No. 13-975

In The
Supreme Court of the United States

T-MOBILE SOUTH, LLC,

Petitioner,

v.

CITY OF ROSWELL, GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner alleges that the City of Roswell violated the "in writing" requirement of 47 U.S.C. § 332(c)(7)(B)(iii) of the federal Telecommunications Act of 1996 and requests statutory construction of straightforward language that a decision to deny a request for a cellular tower "shall be in writing."

The question presented is whether Petitioner has set forth compelling reasons to grant the Petition, when: (1) the requested statutory construction does not raise an important federal question in need of resolution by this Court because it is neither integral to nor harms Petitioner with respect to its rights and protection under the substantive provisions of the Act, and (2) any split in the Circuits on this construction is so narrow and insignificant in scope that it is already being harmonized in more recent decisions, including the Eleventh Circuit's Opinion at issue.

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INTRODUCTION

Petitioner has failed to carry its burden to demonstrate that there are any "compelling reasons" for this Court to grant this Petition for a Writ of *Certiorari* as required by Sup. Ct. R. 10. First and foremost, Petitioner cannot show that the interpretation of the "in writing" requirement of Section 332(c)(7)(B)(iii) of the Telecommunications Act of 1996 (herein the "Act") presents an important federal question that in any way harms Petitioner and thus needs to be decided by this Court. Second, Petitioner's attempt to show a decisive and "intractable" split in the Circuits on the interpretation of this procedural requirement is flawed. Even a cursory review of the more recent decisions and the relevant Eleventh Circuit Opinion appealed underscore the reality that the Circuit Courts are now reaching a consensus in theory or practice such that this issue does not necessitate or merit review. Finally, Petitioner has not and cannot show that the Eleventh Circuit erred in its interpretation of the straightforward language of the Act, thereby failing to set forth any underlying error and basis for granting of the Petition. The Petition should therefore be denied.

Interpretation of the four words "shall be in writing" is not an important federal question regardless of the fact that these words appear in a federal statute and involve the telecommunications industry. This intended procedural requirement does not affect the substantive rights and protection provided by the Act to telecommunication carriers. Regardless of "the writing," carriers whose petitions are denied at

the local level are still entitled to substantive review of the merits of any decision and enforcement of the protections provided to them by Congress. Indeed, the telecommunications industry has nothing to lose in this alleged conflict, but it undoubtedly has everything to gain. If the Court granted the Petition and decided that the Eleventh Circuit was wrong as to the interpretation of these four words, it is the local governments who would be harmed, as they would be forced to allow cellular towers in the heart of their residential communities based upon a mere technicality, without regard for the merits of their decisions. Seeking to obtain this advantage for itself and the industry, Petitioner brings these four simple words to this Court and asks for an interpretation that is clearly not mandated by the language.

To achieve this benefit through statutory interpretation, Petitioner asserts that there is an "intractable" split in the Circuit Courts as to what constitutes a denial "in writing." A review of the limited Circuit Court decisions on this truly non-issue reveals that Petitioner actually relies upon a conflict that arose more than ten years ago. In 1999, the Fourth Circuit, desiring to protect the quintessential zoning rights of local government specifically set forth by Congress in the Act, took a very conservative approach to the "in writing" requirement allowing a mere stamp on an Application to meet the definition of a "writing." The First and Ninth Circuits quickly responded by requiring that a decision to deny actually be "in writing," i.e., more than a stamp. In doing so, these two Circuits went further and

added a judicial interpretation that clearly exceeded the statutory language of the Act, supplementing the language to include that "the writing" must be a separate letter and contain the explicit reasons for the denial. As the courts have continued to deal with and iron out this procedural issue over the last ten years, any disagreement has become extremely narrow in scope and creates no need for intervention from the highest Court.

All of the Circuits now concur (or by virtue of the facts underlying their decisions their application includes) that to meet the "in writing" requirement of 332(c)(7)(B)(iii) there should be a separate writing (a letter) that sets forth the decision of the local authority to deny the carrier's Application. All of the Circuits agree that "reasons" for a denial are necessary for a reviewing court's evaluation of the merits of the separate and distinct substantive limitation that the decision be "supported by substantial evidence in a written record." The only current discrepancy in the decisions concerns where one may *look* for the reasons for denial of an Application for cellular activity. The real majority, now 5 to 2, maintains that the reasons can be contained in the Minutes or transcripts of the local proceedings, with indications from *dicta* in several of the remaining circuits that they will join this majority approach. The two remaining minority opinions are the ten-year-old First and Ninth Circuit decisions that still require the specific reasons be set out in the denial letter.

Initially, the Sixth Circuit followed this approach. *See New Par v. City of Saginaw*, 301 F.3d 390 (6th Cir.

2002). In fact, the District Court below relied upon *New Par* and adopted its holdings to support the grant of summary judgment to Petitioner. However, two years later in *Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601, 604-607 (6th Cir. 2004), the Sixth Circuit overturned its decision in *New Par* and found that the reasons for the denial could be found in the Minutes of the meeting contained in the record and did not have to be in a separate denial letter. It is reasonable to assume that these two much older decisions will likewise eventually conform to the new majority.

The Eleventh Circuit's Opinion in *T-Mobile South, LLC v. The City of Roswell*, 731 F.3d 1213 (11th Cir. 2013), relies upon the reasoning and detailed analysis of the "in writing" requirement in its decision two months prior in *T-Mobile South, LLC v. The City of Milton*, 728 F.3d 1274 (11th Cir. 2013). This decision follows this current majority that allows the reasons to be found in the Minutes, transcripts or record of the proceedings at the local level. In the *City of Milton*, the Eleventh Circuit refused to add requirements through judicial interpretation to the simple Congressional language that a decision to deny "shall be in writing." Thus, a separate letter stating that the Application was denied was deemed sufficient to meet the "in writing" requirement. The reasoning was followed and applied in the decision at bar. This statutory construction is correct and provides no reason for review.

It is worth considering why, almost two decades after the passage of the Telecommunications Act, Petitioner and the telecommunications industry now seek

statutory construction of a procedural technicality that was only truly an issue among a few Circuits ten years ago. It would seem that cellular providers may have exhausted commercial and industrial locations to set up their infrastructure and now desire to gain any advantage possible to allow further expansion by placing cellular towers in the middle of our residential communities, such as the instant Application for an eleven story tower in the heart of an established lakeside neighborhood. As Congress rightly envisioned, local authorities now more than ever must control siting and have the ability to protect their unique environs on a case-by-case basis, subject to the very limited substantive restrictions of the Act. Petitioner should not be able to get around this important Congressional intent by creating a procedural loophole through the "in writing" requirement. Petitioner has not shown a "compelling reason" for granting the Petition, and any motives for the Petition are suspect at best. The Petition should rightfully be denied.

STATEMENT OF THE CASE

In responding to and correcting Petitioners' Statement of the Case, Respondent addresses each numbered argument *seriatim*:

1. Strangely, Petitioner begins its Statement of the Case by seeming to argue that telecommunications are sacrosanct. It certainly more than alludes to the fact that because the United States is falling behind technology in other countries this Court

should be proactive in granting this Petition and protecting the rights of the industry and citizens reliant upon telecommunications. Ignoring the Congressionally mandated limited intrusion into local governmental entities' freedom to locate telecommunication activities, Petitioner argues that it is local government interference that is holding back progress.

While Respondent readily agrees that the United States is indeed becoming a more technologically mobile society, the key concept here is technology. Technology, which despite President Obama's comments, more than doubles in its advancement roughly every eighteen months per what has come to be known and proven as "Moore's Law." Gordon E. Moore, "Cramming More Components Onto Integrated Circuits," *Electronics Magazine* (1969). What Petitioner fails to address or acknowledge is that along with the growing demand for telecommunication service has come the need for and the advancement of technology to support that demand.

Telecommunication carriers have and are working to develop better, smaller and cheaper technology to be used to increase coverage and capacity in their networks. Miniaturization of cellular antennas and transmission equipment is already occurring. Since 2010, carriers have had and deployed "picocells" – miniature antennas that can be attached to sides of buildings and on small poles that operate to *augment* coverage and capacity in small areas. Distributed Antenna Systems have nodes that include both the transmission equipment and the antennas in small

packages that are mounted on utility poles, in stadiums and buildings. Carriers already deploy "femtocells" (mini-towers) that you can use in your own home to boost coverage. It is more than conceivable, particularly as the infrastructure for true 4G LTE telecommunication service is put in place, that in as little as another decade multi-story cellular towers will be dinosaurs. As such, the need is paramount, now more than ever, to allow land use decisions to remain in the province of local governments that can require simple co-location of cell sites and additional advanced technologies to help protect important areas from these large structures.

When infrastructures were new and first developing, cellular devices were nothing more than radios and were completely dependent upon "RF signals" from cellular towers. In the 1990s, we saw commercial and industrial zoned sites quickly taken over by these towers, leaving local governments more than a decade later to deal with inevitable requests to place these certain-to-be-outdated structures in their residential oases. Thus, we have the instant Application to site an eleven story tower, 25 feet higher than any tree in the area, in the middle of a lakeside residential neighborhood. This is exactly why Congress saw fit and specifically determined that there were legitimate state and local concerns involved in regulating the siting of such facilities that could not be mandated on a federal level in the Telecommunications Act. *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1213 (11th Cir. 2002). In enacting § 332(c)(7), Congress expressly preserved the sanctity

of the local zoning decision: "Except as provided in this paragraph, nothing in this chapter 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."

As a result, there are only four substantive and two procedural limitations upon the authority of state or local governments to regulate the construction of facilities for wireless communication services. *Id*. at 1214-1215. One such procedural requirement is that the local authority must rule on any Application within a reasonable time period. Petitioner argues that local government decisions are impeding and delaying deployment of telecommunication systems. However, the City herein timely processed and ruled on Petitioner's Application. It is the Petitioner's insistence and persistence in pursuing the alleged violation of the other procedural requirement that a decision be in writing that is causing delay. Instead of allowing the determination of the merits of the denial by the City under the substantive standards of the Act, Petitioner is before this District Court to insist that "in writing" means more than the simple terms. Moreover, this issue could have been determined pursuant to a Motion to Dismiss at the outset of the litigation in 2010, and the Court could have simply sent the matter back to the City for a better "writing" demanded by Petitioner, as other district courts have done. The case would have then quickly moved on to the merits.

Contrary to the assertions, neither lack of technology nor delay and interference by local government are at issue and thus cannot provide a "compelling reason" to grant the Petition. Such arguments have nothing to do with the true nature of this case and do not meet Petitioner's burden to show an important federal question that needs this Court's review.

2. This case concerns the City of Roswell's denial, pursuant to the factors set forth in its City Ordinance Article 21.2, "Standards for Siting Wireless Communications Facilities," of an Application by T-Mobile to place an eleven story cellular tower in the heart of the City's oldest lakeside community to *improve* its *existing* service to its customer base. On May 10, 2010, T-Mobile filed an action in the United States District Court for the Northern District of Georgia alleging that the City's denial was not supported by substantial evidence in the record and would have the effect of prohibiting the provision of wireless service in violation of the Act.[1] T-Mobile also sought an injunction compelling the City to grant it the requested permit for the tower. Although noting in its Verified Complaint that the letter issued by Roswell setting forth the denial of the Application did not contain reasons for the denial, T-Mobile did not allege that this failure violated a requirement under the Act. Following a lengthy discovery period

[1] T-Mobile withdrew its initial claim that this denial had the effect of unreasonably discriminating among providers of functionally equivalent services. (Doc.103).

which T-Mobile instigated,[2] both parties moved for summary judgment. (Pet. App. 22a.) In its motion, T-Mobile asserted and argued for the first time that the City's letter failed to meet the "in writing" requirement of the Act.

On March 27, 2012, the District Court granted T-Mobile's motion for summary judgment finding that, despite the City's Ordinance which set forth the factors to be considered, a letter sent the day after the hearing before the Mayor and Council stating the Application was denied and that the Minutes of the meeting were available, comprehensive Minutes of the meeting which included a motion setting forth detailed reasons pursuant to the City Ordinance to deny the Application and a verbatim transcript of the hearing, the City did not meet the requirements of the "in writing" requirement because it did not provide a separate written denial that set forth the specific reasons the Application was denied. (Pet. App. 34a.) Elevating form over substance, based on this presumed technical defect in the City's letter of denial the court issued an injunction requiring the City to grant T-Mobile's Application for the cellular tower without ever considering the true substantive constraint of the Act on a City's decision, i.e., whether

[2] The City desired to bifurcate the case into two parts, first dealing with the "substantial evidence in the record test" and then moving to the other expert based issues, forgoing discovery and allowing immediate motions that would have included the issue at bar with no delay in the federal district court.

the City's decision to deny same was "supported by substantial evidence contained in a written record." (Pet. App. 35a.)

In arguing that specific reasons for a decision are necessary for effective substantive review and must be contained in the denial letter, though clearly not within the words of the statute, both the District Court and Petitioner ignore that after the discussion between applicant and the City Council where various reasons and concerns were discussed, a specific motion was made by Council Member Price to deny the Application stating that:

> I think based on our ordinance, Article 21.2.1, . . . the purpose and intent of our cell phone ordinance to protect the residential areas from the adverse impact of telecommunications towers and to minimize the number of towers and the other adverse impacts being minimized.
>
> I think the conclusion from that first section would be that this is aesthetically incompatible and certainly in this area. It's other than I-1, C-3, offices or highway commercial area [zoning districts].
>
> Number two, the alternative tower that was proposed, in my opinion, it would not be compatible with the natural setting and surrounding structures also due to the height being greater than the other trees.
>
> And, number three, in our Ordinance Article 21.2.4, the proximity to residential structures,

> the nearness to other homes, and being within the residential zoning area and adjacent properties, therefore, the adverse effects to the enjoyment of those neighbors and potential loss of resale value, among other potential parameters are difficult really to definitively assess.
>
> Therefore, overall, I move to deny the application for the wireless facility mono-pine tower on Lake Charles Drive.

(Pet. App. 8a.) This motion was seconded by two Council members and then unanimously approved. (Pet. App. 15a.) It can and must be readily inferred that the Council was in complete agreement both as to the reasons set forth and the denial. The reasons, though not in the letter, were right there in the Minutes and transcript of proceedings.

3. In *T-Mobile South, LLC v. The City of Milton*, 728 F.3d 1274 (11th Cir. 2013),[3] the Eleventh Circuit adhered to its longstanding precedent of statutory

[3] It is interesting to note that T-Mobile chose not to appeal the *City of Milton* decision directly, even though it sought and was denied an *en banc* hearing in that case. The Opinion on appeal relies completely upon the reasoning and holding in *City of Milton*, the only differentiating facts being that the District Court in *City of Milton* bifurcated the substantive issues to provide an expedited decision on whether Milton's denial was supported by substantial evidence in the record. As a part of this process, when the "in writing" issue was raised (Milton had sent simple letters of denial exactly like Roswell), the District Court sent the matter back to the City to redraft the denial letter to include the reasons for its denial.

interpretation, refusing to add to or alter the plain language of the Act, and ruled that the straightforward language of § 332(c)(7)(B)(iii) that "Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities *shall be in writing* and supported by substantial evidence contained in a written record," requires only that the decision to deny be "in" a "written document." In that case, as in Respondent's case, the writing was a letter to T-Mobile stating that the Application had been denied.

The *City of Milton* decision went further to state that there obviously "must be reasons for the denial that can be gleaned from the denial itself or from the written record; otherwise, there would be nothing for substantial evidence to support. What is neither expressed nor implied, however, is any requirement that the reasons for a denial must be stated in the letter or some other document that announces the decision, if there is a separate document doing that, or any prohibition against having the reasons stated only in the hearing transcript or minutes." *Id*. at 1283. Therefore, finding that "to the extent that a decision must contain grounds or reasons or explanations as required by other district courts, it is sufficient if those are contained in a different written document or documents that the applicant is given or has access to." *Id*. at 1285.

The *City of Roswell* decision at bar simply adopted this rationale and then looked at the facts to see that the "in writing" burden had been met. It correctly

held that the letter to T-Mobile stating the Application had been denied, along with the Minutes and transcripts of the meeting which contained the reasons for the denial, collectively were enough to satisfy the "in writing" requirement of § 332(c)(7)(B)(iii).

REASONS TO DENY THE PETITION

Although Respondent firmly believes that the paramount reason to deny the Petition is the failure to show an important federal issue that actually impacts the rights of the Petitioner and its industry, it has responded to the arguments of Petitioner *seriatim*, for the Court's ease of reference.

1. There Is No Split in Authority Warranting the Court's Intervention.

While § 332(c)(7)(B)(iii) provides only that a decision to deny "shall be in writing," it is true that some early Circuit Court decisions imposed the obviously unstated requirements that this "writing" be separate from the written record and describe the reasons for the denial. However, the Circuits are quite clearly resolving this procedural matter and finding middle ground on their own. Indeed, contrary to Petitioner's assertions, the majority of Circuit Courts have now adopted or effectively employ this middle ground for the "in writing" requirement.

The additional mandates (above and beyond those written in the statute) began in the First Circuit holding in *Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001) and were then adopted by the Ninth Circuit in *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 722 (9th Cir. 2005). These decisions were in direct response to the Fourth District's holding in *AT & T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307, 312-313 (4th Cir. 1999), that a local authority could simply stamp "DENIED" on the Application and meet the "in writing" procedural requirement. As a knee-jerk response that a stamp could not equate to a "writing," these decisions stated that there must be a separate letter stating that the Application was denied. Determining that the reasons for the denial were a necessary part of the separate substantive review of whether there was "substantial evidence in the record," the First Circuit rationalized that those reasons should be set forth in the denial letter.

As time progressed, the Circuit Courts adopted a middle ground between the two camps. *See Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601, 604-607 (6th Cir. 2004) (resolution in the record which set forth reasons was sufficient); *U.S. Cellular v. Board of Adjustment*, 180 Fed. Appx. 791, 798-801 (10th Cir. 2006) (Board meeting Minutes and letters not condensed into a formal denial document were deemed sufficient to meet the "in writing" requirement); *Helcher v. Dearborn County*, 595 F.3d 710, 721 (7th Cir. 2010) (reason for denial must be in

writing but Minutes of the Meeting satisfied the "in writing" requirement where the Minutes delineated the issues that arose with the Application and reasons for denial); *T-Mobile South, LLC v. The City of Milton*, 728 F.3d 1274 (11th Cir. 2013) (a written letter stating that the Application was denied with meeting Minutes or other writings citing the reasons for the denial was sufficient to meet the "in writing" requirement). Indeed, in *Omnipoint*, the Sixth Circuit backed down from its earlier concurrence with the First and Ninth Circuits in *New Par v. City of Saginaw*, 301 F.3d 390, 395-396 (6th Cir. 2002), that a separate writing stating the denial and the reasons for the denial was required. In other words, for the now majority, there need only be a separate writing that the local authority denied the request and then the written record can contain reasons for the denial deemed necessary for substantive review under the separate "substantial evidence" test.

In *T-Mobile South, LLC v. The City of Milton*, 728 F.3d 1274 (11th Cir. 2013), the Eleventh Circuit joined this middle ground in finding that the decision need only be in writing (a separate written letter of denial) and that to the extent reasons were required the courts should look to all the writings (meeting Minutes and transcripts of the proceedings).

> All that statutory provision requires of the denial decision is that it be in writing and be supported by substantial evidence in a written record. Whether the denials in this case were supported by substantial evidence in

> the written record is not before us, but the existence of that additional requirement necessarily means that there must be reasons for the denial that can be gleaned from the denial itself or from the written record; otherwise, there would be nothing for substantial evidence to support. What is neither expressed nor implied, however, is any requirement that the reasons for a denial must be stated in the letter or some other document that announces the decision, if there is a separate document doing that, or any prohibition against having the reasons stated only in the hearing transcript or minutes.

Id. at 1285. Following this decision, in the instant matter the Eleventh Circuit determined that there was a separate letter of denial by the City of Roswell and both the meeting Minutes and transcript of the proceeding contained the reasons for the decision. (Pet. App. 15a.)

Although the First and Ninth Circuits have not yet changed their earlier rulings, there is ample reason to believe that, like the Sixth Circuit, if faced with the issue in this new era of decisions, they too would move toward middle ground. *Dicta* in other circuits indicate that they would follow the current majority. *See Shelton v. City of College Station*, 780 F.2d 475, 482 (5th Cir. 1986) (The Fifth Circuit, in a different zoning context, cautioned that requiring a local zoning authority to provide judicial-type findings from the record evidence shifts the function of a member of a zoning board from that of a legislator deciding the best course for the community to that

of a judge adjudicating the rights of contending petitioners).

As shown above, the District Courts are already moving to a middle ground and are coming to a consensus on what constitutes the "in writing" requirement. Going forward, it is easy to see that local jurisdictions will see fewer requests for these larger cellular towers as technology continues its progression. Furthermore, the majority appear to agree that a decision must be in a separate letter or writing and that the reasons can be contained in the Minutes or transcripts. In the two Circuits that require otherwise, local municipalities are clearly on notice and know that their denial letter must include reasons for the denial, which is likely nothing more than the reasons stated by Council members at the hearing as set forth in the record. Based on the current agreement in the other Circuits that the reasons do not have to be in a separate letter of denial, there is no important split in the Circuit Courts to warrant the Court's intervention and the Petition should therefore be denied.

2. The Question Presented Lacks Exceptional Importance and Does Not Need Resolution.

Determination of what constitutes "in writing" under § 332(c)(7)(B)(iii) does not raise an important federal question in this case. Irrespective of what stance the Court might take on the procedural "in writing" requirement, there will be no harm to or trampling of Petitioner's or the telecommunications

industry's rights. Either way, this case will go back to the District Court for determination on the merits of the substantive claims and protections under the Act, i.e., whether there is "substantial evidence in the written record" to support the denial and whether or not the denial has the effect of prohibiting the provision of wireless service in violation of the Act. Petitioner loses *nothing* here. There are no important federal rights to be protected.

The only thing that can come of a decision on this limited procedural issue is potential harm to the local governments, who could be forced to allow cellular towers based on a technical misstep without a determination of the merits of their decisions. It is not over-reaching to state that this cannot be what Congress intended. Historically, land use decisions have been the province of local government. *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975). Land use regulation is "perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982). Congress specifically preserved the elevated status of local government in land use decisions, including the siting of telecommunication towers in the very Act, allowing only four substantive limitations to local authority. It surely did not envision a loophole to benefit the telecommunication industry and undermine governmental authority in the four simple words "shall be in writing."

To the extent the lower courts need the reasons or specific rationale to conduct a "substantial evidence" review of the merits as argued by Petitioner, the

courts can simply look to the Minutes and transcripts of the hearing as the majority of Circuit Courts now allow. The facts of the cases readily show that this does not equate to a review of thousands of pages as suggested by Petitioner. The Minutes herein were 10 pages and the transcript approximately 108 pages. (Pet. App. 15a, 16a.) Furthermore, if the lower court did not feel that it could determine the reasons from the record, it could simply send it back down to the local authority for delineation of same as the district court did in *City of Milton*.

To allow Petitioner and the telecommunications industry to trump local government authority in land use decisions through the imposition of a technicality not intended by Congress and easily resolved by other means would be a travesty of justice that this Court should not entertain. Having failed to allege and show an important federal question that causes harm to or an invasion of Petitioner's rights, the Petition fails and should therefore be denied.

3. This Case is Neither the Ideal Vehicle Nor Does This Court Need to Resolve the Issue.

The instant case follows the new middle ground approach for handling the procedural "in writing" requirement. There is a separate writing setting forth the denial of the Mayor and Council on Petitioner's Application. Likewise, the reasons for that denial are easily found in the Minutes and transcript of the hearing. Specifically, the reasons were articulated in

Councilperson Price's Motion to Deny the Application. This motion, citing to and stating reasons from the City's Ordinance which sets forth the specific issues to be considered in determining such an Application, is all the lower court needs. Requesting more would be requiring findings of fact and conclusions of law, which is eschewed by all of the Circuit Court's, including the First and Ninth Circuits that first demanded a separate statement of reasons. *See Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001) (Formal findings of fact and conclusions of law are not required. Local zoning boards are primarily staffed by lay people and although their decisions are now subject to review under the Act, it is not realistic to expect highly detailed findings of fact and conclusions of law); *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715 (9th Cir. 2005) (Requiring findings of fact and conclusions of law would place an unduly heavy burden on lay zoning boards).

A better case to initiate review of this issue would be one where there was simply a stamp of denial and no Minutes or transcripts of the proceedings from which the district court could ascertain any rationale for a denial. This Court does not have before it such a case because given the progression of decisions since the Fourth Circuit's initial review of the issue in 1999, local governments know what to expect and what to do, as evidenced by the case at hand.

It makes no sense to review this middle ground approach adopted by the Eleventh Circuit and impose

additional requirements not set forth in the Act and not contemplated by Congress, when there is no harm to Petitioner and nothing to be gained but the stripping of local authority. The Petition should therefore be denied.

4. The Eleventh Circuit Correctly Applied Well-Established Principles of Statutory Construction to the Facts of This Case.

47 U.S.C. § 332(c)(7)(B)(iii) simply states that a decision to deny a request for a permit to erect a cellular tower must be "in writing" and "supported by substantial evidence contained in a written record." Petitioner seeks to read these requirements as one, when both the conjunction "and," as well as the legislative history, clearly separate and distinguish the two different elements in this limitation. The Eleventh Circuit's ruling in *T-Mobile South, LLC v. The City of Milton*, 728 F.3d 1274 (11th Cir. 2013),[4] which was applied to the instant case, was correct.

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[4] "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

(Continued on following page)

Using well-settled rules of statutory construction, the statute's plain meaning requires only that a denial for a permit be "in writing." The City's decision was clearly reduced to writing in numerous forms, including the letter, Minutes and a detailed transcript, thereby complying with the statute. Neither the statute nor anything in its legislative history, requires that the "writing" provide the reasons for a local government's decision. The decision is consistent with the comity concerns underlying Congress's clear intent to maintain local zoning control in § 332(c)(7).

> 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.
>
> In this case the written documents available to T-Mobile include: . . . transcripts of the city council's hearings (one on each application) recounting the motions that were made and the reasons that were given for denying or conditionally approving each of the applications; the letters the City of Milton sent to T-Mobile two or three days after the city council hearing stating that two of the permit applications were denied and that one was approved subject to listed conditions; and the detailed minutes of the city council hearings, recounting all of the reasons for the action on each application along with the relevant discussion. T-Mobile had access to all of those documents before its deadline for filing the lawsuit, and collectively they are enough to satisfy the writing requirement of § 332(c)(7)(B)(iii). We need not consider whether something less than or different from all of those documents would be enough."

City of Milton, 728 F.3d at 1285.

"When legislation intrudes upon traditional state authority – like the local zoning authority – our republican structure instructs that "we should not quickly attribute to Congress an unstated intent." *Bellsouth Mobility, Inc. v. The Parish of Plaquemines*, 40 F.Supp.2d 372, 377 (E.D. La. 1999) (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16 (1981)).

> "The starting point for interpreting a statute is the language of the statute itself. . . ." As a basic rule of statutory interpretation, we read the statute using the normal meanings of its words. . . . "Courts must assume that Congress intended the ordinary meaning of the words it used and, absent a clearly expressed legislative intent to the contrary, that language is generally dispositive." We are required to look beyond the plain language of the statute only when the language of the statute is unclear or ambiguous, when Congress has expressed an intent contrary to that suggested by the plain language, or when absurd results would ensue from adopting the plain language interpretation.

Consolidated Bank N.A. v. United States, 118 F.3d 1461, 1463-1464 (11th Cir. 1997) (citations omitted).

The language in question **is not** ambiguous – it requires that a denial be "in writing," or obviously in some written form. *See CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225 (11th Cir. 2001) ("Any ambiguity in the statutory language must result from the common usage of that language, ...").

Neither § 332(c)(7) nor any other section of the Act imposes **any** requirements on the writing's form or content. In contrast, and importantly, Congress plainly and specifically required certain content for other kinds of writings issued under the Telecommunications Act. *See*, *e.g.*, 47 U.S.C. § 252(e)(1) ("written findings as to any deficiencies" are required in connection with certain types of agreements); § 271(d)(3) (FCC is required to "state the basis for its approval or denial" of specific kinds of Applications). *See also* 47 U.S.C. § 204(a)(1) (Congress required the FCC to provide a carrier a "statement in writing of its reasons" for suspending charges); § 213(f) (Congress required that "reasons" be provided for denying access to certain records). This Court has declared "well settled that '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Pugliese v. Pukka Development, Inc.*, 550 F.3d 1299, 1303 (11th Cir. 2008) (quoting *Brown v. Gardner*, 513 U.S. 115, 120 (1994)).[5]

[5] The report accompanying the Act does not provide "clear evidence" of a legislative intent contrary to the plain meaning of the words used. *See Alacare Home Health Services, Inc. v. Sullivan*, 891 F.2d 850, 856 (11th Cir. 1990) ("Generally a court will look to a statute's legislative history, if the statute is ambiguous, or to see whether Congress clearly expressed an intent contrary to the plain language of the statute."). The report identifies no form or content for the writing.

Employing basic rules of statutory construction, the Act requires that the decision to deny be in a written form. It does not require a separate document or "written findings" or a statement, description, or explanation of the bases or reasons for a denial. "Had Congress wished unique or specialized meanings to attach . . . it could have taken the obvious and usual step either of including a specialized meaning in the definitions . . . or by using clear modifying language in the text of the statute," just as it did in other sections of the same Act. *Consolidated Bank N.A.*, 118 F.3d at 1464. Section 332(c)(7)(B)(iii) requires just what it says – that a decision denying a permit be in written form.

The Court in *City of Milton* adhered to this approach and the mandates of this Court regarding such construction, articulating well why any other finding would run afoul of judicial construction:

> The temptation for judges to give in to the cardinal sin of statutory revision instead of confining themselves to the task of statutory interpretation is a strong one. The strength of that temptation is captured in an observation, attributed to H.G. Wells, that "[n]o passion in the world is equal to the passion to alter someone else's draft." But the words of Congress don't come to us in draft form. They don't come to us for editing or revision. They come to us as law. "'[W]e are not licensed to practice statutory remodeling.'" *Myers v. TooJay's Mgmt. Corp.*, 640 F.3d 1278, 1286 (11th Cir. 2011). We must, instead, take

the model that Congress has constructed, perceived defects and all. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228, 128 S.Ct. 831, 841 (2008) ("We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable."); *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126, 110 S.Ct. 456, 460 (1989) ("Our task is to apply the text, not to improve upon it."); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1224 (11th Cir. 2009) ("[W]e are not allowed to add or subtract words from a statute; we cannot rewrite it."); *Wright v. Secretary for Department of Corrections*, 278 F.3d 1245, 1255 (11th Cir. 2002) ("Our function is to apply statutes, to carry out the expression of the legislative will that is embodied in them, not to 'improve' statutes by altering them."); *Harris v. Garner*, 216 F.3d 970, 976 (11th Cir. 2000) ("We will not do to the statutory language what Congress did not do with it, because the role of the judicial branch is to apply statutory language, not to rewrite it.").

Our oft-stated rule against judicial revision of statutes finds plenty of anchor weight in the bedrock principle that we are a country of laws, not one ruled by the musings, whether pragmatic or otherwise, of the black-robed class. And there is another sound reason why judicial "improvement" of legislation, even in pursuit of noble interest, is not noble. Justice Holmes explained why courts should not change the rules of the game even when it seems that different rules might make more

> sense: "[A]lmost the only thing that can be assumed as certainly to be wished is that men should know the rules by which the game will be played. Doubt as to the value of some of those rules is no sufficient reason why they should not be followed by the courts. Legislation gives notice at least if it makes a change." Oliver Wendell Holmes, Jr., "Holdworth's English Law," 25 *Law Quarterly Review* 412, 414 (1909), quoted in Richard A. Posner, *The Essential Holmes 206* (1992). Judicial improvement of statutory language through aggressive interpretation is unfair to those whose actions satisfied the unimproved language but do not satisfy the "improvements" that the judiciary announces in the course of judging actions that have already been taken.

Id. at 1284-1285.

It is for Congress to say what the "in writing" requirement mandates and where it can be found. As the Eleventh Circuit said in *City of Milton*, to change the rules of the game for the local authority by adding to the statute would create the injustice of mandating an injunction when the merits of the decision had yet to be determined. Likewise, in the instant case, it would have been egregious for the Eleventh Circuit to let stand an injunction demanding the City approve the Petitioner's Application and allow a cellular tower in the middle of a residential community without considering the merits of the substantive requirements of the Telecommunications Act. The Eleventh

Circuit's decisions based on bedrock principles of statutory construction are both correct and just. There being no error in the *City of Roswell* decision appealed, there is no need for judicial review and the Petition should therefore be denied.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should clearly be denied.

Respectfully submitted, this the 19th day of March, 2014.

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