No. 13-975

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

SUPPLEMENTAL BRIEF OF RESPONDENT

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SUPPLEMENTAL BRIEF OF RESPONDENT

Respondent filed its brief with the Court on August 18, 2014. On August 22, 2014, the Eighth Circuit Court of Appeals issued its ruling in *NE Colorado Cellular, Inc. v. City of North Platte, Nebraska*, No. 13-3190, 2014 WL 4116809 (8th Cir. Aug. 22, 2014), weighing in as matter of first impression for the circuit on the issue before this Court. More importantly, *North Platte* follows the Eleventh Circuit and the position taken by Respondent and its Amici herein and should therefore be considered by this Court. In its Reply Brief filed on September 17, 2014, Petitioner T-Mobile failed to bring this new decision to the Court's attention. Pursuant to Supreme Court Rule 25.6, Respondent files this Supplemental Brief to address this relevant "late authority."

In *North Platte*, NE Colorado Cellular, doing business as Viaero Wireless ("Viaero"), sought a permit to construct a telecommunications tower on property it purchased in the City's B-1 zoning district. The City's Ordinance permits towers in the B-1 district pursuant to application and receipt of a conditional use permit. The Ordinance further provides that conditional uses must "be in harmony with the character of the area and the most appropriate use of the land." *Slip op.* at 1.

Viaero filed its application for a conditional use permit on March 11, 2012, seeking to install a 100-foot cellular tower on its B-1 property to address a "lack of reliable in-building wireless service in the

City." *Id*. The City Council denied the application. The minutes of the meeting summarize the motion and resolution:

> Stoll moved and McGuire seconded the motion to find the request for a Conditional Use Permit to allow a 100' tower and communication facility building located at [the proposed tower site] does not meet the minimum standards stated in the North Platte Code of Ordinances Section 156.322 and deny the Conditional Use Permit as requested based on the following factual findings: 5. The use is not in harmony with the character of the area and it is not the most appropriate use of the land as it is a historic neighborhood and the tower would decrease property values in the area. Roll call vote: "AYE": Barrett, Stoll, McNea, McGuire, Carman, Steinbeck. "NAY": Pederson, Campbell. Motion carried.

Id.

Based on the denial, Viaero filed suit against the City alleging that the Council's decision was not in writing and was not supported by substantial evidence in the record. The district court upheld the City's denial of the use permit. The Eighth Circuit affirmed, agreeing with the Eleventh Circuit and Fourth Circuit with respect to the "in writing" requirement, finding that:

> Nowhere does the statutory text require that the denial and the "written record" be separate writings. Section 332 requires only that the denial and the record both be written.

> Section 332 does not require that the written denial state the reasons for the denial. Congress may require an agency or board to state its findings. *See*, *e.g.*, 5 U.S.C. § 557(c). Congress did not do so here.

Slip op. at 11. Interestingly, in reaching this conclusion, the circuit court found that courts have adopted four different interpretations of the "in writing" requirement.

It defined the first approach based on the district court decisions that require that there be a separate denial and a separate written record. In addition, the separate denial must contain written findings of fact tied to the evidence in the record so as to preclude placing the burden on the district court to "wade through the record below in an attempt to discern the Commission's rationale." *Slip op.* at 3; quoting *Omnipoint Communications, Inc. v. Planning & Zoning Commission of Wallingford*, 83 F.Supp.2d 306, 309 (D.Conn. 2000). The *North Platte* court found that this rule effectively requires formal findings of fact and conclusions of law, akin to the strictures of the Administrative Procedures Act (APA).

T-Mobile argued that a locality's separate decision must allow a wireless provider and the reviewing court to be "sure to know" the bases for the locality's decision and on what parts of the record the locality relied. (*Brief for Petitioner*, p. 22.) Even the First Circuit rejected the notion that the separate written decision it required must contain references to all facts in the record relied on by the locality:

> We stress, however, that meaningful review of the decision is not limited, as *Southwestern Bell* would have it, only to the facts specifically offered in the written decision. Again, such a requirement would place an unjustified premium on the ability of a lay board to write a decision.

Southwestern Bell Mobile Systems, Inc. v. Todd, 244 F.3d 51, 60 (1st Cir. 2001).

The second approach, which the court defined as the majority rule, is that adopted by the First, Seventh and Ninth Circuits holding that "the TCA requires local boards to issue a written denial separate from the written record." *Id.* This denial "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, 395-396 (6th Cir. 2002).

The court illustrated the third approach based on the holding in *Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601 (6th Cir. 2004). In that case, "the minutes of the council meeting, which contained the resolution, constituted the only 'writing' containing the denial." *Id*. at 606. Because the Telecommunications Act (TCA) did not state that the denial had to be in a separate writing, *Southfield* found the resolution sufficient to meet the "in writing" requirement.

Finally, the court defined the fourth approach as that adopted by the Fourth and Eleventh Circuits, definitively rejecting the *Wallingford* "findings of fact" rule. The APA requires "a statement of . . . findings and conclusions, and the reasons or basis therefor." Section 332 of the TCA contains no such requirement. Noting that "Congress knows how to demand findings and explanations" and did not do so in § 332, the court determined that the "simple requirement of a 'decision . . . in writing' cannot reasonably be inflated into a requirement of a 'statement of . . . findings and conclusions, and the reasons or basis therefor.'" *AT&T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 155 F.3d 423, 429-430 (4th Cir. 1998). The Eleventh Circuit followed this approach holding:

> The words of the statute we are interpreting require that the decision on a cell tower construction permit application be "in writing," not that the decision be "in a separate writing" or in a "writing separate from the transcript of the hearing and the minutes of the meeting in which the hearing was held" or "in a single writing that itself contains all of the grounds and explanations for the decision." *See* 47 U.S.C. § 332(c)(7)(B)(iii). So, to the extent that the decision must contain grounds or reasons or explanations, it is sufficient if those are contained in a different written document or documents that the applicant is given or has access to. All of the written documents should be considered collectively in deciding if the decision, whatever it must include, is in writing.

T-Mobile South, LLC v. City of Milton, Ga., 728 F.3d 1274, 1285 (11th Cir. 2013).

The Eighth Circuit found that the Fourth and Eleventh Circuits articulated the better rule because the statute does not state that denial and the written record must be separate and distinct nor does it require a written denial stating the reasons for the denial. It thus held that the City did not run afoul of the "in writing" requirement by recording its decision in the minutes in the "written record."

North Platte supports the decision at bar and the arguments of Respondent and its Amici. On the other hand, T-Mobile is advocating the first approach identified and rejected by the Eighth Circuit, along with all other circuits. Even the "majority rule" rejects a requirement of "findings of fact" as having no basis in the language of the Telecommunications Act at issue. No circuit court has adopted such a finding.

CONCLUSION

This late authority fully supports Respondent and its Amici's position in this matter that the decision of the Eleventh Circuit should be affirmed.

Respectfully submitted,

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