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**Fresno's Failure to Act with Finality Frustrates Wireless Deployment,
Violates 1996 Act**

by

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In 1996, recognizing the incontrovertible consumer benefits that result from the rapid rollout of wireless capabilities, Congress set forth a clear policy: the local zoning approval process shall not "[prohibit or have the effect of prohibiting the provision of personal wireless services](#)." It therefore required final action on applications for new wireless facilities "within a reasonable period of time." In 2009, the FCC provided additional clarity by establishing a [150-day "shot clock"](#) within which local governments generally must act.

Nevertheless, Verizon Wireless, having endured what it describes as a "municipal, bureaucratic gauntlet" in its efforts to improve the service it provides to the City of Fresno, California, has found it necessary to seek expedited judicial relief from the U.S. District Court for the Eastern District of California, Fresno Division.

Exactly one year ago today, on July 8, 2021, Verizon Wireless submitted an application to construct a new, 80-foot cell tower – one that would take on the unassuming appearance of a pine tree – in Fresno, California. As detailed below, the parties eventually agreed that the applicable "shot clock" would expire, not after 150 days, but at a later date: on February 28, 2022.

As it happens, the City did approve Verizon Wireless's application within the negotiated timeframe. A seemingly interminable appeals process, however, leaves that request in limbo to this day. Facing a deadline, on June 30, 2022, Verizon Wireless filed with the Eastern California District Court, Fresno Division, a *Complaint for Declaratory Judgment and Injunction; Request for Expedited Review Under 47 U.S.C. § 332(c)(7)(B)(v)* (available via [PACER](#), subscription required) (the "Complaint").

On their own, the [hundreds of billions in subsidies](#) that Congress has dedicated to the construction of broadband infrastructure will not connect – *in a timely fashion* – those Americans that remain unserved. Regulatory hurdles, bureaucratic red tape, and lengthy local approval processes all can lead to unreasonable delays and thus demand constant attention.

Free State Foundation scholars emphasize this point regularly – most recently in comments filed in the [Communications Marketplace Report](#) proceeding as well as in "[The FCC Should Preserve and Expand Its Broadband Infrastructure Reforms](#)," a *Perspectives from FSF Scholars* by Seth Cooper and Andrew Magloughlin.

In a similar vein, [Section 332\(c\)\(7\)\(B\)\(i\)\(II\) of the Communications Act](#), enacted by Congress as part of the Telecommunications Act of 1996, states that local regulation of "personal wireless service facilities ... shall not prohibit or have the effect of prohibiting the provision of personal wireless services" – and subsection (c)(7)(B)(ii) directs a local government to "act on any request for authorization to place, construct, or modify personal wireless service facilities *within a reasonable period of time*" (emphasis added).

In a [2009 Declaratory Ruling](#) (the "Shot Clock Ruling"), the FCC clarified what is meant by "within a reasonable period of time" by establishing a 150-day "shot clock" governing local review of new siting applications to address "delays in the zoning process [that] have hindered the deployment of new wireless infrastructure." The Supreme Court upheld that decision in 2013's [City of Arlington v. Federal Communications Commission](#).

Consistent with the Shot Clock Ruling, Verizon Wireless and the City agreed to toll the (1) deadline by which the City must act with finality to February 28, 2022, and (2) the date by which Verizon Wireless must file suit to June 30, 2022 – that is, the day upon which it submitted its Complaint.

To be clear, Verizon Wireless is seeking judicial redress not because of an outright failure to act – the City did approve the application on February 24, 2022, four days before the "shot clock" expired – but because it has allowed the appeals process to drag on with no clear end in sight.

The first appeal, filed on March 8, 2022, by a nearby residential condominium development, resulted in three hearings, two of which required rescheduling due to a lack of a quorum. On May 18, 2022, that appeal at long last was rejected, and the application again was approved.

The second appeal, filed on May 31, 2022, by District Councilmember Miguel Arias, remains pending. Not only that, but a hearing has yet to be scheduled, and apparently will not take place any sooner than July 21, 2022.

The consequence of these drawn-out, serial appeals? A failure to act with finality prior to the expiration of the "shot clock" – and thus a clear violation of Section 332 and the FCC's implementing rules.

As the U.S. District Court for the District of New Hampshire held in 2012's [*New Cingular Wireless PCS, LLC v. Town of Stoddard*](#), "[t]he Shot Clock Ruling contemplates not just that a local government will take some action within the deadline, but that it will '*resolve* [the] application' before the deadline." It continued: the "150–day deadline ... encompasses not only the time it takes a local government to reach an initial decision on an application, but the time it takes to complete the rehearing process ... as well."

Accordingly, the facts here – in particular, the parties' agreement as to when the "shot clock" expired – and relevant case law present a clear instance where a local government has failed to act "within a reasonable period of time" as required by Section 332.

What's more, [Section 65964.1\(a\)\(1\) of California's Government Code](#) states in relevant part that a siting application "shall be deemed approved if ... [t]he city or county fails to approve or disapprove the application within a reasonable period of time in accordance with the time periods and procedures established by applicable FCC decisions." As Verizon Wireless points out in its Complaint, "[t]he California Legislature has made the timeframes for action under the *Shot Clock Ruling* self-executing."

Consequently, the court, consistent with the language of Section 332(c)(7)(B)(v), should grant the relief requested by Verizon Wireless – that is, deem its application granted as a matter of law – on an expedited basis. This is not only important for consumers impacted by the delay in this case – which it certainly is – but also because it is important to further establish firmly in our jurisprudence the principle that the "Shot Clock Ruling" will be enforced in a timely manner. That's important for consumers everywhere.

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