

TC-3 Resolution in Support of Petition by City of Arlington, TX, et al. v. Federal Communications Commission Before the Supreme Court of the United States

WHEREAS, On November 18, 2009, the Federal Communications Commission (FCC) issued a *Declaratory Ruling* (WT Docket No. 08-165, 24 FCC Rcd 13994) (Shot Clock Ruling) that established uniform time deadlines for State and local government action on zoning applications regarding the collocation and placement of wireless telecommunications facilities; *and*

WHEREAS, On October 5, 2012, the Supreme Court of the United States granted the *Petition for a Writ of Certiorari* (No. 11-1545, consolidated with No. 11-1547) by City of Arlington, Texas; City of Los Angeles, California; City of San Antonio, Texas; County of San Diego, California; and Texas Coalition of Cities for Utility Issues, *Petitioners*, v. United States of America; FCC, *Respondents*, limited to the issue of whether a court should apply *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, (467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694, 21 ERC 1049 (1984) (*Chevron* decision)) to a federal agency's determination of its own jurisdiction; *and*

WHEREAS, In the *Chevron* decision the Supreme Court held that: "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations 'has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies';" *and*

WHEREAS, The federal Circuit Courts are divided over whether the *Chevron* decision should extend beyond a federal agency's interpretation of its administrative policy authority and also apply when a federal agency interprets a statute to determine its own jurisdiction without some clear indication that Congress delegated the agency jurisdiction-defining authority; *and*

WHEREAS, Section 332(c)(7) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, provides that: "nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities," except for five expressed limitations, only one of which the statute empowers the FCC to address; *and*

WHEREAS, In the Shot Clock Ruling, the FCC ruled that it had authority to establish deadlines for State and local government action irrespective of the preservation clause in § 332(c)(7) because it was generally permitted under §§ 1, 4(i), 201(b) and 303(r) to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act"; *and*

WHEREAS, The Fifth Circuit Court upheld the FCC's rules, not because it determined that this was the best reading of the jurisdictional statutes, but because the court applied the *Chevron* decision to defer to the FCC's view of its own statutory authority; *and*

WHEREAS, Federal courts that defer to a federal agency's determinations of its own jurisdiction create a significant risk that the federal agency will impermissibly expand its authority over State regulatory agencies beyond statutory limits; *and*

WHEREAS, The FCC's decision in the Shot Clock Ruling that it has broad and sweeping general authority under the Communications Act to regulate all types of State, local, and private property increases the probability that it will use this determination of jurisdictional authority in the future to preempt State regulatory authority over other matters; *now, therefore be it*

RESOLVED, The National Association of Regulatory Utility Commissioners (NARUC), convened at its 2012 Annual Meeting in Baltimore, Maryland, and reaffirms its policy of opposing FCC efforts to expand its jurisdictional authority and to pre-empt the regulatory authority of State and local governments without clear and specific enabling statutory language; *and be it further*

RESOLVED, That NARUC supports the position of the Petitioners in the *City of Arlington, Texas, et al. v. FCC* before the Supreme Court of the United States regarding the issue that the lower court should not have applied the *Chevron* decision to defer to the FCC's determination of its jurisdictional authority, as set forth in the Shot Clock Ruling.

Sponsored by the Committee on Telecommunications

Adopted by the NARUC Board of Directors, November 13, 2012

Adopted by the NARUC Committee of the Whole, November 15, 2012