

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

In the Matter of )  
 )  
Commnet Wireless, LLC )  
Petition for Declaratory Ruling )

ORDER

Adopted: April 25, 2012

Released: April 26, 2012

By the Associate Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On September 15, 2006, Commnet Wireless, LLC (Commnet) filed a Petition for Declaratory Ruling (Petition),<sup>1</sup> pursuant to Section 1.2 of the Commission’s rules.<sup>2</sup> The petition seeks a declaration that no Commercial Mobile Radio Services (CMRS) carrier may “use its position as the owner, manager or pre-existing tenant of a radio communications tower to deny or restrict access to available space on radio communications towers by other CMRS carriers.”<sup>3</sup> Commnet defines “available space on such tower” to mean “space actually suitable for lease or placement of antenna facilities.”<sup>4</sup> Commnet proposes that the ruling be prospective only, in that no carrier would be subject to penalty for past conduct inconsistent with the ruling, but that the ruling would render any pre-existing contractual clauses implementing the prohibited activities unenforceable.<sup>5</sup>

2. Commnet contends that state, local, and Tribal governments have generally opposed the construction of tower facilities in the same general area where there is an existing tower with available space, and that as a result, tower space constitutes a bottleneck type of facility in many cases.<sup>6</sup> Commnet asserts that denial of access by competitors thus poses a threat to a free and open marketplace in telecommunications.<sup>7</sup> It argues that the Commission is required by “traditional antitrust principles” to require the owner of a bottleneck facility to make the shared use of the facility available to its competitors.<sup>8</sup> Further, relying on instances where bottlenecks have served to justify Commission action, Commnet urges the Commission, as a matter of federal telecommunications policy, to make the above-referenced declaration.<sup>9</sup> It also argues that environmental and historic preservation laws have frequently

<sup>1</sup> See Commnet Wireless, LLC Petition for Declaratory Ruling That It Is Contrary to Public Policy for a CMRS Carrier to Restrict Competitors’ Access to Tower Space for Anti-Competitive Purposes, *Petition for Declaratory Ruling* (filed Sept. 15, 2006) (Petition).

<sup>2</sup> 47 C.F.R. § 1.2.

<sup>3</sup> See Petition at 3.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.* at 4-5.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 4-6.

made it difficult, if not impossible, to construct a tower facility where there is an existing tower in the same general area.<sup>10</sup> By making the requested declaratory ruling, Commnet concludes, the Commission would enable market forces to operate, avoid the need for cumbersome economic and environmental regulation, and promote public safety by facilitating widespread deployment of facilities utilizing multiple technologies.<sup>11</sup> For the reasons set forth below, we deny the petition.

## II. DISCUSSION

3. Under section 1.2 of the rules, the Commission “may . . . issue a declaratory ruling terminating a controversy or removing uncertainty.”<sup>12</sup> Thus, the Commission typically employs a declaratory ruling to clarify, interpret, or determine the appropriate application of a provision of the Communications Act (or other statute within its jurisdiction), the Commission’s rules or prior Commission orders. In contrast, the Commission uses the rulemaking process to exercise its authority under the Communications Act (or other applicable statute) to promulgate new requirements.<sup>13</sup> In its Petition, Commnet does not suggest that the requirement it has proposed is mandated by any statutory provision, rule or order, and Commnet does not point the Commission toward any such authority that it contends should be interpreted or clarified as inherently imposing this requirement. Rather, it requests that the Commission invoke “principles” of antitrust or telecommunications law to establish a new requirement that would extend to CMRS providers obligations similar to those that section 224 of the Act currently places on utility pole owners.<sup>14</sup> Thus, the relief requested cannot appropriately be imposed by a declaratory ruling. Accordingly, in exercising the Commission’s broad discretion in deciding whether or not to issue such a ruling,<sup>15</sup> we deny Commnet’s Petition.

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<sup>10</sup> *Id.* at 6-8.

<sup>11</sup> *Id.* at 8-9.

<sup>12</sup> 47 C.F.R. § 1.2.

<sup>13</sup> See *Public Service Commission of Maryland*, Memorandum Opinion and Order, 4 FCC Rcd 4000, 4004 ¶30 (1989) (declaratory ruling may be used to resolve controversies relating to rights or duties under the Communications Act, the Commission’s rules, or prior Commission orders), *aff’d*, *Public Service Commission of Maryland v F.C.C.*, 909 F.2d 1510 (D.C. Cir. 1990); Competition in the Interstate Interexchange Marketplace, Petitions for Modification of Fresh Look Policy, CC Docket No. 90-132, *Memorandum Opinion and Order*, 8 FCC Rcd 5046, 5049-50 ¶ 20 (1993) North American Telecommunications Association, *Memorandum Opinion and Order*, 101 FCC 2d 349, 371 (1985) (classification of services under existing rule may be accomplished through declaratory ruling, but rule changes more appropriately handled in rulemaking).

<sup>14</sup> See 47 U.S.C. § 224.

<sup>15</sup> See *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir.), *cert denied*, 414 U.S. 914 (1973); Telephone Number Portability, CC Docket No. 95-116, *Order*, 19 FCC Rcd 6800, 6810 ¶ 20 (2004).

**III. ORDERING CLAUSE**

4. IT IS THEREFORE ORDERED, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 0.331 and 1.2 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.2, that the Petition for Declaratory Ruling filed by Commnet Wireless, LLC, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Jane E. Jackson  
Associate Chief  
Wireless Telecommunications Bureau