IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NOS. 10-60039 & 10-60805

CITY OF ARLINGTON AND CITY OF SAN ANTONIO,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW FROM ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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STATEMENT REGARDING ORAL ARGUMENT

The respondents believe that oral argument would be helpful to the Court in resolving the issues presented by this case, including the Federal Communications Commission's interpretation of ambiguous provisions of the Communications Act.

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BRIEF FOR RESPONDENTS

Section 332(c)(7)(B) of the Communications Act, 47 U.S.C. § 332(c)(7)(B), requires States and local governments to rule on pending applications for the siting of wireless telecommunications facilities "within a reasonable period of time." The statute also provides that applicants facing undue delay may seek judicial review of a State or local government's "failure to act" on a pending application within 30 days after the "failure to act." The statute itself does not define what constitutes a "reasonable period of time" or a "failure to act." In this case, two Texas cities challenge the authority of the Federal Communications Commission,

the agency entrusted by Congress with implementing the Communications Act, to clarify those ambiguous terms.

JURISDICTIONAL STATEMENT

On November 18, 2009, the FCC issued a declaratory ruling interpreting Section 332(c)(7)(B) of the Communications Act.[1] The City of Arlington, Texas filed a timely petition for judicial review of the *Declaratory Ruling* on January 14, 2010, within the 60-day deadline established by 28 U.S.C. § 2344.

The FCC denied a petition for reconsideration of the *Declaratory Ruling* in an order released on August 4, 2010.[2] The City of San Antonio, Texas filed a timely petition for judicial review of the *Reconsideration Order* on October 1, 2010, within the 60-day deadline established by 28 U.S.C. § 2344.

In its petition for review, San Antonio purports to seek review of both the *Reconsideration Order* and the *Declaratory Ruling*. But San Antonio did not petition for review of the *Declaratory Ruling* within 60 days of that order's release. Nor did San Antonio file a petition for reconsideration of the *Declaratory Ruling*,

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[1] *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*, 24 FCC Rcd 13994 (2009) ("*Declaratory Ruling*").

[2] *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*, 25 FCC Rcd 11157 (2010) ("*Reconsideration Order*").

which would have tolled the 60-day period for seeking judicial review "until the petition had been acted upon by the Commission." *See ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 284 (1987) ("*BLE*").[3] While the *Declaratory Ruling* was not final with respect to the parties that petitioned for reconsideration, it became final as to all other parties – including San Antonio.[4] Consequently, San Antonio's attempt to seek review of the *Declaratory Ruling* is untimely under 28 U.S.C. § 2344.[5]

Moreover, insofar as San Antonio seeks review of the *Reconsideration Order* "on the ground of 'material error,' *i.e.*, on the same record that was before the agency when it rendered its original decision," the *Reconsideration Order* is "not itself reviewable." *See BLE*, 482 U.S. at 279 (citation and internal quotation marks omitted); *see also American Ass'n of Paging Carriers v. FCC*, 442 F.3d

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[3] *See also Simmons v. Reliance Std. Life Ins. Co.*, 310 F.3d 865, 868 (5th Cir. 2002) ("a party's request for agency reconsideration" of an agency decision "render[s] the underlying action nonfinal") (internal quotation marks omitted).

[4] *See BellSouth Corp. v. FCC,* 17 F.3d 1487, 1489 (D.C. Cir. 1994) ("finality with respect to agency action is a party-based concept"); *West Penn Power Co. v. EPA*, 860 F.2d 581, 587 (3d Cir. 1988) ("an agency action can be final for one party and nonfinal for another"); *Winter v. ICC*, 851 F.2d 1056, 1062 (8th Cir. 1988) (same).

[5] *See BLE*, 482 U.S. at 277 (although petitions for review of an agency order denying reconsideration were "timely for purposes of reviewing that order," they "obviously were not timely for purposes of reviewing the [agency's] original order").

751, 756-58 (D.C. Cir. 2006). Accordingly, the Court should dismiss San Antonio's petition for review (No. 10-60805).

Although Arlington – which timely sought review of the *Declaratory Ruling* – repeats many of San Antonio's arguments, some of the challenges to the *Declaratory Ruling* are presented solely by San Antonio. The Court should dismiss those claims, which we identify below, because San Antonio did not timely seek review of the *Declaratory Ruling*. *See Brazoria County v. EEOC*, 391 F.3d 685, 688-89 (5th Cir. 2004).

This Court has jurisdiction to review the *Declaratory Ruling* and the *Reconsideration Order* under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Congress has entrusted the Federal Communications Commission with administering the Communications Act. Section 332(c)(7)(B) of the Act requires State and local governments to "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time." 47 U.S.C. § 332(c)(7)(B)(ii). If State or local officials fail to act on any such request within a reasonable period of time, "[a]ny person adversely affected by" the State or local government's "failure to act … may, within 30 days after such … failure to act, commence an action in any court of competent jurisdiction."

47 U.S.C. § 332(c)(7)(B)(v). The statute, however, does not define the terms "reasonable period of time" and "failure to act."

Section 332(c)(7)(B) further provides that State or local regulation of the siting of wireless service facilities "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). But the Act does not specify what constitutes such a prohibition of wireless service.

In response to a petition from a trade association of wireless telephone service providers, the FCC issued a declaratory ruling to clarify this ambiguous statutory language. This case presents two issues for review:

(1) whether the FCC properly exercised its authority to interpret the ambiguous terms of Section 332(c)(7)(B) of the Communications Act; and

(2) whether, in issuing the *Declaratory Ruling* in an adjudication rather than a rulemaking, the Commission properly followed the statutory procedures governing agency adjudications and its own rules concerning declaratory rulings.

COUNTERSTATEMENT OF THE CASE

The Federal Communications Commission is "the agency charged with administration of the Communications Act." *Brittan Commc'ns Int'l Corp. v. Sw. Bell Tel. Co.*, 313 F.3d 899, 904 (5th Cir. 2002). In this case, two Texas municipalities – Arlington and San Antonio – seek review of two orders in which

the FCC exercised its authority to "resolve[]" "ambiguities" in the Communications Act, *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 397 (1999), by providing much-needed guidance concerning the meaning of undefined terms in Section 332(c)(7)(B) of the Act, 47 U.S.C. § 332(c)(7)(B).

On July 11, 2008, CTIA – The Wireless Association, a trade association of wireless telephone service providers, filed a petition for declaratory ruling with the FCC. Among other things, CTIA asked the Commission to clarify what constitutes a "failure to act" under Section 332(c)(7)(B)(v). CTIA Petition at 17-27. CTIA also requested a declaration that a State or local government violates Section 332(c)(7)(B)(i)(II) (the prohibition of service provision) if it denies a wireless carrier's siting application solely because one or more other carriers already serve a particular area. *Id.* at 30-35.

After reviewing hundreds of comments on CTIA's petition from a wide array of interested parties, the Commission in November 2009 issued a declaratory ruling granting CTIA's petition in part. Arlington has petitioned for review of the *Declaratory Ruling*.

On December 17, 2009, several national organizations representing local governments filed a petition with the FCC for reconsideration of the *Declaratory*

Ruling.[6] In August 2010, the Commission released the *Reconsideration Order*, which denied the petition for reconsideration. San Antonio has petitioned for review of the *Reconsideration Order*.[7]

COUNTERSTATEMENT OF FACTS

A. Section 332(c)(7) Of The Communications Act

An effective national wireless telecommunications network depends on the construction of cellular phone towers and antenna sites. Local residents, however, sometimes resist the erection of such facilities in their communities. As a result, "zoning approval for new wireless facilities is both a major cost component and a major delay factor in deploying wireless systems." *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, 12 FCC Rcd 10785, 10833 ¶ 90 (1997).

Congress has attempted to balance these competing federal and local concerns. As part of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"), Congress added Section 332(c)(7) to the Communications Act of 1934. This provision reflects "a deliberate compromise

[6] By order dated March 4, 2010, this Court granted the FCC's motion to hold Arlington's petition for review in abeyance while the agency reviewed the petition for reconsideration.

[7] Although San Antonio purports to seek review of the *Reconsideration Order*, its brief focuses entirely on attacking the *Declaratory Ruling*. For the reasons discussed in the Jurisdictional Statement above, San Antonio's challenge to the *Declaratory Ruling* is untimely.

between two competing aims – to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over [the] siting of [cellular phone] towers" and other wireless telecommunications infrastructure. *Town of Amherst v. Omnipoint Commc'ns Enters.*, 173 F.3d 9, 13 (1st Cir. 1999). Section 332(c)(7) "attempts to strike a balance between the states' interests in regulating land use and the federal government's interest in facilitating the development of wireless telephone service." *Pinney v. Nokia, Inc.,* 402 F.3d 430, 455 (4th Cir. 2005).

Reflecting this balance, Section 332(c)(7), entitled "Preservation of local zoning authority," contains two parts. In the first part, entitled "General authority," Section 332(c)(7)(A) preserves the residual zoning authority of State and local governments "over decisions regarding the placement, construction, and modification of personal wireless service facilities" (such as cell towers and transmitters). 47 U.S.C. § 332(c)(7)(A). In the second part, entitled "Limitations," Section 332(c)(7)(B) "imposes specific limitations on the traditional authority of [S]tate and local governments to regulate the location, construction, and modification of such facilities." *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 115 (2005). These "substantive and procedural limitations … subject [States and local governments] to an outer limit upon their ability to regulate … land use" by wireless service providers. *Southwestern Bell Mobile Sys., Inc. v. Todd*, 244

F.3d 51, 57 (1st Cir. 2001) (internal quotation marks omitted). Congress adopted these restrictions on local zoning authority to "reduc[e] … the impediments imposed by local governments upon the installation of facilities for wireless communications." *Rancho Palos Verdes*, 544 U.S. at 115.

In particular, to expedite the processing of wireless facility siting applications, Section 332(c)(7)(B)(ii) requires a State or local government (or its instrumentality) to "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) (emphasis added). The statute nowhere defines the phrase "reasonable period of time," nor does it provide any guidance for determining how a "reasonable period of time" is to be calculated.

If a State or local government does not act on a wireless facility siting request within a reasonable period of time, any person "adversely affected by" the government's "failure to act … may, within 30 days after such … failure to act, commence an action in any court of competent jurisdiction," and the "court shall hear and decide such action on an expedited basis." 47 U.S.C. § 332(c)(7)(B)(v). Although the 30-day period for seeking judicial review of a "failure to act" begins to run from the date on which the "failure to act" occurs, the statute does not

specify when a "failure to act" takes place. That question turns on what constitutes a processing delay that exceeds a "reasonable period of time." Thus, the two undefined terms, "failure to act" and "reasonable period of time," work in tandem.

The statute further provides that State or local regulation of the siting of wireless service facilities "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). But the Act does not define what constitutes a prohibition of wireless services within the meaning of the statute.

B. CTIA's Petition For Declaratory Ruling

On July 11, 2008, CTIA filed a petition for declaratory ruling with the FCC. Among other things, CTIA asked the Commission to clarify the meaning of the phrase "failure to act" in Section 332(c)(7)(B)(v). CTIA Petition at 17-27. CTIA pointed out that because the Communications Act "does not explain when a 'failure to act' accrues" under Section 332(c)(7)(B)(v), "such a failure" has sometimes "been impossible to pinpoint." *Id.* at 20. This is an issue of considerable practical importance because, if a party adversely affected by a State or local government's "failure to act" chooses to challenge that failure, it must file suit "within 30 days after such … failure to act." *See* 47 U.S.C. § 332(c)(7)(B)(v).

CTIA explained that, without knowing when a failure to act occurs, wireless carriers face the "impossible choice" of either "endur[ing] further delay" in the

hope that government action will be forthcoming – "and possibly miss[ing] the 30-day window" to file suit – or "incur[ring] the substantial costs and additional time" associated with a lawsuit that may be dismissed as premature because "insufficient time has passed for the siting authority to have 'failed to act.'" CTIA Petition at 20 (quoting 47 U.S.C. § 332(c)(7)(B)(v)). CTIA also stated that "because a 'failure to act' is not defined in the Act, some localities have been able to drag out the review process while remaining shielded from the judicial scrutiny Congress intended." *Id.* at 13.

CTIA noted "examples of egregious delays in the wireless facility siting process" in various local communities across the country. CTIA Petition at 14-15. "In each of these cases," CTIA stated, "the careful balance established by Congress between local and state prerogatives and federal deployment goals has been disrupted." *Id.* at 16. To restore that balance, CTIA asked the Commission to provide guidance regarding the term "failure to act" in Section 332(c)(7)(B)(v).

In particular, CTIA asked the agency to issue "a declaratory ruling establishing reasonable time frames in which state and local zoning authorities must act on zoning requests" involving wireless telecommunications facilities. CTIA Petition at 20. CTIA proposed two different time frames. For "wireless collocation applications" – *i.e.*, where the "applicant is merely seeking to add antennas to an existing facility that has already … been approved" by local zoning

officials – CTIA asked the Commission to declare that "failure to render a final decision within 45 days will constitute a 'failure to act' pursuant to Section 332(c)(7)(B)(v)." *Id.* at 25. For other wireless siting applications – which, according to CTIA, typically require more processing time than collocation applications – it sought a declaratory ruling that "the failure to render a final decision ... within 75 days constitutes a failure to act for purposes of Section 332(c)(7)(B)(v)." *Id.* at 25-26.

CTIA asked the Commission to "declare that when a zoning authority has failed to act" on an application within the prescribed time frame, "the application will be deemed granted." CTIA Petition at 27. Alternatively, CTIA requested that the Commission "establish a presumption that when a zoning authority cannot explain a failure to act" within the prescribed time frame, "a reviewing court should find a violation of Section 332(c)(7)(B)(ii) and issue an injunction granting the underlying application." *Id.* at 29.

In addition, CTIA sought clarification of Section 332(c)(7)(B)(i)(II), which bars State or local governments from taking action that would "prohibit or have the effect of prohibiting" the provision of wireless services. CTIA Petition at 30-35. CTIA asked the Commission to clarify that "the fact that one or more other [wireless] carriers [already] serve a given geographic market is not by itself a

sufficient defense against a suit brought under Section 332(c)(7)(B)(i)(II)." *Id.* at 32.

On August 14, 2008, the FCC's Wireless Telecommunications Bureau issued a Public Notice seeking comment on CTIA's petition for declaratory ruling.[8] The Commission received hundreds of comments in response to the Public Notice, "including comments from wireless service providers, tower owners, local and State government entities, and airport authorities." *Declaratory Ruling* ¶ 13.

Numerous interested parties supported CTIA's request for clarification of Section 332(c)(7)(B). Several commenters contended that the Commission should define "reasonable timeframes for State and local governments to process facility siting applications ... so that [applicants] know when they should seek redress from courts for State and local governments' failure to act in a timely manner." *Declaratory Ruling* ¶ 14.

Arguing in favor of a broad reading of their powers, various zoning authorities opposed CTIA's petition. Primarily, they argued 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" under Section

[8] Public Notice, *Wireless Telecommunications Bureau Seeks Comment On Petition For Declaratory Ruling By CTIA*, 23 FCC Rcd 12198 (2008).

332(c)(7)(B) because "Congress gave the courts, rather than the Commission, the authority to interpret Section 332(c)(7)." *Declaratory Ruling* ¶ 15.

C. The *Declaratory Ruling*

In November 2009, after reviewing the record in this proceeding, the FCC issued a *Declaratory Ruling* granting in part and denying in part CTIA's petition. *Declaratory Ruling* ¶ 71. Tto provide guidance to siting applicants, State and local governments, and courts, the Commission clarified the term "failure to act" in Section 332(c)(7)(B)(v) by defining presumptively reasonable timeframes for government action on wireless facility siting applications. *Id.* ¶¶ 27-53. The agency also clarified that Section 332(c)(7)(B)(i)(II), which bars zoning authorities from prohibiting wireless services, precludes those authorities from barring wireless competition. *Id.* ¶¶ 54-65.

As a threshold matter, the Commission found that it had "the authority to interpret Section 332(c)(7)." *Declaratory Ruling* ¶ 23. It noted that several sections of the Communications Act – specifically, Sections 1, 4(i), 201(b), and 303(r) – grant the Commission authority to interpret and implement the Act's provisions. *Id.* (citing 47 U.S.C. §§ 151, 154(i), 201(b), 303(r)).

The Commission went on to explain that a ruling that "merely interprets the limits Congress already imposed on State and local governments" would not, as the zoning authorities claimed, "impos[e] *new* limitations" on them. *Declaratory*

Ruling ¶ 25. The Commission also rejected the argument that "Congress gave the courts, not the Commission, exclusive jurisdiction to interpret and enforce Section 332(c)(7)." *Id.* ¶ 26. The Commission noted that it had previously rejected a similar argument when it interpreted ambiguous language in a similar provision of the Communications Act that provided for judicial review. *See id.* Section 621(a)(1) of the Act states that local governments may not "unreasonably refuse to award" a competitive cable franchise, but the statute does not define what constitutes such an unreasonable refusal. *See* 47 U.S.C. § 541(a)(1). The Commission issued an order filling in that gap in the legislative scheme, and the Sixth Circuit upheld its order on appeal.[9]

Similarly here, the Commission noted that "it is not clear from the Communications Act *what* is a reasonable period of time to act on an application" under Section 332(c)(7)(B)(ii) "or *when* a failure to act occurs" under Section 332(c)(7)(B)(v). *Declaratory Ruling* ¶ 41 (emphasis in original). The agency further determined 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" under Section 332(c)(7)(B)(v). *Id.* ¶ 32. That interest in

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[9] *See 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*, 22 FCC Rcd 5101 (2007) ("*Video Franchising Order*"), *petitions for review denied, Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 2821 (2009).

legal certainty was particularly significant because the record before the agency revealed "a significant number of cases" of "unreasonable delays" in the wireless facility siting process. *Id.* ¶ 33. Such delays had "obstructed the provision of wireless services" as well as "the deployment of advanced wireless communications services" and "wireless 911" service. *Id.* ¶¶ 34-36.

"Given the evidence of unreasonable delays and the public interest in avoiding such delays," the Commission decided that it should offer guidance regarding the meaning of the statutory phrases "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." *Declaratory Ruling* ¶ 37. The Commission explained that guidance regarding specific time periods would provide greater "certainty" and enable wireless carriers "more vigorously to enforce the statutory mandate against unreasonable delay." *Id.*

In defining a "reasonable period of time" (which, in turn, clarifies what constitutes a "failure to act"), the FCC declined to adopt the 45- and 75-day rules proposed by CTIA. It believed that those timeframes "may not accommodate reasonable, generally applicable procedural requirements in some communities." *Declaratory Ruling* ¶ 44. Instead, the agency adopted presumptively reasonable timeframes that were "based on actual practice as shown in the record." *Id.* ¶ 42. The large majority of zoning authorities that participated in the proceeding before

the agency stated that they processed wireless collocation applications within 90 days and other wireless facility siting requests within 150 days. *Id.* ¶¶ 47-48. On that record, 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." *Id.* ¶ 45.

The Commission also rejected CTIA's proposals that the agency "deem an application granted" or "adopt a presumption that the court should issue an injunction granting the application" whenever "a State or local government has failed to act within a defined timeframe." *Declaratory Ruling* ¶ 39. The Commission made clear that while the 90- and 150-day timeframes established by the *Declaratory Ruling* were "presumptively" reasonable, *id.* ¶ 32, State and local governments would "have the opportunity, in any given case that comes before a court, to rebut the presumption that the established timeframes are reasonable." *Id.* ¶ 42.

The Commission created rebuttable presumptions because it recognized that "certain cases may legitimately require more processing time," *Declaratory Ruling* ¶ 37, and that Congress intended "that courts should have the responsibility to fashion appropriate case-specific remedies" based on "the specific facts of individual applications." *Id.* ¶ 39. Thus, under the *Declaratory Ruling*, courts

remain the ultimate arbiters of whether, under the circumstances of the particular case, a zoning authority has unreasonably delayed action on a siting request: "[I]f 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." *Id.* n.99.

The Commission also adopted a flexible approach attuned to the practical realities of siting applications by providing for "further adjustments to the presumptive deadlines in order to ensure that the timeframes accommodate certain contingencies that may arise in particular cases." *Declaratory Ruling* ¶ 42. The timeframes "may be extended" in any case, the Commission explained, "by mutual consent of the … wireless service provider and the State or local government," and any such extension will toll "the commencement of the 30-day period for filing suit" under Section 332(c)(7)(B)(v). *Id.* ¶ 49. In addition, when an applicant fails to submit a complete application, "the time it takes for [the] applicant to respond to a [zoning authority's] request for additional information will not count toward" the presumptive processing timeframe, but only if the authority "notifies the applicant within the first 30 days that its application is incomplete." *Id.* ¶ 53. The Commission reasoned that this approach to tolling strikes an appropriate balance between affording authorities "sufficient time for reviewing applications for

completeness" and "protecting applicants" from "last minute decision[s]" to deny applications "as incomplete." *Id.*

In addition, the Commission granted CTIA's request for clarification of what Section 332(c)(7)(B)(i)(II) means when it forbids zoning authorities from "prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). It concluded that a zoning authority that denies a siting application "solely because one or more [wireless] carriers [already] serve a given geographic market has engaged in unlawful regulation that prohibits or ha[s] the effect of prohibiting the provision of personal wireless services." *Declaratory Ruling* ¶ 56 (internal quotation marks omitted). The Commission found that this reading of the statute was most consistent with "the statutory language" and the pro-competitive "goals of the Communications Act." *Id.* ¶¶ 58, 61.[10]

D. The *Reconsideration Order*

In December 2009, several organizations representing local governments filed a petition with the FCC requesting reconsideration or clarification of the *Declaratory Ruling*. These organizations made clear that "for the limited purposes of this Petition," they "accept[ed] *arguendo*" the Commission's understanding of

[10] The Commission also denied CTIA's request for "preemption of ordinances that impose blanket variance requirements on the siting of wireless facilities." *Declaratory Ruling* ¶ 67. No party sought review of that decision.

its authority to interpret Section 332(c)(7)(B). Petition for Reconsideration at iii. They sought reconsideration of a single, narrow issue: the FCC's determination that the filing of incomplete zoning permit applications would trigger automatic tolling of the processing timeframes only if State or local governments informed applicants within the first 30 days that their applications were incomplete. The petition contended that the 30-day limit on this tolling principle "violates the Commission's interpretation of its own authority" under Section 332(c)(7)(B) "because it creates a 'new limitation' on State and local governments." *Id.* at 5.

After soliciting and reviewing comments on the petition for reconsideration, the Commission denied the petition. *Reconsideration Order* ¶¶ 9-19.

As noted in the Jurisdictional Statement above, San Antonio did not petition for FCC reconsideration of the *Declaratory Ruling*. Instead, it filed comments supporting the petition for reconsideration of automatic tolling. In those comments, San Antonio – unlike the parties seeking reconsideration – argued that the FCC had no authority to interpret Sections 332(c)(7)(B)(i), (ii), and (v). San Antonio also asserted that the *Declaratory Ruling* was a rulemaking "in disguise" that "fails to comply with the Regulatory Flexibility Act." San Antonio Reconsideration Comments at 2. The Commission declined to consider these arguments in the *Reconsideration Order* because they were "beyond the scope" of the petition for reconsideration. *Reconsideration Order* ¶ 20.

SUMMARY OF ARGUMENT

Congress enacted Section 332(c)(7) of the Communications Act to "reduc[e] the impediments imposed by local governments upon the installation of facilities for wireless communications." *Rancho Palos Verdes*, 544 U.S. at 115. Section 332(c)(7)(B) "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities." *Id.* As the agency entrusted with administering the Communications Act, the FCC reasonably interpreted ambiguous statutory language in those congressionally mandated limitations on the zoning authority of State and local governments. The Commission's statutory interpretation, which promotes clarity and legal predictability, is fully consistent with Congress's intent to eliminate unreasonable obstructions to the deployment of wireless telecommunications infrastructure.

I. Section 332(c)(7)(B) contains ambiguous statutory language, including the undefined terms "reasonable period of time" and "failure to act." Neither Arlington nor San Antonio attempts to establish otherwise. Under well-established principles of administrative law, agencies charged with administering statutes – as the FCC undisputedly is entrusted with administering the Communications Act – may fill in the gaps in the legislative scheme where Congress has left ambiguity. "Deference . . . to an agency's construction of a statute that it administers is

premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 159 (2000) (citation omitted). Section 332(c)(7)(B) is part of the Communications Act, and the Commission therefore has the authority to clarify the ambiguities in that provision. In a similar vein, the Sixth Circuit recently held that the Commission acted within its authority in clarifying ambiguous language in an analogous provision of the Communications Act that requires local governments to refrain from "unreasonably refus[ing] to award" a competitive cable television franchise. *Alliance for Community Media,* 529 F.3d at 772-76 (citing 47 U.S.C. § 541(a)(1)).

Contrary to Arlington's assertion, Section 332(c)(7)(A) does not bar the FCC from interpreting Section 332(c)(7)(B). It simply states that nothing in the Communications Act shall limit or affect local zoning authority over wireless facility siting, *except for the provisions of Section 332(c)(7)(B)*. The *Declaratory Ruling* does nothing more than reasonably interpret the restrictions that Congress itself imposed on State and local governments under Section 332(c)(7)(B).

Under the terms of the *Declaratory Ruling*, courts will continue to have the final say in determining whether, based on the particular circumstances, a zoning authority has failed to act on a siting application "within a reasonable period of time." 47 U.S.C. § 332(c)(7)(B)(ii). Thus, the *Declaratory Ruling* does not

conflict with Congress's intent that courts resolve disputes arising under Section 332(c)(7)(B)(ii).

II. The Commission reasonably interpreted the undefined terms "reasonable period of time" and "failure to act" in Section 332(c)(7)(B). Consistent with its mandate to interpret those interdependent concepts, the FCC established processing timeframes based on the actual practice of jurisdictions throughout the country, as reflected in the record before the agency. If a zoning authority does not act on a siting request within the timeframes specified in the *Declaratory Ruling*, the government will be presumed to have failed to act. The Commission made clear, however, that in each court case, zoning authorities will have the opportunity to rebut the presumption that their failure to act within the specified timeframes amounts to unreasonable delay. Ultimately, the court hearing the case will decide – based on the particular circumstances – whether the zoning authority has unreasonably delayed action. "[G]iven the opportunities that [the Commission has] built into the process for ensuring individualized consideration of the nature and scope of each siting request," *Declaratory Ruling* ¶ 41, Arlington has no basis for claiming that the Commission adopted a "one-size-fits-all" rule.

III. Arlington's procedural challenges to the *Declaratory Ruling* likewise are unavailing. Contrary to Arlington's claims, the Commission reasonably concluded that CTIA was not required to comply with the FCC rule governing

service of petitions that request agency "preemption" of State or local regulatory authority. The Commission's understanding of its own rule is entitled to deference, and Arlington fails to show that the Commission abused its discretion in applying its rule.

As for Arlington's complaint that the Commission failed to follow the rulemaking procedures of the Administrative Procedure Act ("APA"), those procedures did not apply here for two reasons. First, this proceeding was an adjudication, not a rulemaking. Second, any rules that the Commission adopted here were interpretative, not substantive.

STANDARD OF REVIEW

Arlington's challenge to the FCC's interpretation of the Communications Act is governed by *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, if "Congress has directly spoken to the precise question at issue," the Court must give effect to Congress's unambiguously expressed intent. *Id.* at 842-43. But if "the statute 'is silent or ambiguous,' [courts] must defer to a reasonable construction by the agency charged with its implementation." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (quoting *Chevron*, 467 U.S. at 843).

If the implementing agency's reading of an ambiguous statute is reasonable, *Chevron* requires the Court "to accept the agency's construction of the statute,

even if the agency's reading differs from what the [C]ourt believes is the best statutory interpretation." *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("*Brand X*"); *see also Texas Coalition of Cities for Util. Issues v. FCC*, 324 F.3d 802, 806-11 (5th Cir. 2003) ("*Texas Coalition*") (deferring to the FCC's reasonable interpretation of ambiguous provisions of the Communications Act). Although Arlington suggests otherwise (Br. 18-20), it is well established that the two-step *Chevron* inquiry applies to judicial review of an agency's interpretation of its statutory authority. *See Commodity Futures Trading Comm. v. Schor*, 478 U.S. 833, 844-45 (1986); *Medical Ctr. Pharmacy v. Mukasey*, 536 F.3d 383, 393 (5th Cir. 2008); *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 619 (5th Cir. 2000).

Arlington also challenges the procedural reasonableness of the Commission's *Declaratory Ruling*. Under the APA, the Court "may only set aside" agency action that is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *City of Dallas v. Hall*, 562 F.3d 712, 717 (5th Cir. 2009) (quoting 5 U.S.C. § 706(2)(A)). "APA arbitrary and capricious review is narrow and deferential, requiring only that the agency articulate a rational relationship between the facts found and the choice made." *Texas Coalition*, 324 F.3d at 811 (quoting *Alenco*, 201 F.3d at 619-20). "Under this highly deferential standard of review," the Court "has the least latitude in finding grounds for

reversal"; it must uphold the FCC's *Declaratory Ruling* "if the agency's judgment conforms to minimum standards of rationality." *ConocoPhillips Co. v. EPA*, 612 F.3d 822, 831-32 (5th Cir. 2010) (internal quotation marks omitted).

ARGUMENT

I. THE COMMISSION CORRECTLY CONCLUDED THAT IT HAS AUTHORITY TO INTERPRET THE AMBIGUOUS TERMS OF SECTION 332(c)(7) OF THE COMMUNICATIONS ACT.

A. The Terms of Section 332(c)(7) Are Ambiguous.

Section 332(c)(7) uses ambiguous language to describe the limitations that Congress imposed on zoning authorities. It requires such authorities to "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time." 47 U.S.C. § 332(c)(7)(B)(ii). The statute, however, does not define the term "reasonable period of time." Courts have repeatedly held that terms such as "reasonable" and "unreasonable" are inherently ambiguous and subject to interpretation by administrative agencies under *Chevron*. For example, in *Alliance for Community Media*, 529 F.3d 763, the Sixth Circuit held that language in Section 621(a)(1) of the Communications Act – which prohibits local governments from "unreasonably refus[ing] to award" a competitive cable franchise – was ambiguous. *Id.* at 777 (citing 47 U.S.C. § 541(a)(1)). The Court explained that the FCC had the authority to resolve the ambiguity by adopting its *Video Franchising Order*, which clarified the meaning

of Section 621(a)(1). *See id.* at 778-86. *See also Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003) ("the generality" of the term "unreasonable" "opens a rather large area for the free play of agency discretion"); *Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) (courts owe "substantial deference" to the FCC's interpretation of the "ambiguous" statutory terms "reasonable" and "unreasonable").

If a zoning authority does not act on a wireless facility siting request within a reasonable period of time, any person "adversely affected by" the government's "failure to act … may, within 30 days after such … failure to act, commence an action in any court of competent jurisdiction." 47 U.S.C. § 332(c)(7)(B)(v). The statute does not define when a "failure to act" occurs. But as CTIA explained in the proceedings before the FCC, unless the term "failure to act" is clearly defined, wireless carriers that experience delays in the processing of their siting applications are confronted with a Hobson's choice. "They can endure further delay" (in the hope that government action is forthcoming) "and possibly miss the 30-day window to 'commence an action in any court of competent jurisdiction,'" or "they can incur the substantial costs and additional time associated with initiating litigation, risking a judicial determination" that the suit must be dismissed because "insufficient time has passed for the siting authority to have 'failed to act.'" CTIA Petition at 20 (quoting 47 U.S.C. § 332(c)(7)(B)(v)).

B. The Commission Has The Authority To Resolve Ambiguities In Section 332(c)(7).

Congress and the courts have long recognized that an agency entrusted with implementing a federal statute is authorized to interpret the statute's ambiguous terms to fill any gaps left by Congress. *See Chevron*, 467 U.S. at 843-45; *see also Brown & Williamson*, 529 U.S. at 159 ("Deference . . . to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps") (citing *Chevron*, 467 U.S. at 844). Under this basic tenet of administrative law, "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *AT&T*, 525 U.S. at 397. Thus, "[u]nder the familiar *Chevron* framework, [courts] defer to an agency's reasonable interpretation of a statute it is charged with administering." *Amazing Spaces, Inc. v. Metro Mini Storage*, 608 F.3d 225, 238 n.11 (5th Cir. 2010) (quoting *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710, 2715 (2009)).[11]

As "the agency charged with administration of the Communications Act," *Brittan*, 313 F.3d at 904, the FCC has authority to interpret the Act's ambiguous

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[11] *See also Texas Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 775 (5th Cir. 2010) (courts "accord deference to agencies under *Chevron* because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency") (internal quotation marks omitted).

provisions, including Section 332(c)(7). Several sections of the Communications Act confirm the agency's broad authority to do so. Section 1, for example, directs the Commission to "execute and enforce the provisions of this Act." 47 U.S.C. § 151. Section 201(b) empowers the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b). Similarly, 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." 47 U.S.C. § 154(i). Finally, Section 303(r) authorizes the agency to "[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." 47 U.S.C. § 303(r). Citing these provisions in this case, the Commission correctly concluded that it "has the authority to interpret Section 332(c)(7)." *Declaratory Ruling* ¶ 23.[12]

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[12] This conclusion did not represent a "dramatic shift" in the FCC's position, as Arlington claims (Br. 35). The Commission had never before addressed the question of its authority to interpret the specific provisions at issue here. In a 1997 letter cited by Arlington, the Chief of the FCC's Wireless Telecommunications Bureau (WTB) opined that "the Commission's interpretation of these provisions" would not be "legally binding" because "legal jurisdiction to determine" whether the provisions have been violated "is reserved by statute to the courts." *Thomas E. Wheeler*, 1997 WL 14744 (Wireless Telecommunications Bureau 1997). But that assertion is not inconsistent with the FCC's recognition in the *Declaratory Ruling* that courts remain the final arbiters of whether a zoning authority has failed to act on an application within a reasonable time in a particular case. *Declaratory Ruling*

The Commission noted that it had reached a similar conclusion in 2007, finding that it had "clear authority to interpret what it means for a local government to 'unreasonably refuse to award' a [cable] franchise" under Section 621(a)(1) of the Act. *Declaratory Ruling* ¶ 24 (citing *Video Franchising Order*, 22 FCC Rcd at 5128 ¶ 54). The Sixth Circuit upheld that determination, citing a 1999 Supreme Court ruling that Section 201(b) of the Communications Act "means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act.'" *Alliance for Community Media*, 529 F.3d at 773 (quoting *AT&T*, 525 U.S. at 378). The Sixth Circuit held that because Section 621(a)(1) "qualifies as a 'provision[ ] of this Act' within the meaning of [S]ection 201(b)," the FCC "possesses clear jurisdictional authority to formulate rules and regulations interpreting the contours of [S]ection 621(a)(1)." *Id.* at 774 (citing *AT&T,* 525 U.S. at 378).

Likewise, the Supreme Court in *AT&T* held that Section 201(b) authorized the FCC to adopt rules implementing Sections 251 and 252 of the Communications Act – "local competition" provisions that Congress added to the statute in 1996. Although those provisions primarily concern intrastate telecommunications (which

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¶ 39. In any event, the Commission itself never adopted the position set forth in the WTB letter. It is well established that the FCC "is not bound by the actions of its staff if the agency has not endorsed those actions." *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008) (internal quotations omitted).

historically had been regulated exclusively by the States), and although Section 252(c) entrusts certain tasks to State commissions, the Supreme Court concluded that Sections 251 and 252 are subject to the FCC's rulemaking power under Section 201(b) because they are provisions of the Communications Act. *AT&T*, 525 U.S. at 377-85.

The same reasoning applies here. As the FCC explained in its *Declaratory Ruling*, "Section 332(c)(7) falls within the [Communications] Act; accordingly, the Commission has the authority to interpret it." *Declaratory Ruling* ¶ 24. Thus, for the same reasons that the Supreme Court and the Sixth Circuit denied challenges by State and local governments to the FCC's authority to construe Sections 251, 252, and 621 of the Communications Act, this Court should reject Arlington's challenge to the agency's authority to interpret Sections 332(c)(7)(B)(ii) and (v) of the Act.[13]

[13] Although Arlington generally challenges the FCC's authority to interpret Section 332(c)(7)(B), its brief makes no mention of the agency's clarification of Section 332(c)(7)(B)(i)(II) (the prohibition of service provision). *See Declaratory Ruling* ¶¶ 54-65. Only San Antonio specifically challenges the Commission's authority to issue that part of the *Declaratory Ruling*. San Antonio Br. 2, 24-25, 31, 41. The Court should not consider this claim because, as shown in the Jurisdictional Statement above, San Antonio's challenge to the *Declaratory Ruling* is untimely. In any event, for the same reasons that the FCC has authority to construe Sections 332(c)(7)(B)(ii) and (v) ("reasonable period of time" and "failure to act"), it also has authority to interpret Section 332(c)(7)(B)(i)(II).

C. Section 332(c)(7)(A) Does Not Divest The Commission Of Its Authority To Interpret Section 332(c)(7)(B).

Arlington attempts to distinguish this case from *Alliance for Community Media* and *AT&T* by pointing to Section 332(c)(7)(A) of the Communications Act. Br. 52-53. That provision states: "Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). Arlington construes Section 332(c)(7)(A) to mean that "the FCC may *not* implement [Section 332(c)(7)(B)] through its general rulemaking powers." Br. 25. Under Arlington's reading of the statute, the Commission may not even *interpret* any part of Section 332(c)(7)(B) except for subparagraph (iv), which expressly refers to FCC regulations concerning radio frequency emissions. Br. 25-29. Arlington is mistaken.

While Section 332(c)(7)(A) generally provides that "nothing in [the Communications] Act shall limit or affect" local zoning authority over wireless facility siting decisions, it explicitly makes an exception for the provisions of Section 332(c)(7)(B). *See* 47 U.S.C. § 332(c)(7)(A) ("Except as provided in this paragraph ..."). Here, the Commission did nothing more than "fill in the statutory gaps," *Brown & Williamson*, 529 U.S. at 159, in "the limits Congress already [had]

imposed on State and local governments" under Section 332(c)(7)(B). *Declaratory Ruling* ¶ 25.[14]

Arlington acknowledges that "Congress did adopt specific limitations on the State and local siting process," but maintains that "only the express limitations themselves (not FCC rules *construing* the limitations) would control." Br. 27 n.39. This makes no sense. As shown in Part I.A above, the "express limitations" in the statute are ambiguous; they offer no guidance regarding when a "failure to act" within a "reasonable period of time" occurs. Under Arlington's view of the law, it seems that the Commission has the authority to interpret any ambiguous provision in the Communications Act – a statute comprising over 200 sections – *except* Section 332(c)(7)(B).[15] Arlington provides no persuasive explanation for that anomalous regime and cites no case (nor are we aware of any) that limits the Commission's well-established role in implementing its governing statute in such a fashion. *See AT&T*, 525 U.S. at 378 (section 201(b) of the Communications Act "means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act'") (quoting 47 U.S.C. § 201(b)).

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[14] Arlington makes much of the fact that Section 332(c)(7) is entitled "Preservation of local zoning authority." Br. 25. But it ignores the fact that Section 332(c)(7)(B) is entitled "Limitations." Congress plainly intended for the "[l]imitations" set forth in Section 332(c)(7)(B) to restrict local zoning authority.

[15] Arlington concedes that "[a]n agency is entitled to deference when it fills a statutory ambiguity by making its own policy choice." Br. 20.

Arlington argues that the Commission violated Section 332(c)(7)(A) by invoking statutory provisions outside of Section 332(c)(7) to "limit or affect" local zoning authority. Br. 25-26. But the provisions to which Arlington refers – Sections 1, 4(i), 201(b), and 303(r) of the Act – do not "limit or affect" State or local authority. To the contrary, they grant the FCC authority to implement the Act's provisions – including Section 332(c)(7)(B). Any effect that the *Declaratory Ruling* might have on local zoning authority is the result of the FCC's reasonable interpretation of the limits that Congress itself chose to place on State and local governments when it enacted Section 332(c)(7)(B). Thus, nothing in section 332(c)(7)(A) divests the Commission of its general authority to interpret ambiguous provisions of the Communications Act, including those contained in 332(c)(7)(B).[16]

[16] Arlington posits that the Sixth Circuit would have reached a "different result" in *Alliance for Community Media* if "Congress had instructed that 'nothing in the Act' beyond Section 621(a)(1) could be used to 'limit' or … 'affect' … State and local cable franchising authority." Br. 53. To the contrary, in a case that predated *Alliance for Community Media*, the Seventh Circuit held that the FCC has authority to interpret Section 621 because "the FCC is charged by Congress with the administration of the Cable Act." *City of Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir. 1999). The court reached that conclusion without relying on any statutory provision beyond Section 621. That approach was consistent with the Supreme Court's explanation that "a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *Brown & Williamson*, 529 U.S. at 159.

D. The Commission's Conclusion That It Has Authority To Interpret Section 332(c)(7) Does Not Conflict With Congress's Intent.

Contrary to Arlington's contention, the *Declaratory Ruling* was entirely consistent with Congress's intent that courts "have 'exclusive jurisdiction' over Section 332(c)(7) disputes other than those concerning [radio frequency] emissions." Br. 30 (quoting H.R. Conf. Rep. No. 104-458, at 208 (1996)). While the FCC adopted presumptively reasonable timeframes for processing applications under Section 332(c)(7)(B)(ii), the agency made clear that the courts would ultimately decide – after reviewing "the specific facts of individual applications" – whether a zoning authority unreasonably delayed action on a siting request. *Declaratory Ruling* ¶ 39.[17] The Commission's determination that courts should have the final say on this issue properly reflect "Congressional intent that courts should have the responsibility to fashion appropriate case-specific remedies" to resolve disputes under Section 332(c)(7)(B)(ii). *Declaratory Ruling* ¶ 39.

Congress's decision to give courts jurisdiction to review certain disputes under Section 332(c)(7)(B) does not preclude the Commission from interpreting the statute. In upholding the FCC's video franchising rules in *Alliance for Community Media*, the Sixth Circuit noted: "[T]he availability of a judicial

[17] *See also id.* ¶ 42 (a "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").

remedy for unreasonable denials of competitive franchise applications does not foreclose the [FCC's] rulemaking authority over [S]ection 621(a)(1)." 529 F.3d at 775.

The Supreme Court made a similar determination in *AT&T*. There, the Court affirmed the FCC's authority to issue rules governing the States' resolution of disputes between telephone companies regarding their duties to interconnect with other carriers, even though the Communications Act provides for judicial review of State commission decisions arbitrating such disputes. *See AT&T,* 525 U.S. at 377-85; 47 U.S.C. § 252(e)(6). The Court reasoned that Congress's "assignment[ ]" of the adjudicatory task to State commissions did "not logically preclude the [FCC]'s issuance of rules to guide the [S]tate-commission judgments." *AT&T,* 525 U.S. at 385. In a similar vein, the fact that "courts may have to grant deference to" the FCC's interpretation "does not in any way impede" their "fact-finding or legal analysis" in individual cases, *Alliance for Community Media v. FCC*, 529 F.3d at 775, or impair their authority "to make factual determinations, and to apply those determinations to the law." *United States v. Haggar Apparel Co.,* 526 U.S. 380, 391 (1999).

Arlington makes much of a statement in the House of Representatives Conference Report on Section 332(c)(7) that then-pending FCC rulemakings should be terminated. Br. 30. It mistakenly reads this statement to mean that

Congress intended to prohibit the FCC from adopting rules to interpret or implement Section 332(c)(7). That is not what the Conference Report said. It simply stated: "Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of [wireless service] facilities should be terminated." H.R. Conf. Rep. No. 104-458, at 208 (1996). Simply put, the conferees did not want the FCC to undermine the new legislation by adopting rules that were inconsistent with the legislative scheme. Nothing in the Conference Report suggested that Congress intended to displace the settled principle of administrative law that the FCC may resolve ambiguities in its authorizing statute, including the new provisions of Section 332(c)(7).

San Antonio separately argues that the FCC lacks authority "to assume the role of resolving conflicts among the federal circuits concerning the meaning of the 'prohibition' language in [Section] 332(c)(7)(B)(i)(II)." Br. 41. This claim is time-barred for the reasons discussed in the Jurisdictional Statement above. In any event, the contention lacks merit. The Supreme Court has instructed that when an agency reasonably construes an ambiguous provision of a statute it is charged with administering, a court must defer to the agency's interpretation – even if the court previously adopted a different reading of the same statute. *See Brand X*, 545 U.S. at 980-86. Before the *Declaratory Ruling*, some courts disagreed about the proper

interpretation of Section 332(c)(7)(B)(i)(II).[18] After the *Declaratory Ruling*, however, the FCC's reasonable reading of that ambiguous provision is entitled to deference.[19]

E. The "Clear Statement" Doctrine Does Not Apply Here.

Arlington asserts that the FCC must lack the authority to interpret Section 332(c)(7)(B) because, according to Arlington, "Congress provided no 'clear statement' to grant the FCC authority to regulate the State and local siting process." Br. 34. This argument suffers from multiple flaws.

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[18] For example, the Third and Fourth Circuits had read the statute to permit denial of a siting application solely on the ground that another wireless carrier was already serving the area. *See, e.g., USCOC of Virginia RSA # 3, Inc. v. Montgomery County Bd. of Supervisors*, 343 F.3d 262, 268 (4th Cir. 2003); *APT Pittsburgh Ltd. P'ship v. Penn Township*, 196 F.3d 469, 480 (3d Cir. 1999). By contrast, the First Circuit had held that a wireless service "provider is not precluded from obtaining relief under [Section 332(c)(7)(B)(i)(II)] simply because some other provider services" the same area. *Metheny v. Becker*, 352 F.3d 458, 461 n.2 (1st Cir. 2003) (citing *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620, 632-35 (1st Cir. 2002)).

[19] *See, e.g., Sprint Spectrum L.P. v. Zoning Board of Adjustment of Paramus*, 2010 WL 4868218 (D.N.J. Nov. 22, 2010) (concluding, in light of *Brand X*, that courts are required to follow the FCC's interpretation); *Liberty Towers, LLC v. Zoning Hearing Board of Lower Makefield*, 2010 WL 3769102 (E.D. Pa. Sept. 28, 2010) (same); *Clear Wireless, LLC v. City of Wilmington*, 2010 WL 3463729 (D. Del. Aug. 30, 2010) (same).

To begin with, the "clear statement" doctrine invoked by Arlington applies only to cases involving federal preemption.[20] This is not such a case. The timeframes that the Commission established in the *Declaratory Ruling* do not "preempt" State or local authority, which occurs when federal law supersedes contrary State or local law under the Constitution's Supremacy Clause. *See City of New York v. FCC,* 486 U.S. 57, 63-64 (1988). Here, the FCC denied CTIA's request to preempt local ordinances (*see Declaratory Ruling* ¶ 67) and instead adopted a presumption defining what constitutes a "reasonable period of time" under Section 332(c)(7)(B)(ii), thereby clarifying the start of the 30-day period for seeking judicial review of a "failure to act" under Section 332(c)(7)(B)(v). Significantly, that presumption is rebuttable; State or local officials may persuade courts that longer processing periods are reasonable in particular cases. Because the Commission's timeframes do not preempt State or local governments from taking more time to process wireless facility siting applications, the "clear statement" doctrine is inapplicable.

In any event, the statute itself preempts State and local zoning authority. As the Supreme Court has recognized, Section 332(c)(7)(B) "imposes specific

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[20] *See City of Dallas v. FCC*, 165 F.3d 341, 347 (5th Cir. 1999) ("if Congress intends to preempt a power traditionally exercised by a [S]tate or local government, 'it must make its intention to do so unmistakably clear in the language of the statute'") (quoting *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991)).

limitations on the traditional authority of [S]tate and local governments to regulate" the siting of wireless service facilities. *Rancho Palos Verdes*, 544 U.S. at 115. Thus, even if Arlington is correct in asserting that the *Declaratory Ruling* somehow preempted local zoning authority, the preemption flows from the terms of the statute itself and the FCC's reasonable interpretation of it.[21]

Arlington claims (Br. 34) that if Section 332(c)(7)(A) "does not limit the FCC's authority, it is hard to imagine how [FCC authority] could be limited." To the contrary, when Congress wishes to limit FCC authority over an area covered by the Communications Act, it knows how to do so. For example, Section 2(b) of the Communications Act provides that, with limited exceptions, "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to" certain matters regarding intrastate communications. 47 U.S.C. § 152(b); *see also* 47 U.S.C. § 224(c)(1) ("Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to" certain matters involving pole

[21] Arlington cites "Congress's instruction" that the provisions of the 1996 Act "cannot be 'construed' to modify, impair, or supersede Federal, State or local law '*unless expressly so provided*'" in the 1996 Act. Br. 39 (quoting Pub. L. No. 104-104, § 601(c), 110 Stat. 56 (1996)) (emphasis supplied by Arlington). This prohibition on implied preemption does not apply here because Section 332(c)(7)(B) expressly imposes specific limits on local zoning authority.

attachments). By contrast, Section 332(c)(7)(A) does not contain any language limiting the Commission's jurisdiction.[22]

F. The Commission's Approach to Tolling Does Not Exceed Its Authority To Interpret Section 332(c)(7)(B).

Under the *Declaratory Ruling*, the presumptive time periods for processing applications are tolled during "the time it takes for an applicant to respond to a request for additional information" from a State or local government, but "only if that State or local government notifies the applicant within the first 30 days that its application is incomplete." *Declaratory Ruling* ¶ 53. Arlington contends that the Commission lacks authority to impose this condition on tolling because "Section 332(c)(7) does not regulate application completeness." Br. 45.

The Commission rightly rejected the argument that its approach to tolling "established a new limitation on State and local governments that was not within the statute." *Reconsideration Order* ¶ 10. It explained that because the "period for tolling is an integral part of the Commission's interpretation of what constitutes a 'reasonable period of time'" under Section 332(c)(7)(B)(ii), the agency's adoption of a limited tolling principle was within its authority to interpret the statute. *Id.*

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[22] Because Section 332(c)(7)(A) contains no comparable limitation on the FCC's authority, this case is unlike *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), on which Arlington heavily relies (Br. 23). That case is inapposite because the provision at issue there – Section 2(b) of the Act, 47 U.S.C. § 152(b) – expressly limited the FCC's jurisdiction.

The Commission could not establish reasonable processing timeframes if it allowed for unlimited tolling. "Were State and local governments able unilaterally to toll the decisionmaking period at any time" simply by requesting additional information from the applicant, "the Commission's authority to define" a reasonable period of time for processing applications "would be rendered meaningless." *Id.* ¶ 12. By requiring a State or local government to provide notice of an incomplete application within 30 days to qualify for automatic tolling, the FCC sought to prevent abuse of the tolling principle and to ensure that the presumptive timeframes it defined would be reasonable in practice. This furthered – rather than thwarted – Congress's intent in enacting Section 332(c)(7) to "reduc[e] the impediments imposed by local governments upon the installation of facilities for wireless communications." *Rancho Palos Verdes*, 544 U.S. at 115.

The Commission explained that it was "under no statutory obligation to adopt any provision for automatic tolling of the presumptively reasonable time periods," and that it could have chosen "to define a 'reasonable period of time' without allowing for *any* automatic tolling." *Reconsideration Order* ¶ 11 (emphasis added). Indeed, the agency adopted the "automatic tolling" principle "to address concerns raised by State and local governments" such as petitioners here. *Id.* While those governments might prefer an unconditional tolling rule, the Commission decided to place reasonable limits on tolling. That approach strikes a

sensible balance between "giv[ing] State and local governments sufficient time for reviewing applications for completeness" and "protecting applicants" from "last minute decision[s]" denying their applications "as incomplete." *Declaratory Ruling* ¶ 53.

Arlington speculates that the Commission's limitation on automatic tolling will disrupt siting processes in many communities. Br. 46-48. Not so. A zoning authority remains free to request additional information from an applicant more than 30 days after an application is filed. While automatic tolling will not apply in this circumstance, the presumptive timeframes "may be extended" – and "the commencement of the 30-day period for filing suit will be tolled" – "by mutual consent of" the applicant and the zoning authority. *Declaratory Ruling* ¶ 49. The Commission anticipates that this sort of negotiated agreement will be common in "cases where the parties are working cooperatively toward a consensual resolution" of the application. *Id.* In addition, the uncertainties inherent in any litigation give the parties an incentive to adopt such an approach.

In other cases, tolling may be unnecessary. A zoning authority may be able to act on an application within the presumptive 90- or 150-day timeframe even if it has requested additional information more than 30 days after the application was filed. Finally, if a zoning authority makes an information request more than 30 days after the application is filed, and then fails to rule on an application within the

presumptive timeframe, it will have an opportunity (in the event a lawsuit is filed) "to rebut the presumption that the established timeframes are reasonable" in its particular situation. *Declaratory Ruling* ¶ 42. For example, it may show that extenuating circumstances justified its late request for more information or that the applicant caused the processing delay by failing to submit the requested information. *Id.* In short, as long as a zoning authority is acting reasonably under the circumstances, it may request additional information from an applicant at any time during the siting process.

The Commission did not exceed its authority in adopting this measured approach.

II. THE COMMISSION REASONABLY INTERPRETED THE AMBIGUOUS TERMS "REASONABLE PERIOD OF TIME" AND "FAILURE TO ACT" IN SECTION 332(c)(7)(B).

As demonstrated in Part I.A above, certain provisions of Section 332(c)(7)(B) are ambiguous. In particular, the statute is unclear as to when a lawsuit must be filed to challenge a State or local government's "failure to act" on a wireless siting application.

The FCC recognized that it needed "to clarify when an adversely affected service provider may take a dilatory State or local government to court" under Section 332(c)(7)(B)(v). *Declaratory Ruling* ¶ 37. The need for clarification was especially urgent in light of the substantial record "evidence of unreasonable

delays and the public interest in avoiding such delays." *Id.* The Commission found that more than 700 siting requests submitted to various localities across the country had been pending for over a year (including almost 200 applications that had been pending for more than three years). *Id.* ¶ 33. The record showed that delays in the siting process had "obstructed the provision of wireless services" as well as "the deployment of advanced wireless communications services" and "wireless 911" service. *Id.* ¶¶ 34-36.[23]

To provide guidance regarding what constitutes a "failure to act" under Section 332(c)(7)(B)(v) – which turns on what constitutes a "reasonable period of time" for acting on an application, 47 U.S.C. § 332(c)(7)(B)(ii) – the Commission reasonably adopted processing timeframes that were "based on actual practice as shown in the record." *Declaratory Ruling* ¶ 42. The large majority of State and local governments that participated in the FCC's proceeding stated that they

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[23] San Antonio argues (Br. 48) that the Commission ignored evidence that "disputes over the timing of local wireless siting decisions were the small exception and not the rule." Like all of San Antonio's attacks on the *Declaratory Ruling*, this claim is time-barred for the reasons discussed in the Jurisdictional Statement above. In any event, the contention lacks merit. Contrary to San Antonio's assertion, the FCC understood that many State and local governments were already processing siting requests within the timeframes that the agency deemed reasonable. *See Declaratory Ruling* ¶¶ 47-48 & n.122. Nonetheless, given the record evidence of hundreds of cases involving lengthy delays, the Commission reasonably determined that it was "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 siting application. *Id.* ¶ 32.

processed wireless collocation applications within 90 days and other wireless facility siting requests within 150 days. *Id.* ¶¶ 47-48. Accordingly, 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" under Section 332(c)(7)(B)(ii). *Id.* ¶ 45. The Commission reasonably concluded that the "lack of a decision" on a siting application "within these timeframes presumptively constitutes a failure to act" and triggers the 30-day period for filing suit under Section 332(c)(7)(B)(v). *Id.*

There is no basis for Arlington's claim that this reading of the statute creates an inflexible "one-size-fits-all national rule." Br. 63. To begin with, the *Declaratory Ruling* established two different processing timeframes: 90 days for collocation requests and 150 days for all other siting applications. It defined "a shorter timeframe for collocation applications" in light of evidence that those applications generally are processed "at a faster pace" than other siting requests. *Declaratory Ruling* ¶ 42.

Moreover, the Commission "provided for further adjustments" to the timeframes to "accommodate certain contingencies that may arise in individual cases." *Declaratory Ruling* ¶ 42. For example, when a wireless carrier and local officials "are working cooperatively toward a consensual resolution" of a siting

application, the timeframes "may be extended … by mutual consent" of the parties. *Id.* ¶ 49. The *Declaratory Ruling* also provides for automatic tolling of the timeframes in some cases where the applicant has filed an incomplete application. *Id.* ¶ 53.

Finally, a zoning authority "will have the opportunity, in any given case that comes before a court, to rebut the presumption that the established timeframes are reasonable." *Declaratory Ruling* ¶ 42. The Commission anticipated that "certain cases may legitimately require more processing time" than the presumptive timeframes afford. *Id.* ¶ 37. It therefore made clear that courts will be able to "consider the specific facts of individual applications" and to "adopt remedies based on those facts." *Id.* ¶ 39.

In short, under the FCC's reading of Section 332(c)(7)(B)(ii), no State or local government will be held liable for failing to act "within a reasonable period of time" until a court has reviewed the specific facts surrounding a particular dispute, "ensuring individualized consideration of the nature and scope of each siting request." *Declaratory Ruling* ¶ 41. Arlington cannot plausibly describe this individualized review process as a "one-size-fits-all" rule.

Arlington also contends that the FCC construed the term "failure to act" too "rigidly." Br. 42. Arlington proposes an alternative reading of the statute under which a failure to act would "not occur at a fixed point in time," but instead would

be "on-going," so that an applicant would not be "compelled to bring a lawsuit after a fixed number of days." Br. 42 n.51. Under Arlington's proposed rule, applicants would be permitted to file suit any time after a "failure to act" on their applications. One of the many problems with Arlington's interpretation is that "Congress did not write the statute that way." *United States v. Monsanto*, 491 U.S. 600, 611 (1989) (internal quotation marks omitted). Section 332(c)(7)(B)(v) plainly states that a person aggrieved by a "failure to act" may commence a lawsuit "within 30 days after such … failure to act." 47 U.S.C. § 332(c)(7)(B)(v). Because the statute sets a limited time period for filing suit after a failure to act occurs, a clear understanding of what constitutes a "failure to act" – which, in turn, depends on what is a "reasonable period of time" – is essential to provide wireless carriers with "certainty as to when they may seek redress for inaction" on a siting application. *Declaratory Ruling* ¶ 37. As the FCC explained, without such clarification, the statute would be "left so ambiguous that it risks depriving a wireless siting applicant of its right to redress." *Id.* ¶ 41.

Arlington seizes on a statement in the legislative history that it "is not the intent" of Section 332(c)(7)(B)(ii) "to subject" the siting requests of wireless carriers "to [any] but the generally applicable time frames for zoning decision[s]." Br. 64 (quoting H.R. Conf. Rep. No. 104-458, at 208 (1996)). Arlington maintains that the FCC's presumptive timeframes are shorter than the "generally applicable

time frames" for zoning decisions in some communities. Br. 63-65. But the Commission's timeframes are entirely consistent with the "generally applicable time frames" in the large majority of jurisdictions that participated in this proceeding. The Commission based its presumptive timeframes on the "actual practice" of State and local governments throughout the country. *Declaratory Ruling* ¶ 42. The evidence of zoning authorities that participated in the proceeding (as well as evidence concerning statutes or regulations that governed other zoning authorities) showed that most of those authorities typically act within 90 days on wireless collocation requests and within 150 days on other siting applications. *Id.* ¶¶ 47-48; *see also id.* ¶ 42 ("most statutes and government processes discussed in the record already conform to the timeframes we define"). On that record, the Commission reasonably concluded that its timeframes would not "disrupt many of the processes State and local governments already have in place" for wireless siting applications. *Id.* ¶ 48.

To be sure, some State and local governments have adopted longer timeframes for processing wireless siting requests. *See, e.g., Declaratory Ruling* ¶ 48 & n.150 (a Connecticut statute contemplates a 180-day processing period). But Arlington is wrong in asserting that the FCC's timeframes have "essentially nullified" State and local laws that provide more time for review of siting applications. Br. 66. If a siting applicant files a lawsuit claiming unreasonable

delay under Section 332(c)(7)(B)(ii), a State or local government will have an opportunity in court to rebut the presumption that a review period exceeding the FCC's timeframes is unreasonable. *Declaratory Ruling* ¶ 42. As part of its rebuttal, the government could support its argument that a longer period is more reasonable under the circumstances by citing, for example, a State or local law that contains a longer timeframe or evidence that comparable siting or construction applications ordinarily take more time. Ultimately, the court that hears the case "will determine whether the delay was in fact unreasonable under all the circumstances of the case." *Id.* ¶ 4. As long as State and local processing requirements allow for a siting decision "within a reasonable period of time," the court may take into account these particularized circumstances in deciding whether to reject a claim of unreasonable delay under Section 332(c)(7)(B)(ii).

III. ARLINGTON'S PROCEDURAL CHALLENGES TO THE *DECLARATORY RULING* LACK MERIT.

Arlington makes two procedural attacks on the *Declaratory Ruling*. First, it asserts that the FCC violated its own rules by failing to require CTIA to serve its petition for declaratory ruling "on the State and local governments that had allegedly delayed siting decisions." Br. 58. Second, it argues that the agency adopted "substantive" rules without complying with the APA's rulemaking requirements. Br. 61-62. Neither claim has merit.

A. The Commission Did Not Violate Its Own Rules.

A note to FCC Rule 1.1206(a) states that when a petition for declaratory ruling seeks "Commission preemption of [S]tate or local regulatory authority …, the petitioner must serve the original petition on any [S]tate or local government, the actions of which are specifically cited as a basis for requesting preemption." 47 C.F.R. § 1.1206(a), Note 1.

Arlington contends that the Commission violated Rule 1.1206(a) by refusing to dismiss CTIA's petition for declaratory ruling. Br. 57-61. According to Arlington, CTIA's petition was based in part "on specific, anecdotal complaints" about "'unidentified jurisdictions,'" and CTIA "did not serve its petition on the State and local governments that had allegedly delayed siting decisions." Br. 58 (quoting *Declaratory Ruling* ¶ 68).

The Commission properly rejected Arlington's reading of the agency's rules. It reasonably concluded that its "service requirements with respect to preemption petitions" did not apply to CTIA's petition because CTIA had not "specifically cited" the actions of States or local governments to "request[ ] preemption," 47 C.F.R. § 1.1206(a), Note 1. Rather, CTIA had noted the actions of "unidentified jurisdictions to demonstrate the need for a declaratory ruling interpreting provisions of the Communications Act." *Declaratory Ruling* ¶ 68.

Courts are especially "deferential" when "reviewing an agency's application and interpretation of its own regulations." *Texas Coalition*, 324 F.3d at 811 (internal quotation marks omitted). An agency's interpretation of its own regulation "must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (internal quotation marks omitted). Here, the Commission reasonably determined that "nothing in [its] rules require[d]" CTIA "to identify the jurisdictions" that were generally referenced in its petition. *Declaratory Ruling* ¶ 68. The Commission's understanding of its own rule was not "plainly erroneous" or contrary to its rule, and therefore should be upheld by the Court.

Alternatively, Arlington asserts that the FCC "violated due process" because, according to Arlington, "no one had a fair opportunity to respond" to CTIA's "anecdotal claims" of unreasonable delays. Br. 59, 61. This argument fails because the Commission did not address any disputes concerning specific zoning applications. Neither Arlington nor any other zoning authority has suffered a deprivation of liberty or property as a result of the *Declaratory Ruling*. And unless and until such a deprivation occurs, any due process claim is, at the very least, premature. *See Urban Developers LLC v. City of Jackson*, 468 F.3d 281, 295-96 (5th Cir. 2006); *Smith v. City of Brenham*, 865 F.2d 662, 664 (5th Cir. 1989). In any event, Arlington cannot seriously claim that State and local

governments lacked an opportunity to make their views known in this proceeding. The record here contained "voluminous evidence" submitted by State and local governments, "including responses to several of the specific examples offered by" CTIA. *Declaratory Ruling* ¶ 68.

More generally, Arlington claims that the *Declaratory Ruling* is "defective" because it was based on "anonymous allegations about local governments." Br. 61. As noted above, the Commission found "that unreasonable delays are occurring in a significant number of cases." *Declaratory Ruling* ¶ 33. The record showed that more than 700 siting applications had been pending for over a year – including nearly 200 applications that had been pending for more than three years. *Id.* While the record did not contain specific details regarding each of the data points, the sheer volume of this "extensive statistical evidence" – which "amply establishe[d] the occurrence of significant instances of delay" – convinced the Commission that it needed to clarify the terms "reasonable period of time" and "failure to act" in Section 332(c)(7)(B). *Id.* ¶ 34. Thus, the record contained substantial evidence supporting the Commission's decision to clarify when a "failure to act" occurs under Section 332(c)(7)(B)(v). That decision was not undermined by the fact that not every local authority causing the delays was specifically named.

B. The APA's Rulemaking Procedures Did Not Apply To This Proceeding.

Finally, Arlington complains that "the FCC did not release a Notice of Proposed Rulemaking or otherwise comply with the APA's rulemaking requirements" in this proceeding. Br. 62. Those requirements apply only to rulemakings conducted under Section 553 of the APA. *See* 5 U.S.C. § 553. This proceeding was an adjudication governed by Section 554 of the APA. *See* 5 U.S.C. § 554(e) (an agency "may issue a declaratory order to terminate a controversy or remove uncertainty"); *see also* 47 C.F.R. § 1.2. Because the Commission engaged in adjudication rather than rulemaking, it was not obliged to adhere to the APA's rulemaking procedures. *See American Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 796-98 (5th Cir. 2000) (a declaratory ruling proceeding is an adjudication, not a rulemaking).

Arlington's argument fails on the additional – and independent – ground that the APA's rulemaking requirements do not apply to "interpretative rules." *See* 5 U.S.C. §§ 553(b)(A), 553(d)(2). Any rules that the Commission adopted in the *Declaratory Ruling* were interpretative. Unlike substantive rules, "which create law," interpretative rules "are statements as to what the [agency] thinks the statute … means." *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 619 (5th Cir. 1994) (quoting *Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th Cir. 1979)). The *Declaratory Ruling* – which interprets and defines ambiguous terms in the

Communications Act – "could aptly be characterized as an interpretative rule" because it "clarifies, rather than creates, law." *Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592, 602 (5th Cir. 1995).[24]

[24] San Antonio additionally asserts that the Commission violated the Regulatory Flexibility Act ("RFA"). Br. 53-54. For the reasons discussed in the Jurisdictional Statement above, this claim should be dismissed because San Antonio's petition was untimely. In any event, the argument is meritless. By its terms, the RFA applies only when an agency is required by Section 553 of the APA to publish a notice of proposed rulemaking or when it publishes a notice of an interpretative rule involving the internal revenue laws. *See* 5 U.S.C. §§ 603(a), 604(a). Neither circumstance applies here. Consequently, the RFA did not apply to the FCC's proceeding.

CONCLUSION

For the foregoing reasons, the Court should dismiss San Antonio's petition for review. Alternatively, it should deny the petition on the merits. In addition, the Court should deny Arlington's petition for review.

Respectfully submitted,

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December 22, 2010

STATUTORY ADDENDUM

47 U.S.C. § 332(c)(7)

47 C.F.R. § 1.1206(a)

47 U.S.C. § 332(c)(7)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER III. SPECIAL PROVISIONS RELATING TO RADIO
PART I. GENERAL PROVISIONS

§ 332. Mobile services

* * * * * *

(c) Regulatory treatment of mobile services

* * * * * *

(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) of this title).

* * * * * *

47 C.F.R. § 1.1206(a)

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A. GENERAL
PART 1. PRACTICE AND PROCEDURE
SUBPART H. EX PARTE COMMUNICATIONS
NON-RESTRICTED PROCEEDINGS
PERMIT-BUT-DISCLOSE PROCEEDINGS.

§ 1.1206 Permit-but-disclose proceedings.

(a) Unless otherwise provided by the Commission or the staff pursuant to § 1.1200(a), until the proceeding is no longer subject to administrative reconsideration or review or to judicial review, ex parte presentations (other than ex parte presentations exempt under § 1.1204(a)) to or from Commission decision-making personnel are permissible in the following proceedings, which are referred to as permit-but-disclose proceedings, provided that ex parte presentations to Commission decision-making personnel are disclosed pursuant to paragraph (b) of this section:

Note 1 to paragraph (a): In the case of petitions for declaratory ruling that seek Commission preemption of state or local regulatory authority and petitions for relief under 47 U.S.C. 332(c)(7)(B)(v), the petitioner must serve the original petition on any state or local government, the actions of which are specifically cited as a basis for requesting preemption. Service should be made on those bodies within the state or local governments that are legally authorized to accept service of legal documents in a civil context. Such pleadings that are not served will be dismissed without consideration as a defective pleading and treated as a violation of the ex parte rules unless the Commission determines that the matter should be entertained by making it part of the record under § 1.1212(d) and the parties are so informed.

(1) An informal rulemaking proceeding conducted under section 553 of the Administrative Procedure Act other than a proceeding for the allotment of a broadcast channel, upon release of a Notice of Proposed Rulemaking (see also § 1.1204(b)(2));

(2) A proceeding involving a rule change, policy statement or interpretive rule adopted without a Notice of Proposed Rule Making upon release of the order adopting the rule change, policy statement or interpretive rule;

(3) A declaratory ruling proceeding;

(4) A tariff proceeding which has been set for investigation under section 204 or 205 of the Communications Act (including directly associated waiver requests or requests for special permission) (see also § 1.1204(b)(4));

(5) Unless designated for hearing, a proceeding under section 214(a) of the Communications Act that does not also involve applications under Title III of the Communications Act (see also § 1.1208);

(6) Unless designated for hearing, a proceeding involving an application for a Cable Landing Act license that does not also involve applications under Title III of the Communications Act (see also § 1.1208);

(7) A proceeding involving a request for information filed pursuant to the Freedom of Information Act;

* * * * * *

IN THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

CITY OF ARLINGTON AND CITY OF SAN ANTONIO PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA RESPONDENTS.	)	NOS. 10-60039 & 10-60805

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 12522 words.

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December 22, 2010

10-60039
10-60805

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The City of Arlington, Texas and the City of San Antonio, Texas, Petitioners,

v.

Federal Communications Commission and United States of America, Respondents.

CERTIFICATE OF SERVICE

I, James M. Carr, hereby certify that on December 22, 2010, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Some of the participants in the case, denoted with asterisks below, are not CM/ECF users. I certify further that I have directed that copies of the foregoing document be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

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