed under chapter 202; include the costs of roads or rights-of-way acquisition or roads or rights-of-way rental; include any general administrative, management, or maintenance costs of the roads or rights-of-way; or be based on a percentage of the value or costs associated with the work to be performed on the roads or rights-of-way. In an action to recover amounts due for a fee not permitted under this sub-subparagraph, the prevailing party may recover court costs and attorney's fees at trial and on appeal. In addition to the limitations set forth in this section, a fee levied by a municipality or charter county under this sub-subparagraph may not exceed $100. However, permit fees may not be imposed with respect to permits that may be required for service drop lines not required to be noticed under s. 556.108(5)(a) 2. or for any activity that does not require the physical disturbance of the roads or rights-of-way or does not impair access to or full use of the roads or rights-of-way.

(II) To ensure competitive neutrality among providers of communications services, for any municipality or charter county that elects to exercise its authority to require and collect permit fees under this sub-subparagraph, the rate of the local communications services tax imposed by such jurisdiction, as computed under s. 202.20, shall automatically be reduced by a rate of 0.12 percent.

b. Alternatively, the municipality or charter county may elect not to require and collect permit fees from any provider of communications services that uses or occupies municipal or charter county roads or rights-of-way for the provision of communications services; however, each municipality or charter county that elects to operate under this sub-subparagraph retains all authority to establish rules and regulations for providers of communications services to use or occupy roads or rights-of-way as provided in this section. If a municipality or charter county elects to operate under this sub-subparagraph, the total rate for the local communications services tax as computed under s. 202.20 for that municipality or charter county may be increased by ordinance or resolution by an amount not to exceed a rate of 0.12 percent. If a municipality or charter county elects to increase its rate effective October 1, 2001, the municipality or charter county shall inform the department of such increased rate by certified mail postmarked on or before July 16, 2001.

c. A municipality or charter county that does not make an election as provided for in this subparagraph shall be presumed to have elected to operate under the provisions of sub-subparagraph b.

2. Each noncharter county shall make an election under either sub-subparagraph a. or sub-subparagraph b. and shall inform the Department of Revenue of the election by certified mail by July 16, 2001. Such election shall take effect October 1, 2001.

a. The noncharter county may elect to require and collect permit fees from any providers of communications services that use or occupy noncharter county roads or rights-of-way. All fees permitted under this sub-subparagraph must be reasonable and commensurate with the direct and actual cost of the regulatory activity, including issuing and processing permits, plan reviews, physical inspection, and direct administrative costs; must be demonstrable; and must be equitable among users of the roads or rights-of-way. A fee permitted under this sub-subparagraph may not: be offset against the tax imposed under chapter 202; include the costs of roads or rights-of-way acquisition or roads or rights-of-way rental; include any general administrative, management, or maintenance costs of the roads or rights-of-way; or be based on a percentage of the value or costs associated with the work to be performed on the roads or rights-of-way. In an action to recover amounts due for a fee not permitted under this sub-subparagraph, the prevailing party may recover court costs and attorney's fees at trial and on appeal. In addition to the limitations set forth in this section, a fee levied by a noncharter county under this sub-subparagraph may not exceed $100. However, permit fees may not be imposed with respect to permits that may be required for service drop lines not required to be noticed under s. 556.108(5)(a) 2. or for

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any activity that does not require the physical disturbance of the roads or rights-of-way or does not impair access to or full use of the roads or rights-of-way.

b. Alternatively, the noncharter county may elect not to require and collect permit fees from any provider of communications services that uses or occupies noncharter county roads or rights-of-way for the provision of communications services; however, each noncharter county that elects to operate under this sub-subparagraph shall retain all authority to establish rules and regulations for providers of communications services to use or occupy roads or rights-of-way as provided in this section. If a noncharter county elects to operate under this sub-subparagraph, the total rate for the local communications services tax as computed under s. 202.20 for that noncharter county may be increased by ordinance or resolution by an amount not to exceed a rate of 0.24 percent, to replace the revenue the noncharter county would otherwise have received from permit fees for providers of communications services. If a noncharter county elects to increase its rate effective October 1, 2001, the noncharter county shall inform the department of such increased rate by certified mail postmarked on or before July 16, 2001.

c. A noncharter county that does not make an election as provided for in this subparagraph shall be presumed to have elected to operate under the provisions of sub-subparagraph b.

3. Except as provided in this paragraph, municipalities and counties retain all existing authority to require and collect permit fees from users or occupants of municipal or county roads or rights-of-way and to set appropriate permit fee amounts.

(d) After January 1, 2001, in addition to any other notice requirements, a municipality must provide to the Secretary of State, at least 10 days prior to consideration on first reading, notice of a proposed ordinance governing a telecommunications company placing or maintaining telecommunications facilities in its roads or rights-of-way. After January 1, 2001, in addition to any other notice requirements, a county must provide to the Secretary of State, at least 15 days prior to consideration at a public hearing, notice of a proposed ordinance governing a telecommunications company placing or maintaining telecommunications facilities in its roads or rights-of-way. The notice required by this paragraph must be published by the Secretary of State on a designated Internet website. The failure of a municipality or county to provide such notice does not render the ordinance invalid.

(e) The authority of municipalities and counties to require franchise fees from providers of communications services, with respect to the provision of communications services, is specifically preempted by the state because of unique circumstances applicable to providers of communications services when compared to other utilities occupying municipal or county roads or rights-of-way. Providers of communications services may provide similar services in a manner that requires the placement of facilities in municipal or county roads or rights-of-way or in a manner that does not require the placement of facilities in such roads or rights-of-way. Although similar communications services may be provided by different means, the state desires to treat providers of communications services in a nondiscriminatory manner and to have the taxes, franchise fees, and other fees paid by providers of communications services be competitively neutral. Municipalities and counties retain all existing authority, if any, to collect franchise fees from users or occupants of municipal or county roads or rights-of-way other than providers of communications services, and the provisions of this subsection shall have no effect upon this authority. The provisions of this subsection do not restrict the authority, if any, of municipalities or counties or other governmental entities to receive reasonable rental fees based on fair market value for the use of public lands and buildings on property outside the public roads or rights-of-way for the placement of communications antennas and towers.

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(f) Except as expressly allowed or authorized by general law and except for the rights-of-way permit fees subject to paragraph (c), a municipality or county may not levy on a provider of communications services a tax, fee, or other charge or imposition for operating as a provider of communications services within the jurisdiction of the municipality or county which is in any way related to using its roads or rights-of-way. A municipality or county may not require or solicit in-kind compensation, except as otherwise provided in s. 202.24(2)(c) 8. or s. 610.109. Nothing in this paragraph shall impair any ordinance or agreement in effect on May 22, 1998, or any voluntary agreement entered into subsequent to that date, which provides for or allows in-kind compensation by a telecommunications company.

(g) A municipality or county may not use its authority over the placement of facilities in its roads and rights-of-way as a basis for asserting or exercising regulatory control over a provider of communications services regarding matters within the exclusive jurisdiction of the Florida Public Service Commission or the Federal Communications Commission, including, but not limited to, the operations, systems, qualifications, services, service quality, service territory, and prices of a provider of communications services.

(h) A provider of communications services that has obtained permission to occupy the roads or rights-of-way of an incorporated municipality pursuant to s. 362.01 or that is otherwise lawfully occupying the roads or rights-of-way of a municipality shall not be required to obtain consent to continue such lawful occupation of those roads or rights-of-way; however, nothing in this paragraph shall be interpreted to limit the power of a municipality to adopt or enforce reasonable rules or regulations as provided in this section.

(i) Except as expressly provided in this section, this section does not modify the authority of municipalities and counties to levy the tax authorized in chapter 202 or the duties of providers of communications services under ss. 337.402-337.404. This section does not apply to building permits, pole attachments, or private roads, private easements, and private rights-of-way.

(j) Pursuant to this paragraph, any county or municipality may by ordinance change either its election made on or before July 16, 2001, under paragraph (c) or an election made under this paragraph.

1. a. If a municipality or charter county changes its election under this paragraph in order to exercise its authority to require and collect permit fees in accordance with this subsection, the rate of the local communications services tax imposed by such jurisdiction pursuant to ss. 202.19 and 202.20 shall automatically be reduced by the sum of 0.12 percent plus the percentage, if any, by which such rate was increased pursuant to sub-subparagraph (c)1.b.

b. If a municipality or charter county changes its election under this paragraph in order to discontinue requiring and collecting permit fees, the rate of the local communications services tax imposed by such jurisdiction pursuant to ss. 202.19 and 202.20 may be increased by ordinance or resolution by an amount not to exceed 0.24 percent.

2. a. If a noncharter county changes its election under this paragraph in order to exercise its authority to require and collect permit fees in accordance with this subsection, the rate of the local communications services tax imposed by such jurisdiction pursuant to ss. 202.19 and 202.20 shall automatically be reduced by the percentage, if any, by which such rate was increased pursuant to sub-subparagraph (c)2.b.

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b. If a noncharter county changes its election under this paragraph in order to discontinue requiring and collecting permit fees, the rate of the local communications services tax imposed by such jurisdiction pursuant to ss. 202.19 and 202.20 may be increased by ordinance or resolution by an amount not to exceed 0.24 percent.

3. a. Any change of election pursuant to this paragraph and any tax rate change resulting from such change of election shall be subject to the notice requirements of s. 202.21; however, no such change of election shall become effective prior to January 1, 2003.

b. Any county or municipality changing its election under this paragraph in order to exercise its authority to require and collect permit fees shall, in addition to complying with the notice requirements under s. 202.21, provide to all dealers providing communications services in such jurisdiction written notice of such change of election by September 1 immediately preceding the January 1 on which such change of election becomes effective. For purposes of this sub-subparagraph, dealers providing communications services in such jurisdiction shall include every dealer reporting tax to such jurisdiction pursuant to s. 202.37 on the return required under s. 202.27 to be filed on or before the 20th day of May immediately preceding the January 1 on which such change of election becomes effective.

(k) Notwithstanding the provisions of s. 202.19, when a local communications services tax rate is changed as a result of an election made or changed under this subsection, such rate shall not be rounded to tenths.

(4) As used in this section, "communications services" and "dealer" have the same meanings ascribed in chapter 202, and "cable service" has the same meaning ascribed in 47 U.S.C. s. 522, as amended.

(5) This section, except subsections (1) and (2) and paragraph (3)(g), does not apply to the provision of pay telephone service on public, municipal, or county roads or rights-of-way.

(6)(a) As used in this subsection, the following definitions apply:

1. A "pass-through provider" is any person who places or maintains a communications facility in the roads or rights-of-way of a municipality or county that levies a tax pursuant to chapter 202 and who does not remit taxes imposed by that municipality or county pursuant to chapter 202.

2. A "communications facility" is a facility that may be used to provide communications services. Multiple cables, conduits, strands, or fibers located within the same conduit shall be considered one communications facility for purposes of this subsection.

(b) A municipality that levies a tax pursuant to chapter 202 may charge a pass-through provider that places or maintains a communications facility in the municipality's roads or rights-of-way an annual amount not to exceed $500 per linear mile or portion thereof. A municipality's roads or rights-of-way do not include roads or rights-of-way that extend in or through the municipality but are state, county, or another authority's roads or rights-of-way.

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(c) A county that levies a tax pursuant to chapter 202 may charge a pass-through provider that places or maintains a communications facility in the county's roads or rights-of-way, including county roads or rights-of-way within a municipality in the county, an annual amount not to exceed $500 per linear mile or portion thereof. However, a county shall not impose a charge for any linear miles, or portions thereof, of county roads or rights-of-way where a communications facility is placed that extend through any municipality within the county to which the pass-through provider remits a tax imposed pursuant to chapter 202. A county's roads or rights-of-way do not include roads or rights-of-way that extend in or through the county but are state, municipal, or another authority's roads or rights-of-way.

(d) The amounts charged pursuant to this subsection shall be based on the linear miles of roads or rights-of-way where a communications facility is placed, not based on a summation of the lengths of individual cables, conduits, strands, or fibers. The amounts referenced in this subsection may be charged only once annually and only to one person annually for any communications facility. A municipality or county shall discontinue charging such amounts to a person that has ceased to be a pass-through provider. Any annual amounts charged shall be reduced for a prorated portion of any 12-month period during which the person remits taxes imposed by the municipality or county pursuant to chapter 202. Any excess amounts paid to a municipality or county shall be refunded to the person upon written notice of the excess to the municipality or county.

(e) This subsection does not alter any provision of this section or s. 202.24 relating to taxes, fees, or other charges or impositions by a municipality or county on a dealer of communications services or authorize that any charges be assessed on a dealer of communications services, except as specifically set forth herein. A municipality or county may not charge a pass-through provider any amounts other than the charges under this subsection as a condition to the placement or maintenance of a communications facility in the roads or rights-of-way of a municipality or county by a pass-through provider, except that a municipality or county may impose permit fees on a pass-through provider consistent with paragraph (3)(c) if the municipality or county elects to exercise its authority to collect permit fees under paragraph (3)(c).

(f) The charges under this subsection do not apply to communications facilities placed in a municipality's or county's rights-of-way prior to the effective date of this subsection with permission from the municipality or county, if any was required, except to the extent the facilities of a pass-through provider were subject to per linear foot or mile charges in effect as of October 1, 2001, in which case the municipality or county may only impose on a pass-through provider charges consistent with paragraph (b) or paragraph (c) for such facilities. Notwithstanding the foregoing, this subsection does not impair any written agreement between a pass-through provider and a municipality or county imposing per linear foot or mile charges for communications facilities placed in municipal or county roads or rights-of-way that is in effect prior to the effective date of this subsection. Upon the termination or expiration of any such written agreement, any charges imposed shall be consistent with paragraph (b) or paragraph (c). Notwithstanding the foregoing, until October 1, 2005, this subsection shall not affect a municipality or county continuing to impose charges in excess of the charges authorized in this subsection on facilities of a pass-through provider that is not a dealer of communications services in the state under chapter 202, but only to the extent such charges were imposed by municipal or county ordinance or resolution adopted prior to February 1, 2002. Effective October 1, 2005, any charges imposed shall be consistent with paragraph (b) or paragraph (c).

(g) The charges authorized in this subsection shall not be applied with respect to any communications facility that is used exclusively for the internal communications of an electric utility or other person in the business of transmitting or distributing electric energy.

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Credits

Laws 1955, c. 29965, § 127; Laws 1963, c. 63-279, § 1; Laws 1965, c. 65-52, § 1; Laws 1969, c. 69-106, §§ 23, 35; Fla.St.1983, § 338.17; Laws 1984, c. 84-309, § 141; Laws 1985, c. 85-174, § 8; Laws 1986, c. 86-155, § 8; Laws 1988, c. 88-168, §§ 2, 21; Laws 1989, c. 89-232, § 8. Amended by Laws 1991, c. 91-221, § 41; Laws 1994, c. 94-237, § 26, eff. May 25, 1994; Laws 1998, c. 98-147, § 1, eff. May 22, 1998; Laws 1999, c. 99-354, § 2, eff. June 11, 1999; Laws 2000, c. 2000-260, § 50, eff. Jan. 1, 2001; Laws 2000, c. 2000-260, § 51, eff. Oct. 1, 2001; Laws 2000, c. 2000-260, §§ 58, 59, eff. June 30, 2001; Laws 2001, c. 2001-140, §§ 34, 38, eff. June 1, 2001; Laws 2001, c. 2001-140, § 35, eff. Oct. 1, 2001; Laws 2002, c. 2002-20, § 81, eff. July 1, 2002; Laws 2002, c. 2002-48, § 6, eff. April 16, 2002; Laws 2003, c. 2003-286, § 57, eff. July 14, 2003; Laws 2004, c. 2004-366, § 13, eff. June 24, 2004; Laws 2005, c. 2005-171, § 6, eff. July 1, 2005; Laws 2006, c. 2006-138, § 10, eff. Oct. 1, 2006; Laws 2007, c. 2007-29, § 5, eff. May 18, 2007; Laws 2008, c. 2008-227, § 29, eff. July 1, 2008; Laws 2010, c. 2010-225, § 22, eff. July 1, 2010; Laws 2016, c. 2016-44, § 2, eff. March 10, 2016.

West's F. S. A. § 337.401, FL ST § 337.401
Current through the 2016 Second Regular Session of the Twenty-Fourth Legislature.

End of Document

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BEFORE THE PUBLIC SERVICE COMMISSION

In re: Application for certificate to provide alternative access vendor service by Mobilitie, LLC.	DOCKET NO. 060626-TA ORDER NO. PSC-06-0953-PAA-TA ISSUED: November 15, 2006

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
J. TERRY DEASON
ISILIO ARRIAGA
MATTHEW M. CARTER II
KATRINA J. TEW

NOTICE OF PROPOSED AGENCY ACTION
ORDER GRANTING CERTIFICATE TO PROVIDE
ALTERNATIVE ACCESS VENDOR SERVICES

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

Mobilitie, LLC (Mobilitie) has applied for a certificate to provide Alternative Access Vendor (AAV) services pursuant to Section 364.337, Florida Statutes. Upon review of its application, it appears that Mobilitie has sufficient technical, financial, and managerial capability to provide such service. Accordingly, we hereby grant Certificate No. TA079 to Mobilitie.

If this Order becomes final and effective, it shall serve as Mobilitie's certificate. Mobilitie should, therefore, retain this Order as proof of certification. We are vested with jurisdiction over this matter pursuant to Sections 364.335 and 364.337, Florida Statutes.

AAV providers are subject to Chapter 25-24, Florida Administrative Code, Part XIV, Rules Governing Alternative Access Vendor services. AAV providers are also required to comply with all applicable provisions of Chapter 364, Florida Statutes.

DOCUMENT NUMBER-DATE
10487 NOV 15 06
FPSC-COMMISSION CLERK

In addition, under Section 364.336, Florida Statutes, certificate holders must pay a minimum annual Regulatory Assessment Fee (RAFs) of $50 if the certificate was active during any portion of the calendar year. A RAFs Return notice will be mailed each December to Mobilitie for payment by January 30th. Neither the cancellation of the certificate nor the failure to receive a RAFs Return notice shall relieve Mobilitie from its obligation to pay RAFs.

Based on the foregoing, it

ORDERED by the Florida Public Service Commission that we hereby grant Certificate No. TA079 to Mobilitie, LLC, which shall authorize it to provide Alternative Access Vendor services, subject to the terms and conditions specified in the body of this Order. It is further

ORDERED that this Order shall serve as Mobilitie, LLC's certificate and should be retained by Mobilitie, LLC as proof of certification. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 15th day of November, 2006.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(SEAL)

VSM

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on December 6, 2006.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Application for certificate to provide alternative access vendor service by Mobilitie, LLC.	DOCKET NO. 060626-TA ORDER NO. PSC-06-0953A-PAA-TX ISSUED: November 20, 2006

AMENDATORY ORDER

BY THE COMMISSION:

On November 15, 2006, we issued Order No. PSC-06-0953-PAA-TA. The purpose of the Order was to provide an Alternative Access Vendor Certificate. However, due to a scrivener's error, a company code rather than a certificate number was used. Therefore, Order No. PSC-06-0953-PAA-TA is amended to reflect that 8655 is the correct certificate number.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Order No. PSC-06-0953-PAA-TA is hereby amended to reflect that 8655 is the correct certificate number.
It is further

ORDERED that Order No. PSC-06-0953-PAA-TA is reaffirmed in all other respects.

By ORDER of the Florida Public Service Commission this 20th day of November, 2006.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Marcia Sharma
Marcia Sharma, Assistant Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

VSM

DOCUMENT NUMBER-DATE
10611 NOV 20 06
FPSC-COMMISSION CLERK

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Application for certificate to provide alternative access vendor service by Mobilitie, LLC.	DOCKET NO. 060626-TA ORDER NO. PSC-06-1022-CO-TA ISSUED: December 11, 2006

CONSUMMATING ORDER

BY THE COMMISSION:

By Order No. PSC-06-0953-PAA-TA, issued November 15, 2006, this Commission proposed to take certain action, subject to a Petition for Formal Proceeding as provided in Rule 25-22.029, Florida Administrative Code. No response has been filed to the order, in regard to the above mentioned docket. It is, therefore,

ORDERED by the Florida Public Service Commission that Order No. PSC-06-0953-PAA-TA has become effective and final. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 11th day of December, 2006.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(SEAL)

VSM

DOCUMENT NUMBER-DATE
11305 DEC 11 06
FPSC-COMMISSION CLERK

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any judicial review of Commission orders that is available pursuant to Section 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

DOCKET NO. 160079-TX
FILED APR 07, 2016
DOCUMENT NO. 01881-16
FPSC - COMMISSION CLERK

MARASHLIAN & DONAHUE, PLLC
THE COMMLAW GROUP

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April 6, 2016

VIA OVERNIGHT COURIER

Florida Public Service Commission
Office of Commission Clerk
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
(850) 413-6770

REDACTED

Re: Mobilitie Management, LLC – Application for Authority to Provide Telecommunications Company Service within the State of Florida/ Request for Confidential Treatment

Ladies and Gentlemen:

On behalf of Mobilitie Management, LLC ("Mobilitie Management," or the "Company"), transmitted herewith is Mobilitie Management's Application for Authority to Provide Telecommunications Company Service within the State of Florida (the "Application"). Also included is a check payable to the Florida Public Service Commission in the amount of $500.00 for the requisite application fee.

Mobilitie Management hereby requests confidential treatment of the documents and information provided in **Exhibit B** of the Application pursuant to Section 364.183(1) F.S., and FL PUC Rule § 25-22.006(5). The Application contains proprietary confidential business information, including financial information, as defined by Section 364.183(3) F.S. This information is competitively sensitive, and its disclosure would have a negative competitive impact on Mobilitie Management were it made publicly available.

Accordingly, enclosed are the following documents:

- One (1) original copy of the Application, including all confidential materials;
- One (1) copy of the Application highlighting the specific information claimed as confidential; and
- Two (2) edited/ redacted copies of the Application made available for public inspection.

Please date stamp and return the additional copy of the Application. Should you have any questions regarding the Application, please contact the undersigned.

Respectfully submitted,

Michael P. Donahue
Counsel for Mobilitie Management, LLC

COM ____
AFD ____
APA ____
ECO ____
ENG ____
GCL 1 Enclosures
IDM ____
TEL 1
CLK ____

Check received with filing and forwarded to Fiscal for deposit. Fiscal to forward deposit information to Records.

Initials of person who forwarded check

1420 Spring Hill Road, Suite 401
McLean, Virginia 22102
P 703.714.1300
F 703.563.6222
W www.commlawgroup.com
E mail@commlawgroup.com

FLORIDA PUBLIC SERVICE COMMISSION

OFFICE OF TELECOMMUNICATIONS

APPLICATION FORM
FOR
AUTHORITY TO PROVIDE TELECOMMUNICATIONS COMPANY SERVICE WITHIN THE STATE OF FLORIDA

Instructions

A. This form is used as an application for an original certificate and for approval of transfer of an existing certificate. In the case of a transfer, the information provided shall be for the transferee (See Page 8).

B. Print or type all responses to each item requested in the application. If an item is not applicable, please explain.

C. Use a separate sheet for each answer which will not fit the allotted space.

D. Once completed, submit the original and one copy of this form along with a non-refundable application fee of **$500.00** to:

Florida Public Service Commission
Office of Commission Clerk
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850
(850) 413-6770

E. A filing fee of **$500.00** is required for the transfer of an existing certificate to another company.

F. If you have questions about completing the form, contact:

Florida Public Service Commission
Office of Telecommunications
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850
(850) 413-6600

1. This is an application for (check one):

   ☒ **Original certificate** (new company).

   ☐ **Approval of transfer of existing certificate:** Example, a non-certificated company purchases an existing company and desires to retain the original certificate of authority rather that apply for a new certificate.

2. Name of company: **Mobilitie Management, LLC**

3. Name under which applicant will do business (fictitious name, etc.):

   N/A

4. Official mailing address:

   Street/Post Office Box: **2220 University Drive**
   City: **Newport Beach**
   State: **California**
   Zip: **92660**

5. Florida address:

   Street/Post Office Box: **c/o NRAI Services, Inc., 1200 S. Pine Island Road**
   City: **Plantation**
   State: **Florida**
   Zip: **33324**

6. Structure of organization:

   ☐ Individual
   ☐ Corporation
   ☐ Foreign Corporation
   ☐ Foreign Partnership
   ☐ General Partnership
   ☐ Limited Partnership
   ☒ Other, please specify:
   Foreign Limited Liability Company

If individual, provide:

Name: **N/A**
Title: _____
Street/Post Office Box: _____
City: _____
State: _____
Zip: _____
Telephone No.: _____
Fax No.: _____
E-Mail Address: _____
Website Address: _____

7. **If incorporated in Florida,** provide proof of authority to operate in Florida. The Florida Secretary of State corporate registration number is: **N/A**

8. **If foreign corporation,** provide proof of authority to operate in Florida. The Florida Secretary of State corporate registration number is: **M16000000685**

9. **If using fictitious name (d/b/a),** provide proof of compliance with fictitious name statute (Chapter 865.09, FS) to operate in Florida. The Florida Secretary of State fictitious name registration number is: **N/A**

10. **If a limited liability partnership,** please proof of registration to operate in Florida. The Florida Secretary of State registration number is: **N/A**

11. **If a partnership**, provide name, title and address of all partners and a copy of the partnership agreement.

Name: **N/A**
Title: _____
Street/Post Office Box: _____
City: _____
State: _____
Zip: _____
Telephone No.: _____
Fax No.: _____
E-Mail Address: _____
Website Address: _____

12. **If a foreign limited partnership**, provide proof of compliance with the foreign limited partnership statute (Chapter 620.169, FS), if applicable. The Florida registration number is: **N/A**

13. Provide **F.E.I. Number**: **81-0819781**

14. Who will serve as liaison to the Commission in regard to the following?

(a) The application:

Name:	**Michael P. Donahue**
Title:	**Legal Counsel for Mobilitie Transport and Broadband, LLC**
Street Name & Number:	**Marashlian & Donahue, PLLC** **1420 Spring Hill Road, Suite 401**
Post Office Box:	
City:	**McLean**
State:	**Virginia**
Zip:	**22102**
Telephone No.:	**(703) 714-1319**
Fax No.:	**(703) 563-6222**
E-Mail Address:	**mpd@commlawgroup.com**
Website Address:	**www.commlawgroup.com**

(b) Official point of contact for the ongoing operations of the company:

Name:	**Ethan Rogers**
Title:	**Senior Counsel**
Street Name & Number:	**Mobilitie, LLC, 2220 University Drive**
Post Office Box:	
City:	**Newport Beach**
State:	**California**
Zip:	**92660**
Telephone No.:	**(949) 999-5767**
Fax No.:	**(949) 274-7556**
E-Mail Address:	**ethan@mobilitie.com**
Website Address:	**www.mobilitie.com**

(c) Where will you officially designate as your place of publicly publishing your schedule (a/k/a tariffs or price lists)?

☐ Florida Public Service Commission

☒ Website – *Website address*: **www.mobilitie.com**

☐ Other – *Please provide address*:

15. List the states in which the applicant:

(a) has operated as a telecommunications company.

Applicant is a newly formed company. Accordingly, Applicant has not operated as a telecommunications company in any jurisdiction.

(b) has applications pending to be certificated as a telecommunications company.

Applicant is currently applying and/ or registering for authority to operate as a telecommunications service provider in all fifty states, and the District of Columbia.

(c) is certificated to operate as a telecommunications company.

Applicant is a newly formed company. Accordingly, Applicant has not been certified as a telecommunications company in any jurisdiction.

(d) has been denied authority to operate as a telecommunications company and the circumstances involved.

Applicant has not been denied authority to operate as a telecommunications company in any jurisdiction.

(e) has had regulatory penalties imposed for violations of telecommunications statutes and the circumstances involved.

Applicant has not had any regulatory penalties imposed for violations of telecommunications statutes in any jurisdiction.

(f) has been involved in civil court proceedings with another telecommunications entity, and the circumstances involved.

Applicant has not been involved in civil court proceedings with another telecommunications entity in any jurisdiction.

16. Have any of the officers, directors, or any of the ten largest stockholders previously been:

(a) adjudged bankrupt, mentally incompetent (and not had his or her competency restored), or found guilty of any felony or of any crime, or whether such actions may result from pending proceedings. ☐ Yes ☒ No

If yes, provide explanation. **N/A**

(b) granted or denied a certificate in the State of Florida (this includes active and canceled certificates). ☐ Yes ☒ No

If yes, provide explanation and list the certificate holder and certificate number. **N/A**

(c) an officer, director, partner or stockholder in any other Florida certificated or registered telephone company. ☒ Yes ☐ No

If yes, give name of company and relationship. If no longer associated with company, give reason why not. **Christos Karmis, an officer for Applicant, is also an officer for Mobilitie, LLC. Mobilitie, LLC was granted a certificate to provide Alternative Access Vendor (AAV) services on November 15, 2006 (Docket No. 060626-TA, Order No. PSC-06-0943-PAA-TA).**

17. Submit the following:

(a) **Managerial capability:** resumes of employees/officers of the company that would indicate sufficient managerial experiences of each. Please explain if a resume represents an individual that is not employed with the company and provide proof that the individual authorizes the use of the resume. **Please see Exhibit A attached hereto.**

(b) **Technical capability:** resumes of employees/officers of the company that would indicate sufficient technical experiences or indicate what company has been contracted to conduct technical maintenance. Please explain if a resume represents an individual that is not employed with the company and provide proof that the individual authorizes the use of the resume. **Please see Exhibit A attached hereto.**

(c) **Financial Capability:** applicant's audited financial statements for the most recent three (3) years. If the applicant does not have audited financial statements, it shall so be stated. Unaudited financial statements should be signed by the applicant's chief executive officer and chief financial officer affirming that the financial statements are true and correct and should include:

1. the balance sheet,
2. income statement, and
3. statement of retained earnings.

Note: *It is the applicant's burden to demonstrate that it possesses adequate managerial capability, technical capability, and financial capability. Additional supporting information can be supplied at the discretion of the applicant.*

Please see Exhibit B attached hereto.

THIS PAGE MUST BE COMPLETED AND SIGNED

REGULATORY ASSESSMENT FEE: I understand that all telephone companies must pay a regulatory assessment fee. Regardless of the gross operating revenue of a company, a minimum annual assessment fee, as defined by the Commission, is required.

RECEIPT AND UNDERSTANDING OF RULES: I acknowledge receipt and understanding of the Florida Public Service Commission's rules and orders relating to the provisioning of telecommunications company service in Florida.

APPLICANT ACKNOWLEDGEMENT: By my signature below, I, the undersigned officer, attest to the accuracy of the information contained in this application and attached documents and that the applicant has the technical expertise, managerial ability, and financial capability to provide telecommunications company service in the State of Florida. I have read the foregoing and declare that, to the best of my knowledge and belief, the information is true and correct. I attest that I have the authority to sign on behalf of my company and agree to comply, now and in the future, with all applicable Commission rules and orders.

Further, I am aware that, pursuant to Chapter 837.06, Florida Statutes, ***"Whoever knowingly makes a false statement in writing with the intent to mislead a public servant in the performance of his official duty shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 and s. 775.083."***

I understand that any false statements can result in being denied a certificate of authority in Florida.

COMPANY OWNER OR OFFICER

Print Name: Christos Karmis
Title: President
Telephone No.: (877) 999-7070
E-Mail Address: solutions@mobilitie.com

Signature:  Date: 04/05/2016

EXHIBIT A

Management Resumes

CHRISTOS KARMIS

2220 University Drive, Newport Beach, CA 92660
Phone: 949.999.5766 • Email: christos@mobilitie.com

SUMMARY

Christos Karmis is President of Mobilitie and a recognized leader in the telecom industry.

Since joining Mobilitie, Christos led the development and implementation of our customized Lease-to-Suit™ telecom program with several of the largest national telecom carriers. He also currently oversees tower leasing and colocation activity on Mobilitie's telecom communication towers.

Before joining Mobilitie, Christos specialized in real estate advisory services and the telecom communications industry with Deloitte Consulting. While at Deloitte, he provided operational and network optimization strategies to several of the Big Six Telecom Carriers.

In addition, Christos is experienced with process improvement, technology optimization, and establishing Sarbanes-Oxley-compliant financial controls for network lease administration. He has also led due diligence projects for the sale of significant telecom communication assets.

Prior to joining Deloitte, Christos was an engineer for Harris Corporation specializing in digital mapping.

EXPERIENCE AND SELECTED ACHIEVEMENTS

Mobilitie, LLC. **September 2005 – Present**
President

Leads the development and implementation of our customized Lease-to-Suit™ telecom program with several of the largest national telecom carriers

Oversees tower leasing and colocation activity on Mobilitie's telecom communication towers

Deloitte Consulting **August 2001 – August 2005**
Telecommunications Consultant

Specialized in real estate advisory services and the telecom communications industry

Provided operational and network optimization strategies to several of the Big Six Telecom Carriers

Worked on process improvement, technology optimization, and establishing Sarbanes-Oxley-compliant financial controls for network lease administration

Led due diligence projects for the sale of significant telecom communication assets

Harris Corporation **May 1997 – August 1999**
Engineering Manager

Specialized in digital mapping

EDUCATION

MBA, University of Florida - Warrington College of Business Administration, 1999 – 2001
BS, Mechanical Engineering, Clemson University, 1992 – 1997

EXHIBIT B

REDACTED

Financial Information

AFFIDAVIT

STATE OF CALIFORNIA §
§
COUNTY OF ORANGE §

Mobilitie Management, LLC
Application for Service Provider Certificate of Operating Authority

Unaudited Balance Sheet Sworn Officer Statement

1. My name is **Christos Karmis**. I am **President** of the Applicant **Mobilitie Management, LLC**.

2. I swear that I have personal knowledge of the facts stated in Mobilitie Management, LLC's Unaudited Balance Sheet, that I am competent to testify to them, and that I have the authority to make this Disclosure on behalf of the Applicant. I further swear or affirm that all of the statements and representations made in this Disclosure are true and correct.

Signature

Christos Karmis
Typed or Printed Name

SWORN TO AND SUBSCRIBED before me on the 5th day of April, 2016.

VICTORIA ROSE CARDONA
COMM. #2089456
Notary Public - California
Orange County
My Comm. Expires Nov. 9, 2018

Victoria Rose Cardona
Notary Public in and for the
State of California

My commission expires: Nov. 9, 2018

FILED JUL 13, 2016
DOCUMENT NO. 04670-1
FPSC - COMMISSION CL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for certificate to provide local telecommunications service by Mobilitie Management, LLC	DOCKET NO. 160079-TX ORDER NO. PSC-16-0267-PAA-TX ISSUED: July 13, 2016

The following Commissioners participated in the disposition of this matter:

JULIE I. BROWN, Chairman
LISA POLAK EDGAR
ART GRAHAM
RONALD A. BRISÉ
JIMMY PATRONIS

NOTICE OF PROPOSED AGENCY ACTION
ORDER GRANTING CERTIFICATE OF AUTHORITY

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code (F.A.C.).

Mobilitie Management, LLC (Mobilitie Management) applied for a Certificate of Authority to provide telecommunications service, pursuant to Section 364.335, Florida Statutes (F.S.). Upon review of the application, it appears that Mobilitie Management has sufficient technical, financial, and managerial capability to provide such service. Accordingly, we hereby grant to Mobilitie Management Certificate of Authority No. 8895, which shall authorize Mobilitie Management to provide telecommunications service throughout the State of Florida.

Telecommunications service providers are required to comply with all applicable provisions of Chapter 364, F.S., and Chapter 25-4, F.A.C.

In addition, under Section 364.336, F.S., certificate holders must pay a minimum annual Regulatory Assessment Fee (RAF) if the certificate was active during any portion of the calendar year. A RAF Return notice will be mailed each December to Mobilitie Management for payment by January 30th. Neither the cancellation of its certificate nor the failure to receive a RAF Return notice shall relieve Mobilitie Management from its obligation to pay its RAF.

If this Order becomes final and effective, it will serve as Mobilitie Management certificate. Mobilitie Management shall retain this Order as proof of its certification. We are vested with jurisdiction over this matter pursuant to Sections 364.335 and 364.336, F.S.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Mobilitie Management, LLC's application for a Certificate of Authority is hereby granted. It is further

ORDERED that Mobilitie Management, LLC is awarded Certificate of Authority No. 8895, which authorizes Mobilitie Management, LLC, to provide telecommunications service throughout the State of Florida, subject to the terms and conditions set forth in the body of this Order. It is further

ORDERED that this Order shall serve as Mobilitie Management, LLC's certificate and shall be retained by Mobilitie Management, LLC, as proof of certification. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 13th day of July, 2016.

Carlotta S Stauffer

CARLOTTA S. STAUFFER
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

SMH

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on August 3, 2016.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

FILED AUG 08, 2016
DOCUMENT NO. 06076-1
FPSC - COMMISSION CL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for certificate to provide local telecommunications service by Mobilitie Management, LLC.	DOCKET NO. 160079-TX ORDER NO. PSC-16-0319-CO-TX ISSUED: August 8, 2016

CONSUMMATING ORDER

BY THE COMMISSION:

By Order No. PSC-16-0267-PAA-TX, issued July 13, 2016, this Commission proposed to take certain action, subject to a Petition for Formal Proceeding as provided in Rule 25-22.029, Florida Administrative Code. No response has been filed to the order, in regard to the above mentioned docket. It is, therefore,

ORDERED by the Florida Public Service Commission that Order No. PSC-16-0267-PAA-TX has become effective and final. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 8th day of August, 2016.

Carlotta S. Stauffer

CARLOTTA S. STAUFFER
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

SMH

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any judicial review of Commission orders that is available pursuant to Section 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.