

IN THE
Supreme Court of the United States

T-MOBILE SOUTH LLC,
Petitioner,

v.

CITY OF ROSWELL, GEORGIA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

**BRIEF FOR PCIA – THE WIRELESS
INFRASTRUCTURE ASSOCIATION AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONER**

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Dated: July 10, 2014

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE STATUTE IS DESIGNED TO ADVANCE NATIONAL BROADBAND GOALS.....	4
A. Broadband Benefits the Economy, Consumers, and Public Safety.....	4
B. Expanding Broadband Requires Towers and Other Diverse Wireless Infrastructure.....	10
C. Numerous Barriers Delay Wireless Infrastructure Deployment.....	14
D. Policymakers Have Taken Steps to Remove Those Barriers, Including Adoption of Section 332(c)(7).	16
II. THE MAJORITY APPROACH TO SECTION 332(c)(7) IS CLEARLY CORRECT.....	20
A. The Majority Approach Is Consistent With the Statute and Advances National Broadband Priorities.	20
B. The Majority Approach Does Not Infringe on Local Decision-Making.	24
C. The Eleventh Circuit Ruling Invites Delay, Not Expedition.....	25
CONCLUSION	28

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>AT&T Wireless PCS v. City Council of Va. Beach</i> , 155 F.3d 423 (4th Cir. 1998)	22, 27
<i>Cellular Tel. Co. v. Town of Oyster Bay</i> , 166 F.3d 490 (2d Cir. 1999).....	24
<i>City of Arlington v. FCC</i> , 133 S. Ct. 1863 (2013)	2, 19
<i>City of Rancho Palos Verdes v. Abrams</i> , 544 U.S. 113 (2005)	16, 23
<i>Couveau v. Am. Airlines</i> , 218 F.3d 1078 (9th Cir. 2000)	26
<i>Global Tower, LLC v. Hamilton Twp.</i> , 897 F. Supp. 2d 237 (M.D. Pa. 2012).....	18
<i>Helcher v. Dearborn County Bd. of Zoning Appeals</i> , 595 F.3d 710 (7th Cir. 2010)	20, 21
<i>Illinois RSA No. 3 v. County of Peoria</i> , 963 F. Supp. 732 (C.D. Ill. 1997)	24
<i>MetroPCS, Inc. v. San Francisco</i> , 400 F.3d 715 (9th Cir. 2005)	20, 22
<i>Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983)	21

<i>National Ass’n of Home Builders v. Defenders of Wildlife</i> , 551 U.S. 644 (2007)	22
<i>National Tower, LLC v. Plainville Zoning Bd. of Appeals</i> , 297 F.3d 14 (1st Cir. 2002).....	21, 24
<i>New Par v. City of Saginaw</i> , 301 F.3d 390 (6th Cir. 2002)	20, 22, 24
<i>Omnipoint Corp. v. Zoning Hearing Bd.</i> , 181 F.3d 403 (3d Cir. 1999).....	24
<i>Omnipoint Holdings, Inc. v. City of Cranston</i> , 2007 U.S. Dist. LEXIS 50672 (D.R.I. July 12, 2007)	17
<i>Preferred Sites, LLC v. Troup County</i> , 296 F.3d 1210 (11th Cir. 2002)	24
<i>Riley v. California</i> , No. 13-132 (U.S. June 25, 2014)	9
<i>Smart SMR v. Borough of Fair Lawn Bd. of Adjmt.</i> , 704 A.2d 1271 (N.J. 1998).....	17
<i>Southwestern Bell Mobile Sys., Inc. v. Todd</i> , 244 F.3d 51 (1st Cir. 2001).....	20, 22, 26
<i>USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjmt.</i> , 465 F.3d 817 (8th Cir. 2006)	5

ADMINISTRATIVE CASES

<i>Acceleration of Broadband Deployment by Improving Wireless Siting Policies,</i> 28 FCC Rcd. 14238 (2013).....	10, 13, 15, 19
<i>Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless,</i> 28 FCC Rcd. 3700 (2013)	14
<i>Implementation of Section 224 of the Act,</i> 26 FCC Rcd. 5240 (2011)	19
<i>Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Americans,</i> 27 FCC Rcd. 10342 (2012).....	7, 8, 15
<i>Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review,</i> 24 FCC Rcd. 13994 (2009).....	18, 19

STATUTES

47 U.S.C. § 332(c)(7)	<i>passim</i>
American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2)(D), 123 Stat. 115 (2009)	4-5
Middle Class Tax Relief and Job Creation Act of 2012, 112 Pub. L. No. 96, § 6409(a)(1), 126 Stat. 156 (2012), <i>codified at</i> 47 U.S.C. § 1455(a)(1)	18

Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56 (1996), <i>codified at</i> 47 U.S.C. § 1302	<i>passim</i>
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LEGISLATIVE MATERIAL

141 CONG. REC. H8269 (daily ed. Aug. 2, 1995)	15
H.R. REP. NO. 104-204, pt. 1 (1995)	<i>passim</i>
H.R. REP. NO. 104-458 (1996) (Conf. Rep.)	<i>passim</i>

OTHER AUTHORITIES

ALAN PEARCE ET AL., WIRELESS BROADBAND INFRASTRUCTURE: A CATALYST FOR GDP AND JOB GROWTH 2013-2017 (Sept. 2013).....	6-7
Broadband for America, <i>What Is Broadband</i>	7
Cellular South, Inc. & Telepak Networks, Inc., Reply Comments, WC Docket No. 13-184 (Nov. 8, 2013)	8
CISCO VISUAL NETWORKING INDEX: GLOBAL MOBILE DATA TRAFFIC FORECAST UPDATE, 2013–2018 (Feb. 5, 2014).....	8
CTIA – THE WIRELESS ASSOCIATION®, ANNUAL YEAR-END 2013 TOP-LINE SURVEY RESULTS (2014)	11
ERICSSON MOBILITY REPORT: ON THE PULSE OF THE NETWORKED SOCIETY (Nov. 2013).....	8

Fact Sheet, <i>President Obama’s Plan to Win the Future through the Wireless Innovation and Infrastructure Initiative</i> (Feb. 10, 2011)	9
FCC OMNIBUS BROADBAND INITIATIVE, THE BROADBAND AVAILABILITY GAP, OBI Technical Paper No. 1 (Apr. 2010).....	8
FCC, <i>About the Spectrum Dashboard</i>	6
FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (2010)	4, 7, 9
FCC, <i>Getting Broadband</i>	7
FCC, News Release, <i>Chairman Julius Genachowski Announces New Broadband Acceleration Initiative Actions</i> (Jan. 25, 2013)	19
J. Sharpe Smith, <i>Towers Will Handle Most Mobile Data Growth in Next Five Years</i> , AGL MEDIA GROUP, Mar. 11, 2013	13
JUDICIAL CONFERENCE OF THE UNITED STATES, STRATEGIC PLAN FOR THE FEDERAL JUDICIARY (Sept. 2010)	26
Julius Genachowski, Chairman, FCC, Prepared Remarks at Broadband Acceleration Conference (Feb. 9, 2011)	13

Letter from Tom Wheeler, Chairman, FCC, to The Honorable Fred Upton, Chairman, Comm. on Energy and Commerce (June 27, 2014)	10
<i>Moody's: Independent Towers Will Get an EBITDA Boost as Sprint Deploys Clearwire Spectrum, FIERCEWIRELESS TECH NEWSLETTER, Aug. 21, 2013</i>	13-14
PCIA – The Wireless Infrastructure Association & The DAS Forum, Comments, WC Docket No. 11-59 (July 18, 2011)	12, 15
PCIA, Press Release, <i>Experts Talk Small Cells at HetNet Forum Hill Event</i> (July 29, 2013)	14
Remarks in Albuquerque, New Mexico, 40 WEEKLY COMP. PRES. DOC. 477 (Mar. 26, 2004)	9
Remarks on Signing the Telecommunications Act of 1996, 32 WEEKLY COMP. PRES. DOC. 215 (Feb. 12, 1996)	6
Stanley D. Abrams, <i>Update on the 1996 Telecommunications Act: Personal Wireless Services, LAND USE L. & ZONING DIG., Apr. 1998</i>	11
THE HETNET FORUM, DISTRIBUTED ANTENNA SYSTEMS (DAS) AND SMALL CELL TECHNOLOGIES DISTINGUISHED (Feb. 4, 2013)	12

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STATEMENT OF INTEREST¹

PCIA – The Wireless Infrastructure Association (“PCIA”) respectfully submits this brief as *amicus curiae* in support of Petitioner T-Mobile South LLC.

PCIA is the trade association representing the companies that make up the wireless telecommunications infrastructure industry. PCIA’s members

¹ No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

develop, own, manage, and operate towers, rooftop communications sites, and other facilities used for the provision of all types of wireless, telecommunications, and other services. PCIA and its members partner with communities across the nation to facilitate the widespread deployment of communications networks. It thus seeks to advance the key mission of the Federal Communications Commission (“FCC”) under the Telecommunications Act of 1996 (“1996 Act”): “encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” by “remov[ing] barriers to infrastructure investment.” 47 U.S.C. § 1302.

PCIA and its members have an abiding interest in this case. The Eleventh Circuit’s incorrect interpretation of the statute, 47 U.S.C. § 332(c)(7)(B), allows localities to issue siting denials without an accompanying explanation, thus preventing applicants from receiving a final decision on their wireless siting applications in the “expedited” manner the statute commands. Without the ability to deploy infrastructure quickly and where needed, America’s wireless companies and infrastructure providers cannot effectively meet the nation’s broadband deployment goals and satisfy exploding consumer demand. The decision should be reversed.

SUMMARY OF ARGUMENT

This Court has previously recognized that wireless carriers and infrastructure providers face barriers in siting their facilities. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1867 (2013). Among these

barriers are local siting decisions that omit reasons for denial and frustrate expedited court review of those decisions. The steady removal of siting barriers has been the goal of a multi-year, multi-prong effort by Congress, the Administration, the FCC, and other stakeholders in order to expedite the delivery of advanced wireless services, including broadband services, to consumers.

These services provide unparalleled benefits that make them a national priority. By helping to maintain and improve the data and voice communications fundamental to modern society, advanced wireless services create jobs and grow the economy, bridge the broadband availability gap, and strengthen emergency response and public safety. But they cannot be provisioned without the robust deployment of wireless infrastructure in all its forms, ranging from communications towers that can expand wireless coverage in rural and unserved areas to small antenna installations that can boost capacity in urban centers.

Section 332(c)(7) is designed to help reduce barriers to infrastructure siting. Enacted as part of the 1996 Act, which sought to “remove barriers to infrastructure investment” and “accelerate . . . deployment of advanced telecommunications,” *see* 47 U.S.C. § 1302; H.R. REP. NO. 104-458, at 113 (1996) (Conf. Rep.), the statute requires siting denials to be “in writing and supported by substantial evidence” and subject to “expedited” court review. 47 U.S.C. § 332(c)(7)(B)(iii), (v). The majority of the Circuits have correctly found that the text and underlying

purpose of this section require that written denials explain the reasons for denial.

The majority approach is the only sensible reading of the statute. The alternative advanced by the Eleventh Circuit – written denials that lack any explanation – forces providers and reviewing courts to conduct a scavenger hunt through the record in search of the reasons for denial. The result is more time-consuming litigation and increased costs, contrary to the statute and national broadband priorities. The Court should reverse the Eleventh Circuit ruling and adopt the majority approach.

ARGUMENT

I. THE STATUTE IS DESIGNED TO ADVANCE NATIONAL BROADBAND GOALS.

A. Broadband Benefits the Economy, Consumers, and Public Safety.

Broadband has become an indispensable part of American life: it drives economic growth, increases consumer choice, and helps protect our communities.² Broadband is, quite simply, a “national policy imperative,” and Congress has declared that every American should have “access to broadband capability.” FCC, *CONNECTING AMERICA: THE NATIONAL*

² See FCC, *About Broadband*, available at http://www.broadband.gov/about_broadband.html (last visited June 29, 2014). The term “broadband” commonly refers to Internet access at significantly higher speeds than are available through “dial-up” Internet access. *Id.*

BROADBAND PLAN 151 (2010) (“NATIONAL BROADBAND PLAN”); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2)(D), 123 Stat. 115, 516 (2009).

Congress foresaw the importance of broadband when it passed the 1996 Act on a strong bipartisan basis. That act directed the FCC to “encourage the deployment on a reasonable and timely basis” of advanced telecommunications capability, including “broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996), *codified at* 47 U.S.C. § 1302. The purpose of the 1996 Act is clear: “to accelerate rapidly private sector deployment of advanced telecommunications.” H.R. REP. NO. 104-458, at 113 (Conf. Rep.); *see USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment*, 465 F.3d 817, 820 (8th Cir. 2006) (“The Telecommunications Act of 1996 . . . was intended by Congress to . . . encourage the rollout of new technologies without delay.”).

When the 1996 Act was written, broadband was still an emerging service and only a handful of households in a few test markets had broadband access. While analog wireless voice services had been in existence for more than a decade using “cellular” spectrum, the digital wireless services that form the foundation for today’s wireless broadband services were still in their infancy; they were born out of the Personal Communications Service (“PCS”) spectrum

auctions, which began in 1995.³ Yet members of Congress clearly recognized the transformative potential of those services: the House Commerce Committee, for example, noted the importance of fostering “deployment of [PCS] as well as the rebuilding of a digital technology-based cellular telecommunications network” in order to “speed deployment and the availability of competitive wireless telecommunications services [that] ultimately will provide consumers with lower costs as well as with a greater range and options for such services.” H.R. REP. NO. 104-204, pt. 1, at 94 (1995). President Clinton called the final legislation “truly revolutionary” and predicted it would “bring the future to our doorstep.” Remarks on Signing the Telecommunications Act of 1996, 32 WEEKLY COMP. PRES. DOC. 215, 215 (Feb. 12, 1996).

Today, that broadband future is arriving for many Americans. Broadband provides a platform for economic growth and job creation – according to a recent study, mobile broadband investments in the United States will increase Gross Domestic Product in 2017 by up to \$355.3 billion and generate up to 1.2 million net new jobs. ALAN PEARCE ET AL., INFORMATION AGE ECONOMICS, WIRELESS

³ “Spectrum is the range of electromagnetic radio frequencies used to transmit sound, data, and video across the country. It is what carries voice between cell phones, television shows from broadcasters to your TV, and online information from one computer to the next, wirelessly.” FCC, *About the Spectrum Dashboard*, available at <http://reboot.fcc.gov/reform/systems/spectrum-dashboard/about> (last visited June 24, 2014). The FCC licenses spectrum for wireless use in different bands, including cellular (800 MHz), PCS (1900 MHz), and other bands. *Id.*

BROADBAND INFRASTRUCTURE: A CATALYST FOR GDP AND JOB GROWTH 2013-2017 1 (Sept. 2013).⁴ Indeed, over 28,000 of those jobs are directly attributable to investment in wireless broadband deployment. *Id.* Broadband also gives consumers new choices in how they live, work, and communicate – it makes “tele-medicine” and distance learning possible; streamlines access to government information, programs, and services; and enables individuals to more effectively connect and interact with others. *See* Broadband for America, *What Is Broadband*.⁵ And broadband plays a vital role in public safety and homeland security, by “allowing first responders to send and receive video and data,” “ensuring all Americans can access emergency services,” and “improving the way Americans are notified about emergencies.” NATIONAL BROADBAND PLAN at xiv.

But there is still work to be done. As many as 19 million Americans still lack access to broadband, and 14.5 million of those are rural Americans. *Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Americans*, Eighth Broadband Progress Report, 27 FCC Rcd. 10342, 10344-46, 10369 (2012). Wireless broadband is helping to solve this problem,⁶ as it allows for mobility and covers

⁴ Available at http://www.pcia.com/images/IAE_Infrastructure_and_Economy_Fall_2013.PDF.

⁵ Available at <http://www.broadbandforamerica.com/about-broadband/broadband> (last visited June 27, 2014).

⁶ Broadband can be provided over different platforms, including cable, fiber, or radio spectrum (wireless). *See* FCC, *Getting Broadband*, available at <http://www.fcc.gov/guides/getting-broadband> (last visited June 29, 2014).

more people at lower cost. FCC OMNIBUS BROADBAND INITIATIVE, THE BROADBAND AVAILABILITY GAP, OBI Technical Paper No. 1 13, 39, 61 (Apr. 2010).⁷ Indeed, wireless broadband in rural and underserved areas helps bridge the broadband gap – the difference between the number of Americans who have access to high-speed Internet service and those who still lack access to broadband. *E.g.*, Cellular South, Inc. & Telepak Networks, Inc., Reply Comments, WC Docket No. 13-184, at 6-7 (Nov. 8, 2013);⁸ *Eighth Broadband Progress Report*, 27 FCC Rcd. at 10369. Demand for and reliance on wireless broadband services also continues to explode: mobile data traffic grew 77% in North America in 2013, and will increase seven-fold between 2013 and 2019. CISCO, CISCO VISUAL NETWORKING INDEX: GLOBAL MOBILE DATA TRAFFIC FORECAST UPDATE, 2013–2018 4 (Feb. 5, 2014);⁹ ERICSSON, ERICSSON MOBILITY REPORT: ON THE PULSE OF THE NETWORKED SOCIETY 12 (Nov. 2013).¹⁰

Wireless broadband networks power today’s smartphones, which allow people to carry in their pockets massive quantities of information – “millions

⁷ Available at <http://download.broadband.gov/plan/the-broadband-availability-gap-obi-technical-paper-no-1.pdf>.

⁸ Available at <http://apps.fcc.gov/ecfs/document/view?id=7520957194>.

⁹ Available at http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/white_paper_c11-520862.pdf.

¹⁰ Available at <http://www.ericsson.com/res/docs/2013/ericsson-mobility-report-november-2013.pdf>.

of pages of text, thousands of pictures, . . . hundreds of videos” – as well as “tools for managing detailed information about all aspects of a person’s life.” *Riley v. California*, No. 13-132, slip op. at 18, 20 (U.S. June 25, 2014). Given the considerable benefits of wireless broadband, the NATIONAL BROADBAND PLAN recognizes that “[t]he United States should lead the world in mobile innovation, with the fastest and most extensive wireless networks of any nation.” NATIONAL BROADBAND PLAN at xiv. And echoing President Bush’s call for “universal, affordable access for broadband technology,” President Obama has set a goal providing at least 98% of Americans with access to wireless broadband by 2016. Remarks in Albuquerque, New Mexico, 40 WEEKLY COMP. PRES. DOC. 477, 484 (Mar. 26, 2004);¹¹ Fact Sheet, *President Obama’s Plan to Win the Future through the Wireless Innovation and Infrastructure Initiative* (Feb. 10, 2011).¹² America’s wireless and infrastructure providers are working hard to meet these national broadband goals, but critical challenges remain.

¹¹ Available at <http://www.gpo.gov/fdsys/pkg/WCPD-2004-03-29/pdf/WCPD-2004-03-29-Pg477.pdf>.

¹² Available at <http://www.whitehouse.gov/the-press-office/2011/02/10/president-obama-details-plan-win-future-through-expanded-wireless-access> (included in Press Release, The White House, President Obama Details Plan to Win the Future through Expanded Wireless Access (Feb. 10, 2011)).

B. Expanding Broadband Requires Towers and Other Diverse Wireless Infrastructure.

At the time of the 1996 Act, Congress recognized the need to promote “infrastructure investment.” 47 U.S.C. § 1302. The reasons why are as clear today as they were then: near universal wireless broadband availability cannot be achieved without the ability to deploy new or improved wireless facilities, or “cell sites.” See H.R. REP. NO. 104-204, at 94 (describing “the siting of . . . antennas, cell sites and other infrastructure-related equipment” as “necessary to provide efficient wireless telecommunications services to the public”); accord *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Notice of Proposed Rulemaking, 28 FCC Rcd. 14238, 14239 (2013) (“*Broadband Acceleration NPRM*”). As FCC Chairman Wheeler recently explained: “Simply put, we cannot have high-speed broadband if we do not have high-speed deployment.” Letter from Tom Wheeler, Chairman, FCC, to The Honorable Fred Upton, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (June 27, 2014).

Cell sites include antennas and other electronic equipment used to convey radio signals from phone to phone and from wireless devices to the Internet. To allow for clear signals over a broad coverage area, that equipment often must be placed high in the air. Sometimes that means attaching the equipment to a new support structure, like a communications tower. Other times it means “collocating” equipment, *i.e.*, placing it on an existing tower

or other structure, such as a building rooftop, water tank, or utility pole. The impact of broadband demand on the number of cell sites is reflected in data showing that the number of commercially operated cell sites in the United States has grown from around 22,000 at the time of the 1996 Act to more than 304,000 today. See CTIA – THE WIRELESS ASSOCIATION®, ANNUAL YEAR-END 2013 TOP-LINE SURVEY RESULTS 11 (2014).¹³

Antenna installations on towers and collocations on other tall structures (like rooftops) are often referred to as “macro” sites and form the core of the network, enabling wireless service providers to deliver voice, text, and broadband communications to today’s wireless subscribers. Macro sites are effective for covering large geographic areas – for example, many towers used to build out America’s wireless networks range between 150 and 200 feet and have a service area of several miles. Stanley D. Abrams, *Update on the 1996 Telecommunications Act: Personal Wireless Services*, LAND USE L. & ZONING DIG., Apr. 1998, at 5. Macro sites are also essential for meeting capacity demands, including in urban areas where the demand for wireless data usage continues to skyrocket.

Modern networks also use various smaller antenna technologies, such as Distributed Antenna Systems (“DAS”) or “small cells,” which are being deployed closer to the subscriber on structures such as utility poles and streetlamps as well as within

¹³ Available at http://www.ctia.org/docs/default-source/Facts-Stats/ctia_survey_ye_2013_graphics-final.pdf?sfvrsn=2.

buildings. These technologies provide coverage in targeted locations and additional capacity to handle calls and data in areas with concentrated demands for wireless services. For example, a typical outdoor DAS antenna has a coverage range of less than half a mile, while an indoor small cell can have a coverage area as small as 33 feet. THE HETNET FORUM, DISTRIBUTED ANTENNA SYSTEMS (DAS) AND SMALL CELL TECHNOLOGIES DISTINGUISHED 6-9 (Feb. 4, 2013).¹⁴

These various solutions are not, however, interchangeable. Each has different characteristics and capacities that make it more or less suitable for deployment in specific environments and for resolving particular coverage and capacity challenges. *Id.* at 4.

Respondent the City of Roswell, Georgia (“the City”) is therefore wrong when it suggests that towers will soon be rendered “dinosaurs,” resulting in “fewer requests for these larger cellular towers as technology continues its progression,” and therefore localities should be free to prefer other deployments like collocations and small cell technologies. Br. in Opp. 6-7, 18. While collocations, DAS, and small cells are all important to the fabric of the wireless landscape, they are complementary solutions that do not replace the need for towers. PCIA – The Wireless Infrastructure Association & The DAS Forum, Comments, WC Docket No. 11-59, at 11 (July 18, 2011) (“PCIA Accelerating Broadband NOI Com-

¹⁴ Available at http://www.thedasforum.org/wp-content/uploads/2014/07/DAS-and-Small-Cell-Technologies-Distinguished_HNForum.pdf.

ments”);¹⁵ see *Broadband Acceleration NPRM*, 28 FCC Rcd. at 14240 (noting DAS and small cells “supplement the capacity of the ‘macrocell’ network, filling in gaps or providing additional capacity in a localized outdoor or indoor area where adding a traditional macrocell would be impractical or inefficient”). Rather, projections indicate that 75% of mobile data network traffic growth will continue to be delivered over traditional macro sites, primarily towers, through 2017, while 25% will be carried by DAS and other small cell technologies. J. Sharpe Smith, *Towers Will Handle Most Mobile Data Growth in Next Five Years*, AGL MEDIA GROUP, Mar. 11, 2013.¹⁶

In fact, towers form the backbone of the nation’s wireless infrastructure and remain critical to deploying next generation wireless services like broadband, particularly in rural and underserved areas where towers can generally cover larger territory. Indeed, it has been estimated that some 40,000 towers are needed to expand wireless broadband to virtually all Americans. Julius Genachowski, Chairman, FCC, Prepared Remarks at Broadband Acceleration Conference 4 (Feb. 9, 2011).¹⁷ Sprint alone is expected to deploy some 15,000-18,000 new cell tower sites over the next few years, *Moody’s*:

¹⁵ Available at <http://apps.fcc.gov/ecfs/document/view?id=7021693804>.

¹⁶ Available at <http://www.aglmediagroup.com/towers-will-handle-most-mobile-data-growth-in-next-five-years/>.

¹⁷ Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304571A1.pdf.

Independent Towers Will Get an EBITDA Boost as Sprint Deploys Clearwire Spectrum, FIERCEWIRELESS TECH NEWSLETTER, Aug. 21, 2013,¹⁸ and AT&T plans to deploy 10,000 new macro sites, including towers. PCIA, Press Release, *Experts Talk Small Cells at HetNet Forum Hill Event* (July 29, 2013).¹⁹

C. Numerous Barriers Delay Wireless Infrastructure Deployment.

Policymakers have long recognized that barriers to wireless infrastructure deployment frustrate national broadband priorities. In the period leading up to the 1996 Act, the House Commerce Committee found that “current State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment” of advanced wireless services. H.R. REP. NO. 104-204, at 94. Nearly twenty years later, the FCC has acknowledged that “obtaining the necessary regulatory and zoning approvals from state and local authorities” remains a “significant constraint[]” to wireless infrastructure deployment. *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless*, Sixteenth Report, 28 FCC Rcd. 3700, 3908 (2013).

¹⁸ Available at <http://www.fiercewireless.com/tech/press-releases/moodys-independent-towers-will-get-ebitda-boost-sprint-deploys-clearwire-sp>.

¹⁹ Available at <http://www.pcia.com/pcia-press-releases/588-experts-talk-small-cells-at-pcia-hetnet-forum-hill-event>.

These barriers have taken many forms, such as local permitting processes that “exclude the placement of poles altogether,” “unnecessarily delay the process for that purpose,” “favor one competitor over another,” or “attempt to regulate on the basis of radio frequency emissions.” 141 CONG. REC. H8269, H8274 (daily ed. Aug. 2, 1995) (statement of Rep. Goodlatte). Other barriers include: local moratoria on siting applications; unreasonable siting denials that result in protracted and costly litigation; high application fees; municipal property siting preferences; arbitrary evaluation of an applicant’s business or technology choices; inconsistent or unclear application procedures; difficulty collocating facilities on existing structures; difficulty accessing space on poles or rights-of-way; and excessive costs to access those poles or rights-of-way. *See, e.g., Eighth Broadband Progress Report*, 27 FCC Rcd at 10404; *Broadband Acceleration NPRM*, 28 FCC Rcd. at 14240; *see generally* PCIA Accelerating Broadband NOI Comments.

These delays have real consequences. Even for localities with existing wireless coverage, delays can mean the inability to take advantage of new high-speed technologies or persistent gaps in coverage and dropped calls – including emergency calls. For localities without existing coverage, delays keep residents without these critical services altogether. Addressing these challenges has required a concerted, multi-year effort by policymakers to reduce barriers to wireless infrastructure deployment.

D. Policymakers Have Taken Steps to Remove Those Barriers, Including Adoption of Section 332(c)(7).

At the Congressional level, passage of the 1996 Act was an important initial step toward tearing down barriers to infrastructure deployment. Recognizing that the conflicting “patchwork” of state and local siting and zoning requirements “inhibit the deployment” of advanced wireless networks that would benefit consumers, H.R. REP. NO. 104-204, at 94, Congress acted to “remove barriers to infrastructure investment” and “accelerate rapidly private sector deployment of advanced telecommunications.” 47 U.S.C. § 1302; H.R. REP. NO. 104-458, at 113 (Conf. Rep.). As this Court has explained, Congress sought to “promote competition and higher quality in American telecommunications services” and “encourage the rapid deployment of new telecommunications technologies” by reducing “impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers.” *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (citation omitted).

To achieve these goals, Congress took a balanced approach that “imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification” of wireless facilities, *Abrams*, 544 U.S. at 115, without preempting that authority altogether. *See* 47 U.S.C. § 332(c)(7); H.R. REP. NO. 104-458, at 207-08 (Conf. Rep.). Specifically, the 1996 Act added Section 332(c)(7) to the Communications Act. The provision forbids state or local governments

from unreasonably discriminating among providers of wireless services or prohibiting the provision of wireless services; requires action on a wireless siting application “within a reasonable period of time;” and prohibits the denial of an application on the basis of radio frequency emissions if the provider complies with FCC regulations on that subject. 47 U.S.C. § 332(c)(7)(B)(i)-(ii), (iv).

As particularly relevant here, Section 332(c)(7) also provides that “[a]ny decision” by a state or local government to deny a wireless service facility siting request “shall be in writing and supported by substantial evidence contained in a written record.” *Id.* § 332(c)(7)(B)(iii). Any person aggrieved by such a denial can file suit “in any court of competent jurisdiction” within thirty days, and “[t]he court shall hear and decide such action on an expedited basis.” *Id.* § 332(c)(7)(B)(v).

Importantly, these provisions created a clear right to “direct and expedited federal judicial review without any need to exhaust state remedies” – a right that did not exist before the 1996 Act. *Omni-point Holdings, Inc. v. City of Cranston*, 2007 U.S. Dist. LEXIS 50672, *6 (D.R.I. July 12, 2007) (internal quotation marks and citation omitted), *aff’d*, 586 F.3d 38 (1st Cir. 2009). As a consequence, “[s]tate courts no longer provide the only avenue of relief for telecommunications carriers that have lost before local land use agencies.” *See Smart SMR v. Borough of Fair Lawn Bd. of Adjustment*, 704 A.2d 1271, 1280 (N.J. 1998). The statute also replaced the traditional deference previously afforded to local zoning decisions under a standard of rational review with a

more exacting standard that requires substantial evidence. *See Global Tower, LLC v. Hamilton Twp.*, 897 F. Supp. 2d 237, 270-74 (M.D. Pa. 2012). Thus, Section 332(c)(7) took a number of steps to address siting delays on both the front end – *e.g.*, by requiring action on siting applications within a “reasonable” time and precluding discriminatory siting decisions – and on the back end, by providing for expedited court review of siting denials.

Congress has taken other steps as well. It adopted Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, which requires local or state governments to approve certain types of facilities siting applications “[n]otwithstanding section 704 of the Telecommunications Act of 1996 [codified in substantial part as Section 332(c)(7)] . . . or any other provision of law.” 112 Pub. L. No. 96, § 6409(a)(1), 126 Stat. 156, 232, (2012), *codified at* 47 U.S.C. § 1455(a)(1). Section 6409(a) provides that “a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.” 47 U.S.C. § 1455(a).

The FCC also has taken significant steps to reduce barriers to wireless infrastructure investment. In 2009, for example, the FCC interpreted provisions in Section 332(c)(7) to adopt the “Shot Clock,” establishing 90 days as a reasonable time for zoning decisions regarding collocations, and 150 days for other local siting decisions. *Petition for Declaratory Ruling to Clarify Provisions of Section*

332(c)(7)(B) to Ensure Timely Siting Review, Declaratory Ruling, 24 FCC Rcd. 13994, 13995 (2009), *recon. denied*, 25 FCC Rcd. 11157 (2010), *aff'd sub nom. City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013). The FCC acted in response to evidence that some delays in acting on wireless siting applications were egregious: evidence at the time indicated that out of more than 3,300 pending applications, 760 had been pending for over a year and more than 180 had been pending for more than three years. 24 FCC Rcd. at 14005.

More recently, the FCC took steps to help ensure timely and rationally priced access to utility poles, including the attachment of wireless antennas on pole tops. *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240 (2011), *aff'd sub nom. American Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 118 (2013). And just last year, the FCC announced a “Broadband Acceleration Initiative” designed to “remove barriers to broadband build-out, including streamlining the deployment of mobile broadband infrastructure.” FCC, News Release, *Chairman Julius Genachowski Announces New Broadband Acceleration Initiative Actions* (Jan. 25, 2013).²⁰ As part of that initiative, the FCC is examining ways to “reduc[e], where appropriate, the cost and delay associated with the deployment” of wireless infrastructure. *Broadband Acceleration NPRM*, 28 FCC Rcd. at 14241.

²⁰ Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-318589A1.pdf.

Against this backdrop, the need for the Section 332(c)(7)(B)(iii) protections at issue here becomes clear. Not only do providers face siting delays at the outset – delays the Shot Clock and Section 6409(a), for example, are intended to help address – they also face back-end delays when siting applications are denied and providers seek redress in the courts. It is critical that written decisions explain the grounds for denial in order to minimize those delays and facilitate expeditious and meaningful court review.

II. THE MAJORITY APPROACH TO SECTION 332(c)(7) IS CLEARLY CORRECT.

A. The Majority Approach Is Consistent With the Statute and Advances National Broadband Priorities.

The majority of Circuits to address the issue have correctly found that “for a decision . . . denying a [siting] request . . . to be ‘in writing’ for the purposes of 47 U.S.C. § 332(c)(7)(B)(iii), it must (1) be separate from the written record; (2) describe the reasons for the denial; and (3) contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons.” *New Par v. City of Saginaw*, 301 F.3d 390, 395-96 (6th Cir. 2002); accord *Southwestern Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001); *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 722-23 (9th Cir. 2005); see *Helcher v. Dearborn County Bd. of Zoning Appeals*, 595 F.3d 710, 718-19 (7th Cir.

2010) (“We join the First, Sixth and Ninth Circuits, the majority of the courts that have reached this issue.”). Consistent with the statutory text and its purpose, this Court should hold that the statute requires local governments to explain in their written denials the reasons for rejecting a permit or other siting application.

First, the majority view is consistent with the statutory text, which requires a “decision . . . in writing” that is “supported by substantial evidence contained in a written record” and allows court review “on an expedited basis.” 47 U.S.C. § 332(c)(7)(B)(iii), (v). The phrase “substantial evidence contained in a written record” has an established meaning in administrative law – one which Congress intended to apply here. See H.R. REP. NO. 104-458, at 208 (Conf. Rep.). Specifically, it “prohibits a court from affirming an agency on grounds other than those the agency gave in its decision.” *National Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 21 (1st Cir. 2002) (citing *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)). By requiring more than a mere notification, but rather a written “decision,” see Pet. Br. at 24-25, Congress sought to ensure that courts can properly assess whether a locality’s grounds for denial are supported by substantial evidence. See *Helcher*, 595 F.3d at 719; see also *State Farm*, 463 U.S. at 50 (“[A]n agency’s action must be upheld, if at all, *on the basis articulated by the agency itself.*”) (emphasis added). The minority view advanced by the Eleventh and Fourth Circuits, permitting written denials without explanation in reliance only on the record, see Pet.

App. 12a-18a; *AT&T Wireless PCS v. City Council of Va. Beach*, 155 F.3d 423, 429-31 (4th Cir. 1998), makes compliance with this standard impossible.

A decision that does not contain an explanation of its reasoning is also in “direct tension” with the statute’s requirement that judicial review be conducted on an expedited basis. *MetroPCS*, 400 F.3d at 722. It is well established that a statute must be read in context. *National Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (“It is a ‘fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’”). Courts cannot conduct their “substantial evidence” review on an “expedited basis” if they lack a written explanation of the reasons for a siting denial and must methodically sort through potentially contradictory evidence in the record in an effort to reconstruct what the rationale might have been. Rather, “[i]f such an evidentiary review is to be undertaken at all, courts must at least be able to ascertain the basis of the zoning decision at issue; only then can they accurately assess the evidentiary support it finds in the written record.” *MetroPCS*, 400 F.3d at 722; see *Todd*, 244 F.3d at 60; *New Par*, 301 F.3d at 395-96.

A written explanation is particularly important because the statute forbids localities from regulating tower siting on certain grounds. Specifically, it forbids such regulation “on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the FCC’s regulations concerning such emissions.” 47 U.S.C.

§ 332(c)(7)(B)(iv). If the record contained public testimony voicing concerns about radio frequency emissions as well as other issues, a court would be unable to determine whether or not the denial of a zoning request was based on prohibited grounds without a written explanation.

The majority view is also consistent with the underlying purpose of the statute. “Context here . . . makes clear that Congress saw a national problem, namely, an ‘inconsistent and, at times, conflicting patchwork’ of state and local siting requirements, which threatened ‘the deployment’ of a national wireless communication system.” *Abrams*, 544 U.S. at 127-28 (Breyer, J., concurring, joined by O’Connor, Souter & Ginsburg, JJ.) (quoting H.R. REP. NO. 104-204, at 94). Faced with this problem, Congress passed the 1996 Act, including Section 332(c)(7), to “accelerate . . . deployment of advanced telecommunications” and “remove barriers to infrastructure investment.” H.R. REP. NO. 104-458, at 113 (Conf. Rep.); 47 U.S.C. § 1302. Here, requiring localities to explain in writing the reasons for denying a siting application creates a consistent and predictable rule that benefits local planners as well as deployment while still respecting local zoning authority. In turn, court review can continue apace, and providers can receive a final decision on their siting applications in the expedited manner Congress intended. By saving time and money for all involved, providers can more quickly move to invest in infrastructure – not litigation – needed to speed deployment and achieve Congress’ wireless broadband goals.

Finally, the City has suggested that a court faced with a deficient written decision could simply send it back to the locality for a better one, Br. in Opp. 8, 20, but this creates a vicious cycle of delay that would make a mockery of Congress' design. In any case, the remedy for a deficient writing in violation of Section 332(c)(7) is an injunction directing the issuance of the permit, not remand. *Nat'l Tower, LLC*, 297 F.3d at 21-22 ("Congress did not intend multiple rounds of decisions and litigation, in which a court rejects one reason and then gives the board the opportunity, if it chooses, to proffer another. Instead, . . . the proper remedy for a zoning board decision that violates the Act will be an order . . . instructing the board to authorize construction."); see *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2d Cir. 1999); *Omnipoint Corp. v. Zoning Hearing Bd.*, 181 F.3d 403, 410 (3d Cir. 1999); *New Par*, 301 F.3d at 399-400; *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1222 (11th Cir. 2002); see also *Illinois RSA No. 3 v. County of Peoria*, 963 F. Supp. 732, 747 (C.D. Ill. 1997) (remand would "be a waste of time and would frustrate the Telecom Act's direction to expedite [remedial] proceedings").

B. The Majority Approach Does Not Infringe on Local Decision-Making.

Contrary to the City's assertions, a locality's decision-making authority over zoning matters is not at issue in this case. Adoption of the majority approach would not affect "the sanctity of the local zoning decision," "trump local government authority in land use decisions," or "strip[] . . . local authority." Br. in Opp. 7-8, 20, 22. Rather, it would simply make

uniform the requirement that siting denials contain written explanations supported by the record sufficient to permit meaningful judicial review. This requirement does not dictate any particular outcome – it simply means that localities must explain themselves in a written decision and have a record to back it up.

Nor would adoption of the majority approach force localities “to allow cellular towers in the heart of their residential communities based upon a mere technicality.” Br. in Opp. 2, 19-20. To the contrary, applying the majority approach nationwide would create a clear, consistent roadmap for all localities, no matter their location, that would allow them to avoid the very “technical mistakes” the City is concerned about. That is, they will be on notice that a written decision that explains the grounds for denial will satisfy the “in writing” requirement of Section 332(c)(7)(B)(iii). This is not a “travesty of justice,” Br. in Opp. 20, but rather a needed clarification that will advance congressional broadband deployment goals by providing uniform rules of the road for localities that issue siting decisions, providers that are bound by them, and courts that must review them.

C. The Eleventh Circuit Ruling Invites Delay, Not Expedition.

The City is wrong when it suggests that the Eleventh Circuit ruling does not harm the telecommunications industry. Br. in Opp. 18-19. In fact, the ruling invites the exact delay and obfuscation that Congress tried to prevent – results that would only be magnified if extended nationwide.

First, the ruling delays judicial review, rather than expedites it, because courts must sift through the record to determine the reasons for denials and whether they are supported by substantial evidence. As the district court explained: “Absent some explanation of the rationale for the City Council’s denial of petitioner’s application, the Court is left to review this voluminous record without any guidance as to what evidence the City Council found credible and reliable, what evidence it discounted or rejected altogether, and why.” Pet. App. 32a; *see also, e.g., Couveau v. Am. Airlines*, 218 F.3d 1078, 1081 (9th Cir. 2000) (explaining that an order that fails to disclose reasons “runs contrary to the interest of judicial efficiency” by compelling the court to “scour the record in order to find evidence in support of [the] decision”) (internal quotation omitted); JUDICIAL CONFERENCE OF THE UNITED STATES, STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 1-2, 5, 8 (Sept. 2010) (stating that “effective and efficient” use of resources is important to the judiciary’s ability to perform its mission effectively at a time of “overburdened and congested courts”).²¹

While the City contends that courts can simply look to the minutes or transcripts of siting hearings to determine “the reasons or specific rationale” for a denial, Br. in Opp. 19-20, it is often unclear which if any reasons the body as a whole (or a majority thereof) endorses as grounds for denial. *E.g., Todd*, 244 F.3d at 60 (explaining that relying solely on a written record “can create difficulties in deter-

²¹ Available at <http://www.uscourts.gov/uscourts/FederalCourts/Publications/StrategicPlan2010.pdf>.

mining the rationale behind a board's decision"); *see also* Pet. Br. at 14. For this reason, the district court found that the record below "reflects a number of different reasons that may have motivated individual Council members to vote to deny petitioner's application," and "it is impossible for the Court to discern which of these reasons motivated the Council as a whole or commanded the support of a majority of the Council members." Pet. App. 30a.

Indeed, the Eleventh Circuit ruling circumvents the Congressional scheme by allowing localities to deny requests even when there is no majority supporting *any* rationale for rejection. If, for example, a five-person local board votes 3-2 in favor of denial, but each member of the majority expresses different concerns, then a reviewing court is left with no rationale that formed the basis for denial by the majority. So not only will a reviewing court have a hard time divining the board's reasoning, there literally will be no board reasoning to evaluate.

In addition, the ruling invites localities to obscure the reasons for their decisions and make them harder to interpret, creating a new barrier to deployment. The more vague or muddled a locality's reason(s) for denial, the harder it is to find error in its issuance. Localities would therefore be incented to merely stamp the word "denied" on applications, as in the Fourth Circuit, *see AT&T Wireless*, 155 F.3d at 429-30 – burying their reasons deep in the record to conceal, rather than illuminate, their thinking to make their decisions less susceptible to challenge or deter challenges altogether. The net result is more complex, time-consuming litigation,

greater uncertainty, and increased costs for all parties, which frustrates the statute and national broadband priorities. This outcome runs counter to Congressional intent.

CONCLUSION

For the foregoing reasons, the Court should adopt the approach of the majority of the Circuits and reverse the Eleventh Circuit ruling.

Respectfully submitted,

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July 10, 2014