

THE BALLER HERBST LAW GROUP

A PROFESSIONAL CORPORATION

WASHINGTON OFFICE

*2014 P Street, NW
Suite 200
Washington, DC 20036
(202) 833-5300
(202) 833-1180 (FAX)*

MINNEAPOLIS OFFICE

*953E Grain Exchange Building
400 South Fourth Street
Minneapolis, MN 55415
(612) 339-2026
(612) 339-4789 (FAX)*

WIRELESS TOWER SITING: THE LOCAL GOVERNMENT PERSPECTIVE

Jim Baller

Casey Lide

Last Updated: July 3, 2003

This memorandum presents the local government perspective on the siting of wireless facilities, and summarizes the leading decisions on tower siting that the courts have issued since the enactment of the federal Telecommunications Act of 1996.

Although we cover a great many statutes, cases and other authorities in this memo, we do not intend the memo to be comprehensive. Since 1996, federal and state courts have issued scores, if not hundreds, of tower siting decisions, and many more cases are currently in litigation. Our main purposes are to identify the issues that have most frequently reached the courts, analyze how the courts have decided these issues, and steer readers to sources of additional pertinent information.

As shown below, localities have generally fared well in wireless tower-siting cases, particularly in the states, including Virginia, that are within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Nevertheless, we do not recommend that localities take a "hard line" approach in reviewing applications to place, construct or modify wireless facilities. Litigation can be time-consuming, expensive and divisive, and it often delays the removal of service gaps that frustrate all concerned. Rather, we recommend that localities work as cooperatively as possible with wireless providers. This does not mean that localities should accept what wireless providers say at face value. That could be a serious mistake, even when dealing with honest and well-meaning providers. It does mean coming to the negotiating table with all sides aware of their rights and ready to make reasonable accommodations to achieve mutually beneficial results. We hope that this memorandum will contribute to this.

I. SECTION 704 OF THE TELECOMMUNICATIONS ACT

A. Background

In the six decades between the enactment of the Communications Act 1934 and 1996, the federal government and the states regulated telecommunications through a complex regulatory regime that encouraged and protected local monopolies. In the landmark Telecommunications Act of 1996, Congress sought to replace this regime with a new one that would stimulate new entry and robust competition in all communications markets, including local and long distance wire and wireless telephony, cable television, data communications, Internet, paging, security, etc. As the former Senate Majority Leader Trent Lott

(R-MS) succinctly noted during the debates on the Act, the primary objective of the Act was to establish a “framework where everybody can compete everywhere in everything” by removing barriers that might block or retard the rapid emergence of competition. Congressional Record at S.7906 (June 7, 1995).

In the wireless area, Congress recognized that fulfillment of the pro-competitive goals of the Act would require thousands of new towers and support facilities, which could adversely affect the character, aesthetics, property values, historic significance, and environmental quality of communities across the United States. At one point, Congress considered the possibility of creating a national commission to develop uniform policies for the siting of wireless communications towers. See 141 Cong. Rec. H9954 (daily ed. Oct. 12, 1995) (S.652, Telecommunications Competition and Deregulation Act of 1995, at § 108 Facilities Siting). See *PrimeCo Personal Communications, L.P. v. Village of Fox Lake*, 26 F.Supp. 2d 1052, 1058 (N.D. Ill. 1998). Ultimately, however, Congress attempted to strike a balance between encouraging wireless carriers to enter the telecommunications field and allowing state and local governments to continue to play their traditional roles as protectors of their communities through zoning and other land use measures. As one court has observed, Section 704 of the Telecommunications Act, the provision that reflects this compromise, “fairly bristles with potential issues, from the proper allocation of the burden of proof through the available remedies.” *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999).

B. Language of the Act

Subject to certain specifically enumerated limitations, Section 704 preserves traditional state and local authority over the placement, construction, and modification of facilities used to provide personal wireless services. The term “personal wireless services” (PWS) is defined in Section 704(C)(i) as “commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services.” The term “personal wireless service facilities” is, in turn, defined in Section 704(C)(ii) as “facilities for the provision of personal wireless services.” The critical operative terms of Section 704 read as follows:¹

704. PRESERVATION OF LOCAL ZONING AUTHORITY

(A) General authority

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.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

¹ Section 704 is partially codified at 47 U.S.C. § 332(c)(7).

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) 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.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

Telecommunications Act, § 704, 47 U.S.C. § 332(7).

C. Legislative History

In the legislative history of Section 704, the Joint Conference Committee of the House and the Senate shed additional light on what Congress meant by some of the key terms in Section 332(7):

The conference agreement creates a new section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement. . . .

When utilizing the term “functionally equivalent services” the conferees are referring only to personal wireless services as defined in this section that directly compete against one another. The intent of the conferees is to ensure that a State or local government does not in making a decision regarding the placement, construction and modification of facilities of personal wireless services described in this section unreasonably favor one competitor over another. *The conferees also intend that the phrase “unreasonably discriminate among providers of functionally equivalent services” will provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the*

extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services. For example, the conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district.

Actions taken by State or local governments shall not prohibit or have the effect of prohibiting the placement, construction or modification of personal wireless services. It is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-case basis.

H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 207-08, 1996 WL 46795 (with emphasis added).

In the Conference Report, Congress also specifically directs the Commission to terminate any pending rulemaking proceedings regarding the preemption of local zoning authority over the placement, construction, or modification of cellular towers.

II. KEY CONCEPTS EMBODIED IN SECTION 704

A. Procedural Requirements

The two main procedural requirements imposed by Section 704 are that a denial of an application to place, construct, or modify a tower must be “in writing” and must be supported by “substantial evidence” in a written record. These two requirements have generated more litigation than any of the other requirements of Section 704.

1. “In writing”

a. Relevant Statutory Provision

“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.” Section 704(B)(iii).

b. Key Issues

What information must a written denial include? How detailed must the written decision be?

c. Leading Court Decisions

In *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423, 429 (4th Cir. 1998), the City Council denied permits to build two 135-foot towers on church property in a heavily wooded residential area that had no significant commercial development, no commercial antenna towers, and no above-ground power lines. For various reasons to be discussed later in this memorandum, the City Council rejected the permits simply by stamping the word “DENIED” on a letter describing the application and the date of the decision, but its reasoning was reflected in condensed written notes of its public hearing.

The Fourth Circuit found that the City Council's actions met the "in writing" requirement of Section 704(B)(iii). The court read the "in writing" and the "substantial evidence" requirements separately – i.e., it found that a written decision need not set forth findings and explanations addressing the "substantial evidence" on which the denial was based. Citing the Administrative Procedure Act and various provisions of the Communications Act, the court observed that Congress knew how to require agencies to include written findings of fact and explanations in their decisions but had conspicuously chosen not to include such requirements in Section 704(B)(iii). *Id.* at 430. The Fourth Circuit subsequently reached the same conclusion in *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307, 312-13 (4th Cir.1999) (the word "Denied" written on the first page of an application is sufficient to meet the "in writing" requirement of Section 704).² *See United States Cellular Corporation v. City of Wichita Falls, Texas*, No. Civ.A.7:01-CV-162-R, 2003 WL 21246125 (N.D.Tex. April 21, 2003).

Other courts have required more extensive findings of fact and conclusions of law on the face of the written decision. *See, e.g., Omnipoint Communications, Inc. v. Planning & Zoning Comm'n of the Town of Wallinford*, 83 F.Supp.2d 306, 309 (D. Conn. 2000); *Smart SMR of New York, Inc. v. The Zoning Commission of the Town of Stratford*, 995 F.Supp. 52, 56 (D.Conn.1998); *AT&T Wireless Servs. of Florida, Inc. v. Orange County*, 982 F.Supp. 856, 859 (M.D.Fla.1997); *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F.Supp. 732, 743 (C.D. Ill. 1997); *Western PCS II v. Extraterritorial Zoning Auth.*, 957 F.Supp. 1230, 1236 (D.N.M. 1997).

More recently, the First Circuit has found in *Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.3d 51 (1st Cir. 2001), that both of the foregoing approaches are inadequate. It agreed with the Fourth Circuit that Section 704 does not require written findings of fact and explanations of the locality's conclusions. In fact, the First Circuit added that "strong policy reasons" counsel against such a requirement, because "local boards that administer the zoning laws are primarily staffed by lay people" from whom it is "not realistic to expect highly detailed findings of fact and conclusions of law." *Id.* at 59. The First Circuit concluded, however, that "permitting local boards to issue written denials that give no reasons for a decision would frustrate meaningful judicial review, even where the written record may offer some guidance as to the board's rationale." *Id.* Thus, the First Circuit adopted the following test:

[The Telecommunications Act] requires local boards to issue a written denial separate from the written record. That written denial must contain a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons. We stress, however, that a meaningful review of the decision is not limited, as Southwestern Bell would have it, only to the facts specifically offered in the written decision. Again, such a requirement would place an unjustified premium on the ability of a lay board to write a decision.

² In *Virginia Metronet, Inc. v. Board of Supervisors*, 984 F.Supp. 966 (E.D.Va. 1998), which was decided before the Fourth Circuit issued its *Virginia Beach* opinion, the district court found that the locality had failed to meet the "in writing" requirement of Section 704(B)(iii) because (1) the locality did not include findings of fact and an explanation of its reasoning in its written opinion, and (2) the "writing" in issue was not signed by the decision-making body, the Board of Supervisors, but by a member of the Planning Staff. The first ground was implicitly reversed by *Virginia Beach*, but the second ground is presumably still effective.

Here, shortly after the Board concluded its deliberations and voted to deny the permit, it issued a short written decision. The decision offers little explanation and few facts. Yet the Board states the reasons for its decision with sufficient clarity to permit an assessment of the evidence in the record supporting its reasons.

Id. at 60 (citations omitted). See also *Nextel Communications of the Mid-Atlantic, Inc. v. Town of Randolph*, 193 F.Supp.2d 311 (D.Mass. 2002).

The Sixth Circuit's first treatment of this issue mirrored the First Circuit's "middle position" holding in *Southwestern Bell*. In *New Par v. City of Saginaw*, 301 F.3d 390 (6th Cir. 2002), the Court said:

We hold that for a decision by a State or local government or instrumentality thereof denying a request to place, construct, or modify personal wireless service facilities to be 'in writing' for the purposes of 47 U.S.C. § 332(c)(7)(B)(iii), it must (1) be separate from the written record; (2) describe the reasons for the denial; and (3) contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons.

Id. at 395.

d. Summary and Suggestions

The cases cited above indicate that courts are currently applying at least three interpretations of the "in writing" requirement of Section 704(B)(iii). We suggest that localities go beyond the Fourth Circuit's minimalist approach and include at least a summary of the major grounds for their decisions in any written denial. Not only would such a summary be beneficial to all concerned, but the Fourth Circuit may some day adopt the First Circuit's reasonable compromise, or something like it.

Furthermore, in *AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322 (11th Cir. 2000), *vacated*, 223 F.3d 1324 (11th Cir. 2000), *reinstated*, 250 F.3d 1037 (11th Cir. 2001), the court imposed damages under 42 U.S.C. § 1983 and attorneys fees on the City of Atlanta for failing to meet the "in writing" requirement in denying AT&T permission to construct a tower. While it would seem harsh and unfair for a court to impose damages and attorney fees on a locality in Virginia that believed it was following Fourth Circuit precedent, why take a chance?

2. "Substantial evidence"

As with the "in writing" requirement, the courts are divided in interpreting the "substantial evidence" standard imposed by Section 704(B)(iii). Again, the Fourth Circuit is the most deferential to local authority.

a. Relevant Statutory Provision

"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." Section 704(B)(iii).

b. Key Issues

What law – federal, state or local – determines what evidence is relevant under the substantial evidence standard? What is the quantity, quality and nature of the evidence that is necessary to satisfy the “substantial evidence” standard? Who has the burden of proof?

c. Leading Court Decisions

i. State or local law generally governs what evidence is relevant under the “substantial evidence” standard

In his concurring opinion in *Petersburg Cellular Partnership, d/b/a 360° Communications Co. v. Board of Supervisors of Nottoway County*, 205 F.3d 688 (4th Cir. 2000), Judge Widener extensively reviewed the language and legislative history of Section 704 and concluded that Congress intended that “local and state land use and zoning decisions be tested under *local standards*.” *Id.* at 707 (emphasis in original). Most of the other federal courts of appeal have reached the same conclusion.

In *Aegerter v. City of Delafield*, 174 F.3d 886, 891 (7th Cir.1999), the Seventh Circuit held that “[n]othing in the Telecommunications Act forbids local authorities from applying general and nondiscriminatory standards derived from their zoning codes,” and Congress left “most of the substantive authority to approve the location of personal wireless service facilities in the hands of state or local governments.” In *Town of Amherst v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9 (1st Cir.1999), the First Circuit found that substantial evidence under Section 704 “surely refers to the need for substantial evidence *under the criteria laid down by the zoning law itself*.” *Id.* at 14 (emphasis in original). However, “while it is true that a district court generally defers to a zoning board’s decision and will not substitute its judgment for that of the board, it must overturn the board’s decision under the substantial evidence standard if it cannot conscientiously find that the evidence supporting the decision is substantial when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the board’s view.” *Nextel Communications of the Mid-Atlantic, Inc. v. Town of Provincetown*, No. Civ.A.02-11646-DPW, 2003 WL 21497159 (D.Mass. June 26, 2003)(finding that zoning board’s denial of permit was not supported by substantial evidence).

In *Omnipoint Corp. v. Zoning Hearing Board of Pine Grove Township*, 181 F.3d 403 (3rd Cir. 1999), the Third Circuit observed that “[t]he Board contends the special exception was denied for aesthetic reasons and to protect the values of neighboring properties. Such considerations are sufficient to support the denial of a special exception under Pennsylvania law and are consistent with Congress’ intent to allow localities to accommodate traditional zoning considerations in siting wireless telephone transmitters.” *Id.* at 409 (footnote omitted); accord *Cellular Telephone Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64, 72 (3^d Cir.1999).

Similarly, the Second Circuit found in *Oyster Bay* that “[w]hen evaluating the evidence, local and state zoning laws govern the weight to be given the evidence. The [Telecommunications Act] clearly establishes procedural requirements that local boards must comply with in evaluating cell site applications. And it has been observed that the [Act] does not affect or encroach upon the substantive standards to be applied under established principles of state and local law.” *Oyster Bay*, 166 F.3d at 494 (citations and inner quotes omitted). More recently, the Second Circuit reached the same conclusion in *Todd*, finding

that “‘Substantial evidence’ review under the [Telecommunications Act] does not create a substantive federal limitation upon local land use regulatory power, but is instead centrally directed to those rulings that the Board is expected to make under state law and local ordinance in deciding on variances, special exceptions and the like.” 244 F.3d at 59 (citations and inner quotes omitted).

ii. Quantity, quality and nature of the evidence

In *Virginia Beach*, 155 F.3d 423, 430 (4th Cir. 1998), the Fourth Circuit stated:

The Supreme Court has explained that “[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456 (1951) (internal quotations omitted). While “substantial evidence” is more than a scintilla, it is also less than a preponderance. *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1044 (4th Cir.1997). A court is not free to substitute its judgment for the agency's (or in this case the legislature's); it must uphold a decision that has “substantial support in the record as a whole” even if it might have decided differently as an original matter. *Id.* at 1044 (internal quotations omitted).

The Virginia Beach City Council is a state legislative body, not a federal administrative agency. The “reasonable mind” of a legislator is not necessarily the same as the “reasonable mind” of a bureaucrat, and one should keep the distinction in mind when attempting to impose the “substantial evidence” standard onto the world of legislative decisions. It is not only proper but even expected that a legislature and its members will consider the views of their constituents to be particularly compelling forms of evidence, in zoning as in all other legislative matters. These views, if widely shared, will often trump those of bureaucrats or experts in the minds of reasonable legislators.

On the facts, the Fourth Circuit upheld the City Council’s denial of permits to construct two towers on church grounds in a heavily wooded residential area that had no significant commercial development, no commercial antenna towers, and no above-ground power lines. The court relied heavily on the objections of more than 800 residents, who feared that the towers would materially change the character of their neighborhood.

[The applicants] of course had numerous experts touting both the necessity and the minimal impact of towers at the Church. Such evidence surely would have justified a reasonable legislator in voting to approve the application, and may even amount to a preponderance of the evidence in favor of the application, but the repeated and widespread opposition of a majority of the citizens of Virginia Beach who voiced their views – at the Planning Commission hearing, through petitions, through letters, and at the City Council meeting – amounts to far more than a “mere scintilla” of evidence to persuade a reasonable mind to oppose the application. Indeed, we should wonder at a legislator who ignored such opposition. In all cases of this sort, those seeking to build will come armed with exhibits, experts, and evaluations. Appellees, by urging us to hold that such a predictable barrage mandates that local governments approve applications, effectively demand that we interpret the Act so as always to thwart average, nonexpert citizens; that is, to thwart democracy. The district court dismissed citizen opposition as “generalized concerns.” 979 F.Supp. at

430. Congress, in refusing to abolish local authority over zoning of personal wireless services, categorically rejected this scornful approach.

Id. at 430-31 (citations omitted).

In three of its more recent decisions, the Fourth Circuit has refined its interpretation of the “substantial evidence” standard. First, in *Winston-Salem*, the court reviewed a case that had arisen in North Carolina, where state law treats zoning decisions as quasi-judicial rather than legislative acts. Accordingly, the court ruled that it had to apply the substantial evidence standard in accordance with its precedents concerning federal review of state agency decisions – i.e., “federal courts must accord a zoning board's fact finding the same preclusive effect to which it would have been entitled in the state courts when the agency acted in a judicial capacity and the parties had an adequate opportunity to litigate.” *Winston-Salem*, 172 F.3d. at 314, citing *Williams v. City of Columbia*, 906 F.2d 994, 996 (4th Cir.1990) and *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986). Because North Carolina courts must uphold the decision of a municipal board acting as a quasi-judicial body if the decision was based on competent, material and substantial evidence in the whole record, the Fourth Circuit held the federal district court should have applied that standard as well in reviewing the zoning board’s decision.

Specifically, the Fourth Circuit found that the record in *Winston-Salem* contained substantial evidence to support the zoning board’s decision to deny a permit to construct the proposed tower. That 148-foot tower would have been the first of its kind in the area, would have been constructed just 500 feet from the nearest residential property, would have risen 60-85 feet above the tree line, and would have been adjacent to a house that was currently eligible for listing on the National Register. Among other things, the court noted that eight neighbors had testified that the tower would have a negative effect on the aesthetics and character of their low-density, single-home, residential community; that a mortgage banker had testified that the tower would drive down property resale values; that the City’s historic resources planner had testified that the tower would threaten the historic and cultural value of the entire Winston-Salem community; and that 145 residents had signed a petition opposing the tower. *Id.* at 315-16.

In the second case, *Nottoway County*, 205 F.3d at 695, the Fourth Circuit addressed circumstances that it found to be “substantially and materially different from those in *Virginia Beach* and *Winston-Salem*.” This time, “instead of opposition from hundreds of residents seeking to maintain the character of the residential neighborhood in which they live, we have four individuals – three who testified in person and one who made a telephone call to a Board member – seeking to prevent construction of a tower in a commercially-zoned area based on speculative safety concerns. Moreover, the residents’ objections in this case were readily addressed by objective features of the proposed tower.” *Id.* In these circumstances, the court concluded, the record did not contain substantial evidence to support the city’s denial of a permit.

In *Virginia Beach* and *Winston-Salem*, we held that the widespread expression of concerns about the change that a commercial communications tower would have on the residential character of a neighborhood amounted to substantial evidence. The concerns expressed were objectively reasonable because they were based on known experience about the effects that commercial uses can have on a residential neighborhood. If a legislative body denies a permit based on the *reasonably-founded* concerns of the community, then undoubtedly there is “substantial evidence” to support the body's decision. *If, however, the concerns expressed by a community are objectively unreasonable, such as concerns based*

upon conjecture or speculation, then they lack probative value and will not amount to substantial evidence. The number of persons expressing concerns, standing alone, does not make evidence substantial, but it might be relevant to the reasonableness of the concern. In this case, the concerns expressed by a few citizens in Nottoway County can be readily classified as irrational and therefore insubstantial.

Id. at 695 (emphasis added).

In its third decision, *360° Communications Co. of Charlottesville v. Board of Supervisors of Albemarle County*, 211 F.3d 79 (4th Cir. 2000), the Fourth Circuit found substantial evidence in the record to support a county's denial of a tower construction permit. Among other things, the court noted that between 12-25 citizens of the community testified at two hearings (there may have been some overlap) and 40 signed a petition opposing the tower (again there may have been some overlap). Finding that both the applicant's proposal and the citizens' objections were reasonable, the court concluded, "At bottom, these issues, as to which conflicting evidence was presented, are of the type that zoning boards are typically qualified to resolve." *Id.* at 85; *see, e.g., United States Cellular Corporation v. City of Wichita Falls, Texas*, No. Civ.A.7:01-CV-162-R, 2003 WL 21246125 (N.D.Tex. April 21, 2003)

Courts in other jurisdictions have accorded less weight to the views of non-expert residents, especially in the face of contrary expert testimony. The Third, Sixth and Seventh Circuits have expressly rejected the "reasonable legislator" standard that the Fourth Circuit announced in *Virginia Beach*. Instead, they have interpreted Section 704 as imposing the standard of review that applies to decisions of administrative agencies. *Pine Grove Township*, 181 F.3d at 409; *Telespectrum, Inc. Pub. Serv. Comm. of Kentucky*, 227 F.3d 414, 423 (6th Cir. 2000); *Aegerter*, 174 F.3d at 889. That standard emphasizes objectivity and requires agencies to respond reasonably to evidence contrary to their ultimate decision, and values little, if at all, the political considerations that the Fourth Circuit endorsed in *Virginia Beach*.

In *Oyster Bay*, 166 F.3d at 495, the Second Circuit found it unnecessary to take a position on the Fourth Circuit's *Virginia Beach* approach, as "the few generalized expressions of concern" presented in case before it did not meet even the "low threshold" established in *Virginia Beach*. *Id.* The Second Circuit also found it unnecessary to decided what it called "difficult" and "troubling" questions surrounding constituent testimony regarding property values:

In addition to the uncertain weight to be afforded to citizens' views, this argument raises the issue of how to weigh residents' unsupported expressions of concern against a proffer of expert testimony. *See PrimeCo [Personal Communications, L.P. v. Village of Fox Lake*, 26 F.Supp.2d 1052, 1063 (N.D.Ill.1998)] (holding that, in the face of expert testimony evidence, unsupported constituent testimony in opposition to a cellular tower permit will not satisfy the substantial evidence test); *Cellular Telephone Co. [v. Zoning Bd. of Adjustment*, 24 F.Supp.2d 359, 372 (D.N.J.1998)] (holding that "essentially non-expert testimony presented by local residents with possible biases ... is not enough to discredit the testimony of qualified experts"). Further, since property values can be objectively proven, it is not clear if the Town must receive traditional evidence that would tend to demonstrate that cell sites have a negative impact on property values in order to satisfy the substantial evidence test. *See Sprint Spectrum L.P. v. Town of North Stonington*, 12 F.Supp.2d 247, 254 (D.Conn.1998) (holding that in order for the Town Planning & Zoning Commission to

deny a permit application based on property values, the Town bore the burden of putting evidence into the record tending to show such a negative impact).

Id. at 496.

The First Circuit's position on constituent testimony appears to be somewhat closer to that of the Fourth Circuit than that of the other Circuits. In *Todd*, the First Circuit recently rejected Southwestern Bell's argument that constituent expressions of distaste for the aesthetics of a tower cannot constitute "substantial evidence" in the absence of quantifiable evidence of adverse economic impact associated with the tower's appearance. *Todd*, 244 F.3d at 60-61. The court then upheld the town's rejection of the proposed tower, relying not on the generalized expressions of concern in the record, but on the "majority of the objections to the visual impact of the tower [which] specifically addressed whether this 150-foot tower was appropriate for the particular location." *Id.* at 61. This holding mirrors *Nottoway County's* stricture that constituent testimony can constitute "substantial evidence", but only if it is specific and objectively reasonable.

Finally, in an interesting twist on the value of constituent testimony, the court *AirTouch Cellular v. City of El Cajon*, 83 F.Supp.2d 1158, 1165 (S.D.Cal. 2000), rejected the Fourth Circuit's position that constituent objections alone can constitute substantial evidence. However, after determining that the City had "reached beyond" constituent testimony and relied on other evidence, including the testimony of AirTouch's expert, the court found that "the residents' experience with [the existing provider] make their observations on noise, visual blight, etc., *more*, rather than less credible or 'substantiated' since they are based on personal experience and not on speculation." *Id.* (emphasis in original).

iii. Burden of proof

Although the courts initially split on whether Section 704 imposes the burden of proof on the applicant, the opposing parties, or the locality, the courts have increasingly tended to impose the burden of proof on the applicant. For example, in *Town of Amherst*, the First Circuit discussed burden of proof in the context of alleged "effective" prohibitions:

If the criteria [in the ordinances] or their administration effectively preclude towers no matter what the carrier does, they may amount to a ban "in effect" even though substantial evidence will almost certainly exist for the denial. *See Virginia Metronet, Inc. v. Board of Supervisors*, 984 F.Supp. 966, 970 (E.D.Va. 1998). In that event, the regulation is unlawful under the statute's "effect" provision. But the burden for the carrier invoking this provision is a heavy one: to show from language or circumstances not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try.

Town of Amherst, 173 F.3d at 16; *see Nextel Communications of the Mid-Atlantic, Inc. v. Town of Provincetown*, No. Civ.A.02-11646-DPW, 2003 WL 21497159 (D.Mass. June 26, 2003).

Omnipoint Communications Enterprises, Ltd. v. Zoning Hearing Board of Easttown Township, 248 F.3d 101 (3rd Cir. 2001), the Third Circuit summarized its position on burden of proof as follows:

In *Penn Township* we established a two-prong test to determine if the decision of a local zoning authority has "the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). It requires that the service provider first "show that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network." *Penn Township*, 196 F.3d at 480. If this burden is met, the provider must still prove "that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve."

Id. at 109.

Similarly, in *Todd*, the First Circuit rejected Southwestern Bell's argument that the burden was on the town to show that alternative sites were available:

We see nothing in the [Telecommunications Act] that would support placing a burden upon the Board to present evidence that there were other sites available to Southwestern Bell with a lesser minimal visual impact. The "substantial evidence" requirement does nothing more than allow applicants to overturn denials if they can prove that the denial lacks adequate evidentiary support in the record. Although that substantial evidence requirement is complemented by the provision in the [Telecommunications Act] that prevents a locality from prohibiting personal wireless services, *see Town of Amherst, id. at 16*, the burden would be on Southwestern Bell, and not the Board.

Todd, 244 F.3d at 63.

In *Albemarle County*, the Fourth Circuit made clear that it, too, interprets Section 704 as imposing the burden of proof on the party seeking to place, construct or modify a tower. In fact, the Fourth Circuit criticized the Second and Third Circuits for failing to go far enough to impose the burden of proof on applicants:

Concluding that a single denial could, in certain circumstances, violate [Section 704(B)(i)(II)], the Second and Third Circuits have adopted an interpretation of (B)(i)(II) under which the denial of a permit for a site that is "the least intrusive means to close a significant gap in service" would amount to a denial of wireless services in violation of that section. *See APT Pittsburgh Ltd. Partnership v. Penn Township*, 196 F.3d 469, 480 (3d Cir.1999); *Sprint Spectrum*, 176 F.3d at 643; *see also Cellular Telephone Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64, 70 (3d Cir.1999). This interpretive rule effectively creates a presumption, shifting the burden of production to the local government to explain its reason for denying such an application. But, as an interpretation of the Telecommunications Act, we believe this rule reads too much into the Act, unduly limiting what is essentially a fact-bound inquiry. A community could rationally reject the least intrusive proposal in favor of a more intrusive proposal that provides better service or that better promotes commercial goals of the community.

Albemarle County, 211 F.3d 79 at 87.³

³ Since a provider would rarely challenge a decision that granted a more intrusive proposal than other available options, the Fourth Circuit presumably intended, by its last statement in the passage

Even where the burden is on the provider, however, the facts of a particular case can significantly complicate matters. For example, in *Nextel Partners of Upstate New York v. Town of Canaan*, 62 F.Supp.2d 691 (N.D.N.Y. 1999), Nextel complained that, by repeatedly asking for more information, the Town unreasonably delayed acting on Nextel's request for a special use permit and effectively prohibited it from providing wireless services. Among other things, Nextel alleged that it had evaluated eleven alternative sites and presented the Town evidence that construction of the facilities it needed would be infeasible at these sites, but the Town had played "cat and mouse" with Nextel by demanding even more analyses. The Town countered that Nextel's analyses were deficient in several respects, and it presented an analysis by its own expert to prove this. The court agreed with Nextel that "a zoning authority could transform an application into a self-perpetuating, endless odyssey," but it found, based on the complexities involved and the testimony of the Town's expert, that this had not occurred in the present case. *Id.* at 695. Who actually had the burden of proof in this case? The court did not say.

iv. Factors that Localities Can Take Into Account

(A). Aesthetic Concerns

The legislative history of Section 704 and numerous cases, including *Virginia Beach*, *Winston-Salem*, *Albemarle County*, *Amherst*, *Aegerter*, *Pine Grove Township*, *Ho-Ho-Kus* and *Todd* recognize that state laws virtually universally authorize localities to take aesthetic concerns into account in evaluating a tower siting application. In several "aesthetics" cases, however, a question has arisen about whether aesthetics alone can satisfy the "substantial evidence" requirement of Section 704. While the Fourth Circuit has not explicitly addressed this specific question and the *Virginia Beach* case could be read to answer it in the affirmative,⁴ a recent federal case from Virginia held that, under Virginia law, aesthetics

quoted, to insulate local governing bodies from claims by opponents of the more intrusive proposal.

⁴ In the decision that the Fourth Circuit reversed in *Virginia Beach*, the lower court had found that, under Virginia law, aesthetics alone cannot justify limiting or restricting land use. *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 979 F.Supp. 416, 418 (E.D.Va. 1997); see also another pre-*Virginia Beach* case, *Virginia Metronet*, 984 F.Supp. at 975. After *Virginia Beach* was decided, the lower court in *Albemarle County*, 50 F.Supp.2d at 559-60, reiterated the suggestion that Virginia law does not allow rejection of a tower solely on grounds of aesthetics, but it found that *Virginia Beach*'s ruling to the contrary was now controlling on this issue:

[T]his Circuit's holdings that permit constituent concerns about aesthetics to constitute substantial evidence may be in conflict with Virginia law. In the words of the Supreme Court of Virginia, "a county cannot limit or restrict the use which a person may make of his property under the guise of its police power where the exercise of such power would be justified solely on aesthetic considerations." *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975) (citing *Kenyon Peck v. Kennedy*, 210 Va. 60, 64, 168 S.E.2d 117, 120-21 (1969)). While this state law is not a governing factor in this case, any conflict between state and federal law should be avoided. This court is, however, bound by

alone *cannot* be a valid basis for a zoning decision. *USCOC of Virginia RSA#3 Inc. et al. v. Montgomery County Board of Supervisors*, No 7:02cv01065 (W.D. Va. Feb. 24, 2003)(Board improperly denied 240' lattice tower, while approving 195' stealth monopole tower in the same location). The *USCOC* Court distinguished *Virginia Beach* by noting that *Virginia Beach* involved significant constituent opposition to the tower, in addition to aesthetic concerns, and thus did not run afoul of Virginia law as set forth in *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975).

Elsewhere, in *Todd*, 244 F.3d at 51, the First Circuit found that a Massachusetts law allows a locality to reject a proposed tower solely on the basis of aesthetic considerations, as long as there is substantial evidence in the record to support this conclusion. *See also Nextel Communications of the Mid-Atlantic v. City of Cambridge*, CA No. 02-10429-GAO (D.Mass. Feb. 28, 2003): "A municipality may decide to reject a wireless project because of aesthetic concerns without justifying that judgment by reference to an economic or other quantifiable impact. *Todd*, 244 F.3d at 61. The town's aesthetic judgment is valid as long as it is grounded in the specifics of the case and does not reflect generalized negative views that could apply to any wireless technology installation, regardless of location." *Id.*

Similarly, the Second Circuit noted in *Oyster Bay*, 166 F.3d at 494, that "aesthetics can be a valid ground for local zoning decisions" under New York law and that the Telecommunications Act allows courts to uphold local decisions based on aesthetic considerations "if we can conclude that there was "more than a mere scintilla" of evidence, *Universal Camera*, 340 U.S. at 477, 71 S.Ct. 456, before the Board on the negative visual impact of the cell sites." *See also Sprint Spectrum L.P. v. Board of Zoning Appeals of the Town of Brookhaven*, No. 01-CV-4508 (E.D.N.Y. Feb. 5, 2003); *see also Laurence Wolf Capital Mgmt. Trust v. City of Ferndale*, 128 F.Supp.2d 441 (E.D.Mich. 2000).

(B). Property Values

Potential reduction in property values is unquestionably a factor that localities can take into account. The key question is whether lay testimony alone can satisfy the "substantial evidence" requirement of Section 704 in the face of contrary expert testimony. Again, the Fourth Circuit has not explicitly addressed this question, but *Virginia Beach* suggests that it would probably answer it in the affirmative. Courts in other jurisdictions are divided. Note particularly the Second Circuit's decision in *Oyster Bay*, 166 F.3d at 494, citing several district court cases that had raised "difficult" and "troubling" concerns about whether lay testimony without objective support can constitute "substantial evidence" under Section 704.

(C). Historic Sites

In *Winston Salem*, the court found that concern over the impact on a neighboring historic site was a legitimate consideration and, along with other factors, such as the absence of nearby commercial property, amounted to substantial evidence supporting the denial of the application. In *Amherst*, 173 F.3d at 16, the First Circuit also recognized that a locality can legitimately base its decision on a tower's interference with a historical district.

the Fourth Circuit's clear holdings in *Virginia Beach* and *Winston-Salem* and must decide this case on the basis of those decisions.

Under certain circumstances, Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470, requires persons seeking to place, construct or modify wireless facilities to conduct environmental assessments of actions that potentially affect historic properties. *See also* discussion of the National Environmental Protection Act, 42 U.S.C. §§ 4321-35, in Subsection (F) below. The Advisory Council on Historic Preservation is the federal agency that oversees Section 106 of the NHPA and has the legal responsibility to balance historic preservation concerns with the requirements of federal projects. The process is governed by a set of regulations created by the Advisory Council. Under the regulations, Section 106 is triggered when there is an undertaking by an agency, such as granting licenses or permits, and such an action has the potential to affect properties listed on or eligible to be listed on the Register of Historic Places. Once the agency has concluded that its undertaking would trigger Section 106, the agency must consult with the appropriate state and local officials, typically the State Historic Preservation Officer (“SHPO”), Tribal Historic Preservation Officers, or members of the general public, and initiate the Section 106 review process.⁵ On March 16, 2001, the FCC executed a Nationwide Programmatic Agreement for the Collocation of Wireless Antennas with the National Conference of State Historic Preservation Officers and the Advisory Council on Historic Preservation. This agreement exempted most collocations on existing structures and towers from the procedures enumerated in the Advisory Council’s rules.

The Section 106 process for wireless facilities appears to be in for some changes. The FCC recently embarked on an effort to “develop the agency’s first comprehensive strategic plan to improve our ability to protect valuable historic and environmental resources, while at the same time accelerating the process of deploying necessary communications infrastructure.” *Environmental and Historic Preservation Action Plan*, Statement by FCC Chairman Michael K. Powell, (released May 1, 2003). On June 9, 2003 the FCC issued a Notice of Proposed Rulemaking, seeking comment on a draft agreement among the FCC, the Advisory Council on Historic Preservation, and the National Conference of State Historic Preservation Officers to “tailor and streamline procedures for review of communications facility deployments under the National Historic Preservation Act.” *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, Notice of Proposed Rulemaking, FCC 03-125 (rel. June 9, 2003).

On March 11, 2003 the FCC reviewed and dismissed a recommendation from the New York State Historic Preservation Officer, which claimed that a 185 foot tower proposed for a site near a New York property listed on the National Register of Historic Places (the “Lorenzo Property”) would adversely affect the viewshed of the property. In its Report, the Commission concluded that “given the weak evidence that the viewshed in which the tower is to be located should be considered a characteristic that qualifies Lorenzo for inclusion in the National Register and the limited visual effect of the tower, the Commission can find that the undertaking will not have an Adverse Effect on Lorenzo.” *In Re Section 106 Review of an FCC Undertaking, Syracuse SMSA Limited Partnership*, Proposed Finding of No Adverse Effect at the Woodfield Road Site Near Cazenovia, New York, Dkt. No. DA-03-615 (March 11, 2003).

⁵ On September 21, 2000, the Advisory Council issued a letter authorizing licensees, applicants, tower construction companies, and their authorized representatives to act on behalf of the FCC when contacting state and local authorities. The letter indicated that the FCC still remains responsible to participate in the process in the event of a disagreement between the providers and the local officials regarding the assessment or identification of issues, when it is determined that the Criteria for Adverse Effects apply to an undertaking, and when there is an objection from the consulting parties or the public regarding findings and determinations.

(D). Number, Height, Types, Location, and Impact of Facilities

Number, height, types, location, and impact of personal wireless service facilities are clearly factors that localities can take into account. Indeed, localities are generally *required* to do so under state and local law. As the First Circuit observed in *Amherst*, 173 F.3d at 15:

Ultimately, we are in the land of trade-offs: on one side are the opportunity for the carrier to save costs, pay more to the town, and reduce the number of towers; on the other are more costs, more towers, but possibly less offensive sites, and somewhat shorter towers. Omnipoint may think that even from an aesthetic standpoint, its solution is best. But subject to an outer limit, such choices are just what Congress has reserved to the town.

But cf., Nextel Communications of the Mid-Atlantic, Inc. v. Town of Provincetown, No. Civ.A.02-11646-DPW, 2003 WL 21497159 (D.Mass. June 26, 2003)(finding town's denial of permit for cellular device in cupola of private home, in large part because it required a zoning variance, to be an effective prohibition and unsupportable).

Courts have also recognized that communities can deny towers that would make what they perceive to be a bad situation worse. The Second Circuit found in *Sprint Spectrum, LP v. Willoth*, 176 F.3d 630 (2nd Cir. 1999) that "it is not unreasonably discriminatory to deny a subsequent application for a cell site that is substantially more intrusive than existing cell sites by virtue of its structure, placement or cumulative impact." Similarly, the court in *El Cajon* upheld the City's decision to deny AirTouch permission to locate antennas on a water tower, even though the City had previously granted Nextel the right to place its facilities on the same tower. The court rejected AirTouch's claim that the City's action amounted to unreasonable discrimination.

In this case, the Court finds that the City did not discriminate against AirTouch at all, let alone unreasonably. While Nextel's prior application on the same site had previously been granted, the situation in the neighborhood had changed in the time between Nextel's application and AirTouch's. At the hearings on AirTouch's application, the residents expressed concern regarding the *increase* in antennas, adding *another* equipment structure, and an *increase* in visual blight and problems such as noise.

El Cajon, 83 F.Supp.2d at 1166 (emphasis in original); *see also Cellular Telephone Company v. Zoning Board of Adjustment of the Borough of Harrington Park*, 90 F.Supp.2d 557, 570 (D.N.J. 2000) (zoning board could reasonably reject proposal for a variance to construct a tower on a lot "already overcrowded with existing uses").

(E). Quality of Service

In *Ho-Ho-Kus*, two radio frequency engineers testified for the providers that there were areas within the Borough where the quality of service was very poor. Residents offered evidence to the contrary in the form of several tape recorded cellular calls placed from different areas in the Borough. The provider claimed that federal law regulating the telecommunications industry preempts localities from regulating the quality of wireless services. The Third Circuit rejected the provider's assertion that local authorities

are wholly barred from considering the quality of existing personal wireless service in determining whether to approve a proposed tower site. The court stated, however, that

In so holding, we do not suggest that the discretion of local officials is unlimited. The Telecommunications Act imposed a number of explicit restrictions on the exercise of local zoning authority. For example, determinations concerning the quality of existing service must be based in substantial, competent evidence and remain subject to judicial review.

Ho-Ho-Kus, 197 F.3d at 70.

On the merits, the Third Circuit agreed with the district court that “the tape recordings made by the non-expert local opponents of the proposed facility were too insubstantial to discredit the expert testimony presented by the providers.” *Id.* at 73.

Also, in *Virginia Beach*, 155 F.3d at 427-28, the Fourth Circuit impliedly took quality of service into account when it observed that the City Council could reasonably honor its constituents’ preference to settle for analog service rather than obtain digital service at the cost of two new towers in their community.

(F). Safety and Environmental Concerns

Localities can lawfully rely on environmental considerations to deny an application to construct a tower, as long as such considerations do not involve radio frequency emissions.⁶ For example, in *Albemarle County*, the Board found, among other things, that the proposed tower was contrary to the County’s Comprehensive Space Plan as well as the County’s Open Space Plan, which provide that “any serious modifications of the natural ridge lines in the County will modify the visual character of an entire area,’ that ‘activities which alter the continuity of the ridge line...should be discouraged,’ and that ‘issues related to soil erosion [and] surface water runoff’ are amplified in mountainous areas.” Several residents and the Board expressed the concern that the proposed tower would be inconsistent with environmental preservation goals, and that the access road for the tower would disturb steep, critical slopes. *Albemarle County*, 211 F.3d at 84.

Similarly, in *American Towers, Inc. v. Williams*, 146 F.Supp.2d 27 (D.D.C. 2001), the court upheld the District of Columbia’s revocation of a permit to erect a 756-foot tower, which the District had based in part on concerns about the environmental hazards of falling ice from so tall a structure. The court noted that “while Section [704](B)(iv) of the Act prohibits any regulation on the placement of wireless facilities based upon environmental effects, the restriction by its explicit terms applies only to regulations on facilities based on concerns over radio frequency emissions. Because the District’s expressed concern was over falling ice and the resulting safety risk, the District’s action would appear to fall outside of Section [704](B)(iv)’s prohibition.” *Id.* at 35-36.

The Second Circuit recently made a distinction in this context between a local government acting in a regulatory capacity, and a local government enforcing contractual lease provisions as a property owner. In *Sprint Spectrum L.P. v. Mills*, No. 01-7116, 283 F.3d 404 WL334948 (2nd Cir. March 5, 2002),

⁶ See discussion in Section B.4. below of the Act’s proscription of state and local consideration of the environmental effects of radio frequency emissions.

the Court held that a tower lease requiring the wireless service provider to adhere to FCC radiofrequency emission standards did not constitute an impermissible regulation and was not preempted by §704(B)(iv).

Environmental concerns also implicate the National Environmental Policy Act of 1969, which requires all federal agencies to take into account environmental consequences in their decision making process. Since the FCC is a licensing agency, it complies with the provisions in NEPA by requiring the wireless providers to whom it issues licenses to issue Environmental Assessments (EA) when required by statute and regulation. The FCC has promulgated regulations creating eight categories of facilities that may have a significant environmental impact and require preparation of an Environmental Assessment by the provider. The categories are as follows: (1) facilities that are to be located in an officially designated wilderness area; (2) facilities that are to be located in an officially designated wildlife preserve; (3) facilities that may affect listed threatened or endangered species or critical habitats; (4) facilities that may affect historic districts or areas or places listed or eligible to be designated on the National Register of Historic Places; (5) facilities that may effect Indian religious sites; (6) facilities located in a Flood Plain; (7) facilities whose construction will involve significant change in surface features; and (8) facilities that are to be equipped with high intensity white lights which are to be located in residential neighborhoods. See 47 C.F.R. 1.1307 (a). A service provider must consider the eight categories and decide if their proposed facility fits into any of the categories that would have a significant environmental effect. If so, the provider must file an Environmental Assessment with the FCC. The FCC will then review the complete filing, place the filing on public notice, and review the EA. If the FCC renders a finding of impact, the licensee is allowed an opportunity to amend its proposal.

d. Summary and Suggestions

While the federal appellate cases decided over the last five years may suggest that the federal circuit courts of appeal differ significantly in their approaches to the “substantial evidence” standard of Section 704(B)(iii), we believe that such differences are greatly overstated. To be sure, the Fourth Circuit is nominally more deferential to local authority than any other federal court of appeals. Yet, the outcome of the *Virginia Beach*, *Winston-Salem*, *Nottoway County* and *Albemarle County* cases would probably have been the same in any other federal circuit, and, conversely, the Fourth Circuit would probably have reached the same conclusions in the other circuits’ major cases.

B. Substantive Limitations

1. State and Local Governments Cannot Unreasonably Discriminate Among Providers of Functionally Equivalent Services

a. Relevant Statutory Provision

“The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof ... shall not unreasonably discriminate among providers of functionally equivalent services....” Section 704(B)(I)(I).

b. Key Issues

Does the locality seek to regulate a “personal wireless service facility” or a facility of some other kind that is not covered by Section 704? What does “functionally equivalent service” mean? What kinds of discrimination, if any, are permissible?

c. Leading Court Decisions

i. “Personal wireless service facility”

In *American Towers*, the court dismissed a provider’s claim that the City had violated the Telecommunications Act when it rescinded a permit previously granted to the provider to construct a 756-foot tower. The Court found that the City’s actions were not subject to challenge under Section 704 because the primary purpose for the tower was to support High Definition Television (HDTV), and both the height of the tower and the City’s concerns about falling ice from that height, stemmed from the demands of HDTV, not personal wireless service. Furthermore, the Court held that having a single wireless antenna attached to the tower did not turn the tower into a “personal wireless service facility” for the purposes of Section 704. *American Towers*, 146 F.Supp.2d at 35.

ii. “Functionally equivalent services”

The legislative history of Section 704 makes clear that the term “functionally equivalent services” refers “only to *personal wireless services* as defined in this section that directly compete against one another.” H.R. Conf. Rep. No. 104-458, at 208 (emphasis added); *see also* Section I.C. above. The term “personal wireless services,” in turn, means “commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services.” Section 704(C)(i). Thus, providers of commercial wireless telecommunications services do not have standing under Section 704 to complain about more favorable treatment of entities with which they do not compete, including amateur radio operators, cable operators, electric utilities, or providers of HDTV.

In *Aegerter*, the court found that one-way wireless paging service is not “functionally equivalent” to cellular telephone service and that a locality could reasonably deny a provider of paging services permission to construct a 400 foot tower after having approved several “significantly shorter” towers for two-way cellular service. The court reasoned:

Whether or not two services are “functionally equivalent” depends on what the phrase means, which raises a question of law. In our view, the phrase is reminiscent of the common question in antitrust cases whether two products are in the same relevant market. In each instance, the statute requires the decision maker to see if the two services (or products) are direct substitutes for one another and thus are in direct competition with one another. *See also* H.R. Conf. Rep. 104-458 at 208 (1996) (defining the term to refer to services that directly compete against one another). In order to answer that question, it is common to compare the characteristics of the service or product, the price of each one, and the willingness of consumers have shown to switch from one to another when the price of one changes. Here, one is struck immediately by a number of salient differences between two-way cellular telephone service and one-way paging services, as each exists in the market today. First (and obviously), a cellular caller has an interactive and immediate

conversation with the recipient of the call; there is no need to find a telephone, call back, or drive to the caller in order to respond. Second, although prices for wireless telephone service have fallen lately, there is still a significant difference in price for paging services and cellular telephone service. Wireless telephones are simply a far more versatile product, and even though an increase in the price of paging services might cause a consumer to switch to a cellular telephone, this record does not show that an increase in the price of cellular telephone services would cause a consumer to switch to a pager.

Aegerter, 174 F.3d at 891-892 (citations omitted).

Similarly, the Third Circuit recently noted: “[T]he equivalency of function relates to the telecommunications services the entity provides rather than to the technical particularities of its operations.” *Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Board of Easttown Township*, 331 F.3d 386 (3rd Cir. 2003)(“*Omnipoint IP*”)

iii. “Unreasonably discriminate”

The legislative history of Section 704 also makes clear that Congress intended “to provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services.” H.R. Conf. Rep. No. 104-458, at 208; *see also* Section I.C. above.

In *Virginia Beach*, the City denied permits to build two 135-foot towers on church property in a heavily wooded residential area that had no significant commercial development, no commercial antenna towers, and no above-ground power lines. Residents in the area already received analog cellular service but not digital service. Each tower would have supported new service by one digital service provider as well as upgraded service by one analog service provider. The court rejected a claim that the City’s action discriminated unreasonably against providers of digital service, finding that there was no evidence of bias in favor of analog service providers, that the City’s decision treated all providers the same, and that the four providers in issue were the only ones in the Virginia Beach market. The court also stated that even if there were an element of discrimination, the City’s action would still have been lawful, as “the Act explicitly contemplates that some discrimination among providers of functionally equivalent services is allowed.” *Virginia Beach*, 155 F.3d at 427.

In *Willoth*, Sprint Spectrum proposed to build three 150-foot towers in sensitive parts of a city to support digital personal communications service (PCS) and claimed that the City had unreasonably discriminated against it and in favor of Frontier, a provider of analog cellular service with a single tower in a commercial section of the City. First, Sprint alleged that it was required to comply with a much more rigorous environmental review process than Frontier. Second, Sprint claimed that it was denied permission to build the three towers it needed to provide in-building coverage, whereas Frontier was allowed to build the single tower that it needed to provide in-building service. The court assumed that the City’s action was discriminatory but, citing the legislative history of Section 704 and *Virginia Beach*, found that the City could reasonably take the location of the proposed towers into consideration in deciding whether to require a more probing inquiry and whether to approve construction of the towers. *Willoth*, 176 F.3d at 639.

In *El Cajon*, the City denied AirTouch permission to place antennas on a public water tower in a “residential suburban zone,” even though another wireless carrier, Nextel, had previously installed its facilities on the tower. Relying heavily on the complaints of the residents about the noise and unattractiveness of Nextel’s facilities, the court found that the City’s discrimination was reasonable in view of its reasonable fear that AirTouch’s proposed antennas would amplify the problems that Nextel was already creating. *El Cajon*, 83 F.Supp.2d at 1165. See, e.g., *Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Board of Easttown Township*, 331 F.3d 386 (3rd Cir. 2003)(“*Omnipoint II*”).

In *Omnipoint Communications, Inc. v. Port Authority of New York and New Jersey*, 1999 WL 494120 (S.D.N.Y. 1999), a provider of digital PCS alleged that the Port Authority had engaged in unreasonable discrimination by allowing two providers of analog services to continue to provide service in the Lincoln and Holland tunnels pursuant to an existing agreement, while forcing Omnipoint to negotiate a new agreement to install facilities in the tunnels. The court concluded that even if such treatment could be considered discriminatory, it did not amount to unreasonable discrimination because Omnipoint’s application presented technical and other challenges that were significantly different from those surrounding the existing providers.

In *Iowa Wireless Services v. City of Moline, IL*, 29 F.Supp.2d 915, 923 (C.D. Ill. 1998), the court held that no reasonable jury could find the City had discriminated unreasonably against a digital PCS provider where (1) there was no evidence that the City’s action would have been different had any other provider wishing to construct a new tower applied; (2) there was no evidence that the City favored analog over digital services; (3) the City had approved the provider’s installation of four other antennae within the City; (4) the circumstances had changed since the City had granted another provider permission to build its tower – there were now three, rather than two, towers already present; and (5) unlike the present situation, the City had received no objections to the other provider’s tower. Furthermore, the court also found that a city does not have to allow a provider of digital PCS to erect a tower to compete effectively with a provider of analog telecommunications service because “a plain reading of the [Telecommunications Act] does not require municipalities to pave the way for every incremental advance in technology.” *Id.*

d. Summary and Suggestions

Localities, particularly in the Fourth Circuit, have substantial latitude in drawing reasonable distinctions among providers of functionally equivalent services. Localities can use this flexibility to their advantage by establishing “tiers” of requirements that become increasingly rigorous as the impacts of a proposed tower and the sensitivity of the area increases. For example, a locality can encourage construction in industrial areas, as compared to residential areas, by making it relatively easy for a potential provider to construct in an industrial area and relatively difficult in a residential area. A tiered approach can also be used to encourage collocation, use of “stealth” (i.e., disguised) technologies, and other desirable goals.

2. State and Local Governments Cannot Expressly or Effectively Prohibit Service

a. Relevant Statutory Provision

“The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof ... shall not prohibit or have the effect of prohibiting the provision of personal wireless services.” Section 704(B)(i)(II).

b. Key Issues

Does Section 704 apply only to prohibitions of general applicability or also to prohibitions in individual cases? What exactly do the terms “prohibit” and “have the effect of prohibiting” mean? Can a locality explicitly or effectively prohibit a new provider from providing service if an existing provider is already providing service in the area? Who has the burden of proof on whether a local requirement has “the effect” of a prohibition?

c. Leading Court Decisions

i. General Bans v. Case-by-Case Decisions

In *Virginia Beach*, the Fourth Circuit ruled that Section 704(B)(i)(II) applies only to “blanket prohibitions” and “general bans or policies,” and not to individual zoning decisions. Any other interpretation, the court stated, “would effectively nullify local authority by mandating approval of all (or nearly all) applications, a result contrary to the explicit language of section (B)(iii), which manifestly contemplates the ability of local authorities to ‘deny a request.’” *Virginia Beach*, 155 F.3d 423 at 428. In dictum, the court observed that “we see no reason why policies that do not explicitly ban new service but do, when applied on a case-by-case basis, guarantee the rejection of every application could not also violate subsection (II).” *Id.* at 429.⁷

In a subsequent decision, *Albemarle County*, the Fourth Circuit expanded on its *Virginia Beach* analysis and specifically addressed the issue whether a “single denial of a site permit could ever amount in effect to the prohibition of wireless services.” The Court agreed with the conclusion reached in *Virginia Beach* that a single denial of a permit for a particular site cannot, standing alone, be considered an effective prohibition. Instead, the court reasoned “there must be something more, taken from circumstances of the particular application or from the procedure for processing the application, that produces the ‘effect’ of prohibiting wireless services.” *Albemarle County*, 211 F.3d at 86. The court rejected the approach that the Second and Third Circuits were following, *see* discussion below, and determined that the inquiry whether a local action is an “effective prohibition” is best answered by utilizing the case-by-case approach anticipated by the Act. The court recognized the theoretical possibility that a single denial could equate to effective prohibition, but emphasized the provider faced a heavy burden in making such a claim. *Id.*

Furthermore, the Fourth Circuit also rejected the lower court’s determination that a provider could prove that a denial constitutes an “effective prohibition” by showing that it could not provide a high level of wireless service at a cost close to industry standards through the use of another site. The Fourth Circuit found that the appropriate standard is not whether the cost of a tower is in line with industry standards, but

⁷ For an example of a standard that no provider can meet, *see Borough of Harrington Park*, 90 F.Supp.2d 557 (D.N.J. 2000). There, the court noted that the zoning board’s findings that “there are or will be towers in surrounding towns” and that “new technology” exists that offers “an attractive alternative to towers” were “facially neutral” but, when applied on a case-by-case basis, “guarantee the rejection of every application.” *Id.* at 572. The court found, however, that the zoning board had actually based its decision on other legitimate grounds and had merely thrown “everything but the kitchen sink” to buttress that decision. *Id.*

whether the tower is feasible, and the record did not include sufficient information for a determination of that issue. *Id.* at 87-88.

In *Amherst*, the First Circuit rejected the township's argument, based on an unduly narrow interpretation of *Virginia Beach*, that Section 704(B)(i)(II) applies only to general bans:

Obviously, an individual denial is not automatically a forbidden prohibition violating the "effects" provision. But neither can we rule out the possibility that – based on language or circumstances –some individual decisions could be shown to reflect, or represent, an effective prohibition on personal wireless service. Suppose, for example, that in denying an individual permit, the town zoning authority announces that no towers will ever be allowed or sets out criteria that no one could meet. The fact that the ban is embodied in an individual decision does not immunize it. ...

If the criteria or their administration effectively preclude towers no matter what the carrier does, they may amount to a ban "in effect" even though substantial evidence will almost certainly exist for the denial. *See Virginia Metronet, Inc. v. Board of Supervisors*, 984 F.Supp. 966, 970 (E.D. Va.1998). In that event, the regulation is unlawful under the statute's "effect" provision. But the burden for the carrier invoking this provision is a heavy one: to show from language or circumstances not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try.

Amherst, 173 F.3d at 14. *See also Omnipoint Holdings v. Town of Westford*, 206 F.Supp.2d 166, (D.Mass 2002); *Nextel Communications of the Mid-Atlantic, Inc. v. Town of Provincetown*, No. Civ.A.02-11646-DPW, 2003 WL 21497159 (D.Mass. June 26, 2003).

In *Willoth*, the Second Circuit rejected a carrier's all-or-nothing interpretation of Section (B)(i)(II):

The essence of Sprint's argument is that it has the right under this provision of the [Telecommunications Act] to construct any and all towers that, in its business judgment, it deems necessary to compete effectively with other telecommunications providers, wireless or not. Otherwise, Sprint argues in substance, the effect will be to "prohibit ... the provision of personal wireless services." This untenable position founders on the statutory language. Since Sprint admits it would never propose to build towers it deems unnecessary to compete successfully, a fact which undoubtedly will hold true for most service providers, *such a rule would effectively nullify a local government's right to deny construction of wireless telecommunications facilities, a right explicitly contemplated in 47 U.S.C. § 332(c)(7)(B)(iii)*. *See [Virginia Beach]*, 155 F.3d at 428.

Willoth, 176 F.3d at 639 (emphasis added).

Willoth also held that local governments have more room to deny applications if another provider is servicing an area:

[O]nce an area is sufficiently serviced by a wireless service provider, the right to deny applications becomes broader: State and local governments may deny subsequent

applications without thereby violating subsection B(i)(II). The right to deny applications will still be tempered by subsection B(i)(I), which prohibits unreasonable discrimination. However, *it is not unreasonably discriminatory to deny a subsequent application for a cell site that is substantially more intrusive than existing cell sites by virtue of its structure, placement or cumulative impact.*

Id. at 643 (emphasis added).

The Third Circuit has developed a slightly different approach, which it recently summarized in *Easttown Township ("Omnipoint I")*, 248 F.3d at 109:

In [*APT Pittsburgh Ltd. v. Penn Township, Butler County*, 196 F.3d 469 (3d Cir.1999)], we established a two-prong test to determine if the decision of a local zoning authority has "the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). It requires that the service provider first "show that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network." *Penn Township*, 196 F.3d at 480. If this burden is met, the provider must still prove "that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve." *Id.*

The Seventh Circuit has not yet considered a claim brought pursuant to § 332(c)(7)(B)(i)(II), but a Wisconsin district court in *Voicestream Minneapolis v. St. Croix County*, 212 F.Supp.2d 914 (W.D.Wisc. 2002) attempted to reconcile the various approaches, focusing on the provider's burden to prove that other, less intrusive means do not exist:

Although circuit courts have formulated slightly different variations of what additional proof a provider must bring to demonstrate that a governmental entity has effectively prohibited wireless service by denying a single request to construct a telecommunications tower at a particular location, all agree that the availability of other, less intrusive feasible alternatives to close a gap in the provider's service to its customers will defeat a § 332(c)(7)(B)(i)(II) claim. *See Penn Township*, 196 F.3d at 480 . . . ; *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 639 . . . ; *360 Communications*, 211 F.3d at 87-88 . . . ; *Town of Amherst, N.H.*, 173 F.3d at 14 Further, these courts agree that the burden is on the provider to develop a record showing that it made a "full" or "good faith" effort to identify and evaluate less intrusive alternatives and that the alternatives are not feasible to serve its customers. . . .

Voicestream Minneapolis, 212 F.Supp.2d at 927-28.

ii. "Gaps" v. "Significant Gaps"

In order to determine what exactly Section 704(B)(i)(II) precludes state and local governments from prohibiting, the Second Circuit, in *Willoth*, performed an extensive analysis of the interplay between Section 704(B)(i)(II) and the definition of "personal wireless service" in Section 704(C)(i). Based on this analysis, the court concluded that the key issue is whether a denial effectively precludes the closing of service gaps:

By speaking in terms of communications between land stations (cell sites that connect directly to land-lines) and mobile stations (wireless telephones) and access to facilities necessary to make and receive phone calls, the plain focus of the statute is on whether it is possible for a user in a given remote location to reach a facility that can establish connections to the national telephone network. In our view, therefore, the most compelling reading of subsection B(i)(II) is that *local governments may not regulate personal wireless service facilities in such a way as to prohibit remote users from reaching such facilities. In other words, local governments must allow service providers to fill gaps in the ability of wireless telephones to have access to land-lines.*

...
A local government may reject an application for construction of a wireless service facility in an under-served area without thereby prohibiting personal wireless services if the service gap can be closed by less intrusive means. There are numerous ways to limit the aesthetic impact of a cell site. It may be possible to select a less sensitive site, to reduce the tower height, to use a preexisting structure or to camouflage the tower and/or antennae. A local government may also reject an application that seeks permission to construct more towers than the minimum required to provide wireless telephone services in a given area. A denial of such a request is not a prohibition of personal wireless services as long as fewer towers would provide users in the given area with some ability to reach a cell site.

Furthermore, once an area is sufficiently serviced by a wireless service provider, the right to deny applications becomes broader: State and local governments may deny subsequent applications without thereby violating subsection B(i)(II). The right to deny applications will still be tempered by subsection B(i)(I), which prohibits unreasonable discrimination. However, it is not unreasonably discriminatory to deny a subsequent application for a cell site that is substantially more intrusive than existing cell sites by virtue of its structure, placement or cumulative impact. We hold only that the Act's ban on prohibiting personal wireless services precludes denying an application for a facility that is the least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides access to land-lines.

Willloth, 176 F.3d at 642-643 (citations omitted). The court in *Port Authority of New York and New Jersey*, 1999 WL 494120, agreed the court's reasoning in *Willloth* and read it as distinguishing between "regulations that produce gaps in an individual provider's service area from those that result in an absence of coverage by any provider, finding that the latter and not the former prohibit the provision of wireless services."

In *Penn Township*, the Third Circuit agreed with the Second Circuit's interpretation of (B)(i)(II), stating "a provider must bring additional proof to the court to demonstrate that the denial is representative of a broader policy or circumstance that precludes the provision of wireless service." Additionally, the court further articulated the Second Circuit's standard by framing it as a two-pronged approach

In order to show a violation of subsection 332 (c)(7)(B)(i)(II) under *Willloth*, an unsuccessful provider applicant must show two things. First, the provider must show that its facility will fill an existing significant gap in the availability of remote users to access the national telephone network. In this context, the relevant gap, if any, is a gap in the

service available to remote users. Not all gaps in a particular provider's service will involve a gap in the service available to remote users. The provider's showing on this issue will thus have to include evidence that the area the new facility will serve is not already served by another provider. Second, the provider applicant must show that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve. This will require a showing that a good faith effort had been made to identify and evaluate less intrusive alternative, e.g. that the provider has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, etc.

Penn Township, 196 F.3d at 480.

The Third Circuit, applying the two-prong analysis developed in *Penn Township*, defined the "significant gap" prong as "requiring a gap from a user's perspective, rather than a particular provider's perspective. Thus, this prong focuses on whether any provider is covering the gap, instead of whether the gap exists only in, for example, Nextel's service." *Nextel West v. Unity Township*, No. 01-2030, 282 F.3d 257, 265 (3rd Cir. March 5, 2002); *Omnipoint Communications Enterprises L.P. v. Zoning Hearing Board of Easttown Township*, No. 02-2194 (3d Cir. Feb. 12, 2003), *opin.vacated on other grounds*, *Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Board of Easttown Township*, 331 F.3d 386 (3rd Cir., June 4, 2003) ("Omnipoint II")

In *Ho-Ho-Kus*, the Third Circuit affirmed its decision in *Penn Township* that "local zoning policies and decisions have the effect of prohibiting personal wireless communications services if they result in 'significant gaps' in the availability of wireless services." *Ho-Ho-Kus*, 197 F.3d at 70. The court noted that the Act banned local actions that prohibited or had the effect of prohibiting personal wireless services, as distinguished from the facilities that provide such services, and that "under the right conditions, it may be possible to provide an adequate level of personal wireless services to a particular community solely through facilities located outside that community." *Id.* at 71. The court also observed that not all service gaps would support a finding that an "effective prohibition" exists, and it shed further light on the factors that courts should consider:

We think it matters a great deal ... whether the "gap" in service merely covers a small residential cul-de-sac or whether it straddles a significant commuter highway or commuter railway. Unlike a utility such as electrical power, cellular service is used in transit, so a gap that covers a well-traveled road could affect large numbers of travelers – and the people who are trying to communicate with them. Over the course of a year, the total disruption caused could be quite significant.

Id. at 70 n.2.

Applying this test, the court in *Omnipoint Communications MB Operations, LLC v. Town of Lincoln*, 107 F.Supp.2d 108, 119 (D. Mass. 2000), found that a "significant gap" existed "where there is currently no [wireless communication facility], within or without the town, which provides wireless services to customers traveling through the northwest section of the Town." This gap was "significant," the court held, because it encompassed a large area of the northwestern part of the town as well as two heavily traveled commuter thoroughfares. *Id.* Viewing the issue of "significant gaps" from a different

angle, the court in *Harrington Park*, 90 F.Supp.2d at 570, found that a loss of 5 to 7 percent of calls because of inadequate support facilities constituted a significant gap. However, the Court in *Easttown Township* recently held that a significant gap in service did not exist, even though Omnipoint asserted a call drop rate of 5.4%, because there were seven other providers in the area.

The First Circuit as well recently decided to follow the “significant gap” line of cases as developed in the Second and Third Circuits. In *National Tower, LLC v. Plainville Zoning Board of Appeals*, 297 F.3d 14 (1st Cir. 2002), the Court stated: “It is undisputed that in this case there is a significant coverage gap. The argument that no tower is needed is unavailable to the town. Several courts have held that local zoning decisions and ordinances that prevent the closing of significant gaps in the available of wireless services violate [47 U.S.C. § 332(c)(7)(B)(i)(II)]. See *Cellular Tel. Co. v. Zoning Bd. Of Adjustment [Ho-Ho-Kus]*, 197 F.3d 64, 68-70 (3d Cir. 1999); *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999); *Omnipoint Communications MB Operations, LLC v. Town of Lincoln*, 107 F.Supp.2d 108, 117 (D.Mass.2000); Finding their reasoning persuasive, we now join their number . . .” *National Tower*, 297 F.3d at 19-20. See *Nextel Communications of the Mid-Atlantic, Inc. v. Town of Provincetown*, No. Civ.A.02-11646-DPW, 2003 WL 21497159 (D.Mass. June 26, 2003)

d. Summary and Suggestions

While outright bans clearly violate the provisions of Section 704, an individual decision may also amount to a violation of Section 704 if it “effectively” prohibits personal wireless services. The courts have generally been reluctant to find that individual decisions amount to effective bans, and they have imposed on providers a heavy burden of proving that further efforts to find a suitable site would be futile.

As to what is a “suitable” alternative site, industry advocates have argued unsuccessfully that Section 704 guarantees providers the right to build any and all towers that the providers believe necessary to compete effectively. The courts have also held that the test of a suitable alternative is not whether the provider will be able to limit its costs to near industry averages, but whether the alternative is feasible. Such issues may turn out to be quite controversial, but the courts have generally recognized that goal of the Act to encourage competition cannot be read to overshadow other important concerns, including the preservation of the autonomy of local governments over zoning matters.

In determining whether an individual denial has the effect of prohibiting wireless services, courts have generally focused on whether a denial would result in a significant gap in wireless service. The Act does not require that there be 100% coverage. In fact, federal regulations expressly acknowledge that dead spot in service will exist. Courts outside the Fourth Circuit generally uphold denials of permission to construct facilities unless the provider meets its burden of proving that its proposed facilities are the least intrusive means necessary to fill a significant gap. While the Fourth Circuit has nominally rejected this approach in favor of a less structured case-by-case approach, we recommend that Virginia localities at least treat the “significant gap” approach as guidance.

The issue of “significant gaps” is likely to grow increasingly important as usage of wireless devices accelerates. Even some areas that have adequate coverage today may experience an increasing number of dropped calls as more users compete for limited frequencies. At some point, the number of such dropped calls will reach the prevailing definition of a “significant gap.” This problem could become particularly acute as wireless data applications become more popular.

3. Localities must make a determination with a reasonable period of time

a. Relevant Statutory Provision

“A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.” Section 704(B)(ii).

b. Key Issues

What law governs what is a “reasonable” period of time? How have the courts interpreted the term “reasonable?” Are moratoria lawful?

c. Leading Court Decisions

i. Generally applicable time frames apply

The legislative history of Section 704 makes clear that Congress intended the term “reasonable period of time” to be interpreted “taking into account the nature and scope of each request,” in accordance with “generally applicable time frames for zoning decision[s],” and without “giv[ing] preferential treatment to the personal wireless service industry.” H.R. Conf. Rep. No. 104-458, at 208. Thus, citing this legislative history, Judge Widener observed in his concurring opinion in *Nottoway County*, 205 F.3d at 708, that “the reasonable time requirement for action on a zoning request application is to be within “generally applicable time frames for zoning decision[s].”

ii. Interpretations of “reasonable period”

In *Virginia Metronet*, 984 F.Supp. at 977, the court found that each situation must be examined independently and that a 14-month delay in the issuance of a permit was not *per se* unreasonable, given Section 704(B)(ii)’s requirement that localities tak[e] into account the nature and scope of such request.” The court observed that there was evidence in the record of repeated delays by the board’s staff, but having invalidated the board’s denial for not being “in writing,” the court did not have to decide whether the delay violated Section 704(B)(ii).

In *Port Authority*, 1999 WL 494120 (S.D.N.Y. 1999), an applicant seeking permission to install digital wireless facilities in the Holland and Lincoln tunnels alleged that the Port Authority failed to approve its application within a reasonable period, nine months. The court rejected this claim, finding that (1) Omnipoint had never “duly filed” its application with the proper officials in the Port Authority; (2) what would have been a “reasonable period” under the circumstances was unclear, and (3) Omnipoint was itself as responsible for the delay as the Port Authority, because it took 5 months to make a technical proposal, failed to develop alternative proposals in a timely manner, and never attempted to negotiate interim or long term financial arrangements. Furthermore, the court observed that the Act does not require that the Port Authority “approve” any request within a reasonable period, but only that it “act” within a reasonable period.

In New York SMSA Ltd. Partnership v. City of Riverhead, 1999 WL 494120 (S.D.N.Y. July 13, 1999), the court rejected a provider's claim of unreasonable delay where the town had required the provider to prepare an environmental impact statement pursuant to relevant state law. The court found that the parties had proceeded with a "steady pace of action" and that the town's requirement was reasonable given the nature and scope of the provider's request.

iii. Moratoria

Several communities have enacted moratoria to enable them to develop standards and procedures to evaluate proposals to place, construct or modify personal wireless service facilities. The courts have come to differing conclusions on whether such moratoria violate the "reasonable period" requirement of Section 704(B)ii.

Some courts have upheld moratoria. *See, e.g., Sprint Spectrum, L.P. v. City of Medina*, 924 F.Supp. 1036 (W.D. Wash. 1996) (six-month moratorium issued five days after the enactment of the Telecommunications Act in February 1996 upheld); *National Telecommunications Advisors, LLC v. Board of Selectman of West Stockbridge*, 27 F.Supp.2d 284 (D. Mass. 1998) (six-month moratorium upheld). Other courts have found them contrary to Section 704(B)(ii). *See, e.g., Sprint Spectrum, L.P. v. Town of Farmington*, 1997 WL 631104 (D. Conn. Oct.6 1997); *Sprint Spectrum, L.P. v. Jefferson County*, 968 F.Supp. 1457 (D. Ala. 1997).

In 1996, the Cellular Telephone & Internet Association (CTIA), a trade association for wireless carriers, petitioned the Federal Communications Commission to preempt moratoria longer than 90 days. *In re Petition for Declaratory Ruling of the Cellular Telecommunications Industry Association*, 12 FCC Rcd. 22,795 (1996). CTIA subsequently withdrew its petition after working out a compromise with the Commission's Local and State Government Advisory Committee. *Agreement of FCC Local and State Government Advisory Committee, the Cellular Telecommunications Industry Association, the Personal Communications Industry Association and the American Mobile Telecommunications Association*, <http://www.fcc.gov/statelocal/agreement.html>. Notice, 1998 WL 442941 (August 5, 1998).

The agreement creates an informal dispute resolution process and generally recognizes moratoria up to 180 days. The key passages of the agreement are the following guidelines:

B. If a moratorium is adopted, local governments and affected wireless service providers shall work together to expeditiously and effectively address issues leading to the lifting of the moratorium. Moratoria should be for a fixed (as opposed to open ended) period of time, with a specified termination date. The length of the moratorium should be that which is reasonably necessary for the local government to adequately address the issues described in Guideline A. In many cases, the issues that need to be addressed during a moratorium can be resolved within 180 days. All parties understand that cases may arise where the length of a moratorium may need to be longer than 180 days. Moratoria should not be used to stall or discourage the placement of wireless telecommunications facilities within a community, but should be used in a judicious and constructive manner.

C. During the time that a moratorium is in effect, the local government should, within the frame work of the organization's many other responsibilities, continue to accept and process applications (e.g., assigning docket numbers and other administrative aspects

associated with the filing of applications), subject to ordinance provisions as may be revised during the moratorium. The local government should continue to work on the review and possible revisions to its land use regulations in order that the moratorium can terminate within its defined period of time, and that both local planning goals and the goals of the Telecommunications Act of 1996 with respect to wireless telecommunications services be met. Wireless service providers should assist by providing appropriate, relevant and non-proprietary information requested by the local government for the purposes of siting wireless telecommunications facilities.

d. Summary and Comments

Localities must make reasonable progress in reviewing applications for permission to place, construct or modify towers, with due regard for their normal procedures and for complexities imposed by particular projects. While moratoria are still possible, localities should not wait for an application to be submitted to begin the task of developing appropriate standards and procedures. If a moratorium is necessary, however, the locality should not delay review of the application until its work on developing standards and procedures is completed, but should interact with the applicant and gather as much relevant information as possible during the interim.

4. Localities cannot deny an application based on concerns about radio frequency radiation

a. Relevant Statutory Provision

“No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.” Section 704(B)(iv)

b. Key Issues

Is the prohibition on local consideration of the environmental effects of radio frequency emissions constitutional? What if a decision to deny is based in part on concerns about radio frequency emissions and in part on other considerations? What does the proviso “to the extent that such facilities comply with the Commission’s regulations concerning such emissions” mean?

c. Leading Court Decisions

In *Southwestern Bell Wireless v. Johnson County Board of Commissioners*, 199 F.3d 1185, 1193-1194 (10th Cir. 1999), the court found that Section 704(B)(iv) preempts the entire field of radio frequency regulation by local governments and that the ban on local consideration of radio frequency emissions from wireless facilities does not violate the Tenth Amendment. *See also Freeman v. Burlington Broadcasters, Inc.*, 204 F. 3d 311 (1st Cir 2000), *cert. denied*, 121 S. Ct. 276, holding essentially the same.

Several cases have held that, given the clear prohibition of Section 704(B)(iv), state and local governments cannot rely on concerns about radio frequency emissions to support a denial of an application to place, construct or modify wireless facilities. *Telespectrum*, 227 F.3d at 424 (“concerns of health risks

due to the emissions may not constitute substantial evidence in support of a denial by statutory rule”). But including such concerns in a decision to deny an application will not be fatal if other legitimate and sufficient grounds for the denial are present in the record. *See, e.g., Harrington Park*, 90 F.Supp.2d at 572-73; *City of Moline*, 29 F.Supp.2d 915, 924 (C.D. Ill. 1998); *Sprint Spectrum, L.P. v. Charter Township of West Bloomfield*, 141 F.Supp.2d 795, 802 (E.D. Mich. 2000).

Although localities cannot regulate or rely on radio frequency emissions in zoning decisions, Section 704(B)(iv) does allow them to ensure that providers meet the FCC’s requirements. Thus, in *Sprint Spectrum v. Township of Warren Planning Board*, 737 A. 2d 715 (N.J. Superior Ct. App. Div. 1999), the court held that a local zoning authority could inquire about RF transmissions and could require the provider to explain its emission study in order to make sure that the provider will meet the FCC’s standards. Another court has upheld a locality’s ability to choose one tower site in favor of another based on which site would provide the better protection from RF transmission, but only if there were no carriers that would be prohibited from providing service as a result of that decision. *New York SMSA Limited Partnership v. Town of Clarkstown*, 99 F.Supp. 2d 381 (S.D.N.Y. 2000).

The Second Circuit recently made a distinction in this context between a local instrumentality acting in a regulatory capacity (e.g., zoning), and a local government enforcing contractual lease provisions as a property owner. In *Sprint Spectrum L.P. v. Mills*, No. 01-7116, 283 F.3d 257 (2nd Cir. 2002), the Court held that a tower lease requiring the wireless service provider to adhere to FCC radiofrequency emission standards did not constitute an impermissible regulation and was not preempted by §704(B)(iv). In *Sprint*, the provider had already acquired a permit and constructed a tower on the property of a local public high school. The Court emphasized that the school’s RF emission requirement was a private contractual provision:

“[W]e view the actions of the School District in entering into the Lease agreement as plainly proprietary. There is no state or local statute or ordinance or guideline with respect to the RF Emissions levels at issue here. The School District entered into a single lease agreement with respect to a single building. The District did not purport to punish Sprint for any past conduct or to impose any condition with respect to any Sprint tower other than that to be located on the High School....We conclude that the Telecommunications Act does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity; that the School District acted in a proprietary capacity, not a regulatory capacity, in entering into the Lease agreement with Sprint; that the conditions to which Sprint agreed at the request of the District are conditions that a private property owner would be free to demand; and that such a private owner would not be compelled to perform obligations imposed on him by the contract if the communications company refused to perform the conditions agreed to by it in the contract. Accordingly, the School District’s attempt to enforce the RF Emissions provisions in the Lease agreement, as the District interprets those provisions, is not preempted by the Telecommunications Act.”

Sprint Spectrum, 283 F.3d at 421.

d. Summary and Suggestions

If a locality's citizens are deeply concerned about radio frequency emissions, they can find a substantial amount of information on them at the FCC's website, <http://www.fcc.gov/wtbsiting/fact2.pdf>. Furthermore, a local government can require a wireless provider to provide the locality copies of its filings with the FCC demonstrating compliance with its radio frequency emissions standards. By all means, the locality should not base, or allow a significant part of its tower siting regulatory decisions to be based, on concerns about radio frequency emissions.

5. Aggrieved persons have a right to expedited judicial review

a. Relevant Statutory Provision

“Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.” Section 704(B)(v)

b. Key Issues

What courts have jurisdiction to hear appeals under Section 704? When does the appeal period begin to run? What remedies are available to a successful claimant?

c. Leading Court Decisions

i. Jurisdiction

In *Telespectrum*, 227 F.3d at 421, the Sixth Circuit rejected the defendant's argument that Section 704(B)(v) gives only state courts jurisdiction over tower siting issues. Rather, the court found that the term “in any court of competent jurisdiction” has frequently been interpreted to include both federal and state courts.

ii. Ripeness

In *Cellco Partnership v. Russell*, 187 F.3d 628, 1999 WL 556444 (4th Cir. (N.C.)) (unpublished), a wireless provider brought suit to challenge a new tower siting ordinance, alleging that it “tend[ed] to make the construction and maintenance of the towers so costly and burdensome that it either prohibits or has the effect of prohibiting the provision of wireless services in the county.” The Fourth Circuit dismissed the claim as unripe, as the provider had not first filed an application and given the locality an opportunity to apply the ordinance. Although the provider insisted that any application that it filed would not comply with the ordinance's requirements, the court observed that it could not predict the locality's response because it might be willing to grant a variance or negotiate a compromise.

In *Canaan*, Nextel sought a preliminary injunction to force the Town to grant its application for a variance to construct a tower, alleging that the Town had constructively denied its application by

repeatedly asking for more information. The court recognized that, in a proper case, a wireless provider could bring suit under Section 704 before obtaining a formal denial.

As the statute itself recognizes, inaction can take not only the form of complete inactivity, but also the absence of any meaningful consideration of an application. Otherwise, a local zoning authority could indefinitely delay an application by a flurry of hearings, requests, and counter-submissions that effectively mask a denial. An inquiry into the ripeness of Nextel's action therefore is inextricably connected to its claim of unreasonable delay and violation of the [Telecommunications Act].

Canaan, 62 F.Supp.2d at 694. On the facts, however, the court found that the Town was moving forward at a reasonable pace to evaluate various environmental issues, as required by state law. The court also found some support for the Town's claim that at least some of Nextel's submissions were not genuine.

Similarly, in *Port Authority*, 1999 WL 494120 (S.D.N.Y. 1999), the court found that Omnipoint had no right to sue under Section 704(B)(v) because there had been no "final action or failure to act." The court agreed with the Port Authority that the parties were still "in negotiation" and that Omnipoint had not yet proposed any financial terms that the Port Authority could have rejected.

iii. Remedies

Section 704(B)(ii) does not on its face state the kinds of remedies that adversely affected parties can obtain. At one time, there was some question as to whether a court could order a locality to grant the wireless provider the permission that it had wrongly denied rather than merely remand the case to the locality for further proceedings. There are now dozens of cases holding that a court can, if it believes that doing so would serve the public interest, order the locality to grant the wireless provider the relief that the locality had improperly denied. See, e.g., *Oyster Bay*, 166 F.3d at 497; *Telespectrum, Inc. Pub. Serv. Comm. of Kentucky*, 43 F.Supp.2d 75 (E.D.Ky. 1999), *aff'd* 227 F.3d 414 (6th Cir. 2000).

The courts have also split over whether damages and attorneys fees are available to an adversely affected party under Section 704. In *City of Atlanta*, 210 F.3d at 1330-31, the Eleventh Circuit became the first appellate court to address this issue, and it held that Congress did not preclude the imposition of compensatory damages under 42 U.S.C. § 1983 (civil action for deprivation of rights) and attorneys fees under 42 U.S.C. § 1988 on the City of Atlanta for failing to meet the "in writing" requirement in denying AT&T permission to construct a tower. The Third Circuit, however, recently ruled that Section 704 did preclude relief under 42 U.S.C. § 1983, because "the [Telecommunication Act] implicitly precludes an action under S.1983 by creating a comprehensive remedial scheme that furnishes private judicial remedies." *Nextel Partners v. Kingston Township*, No. 00-2502, 286 F.3d 687 (3d Cir. 2002). *Nextel* becomes law in Delaware, New Jersey and Pennsylvania, but district courts elsewhere have and are likely to continue to hold differently unless their respective circuits adopt the Third Circuit's reasoning. See, e.g., *Omnipoint Communications, Inc. v. Planning and Zoning Commission*, 83 F.Supp.2d 306 (D. Conn. 2000)(finding claim for damages and attorneys fees exists under Sections 1983 and 1988); *National Telecomm. Advisors, Inc. v. City of Chicopee*, 16 F.Supp.2d 117 (D. Mass. 1998)(finding no such claim exists).

III. FINAL THOUGHTS

Case law provides a guide to what local actions may or may not be upheld, under circumstances similar to those existing in the cases cited. As such, case law has its limitations in rapidly evolving environments, such as the world of telecommunications. As the wireless applications proliferate and become increasingly important to our lives, so will the tensions between the need for more towers and the need to protect the aesthetics, property values and safety of local communities. Litigation will be an inevitable feature of the landscape in the years ahead, but all concerned would do well to avoid it to the maximum extent possible. Cooperation among localities, residents and the wireless industry is a much better solution, one that all should attempt to embrace in good faith. We at the Baller Herbst Law Group, P.C., hope that this memorandum will contribute to such cooperative efforts.

TABLE OF CASES

U.S. CIRCUIT COURT DECISIONS

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