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

BRIEF OF COMPETITIVE CARRIERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In order to promote the prompt deployment of telecommunications facilities and to enable expedited judicial review, the Communications Act of 1934, as amended by the Telecommunications Act of 1996, provides that any decision by a state or local government denying a request to place, construct, or modify a personal wireless service facility "shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. §332(c)(7)(B)(iii).

The question presented is whether a document from a state or local government stating that an application has been denied, but providing no reasons whatsoever for the denial, can satisfy this statutory "in writing" requirement.

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INTEREST OF *AMICUS CURIAE*[1]

Competitive Carriers Association ("CCA" or "Association"), founded in 1992 by rural and regional wireless carriers (and previously known as the Rural Cellular Association), is the nation's leading organization of competitive wireless providers and stakeholders. CCA's carrier members attempt to compete with the nation's two largest "incumbent" wireless carriers, AT&T and Verizon. The licensed service area of the Association's more than 100 wireless carriers covers 95 percent of the United States. Its members depend on cell towers and other cell sites permitted by state and local authorities consistent with the Telecommunications Act of 1996. Headquartered in Washington, D.C., the Association advocates on behalf of its members and works to educate policymakers on key issues that affect its members' ability to compete and thrive.

The Association files briefs as *amicus curiae* in cases presenting issues of importance to the wireless industry. *E.g.*, *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863 (2013). It also regularly advocates before Congress, the Federal Communications Commission, and the Administration (including the Office of Science and Technology Policy, the National Telecom-

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of this Court.

munications and Information Administration, and other agencies) to ensure that its members' voices and views are heard not only by policymakers, but also by the media and the general public.

The Association fully supported Congress's enactment of what is now Section 332(c)(7) of the Communications Act of 1934 (as amended by the Telecommunications Act of 1996), the statutory provision in question.

The Association and its members have multiple interests in this case. Carriers must obtain wireless siting approval from state and local authorities before building or improving cell sites, including sites in underserved rural areas. CCA members seek approvals more frequently than the "incumbent" providers because they presently hold a disproportionately small amount of low-frequency spectrum. The Association has a vital interest in ensuring that the approval process is fair, reasonable, timely, and transparent, as an opaque decision-making process impairs its members' ability to address the concerns of state and local authorities or challenge siting denials.

The Eleventh Circuit's interpretation of the "in writing" requirement of Section 332(c)(7)(B)(iii) threatens to weaken competition by impeding the efforts of the Association's members to expand access to underserved areas and compete with the two largest wireless carriers. Given its longstanding commitment to a vibrantly competitive wireless industry, the Association appeared as sole *amicus curiae* on behalf of Petitioner requesting that certiorari be granted in this case, and now appears once again as *amicus curiae* on Petitioner's behalf to urge the Court to reverse the Eleventh Circuit's decision.

SUMMARY OF ARGUMENT

For nearly twenty years, Congress has made the rapid deployment of advanced telecommunications technology a national imperative. Congress enacted the Telecommunications Act of 1996 (the "Act") to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 104 Pub. L. No. 104, 110 Stat. 56, Preamble. Congress reaffirmed these goals in the Broadband Data Improvement Act of 2008 (the "Broadband Act"), which seeks to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," "promote competition in the local telecommunications market," and "remove barriers to infrastructure investment." 47 U.S.C. §1302(a).

In many ways, the wireless industry has made great strides in fulfilling Congress's mission. As this Court recently noted, "modern cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley v. California*, 573 U.S. ___, slip op. at 9 (June 25, 2014). "[A] significant majority of American adults now own" a smart phone, a technology which was "unheard of ten years ago." *Id.* The mass proliferation of broadband services has made the wireless industry a key player in the national economy.

Congress has recognized that the nation benefits substantially from rapid deployment of technological advancements. "The deployment and adoption of

broadband technology has resulted in enhanced economic development and public safety for communities across the nation, improved health care and educational opportunities, and a better quality of life for all Americans." 47 U.S.C. §1301(1).

However, the benefits of these new technologies are not shared equally by all Americans. In rural parts of the country, the lack of choice among providers is stark. While 92.4% of non-rural Americans were covered by four or more mobile broadband service providers as of October 2012, only 37.4% of rural Americans had access to a similar amount of choice. As a result, rural Americans in particular suffer from diminished service and increased costs when competition is impaired. Closing the "broadband availability gap" which affects millions of Americans – particularly those in rural areas – remains the nation's great infrastructure challenge of the 21st century.

The Act includes many provisions, particularly those governing permit applications for siting (*i.e.*, building or modifying) wireless facilities, that reflect Congress's effort to increase competition and reduce unnecessary regulation by state and local governments that impedes the expansion of wireless services. This case is indicative of the problems Congress was acting to resolve.

Section 332(c)(7)(B)(iii) of the Act requires that a state or local government's denial of a service provider's application for siting wireless facilities be "in writing." The First, Sixth, Seventh, and Ninth Circuits have held that Section 332(c)(7)(B)(iii) requires

authorities to explain in writing their reasons for denying applications.[2] The Eleventh Circuit in this case, and the Fourth Circuit before it, on the other hand, have held that a local government satisfies its obligations under Section 332(c)(7)(B)(iii) simply by issuing a written decision that a siting application is "denied."[3]

The minority interpretation of the "in writing" requirement is contrary to the plain language, structure, and legislative history of the statutory provision. It also conflicts with the standard of review contemplated by Congress when it passed the Act and the analogous, long-standing method of judicial review of agency action, pre-dating the Administrative Procedures Act ("APA"). Finally, it is contrary to the Act's purpose of spurring development of the nation's critical telecommunications infrastructure through increased competition and decreased regulation.

CCA's members and the citizens they serve have an interest in a review process that is as transparent, cost-effective, and streamlined as possible. The majority rule fosters such a process. The minority rule, on the other hand, leads to at least two undesirable

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[2] *Sw. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001); *New Par v. City of Saginaw*, 301 F.3d 390, 395-96 (6th Cir. 2002); *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 723 (9th Cir. 2005); *Helcher v. Dearborn Cty.*, 595 F.3d 710, 719 (7th Cir. 2010).

[3] *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307, 312-13 (4th Cir. 1999); *T-Mobile South, LLC v. City of Roswell, Ga.*, 731 F.3d 1213, 1220-21 (11th Cir. 2013).

outcomes that disproportionately affect the Association and its members.

First, the minority rule generates costly and drawn-out litigation that interferes with growth and competition in the wireless service industry. As competitors to the "incumbent" wireless providers (AT&T and Verizon), CCA's carrier members (typically smaller, newer, rural or regional providers) often require more approvals to build or upgrade their networks than the "incumbent" providers, and therefore are impacted disproportionately by impediments created by the siting application review process.

Second, the minority rule has a disproportionate impact on rural communities and communities of color, both of which rely more heavily on mobile wireless broadband to access the Internet than "wired" access.

For these reasons, *amicus* urges this Court to rule that Section 332(c)(7)(B)(iii)'s "in writing" requirement obligates a state or local governmental body to explain its reasons for denying a service provider's application for siting wireless facilities in the written denial of the application.

ARGUMENT

I. Congress and the Executive Branch Agree That Increased Competition Is Key To Improving Access To Wireless Technology.

In the last two decades, both Congress and the Executive Branch have strongly supported the development and deployment of advanced telecommunications technology as a means of promoting economic growth and improving the lives of individual Americans. In 1996, Congress enacted the Telecommunications Act to "secure lower prices and higher quality

services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 104 Pub. L. No. 104, Preamble.

Congress sought to achieve these goals by "promot[ing] competition and reduc[ing] regulation." *Id.*; *see also* H.R. Conf. Rep. No. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 124 (Act's goal is "to provide a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private-sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."). Through the Act, this Court has recognized, Congress "fundamentally restructure[d]" telephone markets; "ended the longstanding regime of state-sanctioned monopolies," encouraged "competition among multiple providers," and prohibited state laws that "impede competition." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-72 (1999).

Congress acknowledged the positive contributions the wireless communications industry has made, both to the nation and in the lives of individual Americans since the Act's passage, when it enacted the Broadband Data Improvement Act of 2008. 47 U.S.C. §1301(1) ("[t]he deployment and adoption of broadband technology has resulted in enhanced economic development and public safety for communities across the nation, improved health care and educational opportunities, and a better quality of life for all Americans.").

Congress also confirmed that developing the nation's telecommunications infrastructure remains "vital" to the nation's future. *Id.*, §1301(2) ("deployment

and adoption of broadband technology is vital to ensuring that our nation remains competitive and continues to create business and job growth."). The Broadband Act was designed to "promote competition" and "remove barriers to infrastructure investment" to ensure "the deployment on a reasonable and timely basis of advanced telecommunications capability to ***all*** Americans." *Id.*, §1302(a) (emphasis added).

President Obama has likewise stressed that improved access to broadband "is essential to the Nation's global competitiveness in the 21st century, driving job creation, promoting innovation, and expanding markets for American businesses." Exec. Order No. 13616, 77 Fed. Reg. 36903 (June 14, 2012) ["Accelerating Broadband Infrastructure Deployment"].[4] According to the White House, "[e]nsuring America has 21st century digital infrastructure," including "high-speed broadband Internet access" and "fourth-generation (4G) wireless networks" is "critical to our long-term prosperity and competitiveness."[5] The President has vowed to "make it possible for businesses to deploy the next generation of high-speed wireless coverage to 98 percent of all Americans" by 2016.[6]

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[4] *Available at* http://www.gpo.gov/fdsys/pkg/DCPD-201200474/pdf/DCPD-201200474.pdf.

[5] The White House, *Technology*, *available at* http://www.whitehouse.gov/issues/technology#.

[6] The White House, Office of the Press Secretary, "Remarks by the President in State of Union Address" (Jan. 25, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address.

The Department of Justice's Antitrust Division believes that "the best method of ensuring that consumers receive low-priced, high-quality products and services, greater choice among providers, and important innovation" in the telecommunications services industry is through "competition." *See* Ex Parte Submission of U. S. Dept. of Justice, *In re Policies Regarding Mobile Spectrum Holdings*, at 6, FCC WT Docket, No. 12-269 (Apr. 11, 2013) ("DOJ Comments");[7] *see also* CCA, "A Framework for Sustainable Competition in the Digital Age: Fostering Connectivity, Innovation, and Consumer Choice," at 18 (Dec. 4, 2013) ["CCA White Paper"][8] ("robust competition protects consumers in more dynamic and effective ways than regulation."). To that end, and in furtherance of its Congressional mandate, the FCC has worked to "reduce barriers to wireless infrastructure investment"[9] and swiftly address "unnecessary or unclear regulatory requirements and processes."[10]

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[7] *Available at* http://apps.fcc.gov/ecfs/document/view?id=7022269624; *id.* ("competitive forces have been a central driver of innovations that have enabled carriers to expand capacity and improve service quality."). One study has concluded that, without robust competition in the mobile broadband market, where it exists, consumers would pay at least ten percent higher prices, which translates conservatively to more than $20 billion annually. *See* William Lehr, Benefits of Competition in Mobile Broadband Services, at 2 (2014), *available at* http://competitivecarriers.org/advocacy/benefits-of-competition-in-mobile-broadband-services-a-study-by-william-lehr/9113652.

[8] *Available at* http://competitivecarriers.org/wp-content/uploads/2014/01/CCA_SustainableCompetition_ FINAL.pdf.

[9] FCC, *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies etc.*, Notice

II. While Competitive Carriers Strive To Meet Consumers' Mobile Demands, Competitive Challenges Remain.

a. The wireless industry has responded enthusiastically to the government's call for ubiquitous broadband services. As the FCC has noted, "tremendous efforts are being made by the private sector, the Commission, and other governmental entities to bring broadband to all Americans."[11] As a result, "Americans are now in the transition toward increasing reliance on their mobile devices for broadband services, in addition to voice services."[12] For example, as of June 2013, there were 93 million mobile broadband connections with download speeds of at least three megabits per second (Mbps) and upload

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of Proposed Rulemaking, 2013 WL 5405395, ¶ 4 (2013) ("2013 FCC NPRM").

[10] *Id.*

[11] FCC, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Ninth Broadband Progress Notice of Inquiry, 27 FCC Rcd. 10523, ¶ 3 (2012).

[12] *See also* FCC, *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, 24 FCC Rcd. 13994, 13995, *recon. denied*, 25 FCC Rcd 11157 (2010), ("Petition for Declaratory Ruling"), *aff'd sub nom. City of Arlington, Texas v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S.Ct. 1863 (2013).

speeds of at least 768 kilobits per second (kbps) (as compared to only 70 million fixed connections with the same speeds).[13]

Because of its ongoing efforts to extend broadband services to all Americans, the wireless industry has become a critical player in the domestic economy, contributing "more than $150 billion in GDP annually[.]"[14] *See also* CCA White Paper, *supra*, at 5 (stating that the wireless industry contributed "$146.2 billion to the nation's GDP in 2011" alone).

Continued expansion and job growth are anticipated. The FCC has estimated that wireless broadband capital expenditures would "increase steadily" by billions of dollars between 2012 and 2015.[15] And a

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[13] FCC, Indus. Analysis & Tech. Div., Wireline Competition Bureau, *Internet Access Servs.: Status as of June 30, 2013* at 1 (June 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0625/DOC-327829A1.pdf.

[14] The White House, Office of the Press Secretary, "FACT SHEET: Administration Provides Another Boost to Wireless Broadband and Technological Innovation" (June 14, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/06/14/fact-sheet-administration-provides-another-boost-wireless-broadband-and-.

[15] FCC, Connecting America: National Broadband Plan, Ch. 4 at 40 (2010), *available at* http://www.broadband.gov/plan/ ("CONNECTING AMERICA"). Current reports of the nation's leading wireless providers' capital expenditure appear to corroborate the FCC's prior estimate. *See* Sarah Reedy, Light Reading: Networking the Telecom Community, "SDN, NFV Not Slashing Wireless Capex Yet" (March 7, 2014), *available at* http://www.lightreading.com/carrier-sdn/nfv-(network-functions-

recent study commissioned by the PCIA – The Wireless Infrastructure Association, concluded that "industry projected mobile broadband investments" will "increase GDP in 2017 by 1.6 to 2.2% ($259.1 to $355.3 billion in dollar terms) and generate up to 1.3 million net new jobs[.]"[16] Given these statistics (and provided with the right regulatory environment), the wireless industry is indisputably an "essential engine of U.S. economic growth[.]" CCA White Paper, *supra*, at 5.

b. Obstacles to achieving the goals set forth in the Act nevertheless remain. Recent findings and conclusions by the FCC about the wireless market demonstrate that the Act's goals have yet to be met, and these shortcomings adversely affect competitive carriers and the customers they serve, particularly in rural and minority communities.

Too many Americans still lack adequate access to mobile wireless broadband. Accelerating Broadband Infrastructure Deployment, 77 Fed. Reg. 36903, 36903 ("today too many areas still lack adequate access to this crucial resource [broadband services]").[17]

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virtualization)/sdn-nfv-not-slashing-wireless-capex-yet/d/d-id/708107.

[16] Alan Pearce, Richard Carlson, and Michael Pagano, "Wireless Broadband Infrastructure: A Catalyst for Job Growth 2013-2017," at 1 (2013), *available at* http://apps.fcc.gov/ecfs/document/view?id=7520949634.

[17] *See also* FCC, Petition for Declaratory Ruling, *supra*, at 13995 ("Without access to mobile wireless networks, . . . consumers cannot receive voice and broadband services from providers.").

The FCC has concluded that "'advanced telecommunications capability' is not being deployed to all Americans in a reasonable and timely fashion." FCC, Ninth Broadband Progress Notice of Inquiry, *supra*, at ¶ 3.

Lack of competition among carriers also persists and has significantly impaired Americans' access to speeds and prices compared to other developed countries. *See* CONNECTING AMERICA, *supra*, at 36. In particular, a substantial disparity exists between the number of mobile broadband service providers in urban versus rural parts of the country. While 92.4% of non-rural Americans were covered by four or more mobile broadband service providers as of October 2012, only 37.4% of rural Americans had similar options.[18]

These figures likely overstate the number of rural Americans who actually have wireless services because there is a critical difference between ***coverage*** and the ***actual provision*** of wireless services: "A provider's having network coverage in an area does not mean that a provider actually offers its service to residents in all of that area." FCC, 16th Wireless Competition Report, *supra*, at ¶ 44. As a result, rural America "comprises the largest portion of unserved

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[18] FCC, *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Sixteenth Mobile Competition Report, 28 FCC Rcd. 3700, ¶ 2 at 28 (2013) ["16th Wireless Competition Report"].

and underserved broadband population" in the country.[19]

c. Predictably, the nation's largest carriers do not prioritize rural fixed or mobile broadband capital investment. Katz *et al.*, *supra*, at 6. Sparsely populated geographical areas, such as rural communities, pose a unique challenge to service providers because they often "cannot earn enough revenue to cover the costs of deploying and operating broadband networks, including expected returns on capital" in these areas. *See* CONNECTING AMERICA, *supra*, at 136.

But there are strong reasons to encourage investment in wireless services. Americans in growing numbers are "cutting the cord" and using wireless lines as their sole voice service.[20] Wireless infra-

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[19] Raul L. Katz, Javier Avila, and Giacomo Meille, "Economic Impact of Wireless Broadband in Rural America," Executive Summary, at 6 (2011), *available at* http://competitivecarriers.org / wpcontent / uploads / 2011 / 02 / Economic – Study – Executive Summary-02.24.11.pdf; *see also* FCC, Ninth Broadband Progress Notice of Inquiry, *supra*, at ¶¶ 3, 37-38 (recognizing that "people living in rural and on Tribal lands are disproportionately lacking" access to broadband services); Hanns Kuttner, Hudson Institute, "Broadband for Rural America: Economic Impacts and Economic Opportunities," at 18 (2012), *available at* http://www.hudson.org/content/researchattachments/attachment /1072/ruraltelecom-kuttner--1012.pdf ("[R]ural America stands at a precipice. A growing technology gap looms. Without broader access to broadband capacity, rural America will lack one of the necessary tools to contain, if not narrow, the gap.")

[20] FCC, Indus. Analysis & Tech. Div., Wireline Competition Bureau, *Local Telephone Competition: Status as of June 30, 2013* at 1-2 (June 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0

structure is generally less expensive to build than fixed wireline infrastructure, and wireless services are often the only avenue for providing broadband access to rural communities. Moreover, minority communities "use their mobile devices to access the Internet much more frequently than other racial groups. Indeed, nearly 65% of African Americans rely on their wireless device to access the online world. This [is] largely due to the fact that only 54% of African Americans and 49% of Hispanics have a working computer at home – and mobile broadband is a convenient and attractive alternative for those do not have access to in-home broadband." Minority Media & Telecom Council, *Universal Broadband Adoption: How To Get There, And Why America Needs It*, 14 (2011).[21]

Against this backdrop, the FCC has declared that providing broadband services to all Americans is "*the* great infrastructure challenge of the early 21st cen-

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625/DOC-327830A1.pdf (noting that as of June 2013 there were 306 million mobile telephony subscriptions compared to 135 million wireline retail local telephone service connections).

[21] *See also* U.S. Census Bureau, Pub. No. P20-569, *Computer and Internet Use in the United States: Population Characteristics*, at 12 (2013), *available at* http://www.census.gov/prod/2013pubs/p20-569.pdf ["Census Study"] ("When compared to percentages of home Internet use, smartphones appear to be leveling the Internet use disparities traditionally present for race and ethnicity groups. While 27 percentage points separated the highest and lowest reported rates of home Internet use[,] *** a smaller gap of 18 percentage points emerged once smartphone use was factored into overall connectivity rates[.]").

tury." *See* CONNECTING AMERICA, *supra*, at 3 (emphasis in original). Failure to meet this challenge deprives rural and minority communities of the "economic and employment benefits enabled by the deployment of wireless broadband infrastructure" – benefits that are themselves "contingent on broad access by consumers regardless of their income or location (rural or urban)." Pearce *et al.*, *supra*, at 27; Katz *et al.*, *supra*, at 8 ("unless [rural] communities are given the opportunity to connect to the Internet, they will remain permanently marginalized and the economic penalty would be significant.").

d. CCA's members are poised to meet the challenge of bringing wireless access to all Americans, but they face an uphill fight. One lasting result of the "longstanding regime of state-sanctioned monopolies," *AT&T Corp.*, 525 U.S. at 371, is that the competitive playing field in the telecommunications industry remains uneven. Though Congress passed the Act to "fundamentally restructure[]" telephone markets and encourage "competition among multiple providers," *id.*, the benefits of "incumbency," in many instances, persist.

Recent history suggests that previous competitive gains have slowed, and, in fact, the industry is now sliding closer to a duopoly. "For the last three years," "the Commission was unable to certify that the mobile wireless industry is characterized by 'effective competition,' confirming the highly (and increasingly) concentrated nature of the wireless industry in the hands of the two largest providers," *i.e.*, AT&T and Verizon. *See* CCA White Paper, *supra*, at 2 (citing FCC, 16th Wireless Competition Report, ¶¶ 14-15). In fact, as of 2011, the wireless industry was more

"highly concentrated" than it has ever been. *Id.* at 7; *see also* FCC, 16th Wireless Competition Report, *supra*, at ¶ 59 (citing measure of industry consolidation showing industry to be substantially more concentrated than in 2003). At the end of 2011 almost 70 percent of all industry revenues were paid to the two leading providers. *See* CCA White Paper, *supra*, at 8; FCC, 16th Wireless Competition Report, *supra*, at ¶ 52 (showing concentration of revenue earned by AT&T and Verizon to be about twice that of top two firms in auto, oil, or banking industries).

In other words, wireless consumers nationwide subscribe to a limited range of service providers. *Id.* at ¶ 59. This market concentration becomes even more pronounced as population density declines in a given area. *Id.* at ¶ 60. For this reason, less populated (*e.g.*, rural) areas generally see decreased competition among wireless service providers. With decreased choice comes the potential for diminished services and increased costs for consumers.

e. The disparity between incumbent and smaller carriers is amplified by the difference in spectrum holdings between these two sets of providers. Next-generation telecommunications services are increasingly being deployed on more efficient, lower-frequency spectrum (*e.g.*, 700 MHz, 600 MHz).[22]

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[22] Low-frequency spectrum (*i.e.*, radio frequency waves of a lower megahertz) can travel longer distances and penetrate into buildings better than higher-frequency waves. *See* DOJ Comments, *supra*, at 2. These "superior propagation characteristics," makes a low-frequency network particularly suitable for rural areas. *Id.* at 12. In addition, networks using low-frequency spectrum cost substantially less than high-frequency

Currently, the two incumbent carriers have the "vast majority of low-frequency spectrum," while the two other nationwide carriers have "virtually none." *See* DOJ Comments, *supra*, at 14. Smaller nationwide carriers, along with local and regional carriers, have a "diminished ability to compete, particularly in rural areas where the cost to build out coverage is higher with high-frequency spectrum." *Id.*

The Justice Department has concluded that "there are substantial advantages to making available new spectrum in order to enable smaller or additional providers to mount stronger challenges to large wireless incumbents." *Id.* at 11-12. Such allocation will "play a vital role in protecting, and indeed enhancing, the competitive dynamic to the benefit of American consumers." *Id.* at 8. The FCC is therefore taking steps to improve smaller carriers' access to low-frequency spectrum.

Of course, a carrier's access to low-frequency spectrum has little utility for the industry or for consumers if barriers to using it exist. *See* 2013 FCC NPRM, *supra*, ¶2 ("The ability of wireless providers to meet" the growing demand for services "will depend not only on access to spectrum, but also on the extent to which they can deploy new or improved wireless facilities or cell sites."). To take advantage of access to lower spectrum, smaller carriers will need to build

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networks. *Id.* at 2. One study suggests that it costs nearly 300% more in capital expenditures to deploy a high-frequency network than a low-frequency network with comparable coverage. *Available at* http://apps.fcc.gov/ecfs/document/view?id=7521085197.

new cell sites or substantially upgrade existing facilities, *e.g.*, replace antennas with equipment necessary to use low-frequency spectrum. Therefore, carriers will need to obtain new local government permits to upgrade their networks and take advantage of access to low frequency spectrum.

III. In Keeping With The Act's Goals Of Increased Competition, Section 332(c)(7) Requires A Written Decision That Includes A Local Government's Reasons For Denying A Siting Application.

a. Congress has recognized that state and local regulation of siting applications may impede "rapid deployment of new telecommunications technologies." H.R. Rep. No. 104-204, at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61 ("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 Personal Communications Services as well as the rebuilding of a digital technology-based cellular telecommunications network.") (quoted in *Omnipoint Corp. v. Zoning Hearing Bd. Of Pine Grove Township*, 181 F.3d 403, 407 (3d Cir. 1999)).

The FCC agrees. *See* Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service, Report and Order, 12 FCC Rcd. 10785, ¶90 (1997) ("zoning approval for new wireless facilities" has been "both a major cost component and a major delay factor in deploying wireless systems.") And experience has borne this out. *See City of Ar-*

lington v. FCC, 133 S. Ct. 1863, 1867 (2013) ("in practice, wireless providers often faced long delays.").[23]

To avoid these potential "impediments," Congress imposed "specific limitations" on the traditional authority of state and local governments to regulate "the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. §332(c)(7)(B) & (B)(1); *see also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005).

Among these limitations is Section 332(c)(7)(B)(iii), which provides that any denial by a state or local government of a carrier's "request to place, construct, or modify personal wireless service facilities shall be in writing *and* supported by substantial evidence contained in a written record." 47 U.S.C. §322(c)(7)(B)(iii) (emphasis added). *City of Rancho Palos Verdes*, 544 U.S. at 115 (Congress enacted the "specific limitations" in Section 332(c)(7)(B), including the "in writing" requirement, to prevent inappropriate state and local regulatory activity from becoming a "barrier[] to infrastructure investment.") (citing 47 U.S.C. §322(c)(7)(B)).[24]

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[23] *See also* FCC, Petition for Declaratory Ruling, *supra*, at 14006, 14008 ("record evidence demonstrates that unreasonable delays in the personal wireless service facility siting process have obstructed the provision of wireless services" and that such delays "impede the promotion of advanced services and competition that Congress deemed critical in the Telecommunications Act of 1996.").

[24] The unidirectional nature of the judicial review process prescribed in the Act, which excludes a right of review for those who object when an application is granted, underscores how

The disjunctive nature of this provision demonstrates that the reasons for the denial cannot simply be buried in the written record. The statute requires that the written denial be "supported," with the particular reason or reasons identified being justified by "substantial evidence" in the record. By operation of the statute, the reasons for the denial must be included in the written decision. A plurality of this Court has already recognized that "local zoning boards" must both "maintain a 'written record' *and give reasons* for denials 'in writing.'" *City of Rancho Palos Verdes*, 544 U.S. 113, 128 (Breyer, J., joined by Ginsburg, Souter, and O'Connor, JJ., concurring) (emphasis added); *see also Todd*, 244 F.3d at 60 (the Act "distinguishes between a written denial and a written record, thus indicating that the record cannot be a substitute for a separate denial.").

Requiring a writing that articulates the reasons for denial avoids the likelihood that courts will otherwise have to examine, as the district court did here, voluminous (or scant) administrative records to try to guess the reasons for a local government's decision to deny a siting application. A reasoned decision informs a service provider's choice to pursue litigation, and makes any subsequent judicial review process more efficient and economical. A simple denial that does nothing but point to the record provides parties

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Congress wanted siting applications to be treated by local governments. *See, e.g.*, *Industrial Comm'n & Elec., Inc. v. Town of Alton*, 646 F.3d 76, 79 (1st Cir. 2011) (§322(c)(7)(5) only allows for review of denials, not grants); *Drago v. Garment*, 691 F. Supp.2d 490, 491 (S.D.N.Y. 2010) (same).

and reviewing courts with no such insight. Instead, it drives up the cost of litigation and thus the cost of siting wireless facilities.

Properly understood, then, the "in writing" provision not only facilitates judicial review, it enhances competition by reducing the cost of litigation. As discussed above, litigation costs affect smaller carriers disproportionately because the high-frequency spectrum and technology they currently employ requires more cell sites than their incumbent competitors. And while moving to lower frequency spectrum will reduce the number of new siting applications by smaller carriers and improve their services, these carriers will still be required to file applications to improve or modify existing sites.

b. Section 332(c)(7)(B)(iii)'s legislative history supports the majority view that the Act requires a separate writing that explains the reasons for the denial of an application. The Conference Report for the Act states that "[t]he phrase 'substantial evidence contained in a written record' is the traditional standard used for judicial review of agency actions." 104th Cong., 2nd Sess., House Rpt. 104-458, 104 H. Rpt. 458 at 208 (Telecommunications Act of 1996) (Jan. 31, 1996) (Conference Report); *see also Todd*, 244 F.3d at 58 ("the 'substantial evidence' standard is 'the same as that traditionally applicable to a review of an administrative agency's findings of fact.'").

c. Time-honored rules of judicial review likewise support this reading. A "simple but fundamental rule of administrative law," stretching back more than seventy years and pre-dating the adoption of the APA, is that "a reviewing court, in dealing with a determination or judgment which an administrative

agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("*Chenery II*"). An "important corollary" to this rule is that:

> If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive.

Id. at 196-97. "In other words, 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.'" *Id.* (quoting *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 511 (1935)) *see also S.E.C. v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("*Chenery I*") ("courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review.").

This Court has repeatedly adhered to this principle when reviewing agency action. *See, e.g., Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto.*, 463 U.S. 29, 43 (1983) (agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) ("an agency's discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the

agency itself."); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) ("courts may not accept appellate counsel's post hoc rationalizations for agency [orders]."); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2263 (2011) (same).

Even the Eleventh Circuit recognizes this rule. *See Preferred Sites, LLC v. Troup Cty.*, 296 F.3d 1210, 1220 n.9 (11th Cir. 2002) (locality "may not rely on rationalizations constructed after the fact to support the denial of [the carrier's] application.").

In sum, the majority position is consistent with the statutory text, structure, and history. It is consistent with this Court's long-established jurisprudence regarding judicial review of agency action. And it furthers the goals of the Act – to encourage the deployment of the nation's telecommunications infrastructure and thereby benefit consumers by promoting increased competition among providers and decreasing regulation by state and local governments that contravene the Act's objectives.

IV. The Court Of Appeals' Decision Flouts The Language And Purpose Of The Act.

In this case, the City of Roswell failed to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43. In fact, the denial contains no "grounds invoked by the [City]" whatsoever. *Chenery II*, 332 U.S. at 196. Because the City made no attempt to explain the factual basis or the reasoning for its decision, the decision does not withstand scrutiny under time-honored principles of judicial review of agency actions. *Burlington Truck Lines, Inc.*, 371 U.S. at 168-69 (order

"[must] be upheld, if at all, on the same basis articulated in the order by the agency itself.").

Moreover, what little one can glean from the record reinforces the premise that the actual reasons for a denial must be articulated. One of the City's board members who voted against T-Mobile's application stated that "other carriers apparently have sufficient coverage in this area," and "[i]t's not our mandate to level the field." J.A. 173-74. Such a rationale is expressly prohibited under the Act which forbids "unreasonably discriminat[ing] among providers of functionally equivalent services" and "prohibiting the provision of personal wireless services." *See* 47 U.S.C. §332(c)(7)(B)(i)(I), (II).[25]

Of course, this is precisely the kind of speculation in which reviewing courts should not indulge, and is precisely why Section 332(c)(7)(B)(iii) requires that any denial explain the bases for that decision in writing. *See Chenery II*, 332 U.S. at 196-97 ("It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive.").

Unless the decision is reversed, smaller carriers filing siting applications in regions governed by the minority view will continue to face litigation costs

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[25] *See also* FCC, Petition for Declaratory Ruling, *supra*, at 14016 ("a State or local government that denies an application for personal wireless service facilities siting solely because 'one or more carriers serve a given geographic market' has engaged in unlawful regulation" in violation of Section 332(c)(7)(B)(i)(II)).

that effectively impede competition and prevent underserved communities served by CCA's carrier members from obtaining access to improved wireless technologies.

CONCLUSION

For the foregoing reasons, Competitive Carriers Association joins Petitioner in urging the Court to reverse the Eleventh Circuit's judgment.

Respectfully submitted,

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