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
	)	
Emergency Motion for Stay of the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association	)	

ORDER

Adopted: January 29, 2010 **Released: January 29, 2010**

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. Under the Communications Act of 1934, as amended ("Communications Act"), State and local governments must act "within a reasonable period of time" on requests for wireless tower and antenna siting.[1] In order to ensure a timely review of these requests while preserving State and local authority over zoning and land use policies, the Commission interpreted "reasonable" time by defining timeframes of 90 days for collocations and 150 days for all other siting applications reviewed by State and local governments.[2] Five associations filed a motion for stay of the Commission's action or, in the alternative, of the portion of that action that defines the ability of State and local governments to toll the timeframes during the first 30 days after receipt of an incomplete application.[3] For the reasons discussed below, we deny the Stay Request.

[1] 47 U.S.C. § 332(c)(7)(B)(ii).

[2] *See generally* In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Declaratory Ruling*, 24 FCC Rcd 13994 (2009) (*Ruling*).

[3] *See generally* In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Emergency Motion for Stay* of the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association, WT Docket No. 08-165, filed Dec. 17, 2009 (Stay Request).

II. BACKGROUND

2. On July 11, 2008, CTIA–The Wireless Association® (CTIA) filed a petition requesting that the Commission issue a declaratory ruling clarifying provisions of the Communications Act regarding State and local review of personal wireless facility siting applications.[4] CTIA sought clarification of provisions in Section 332(c)(7) of the Communications Act that it contended were ambiguous and that it claimed have been interpreted in a manner that has allowed certain zoning authorities to impose unreasonable impediments to wireless facility siting and the provision of wireless services.

3. On August 14, 2008, the Wireless Telecommunications Bureau (WTB) requested comment on the Petition.[5] Hundreds of comments and replies were filed in response to WTB's *Public Notice*, including comments from wireless service providers, tower owners, local and State government entities, and airport authorities.[6] In response to record evidence of "lengthy and unreasonable delays" involving zoning authority review of tower siting applications,[7] the Commission issued its *Ruling* clarifying provisions of Section 332(c)(7) of the Communications Act.[8] In the *Ruling*, the Commission found that "unreasonable delays are occurring in a significant number of cases," and that these unreasonable delays "have obstructed the provision of wireless services."[9] Such delays, the Commission concluded, impede advances in coverage, deployment of advanced wireless communications services, and competition that Congress has deemed critical.[10]

4. To address these findings, the Commission, among other rulings, interpreted what constitutes a "reasonable period of time" under Section 332(c)(7) of the Communications Act.[11] The Commission found "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."[12] Thus,

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[4] In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Petition for Declaratory Ruling* of CTIA–The Wireless Association®, WT Docket No. 08-165, filed July 11, 2008.

[5] Wireless Telecommunications Bureau Seeks Comment On Petition For Declaratory Ruling By CTIA–The Wireless Association® To Clarify Provisions Of Section 332(c)(7)(B) To Ensure Timely Siting Review And To Preempt Under Section 253 State And Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance, WT Docket No. 08-165, *Public Notice*, 23 FCC Rcd 12198 (WTB 2008) (*Public Notice*).

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

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

[8] *See id.* at 14003 ¶ 27 ("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.' Section 332(c)(7)(B)(v) further provides that '[a]ny person adversely affected by any final action or failure to act' by a State or local government on a personal wireless service facility siting application 'may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction.'") (citations omitted); *see also id*. at 14008-10 ¶¶ 37-42.

[9] *Id*. at 14005-06 ¶¶ 33-34.

[10] *Id*. at 14007-08 ¶ 35.

[11] *See* 47 U.S.C. § 332(c)(7)(B)(ii); *see also Ruling*, 24 FCC Rcd at 14010-15 ¶¶ 43-53. The Commission also found that it is a violation of Section 332(c)(7)(B)(i)(II) of the Communications Act for a State or local government to deny a personal wireless service facility siting application because service is available from another provider. *See Ruling*, 24 FCC Rcd at 14015-19 ¶¶ 54-65. In addition, the Commission denied a request to find that a State or local regulation that requires a variance or waiver for every wireless facility siting violates Section 253(a) of the Communications Act. *See id.* at 14019-20 ¶¶ 66-67.

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

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the Commission found, "a lack of a decision within these timeframes presumptively constitutes a failure to act under Section 332(c)(7)(B)(v)" that enables an applicant to pursue judicial relief within the next 30 days.[13] The Commission defined these time periods as rebuttable presumptions and acknowledged that more time may be needed in individual cases.[14] In particular, in the event an applicant pursues a judicial remedy, the Commission stated that the State or local authority "will have the opportunity to rebut the presumption of reasonableness."[15] Ultimately, the Commission stated, "the court will determine whether the delay was in fact unreasonable under all the circumstances of the case."[16] Thus, the Commission's *Ruling* reduces delays in the construction and improvement of wireless networks while preserving the authority of States and localities to make the ultimate determination on local zoning and land use policies.

5. The Commission also defined "adjustments to the presumptive deadlines in order to ensure that the timeframes accommodate certain contingencies that may arise in individual cases, including . . . 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."[17] Specifically, the Commission stated that "when applications are incomplete as filed, the timeframes do not include the time that applicants take to respond to State and local governments' requests for additional information."[18] The Commission further limited this automatic tolling by finding that it applies only if a zoning authority notifies an applicant within the first 30 days that its application is incomplete.[19] In this way, the Commission concluded, "State and local governments [have] sufficient time for reviewing applications for completeness, while protecting applicants from a last minute decision that applications should be denied as incomplete."[20] In addition, the Commission clarified that the "'reasonable period of time' [could] be extended beyond 90 or 150 days by mutual consent . . . and that in such instances, the commencement of the 30-day period for filing suit will be tolled."[21]

6. On December 17, 2009, the Stay Request was filed by the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association ("Petitioners").[22] In the Stay Request, Petitioners ask the Commission to stay the *Ruling* in its entirety pending review of their Petition for Reconsideration and Clarification[23] and any judicial appeals.[24] In the

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[13] *Id.*; *see* 47 U.S.C. § 332(c)(7)(B)(v).

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

[15] *Id*. at 14004-05 ¶ 32.

[16] *Id*. at 13995 ¶ 4.

[17] *Id*. at 14010 ¶ 42.

[18] *Id*. at 14014 ¶ 52.

[19] *Id*. at 14014-15 ¶ 53.

[20] *Id*.

[21] *Id*. at 14013 ¶ 49.

[22] *See supra* note 3.

[23] *See* In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Petition for Reconsideration or Clarification* of the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association, WT Docket No. 08-165, filed Dec. 17, 2009 (Petition).

alternative, Petitioners request that (1) the decisions set forth in the *Ruling* be effective no sooner than 30 days after the *Ruling* is published in the Federal Register, and (2) the Commission stay the effective date of the "30 day review for incompleteness deadline" until it considers their pending Petition.[25] On December 24, 2009, CTIA and PCIA–The Wireless Infrastructure Association (PCIA) filed separate oppositions to the Stay Request.[26]

III. DISCUSSION

7. To qualify for the extraordinary remedy of a stay, a petitioner must show that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent a stay; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest would favor a grant of the stay.[27] We find no compelling reason for granting a stay of the 30-day completeness review period. Even assuming that Petitioners could demonstrate a likelihood of success on the merits of their Petition, they still would not be entitled to a stay of the completeness review rule because they have not established any of the other three factors that would warrant a stay. In particular, they have not shown that they would suffer irreparable harm in the absence of a stay – a prerequisite for obtaining the relief they seek.[28] Nor have they shown that a stay will not adversely affect the interests of other parties and the public interest. In addition, because Petitioners focus all their arguments on the merits and effects of the 30-day completeness review period, they also have not established grounds to stay the entire decision set forth in the *Ruling*, either pending the conclusion of reconsideration and litigation or until 30 days after the *Ruling* is published in the Federal Register.[29] We therefore deny the Stay Request.[30]

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[24] Stay Request at 3.

[25] *Id*. at 3, 12. In their Stay Request, Petitioners elaborate that in the event of a stay of the 30-day completeness review deadline, the Commission should clarify that "in the interim period, when an application is returned to an applicant as incomplete, the 'shot clock' is tolled regardless of whether the request for missing information comes before or after 30 days since the application was initially submitted and regardless of whether the reason for delay is related to the facial completeness of the application or if it is for another valid reason." *Id*. at 3-4.

[26] *See* In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Opposition* of CTIA–The Wireless Association®, WT Docket No. 08-165, filed Dec. 24, 2009 (CTIA Opposition); 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, *Opposition* of PCIA–The Wireless Infrastructure Association, WT Docket No. 08-165, filed Dec. 24, 2009 (PCIA Opposition).

[27] *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc*., 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*Virginia Petroleum Jobbers*).

[28] *See, e.g.*, In the Matter of Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, RM-8553, Implementation of Section 309(j) of The Communications Act – Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz Bands, PP Docket No. 93-253, *Order*, 14 FCC Rcd 19668 (WTB 1999).

[29] Unlike rules, which must be published in the Federal Register, *see* 5 U.S.C. § 553, there is no requirement that adjudicatory decisions such as a declaratory ruling appear in the Federal Register. *See id.* § 554(e). Nonetheless, for informational purposes, the Commission published the *Ruling* in the "Notices" section of the Federal Register on December 21, 2009. *See* 74 Fed. Reg. 67,871 (Dec. 21, 2009). More than 30 days have passed since the *Ruling* appeared in the Federal Register. Therefore, Petitioners' request to stay the *Ruling* until 30 days after publication in the Federal Register is moot.

[30] PCIA also argues that by asking the Commission to declare or clarify that zoning authorities may toll the 90- or 150-day review period at any time, Petitioners are impermissibly seeking a new rule in the context of a request for stay. PCIA Opposition at 2-3; *see* 47 C.F.R. § 1.44(e) ("Any request to stay the effectiveness of any decision or

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A. Irreparable Harm

8. Petitioners claim their members "are likely to suffer significant, immediate harm" if the 30-day completeness deadline is not stayed.[31] Petitioners first contend that because the *Ruling* took effect immediately upon release on November 18, 2009, member communities that had siting requests pending on that date ("especially small ones without extensive legal resources" and "many [that did] not even know [about the deadline] because the [*Ruling*] ha[d] yet to be published in the Federal Register")[32] were "required to make major changes immediately or risk court action."[33] Without a stay, Petitioners also claim, member communities will incur irreparable harm from drafting new ordinances, forms, and fee schedules, which they might then have to redraft if the *Ruling* is reconsidered.[34] They further assert that the 30-day review for incompleteness rule will cause significant harm to member communities and the citizens who live in them because "it does not reflect the realities of the application process and does not account for the fact that often times, supplemental information will be required after 30 days."[35] In this regard, Petitioners state that the 30-day review requirement "will slow the application process to a halt," and that after the 30-day period "local zoning authorities could be forced to reject, or 'deem withdrawn,'" every incomplete application as that "will be the only way that a local zoning authority will be able to protect itself against costly litigation and bad faith applicants."[36]

9. In order to demonstrate "irreparable harm," the injury must be "both certain and great [and] it must be actual and not theoretical."[37] Therefore, to demonstrate irreparable harm, Petitioners must provide "proof indicating that the harm is certain to occur in the near future."[38] Furthermore, an alleged injury is not "irreparable" if "adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation."[39] Consequently, economic loss "does not, in and of itself, constitute irreparable harm."[40]

10. We find that Petitioners have not shown that they would suffer irreparable harm in the absence of a stay because the harms they allege are either insubstantial, purely economic in nature, or speculative. To the extent Petitioners rely on the costs their members will incur to draft, and potentially later redraft, new ordinances and forms, any such injury is economic loss that does not justify a stay.

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order of the Commission shall be filed as a separate pleading. Any such request which is not filed as a separate pleading will not be considered by the Commission."). Because we deny the Stay Request on other grounds, we need not address this argument.

[31] Stay Request at iii.

[32] *Id*. at 9.

[33] *Id*. Petitioners also state that "applicants [had] an incentive to 'keep quiet' about their incomplete application and the new requirements until December 18, 2009 at which point the applicant [could] refuse to cooperate with any further requests and still demand approval within 90 or 150 days on threat of legal action against the community." *Id*.

[34] *Id.* at 11.

[35] *Id.* at 10.

[36] *Id.* They also state that "[t]he increase in applications that are rejected very early in the process, will result in applicants having to pay increased fees and will slow down the process." *Id*.

[37] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (*Wisconsin Gas*).

[38] *Id*.

[39] *Sampson v. Murray,* 415 U.S. 61, 90 (1974) (quoting *Virginia Petroleum Jobbers,* 259 F.2d at 925).

[40] *Wisconsin Gas*, 758 F.2d at 674; *see also Virginia Petroleum Jobbers*, 259 F.2d at 925 ("[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough").

Petitioners also argue that communities – and especially those they allege may not have received prompt notice of the *Ruling* – will be forced to deny applications or risk litigation when they are unable to determine the completeness of an application within the 30-day period. However, contrary to Petitioners' claims,[41] the 30-day review period for completeness does not require anything to happen to a wireless facility siting request or to the local zoning authority considering it.[42] In fact, local governmental bodies are free to request supplemental information, and even deem a wireless facility siting request incomplete, anytime during the 90/150-day period for processing applications. Moreover, governmental authorities and applicants can agree to toll the applicable processing timeframe by mutual consent. There is no reason to think that applicants, which have a strong incentive to cooperate with State and local governments in order to gain approval of their applications, are unlikely to reach tolling agreements to accommodate reasonable requests for additional information. If an applicant declines to do so in an appropriate case, government officials will have the opportunity to rebut in court the presumption that the 90/150-day timeframe was reasonable. Petitioners' argument thus essentially reduces to speculation that their members will incur costs of litigation (which are not the sort of harm that can support a stay) where applicants do not agree to accommodate reasonable requests for additional information after 30 days. Therefore, we find that the 30-day review period for completeness does not cause certain, irreparable harm to local zoning authorities' ability to process wireless facility siting applications, including their ability to request additional information after the 30-day period.[43] We further note that although the Stay Request was filed twenty-nine days after the *Ruling* went into effect, it is void of any specific examples of irreparable harm to member communities that had siting requests pending on November 18, 2009.[44] Thus, we find that Petitioners have not established irreparable harm.

B. Harm to Others

11. Petitioners contend that no other parties would be harmed by grant of a stay of the 30-day completeness deadline. They argue that if we were to stay the entire order, we would simply preserve the *status quo* that existed previously. They further contend that if we were to stay only the 30-day deadline for completeness review, "[a]ll that [would be] required of applicants, in the interim, is to timely respond to requests for information that was [*sic*] not initially submitted when the shot clock is tolled."[45]

12. Petitioners' argument is without merit. As PCIA notes, Petitioners "are not simply requesting a stay of the 30-day time period—they request the ability to toll the shot clock at anytime."[46] For this reason, as CTIA observes, "[e]liminating the 30-day window for automatic tolling of an application would re-institute opportunities for continued 'unreasonable delay' in resolving applications . . . and therefore would harm applicants by perpetuating the practices the Commission already has found harm the public interest."[47] While applicants could ameliorate this harm by responding promptly to information requests, the uncertainty they would face is the very sort of harm to applicants that the Commission

[41] Petitioners claim that the requirement is "a hard one," and there is "no exception for when the request [for supplemental information] is 'reasonable' outside of 30 days." Stay Request at 10.

[42] *See* CTIA Opposition at ii, 11.

[43] To the extent Petitioners assert that zoning authorities would automatically reject and "deem withdrawn" *every* application that is determined to be incomplete after the initial 30-day review period, *see supra* text accompanying note 36, we agree with CTIA that this type of harm would be entirely self-inflicted and is not a basis for finding irreparable harm justifying a stay. *See* CTIA Opposition at 12-13.

[44] *See* PCIA Opposition at 7 (stating that Petitioners provide no examples to support their claims).

[45] Stay Request at 11. They also contend that "[e]ven if this is an 'injury' as compared to the current rule in the [*Ruling*], it is certainly not a substantial injury." *Id*.

[46] PCIA Opposition at 9.

[47] CTIA Opposition at 14-15.

sought to prevent in its *Ruling*.[48] As the Commission expressly stated: "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*."[49] Consistent with the Commission's balancing of these interests, we find that a stay in this case would result in significant harm to applicants.

C. Public Interest

13. Petitioners argue that the public interest weighs in favor of a stay of the 30-day completeness review requirement. First, they contend the public has an interest in allowing their representatives in local government to conduct full inquiries into wireless facility siting requests.[50] They then contend that the public has an interest in making sure that applicants "do not have an incentive to obscure important information that may result in hazardous or unsightly placement of facilities."[51] Finally, they claim that "staying and amending or discarding" the requirement would increase the efficient deployment of service and further the public interest.[52]

14. We agree that the full and fair consideration of wireless facility siting requests promotes the public interest. As discussed above,[53] however, Petitioners have not shown that State and local governments will suffer irreparable harm to their ability to perform complete reviews. On the other hand, a stay of the 30-day rule would risk compromising the public interest in timely review by creating the potential for protracted delays due to unreasonable last-minute requests for additional information. Taking these considerations together, we cannot find on balance that the public interest favors a stay.

IV. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and Section 1.106(n) of the Rules, 47 C.F.R § 1.106(n), the Emergency Motion for Stay filed by the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and the American Planning Association on December 17, 2009 IS DENIED. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Ruth Milkman, Chief
Wireless Telecommunications Bureau

[48] The harm that would result from continued delays if the entire *Ruling* were to be stayed is, of course, far greater.

[49] *Ruling*, 24 FCC Rcd at 14014-15 ¶ 53 (emphasis added).

[50] Stay Request at 12.

[51] *Id.*

[52] *Id.*

[53] *See supra* paras. 8-10.