

U.S. Supreme Court Rejects Municipal Liability **FYI** Under Section 1983 in Cell Tower Cases

The U.S. Supreme Court ended a split among the federal circuits by deciding unanimously that violations of section 332 of the Telecommunications Act of 1996 (the "Act") do not give rise to separate claims for relief under 42 U.S.C. § 1983.

City of Rancho Palos Verdes v. Abrams, Appeal No. 03-1601, 544 U.S. ____ (March 22, 2005).

The decision significantly strengthens the ability of local governments to exercise their traditional zoning powers in reviewing applications for the placement of telecommunications towers. If the court had reached the opposite conclusion, municipalities would have been subject to claims for damages and attorney's fees if they acted in good faith in denying permits for telecommunications towers, but their decision was later overturned by a reviewing court. Threats or even the fear of judgments for substantial damages and attorney's fees could have intimidated many local governments from exercising their full zoning review authority.

Congress passed the Act to encourage competition in the roll-out of wireless communication networks throughout the nation without unreasonable interference by local governments. The Act represents a compromise between federalism -- maintaining traditional state and local control over zoning decisions -- and achieving national policy objectives. The Act imposes both substantive and procedural limitations on local authority over placement and conditions for citing communications towers. Substantively, the Act bars discrimination among functionally equivalent providers of service and prohibits local governments from basing a denial of a tower application on grounds of the environmental or health effects of radio frequency transmissions. Procedurally, the Act requires a zoning authority to act on a permit application within a "reasonable time" and any denial of an application must be based on substantial evidence in a written record. If a permit is denied, the applicant may seek certiorari review within 30 days and is entitled to expedited judicial review.

The laws at issue, 42 U.S.C. §§ 1983 and 1988, provide remedies of damages and actual attorney's fees for the violation of federal constitutional and statutory rights. There is a rebuttable presumption that the remedies of sections 1983 and 1988 apply to

the violation of any private right of action arising under a federal statute. However, Congress may expressly or impliedly exclude the application of section 1983. Where there is no express exclusion, the court will generally find an implied exclusion only where the statute at issue includes such a comprehensive remedial scheme that it appears Congress did not intend to include other remedies.

Finding that the Act included a comprehensive remedial scheme that carefully balanced the interests of federalism while also implementing a national communications policy, the U.S. Court of Appeal for the Third and Seventh Circuits had concluded that section 1983 does not apply to violations of the Act. The Tenth Circuit had concurred in a case not directly on point. The Sixth Circuit (in a decision issued just a month before the Supreme Court's decision) and the Ninth Circuit reached the opposite conclusion. A three-judge panel of the Eleventh Circuit had reached the same result as the Ninth and Sixth Circuits, but its decision was later vacated after en banc review.

The *Abrams* case was not a typical telecommunications fact pattern. The applicant in *Abrams* was an individual homeowner who had obtained a permit for a 52-foot antenna on his property for amateur use and then began providing commercial service for two-way radios. When he applied for a permit for a second tower, the city discovered the commercial use and sought an injunction against the commercial use and also denied the application for a second tower. The district court found that the homeowner's rights had been violated, but concluded that he had no remedy for damages or attorney's fees under section 1983. The Ninth Circuit reversed.

The Supreme Court agreed with the Third and Seventh Circuits that the remedies provided by the Act are comprehensive and inconsistent with the provisions of section 1983. The court stated that the provision of "an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983." *Id.* at *7. However, the court rejected the city's argument that the provision of such a remedy within a statute conclusively establishes a Congressional intent to exclude section 1983 remedies.

The Supreme Court left open the possibility that the Act itself allows for damages, but not attorney's

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PSC Reverses Course on Kewaunee Sale

At its March 17th open meeting, the Public Service Commission of Wisconsin (the "Commission"), reversing its prior decision, voted to approve the sale of the Kewaunee Nuclear Power Plant ("KNPP") to Dominion Energy Kewaunee ("DEK"), a special purpose entity formed by Dominion Resources, Inc., which will own and operate KNPP as a merchant plant. This was the first time the Commission had been asked to allow a rate-based generating unit to be sold to an entity that is not a public utility, subject to the Commission's regulatory authority.

Previously, in its December 11, 2004 decision, the Commission rejected the application to sell the plant to DEK, concluding that the proposed transaction was not in the public interest. The Commission's decision outlined a number of its concerns about the transaction, such as the Commission's loss of authority to prevent DEK or a subsequent owner from storing foreign nuclear waste at the KNPP site. More generally, the Commission expressed concerns over its loss of jurisdiction over the plant and its lack of regulatory authority over DEK or a subsequent non-public utility owner.

After the decision was issued, the current owners of the plant, Wisconsin Public Service Corporation and Wisconsin Power and Light Company, requested that the Commission reopen the docket to consider several new conditions that DEK would agree to follow if the Commission approved the sale. The conditions were to address the concerns stated in the Commission's December decision and were intended to apply to subsequent owners as well.

At the open meeting, Chairperson Bridge focused her comments on the economics of the proposed sale in terms of the benefits the transaction would afford to Wisconsin ratepayers. She stated that she believed that the benefits to ratepayers were significant and were such that the transaction was in the public interest and, therefore, should be approved. She referenced the recent unplanned outages at KNPP (as of mid-April the plant is still not in operation) and the significant costs associated with those outages would be passed on to ratepayers, costs that DEK would be obligated to assume once it owned the plant.

Bridge addressed the proposed conditions, stating that the new conditions adequately addressed all of her prior concerns. She went on to state her belief that the conditions are enforceable by the Commission

as to DEK and to any subsequent purchasers. The enforceability of the proposed conditions was a hotly contested issue among those participating in the proceeding. Bridge also dismissed the arguments made by certain municipal utility groups that converting KNPP to merchant status would sever the regulatory compact and amount to backdoor deregulation.

Commissioner Garvin, the lone dissenter on the November 2004 decision, stated that he believed the transaction was a good deal before and thought that it was even better now that there were additional conditions. Commissioner Meyer also voted to approve the transaction, explaining that the newly proposed conditions adequately addressed the concerns he had previously expressed about the transaction, including concerns about future owners.

Once the Commission issues its written decision, opponents of the sale will have 30 days in which to seek circuit court review of the decision.

— Anita T. Gallucci

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fees to successful plaintiffs. The court stated that "the remedies available [under the Act], moreover, perhaps do not include compensatory damages," comparing a Seventh Circuit case noting in *dictum* holding that damages are "presumptively" available under the Act with a district court holding that a mandatory injunction is the appropriate remedy for violations. See *Primeco Personal Communications, Ltd. Partnership v. Mequon*, 352 F.3d 1147, 1152-53 (7th Cir. 2003). Telecommunications companies may latch onto this language to argue for a damages remedy directly under the Act. However, Justice Stevens, in a concurring opinion, emphasized that "nowhere in the course of Congress' lengthy deliberations is there any hint that Congress wanted damages or attorney's fees to be available." Given the court's unanimous agreement in *Abrams* that the statute's express remedies to evince a comprehensive remedial scheme, the court's recognition that the Act represents a balancing of local and federal interests, and the strong majority of lower courts holding that only injunctive relief is available, it seems unlikely that the Act itself will be found to provide a damage remedy.

— Mark J. Steichen