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# Not in My Backyard: The Siting of Wireless Communications Facilities

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# NOTE

## Not in My Backyard: The Siting of Wireless Communications Facilities

Malcolm J. Tuesley\*

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It shall be the policy of the United States to encourage the provision of new technologies and services to the public.<sup>1</sup>

## I. INTRODUCTION

Wireless service providers are not unlike their more traditional counterparts in their need for an infrastructure from which to provide service. In addition to traditional landlines, wireless communications facilities (WCFs) require numerous strategically placed transmission antennae, which are necessary to send and receive signals. New wireless technology has created new tower construction, which was valued at \$1.6 billion in 1996 and is expected to peak in 2000 at \$2.3 billion.<sup>2</sup> There are already over 57,000 radio transmission sites throughout the country, with an anticipated 110,000 antennae to be in place by 2002.<sup>3</sup> This proliferation of antennae is a function of the burgeoning demand for wireless service and new technology.

The two major competing modes of wireless communications are cellular and Personal Communications Services (PCS). As demand for cellular service has outgrown the available radio spectrum used for cellular signals,<sup>4</sup> the wireless industry has turned to PCS, which utilizes digital technology that triples the capacity of traditional cellular systems.<sup>5</sup> Personal Communications Services enable "users to send and receive voice, data and video communications to and from any location."<sup>6</sup> However, "[a]lthough PCS offer advantages in service, performance and quality, one potential drawback is that a PCS network requires four times the number of antennas and towers to transmit signals in order to meet the

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1. 47 U.S.C. § 157(a) (Supp. II 1996).

2. Matthew Phair et al., *Working on the Air Waves: New Users, New Technologies and New Money Fuel Demand for More Tower and Antenna Infrastructure*, ENGINEERING NEWS-RECORD, Dec. 14, 1998, at 26.

3. *Cell Clusters: Cleona Forces Wireless Companies to Consolidate Their Sprouting Towers*, HARRISBURG PATRIOT (Harrisburg, PA), Mar. 8, 1999, at A6 [hereinafter *Cell Clusters*].

4. Steven J. Bell, *Online Without the Line: Cellular Technology for Searching on the Go*, ONLINE, Sept. 1991, at 15, 16.

5. *Id.* at 16.

6. Jennifer Pia Brovey, Comment, *Personal Communications Services: Crossing the Line from Regulation to Implementation*, 2 COMMLAW CONSPECTUS 67, 68 (1994) (citation omitted).

same coverage as cellular services.”<sup>7</sup> This demand for new sites caught many local zoning authorities off guard, as their antiquated zoning laws were not drafted to respond to the unique demands of PCS tower siting.

This Note seeks first to establish the significance of a fully deployed wireless infrastructure and its potential impact. Part III offers a comprehensive analysis of the relevant federal regulation of tower siting, including recent judicial action. Drawing on existing case law, this Part makes recommendations for the enforcement of the particular provisions of the Telecommunications Act of 1996 (1996 Act or Act). Part IV then discusses the role of state and local governments, emphasizing the need for cooperation and education among all relevant participants.

## II. THE CURRENT STATE OF AFFAIRS

Telephony is at the forefront of the dynamic communications revolution. “The mobile telephone, scourge of the commuter train, the beach and the ski slopes, has been the mainstay of the telecommunications revolution over the past five years.”<sup>8</sup> The significance of the mobile telephone cannot be understated, and while its impact on the developing world will no doubt be revolutionary, it also carries special significance for local communities as it offers an alternative to the local near-monopoly.<sup>9</sup> It is this ability of wireless service to serve as a catalyst in opening local telephone markets that offers an opportunity for profound change. The mobile telephone, once available only to the affluent, continues to become more relevant to the life of the average American, and the reasons are simple.

One of the most promising developments in communications technology is the ability of the mobile phone to act as a substitute to a traditional landline. According to Federal Communications Commission

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7. Jeneba Jalloh, Comment, *Local Tower Siting Preemption: FCC Radio Frequency Guidelines Are Solution for Removing Barriers to PCS Expansion*, 5 COMMLAW CONCEPTUS 113, 113 (1997) (citing Andrew Kupfer, *Phones that Will Work Anywhere*, FORTUNE, Aug. 24, 1992, at 100).

8. *Telecommunications: A Connected World*, ECONOMIST, Sept. 13, 1997, at 16.

9. *Id.* While there have been several recent developments that may lead to a more competitive local exchange market (developing satellite technologies and the recent merger of AT&T with TCI), wireless services currently provide the most realistic hope for disrupting the near-monopoly that currently exists. If the stock price of Iridium, the satellite-phone-service provider, is any indication of the threat posed by satellite telephony, its fall from \$72 to \$11 would indicate that PCS is currently the only credible threat. Christopher Price, *Iridium Wins 60-Day Extension from Lenders*, FIN. TIMES, Mar. 30, 1999, at 22. In fact, the wireless industry has initiated substantial lobbying efforts “aimed at convincing lawmakers and regulators that [the] wireless industry is [the] best chance for local competition in many areas.” *PCIA Begins Lobbying Campaign Saying Wireless Is Best Hope for Competition*, COMM. DAILY, Feb. 11, 1998, at 3.

Chairman William Kennard: “[T]he overarching goal should be—first and foremost—doing everything we can to foster an environment wherein wireless can become a full-fledged substitute for wireline service.”<sup>10</sup> A shortage of competition is largely to blame for the fact that the cost of a wired call is still generally less than that of a call made from a mobile phone.<sup>11</sup> “The capital costs for cellular are lower than for wired,”<sup>12</sup> and the available evidence supports the cost-reducing effect of competition. With a fully deployed PCS network, effective competition may not be far off. “[A] new group of . . . wireless firms are challenging the ‘baby Bells’ by offering small and medium-sized businesses, even entire rural townships, permanent wireless connections that include voice, data and high-speed Internet through a 12-in. rooftop antenna at a 30% discount.”<sup>13</sup> In addition, when the 1996 Act was debated in Congress, the baby Bells were opposed to any shift in the jurisdictional balance concerning federal oversight, a clear indicator of the perceived threat that wireless and other services posed to their entrenched positions.<sup>14</sup> Clearly, the presence of wireless providers adds a new credible threat to entrenched local telephone service providers.

In markets where PCS have been introduced, there has been a 25 percent drop in prices since 1994, compared to a 10 percent reduction in markets with only cellular providers.<sup>15</sup> As a result, when PCS are introduced into a market, service providers will see their margins fall as a result of an increase in competition and a reduction in cost to customers. The news is much better for customers, who will welcome the savings and embrace the affordable and convenient alternative to traditional fixed-line telephony providers, which may now have an incentive to reduce costs.

The benefits of mobile communications are not limited to enhanced competition in the local exchange market. Mobiles provide a partial solution to the inelastic supply of human time, an often “limiting factor in many mature communications markets (think of television).”<sup>16</sup> “[T]he mobile has found a new niche: those moments of the day when people are

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10. *A Year into Office, Kennard Hard to Label*, RCR RADIO COMM. REP., Sept. 21, 1998, at 1.

11. *Telecommunications: A Connected World*, *supra* note 8, at 19.

12. *Id.* (quoting Hermann Bluestein, head of wireless strategy and development at MCI).

13. Phair et al., *supra* note 2.

14. Craig D. Dingwall, *The Last Mile: A Race for Local Telecommunications Competition Policy*, 48 FED. COMM. L.J. 105, 129 (1995).

15. *Telecommunications: A Connected World*, *supra* note 8, at 19. *See also* Mark J. Bennett, *Cities and Carriers at the Build-Out Corral—It’s Time for a Truce* (on file with the *Federal Communications Law Journal*).

16. *Telecommunications: A Connected World*, *supra* note 8, at 16.

walking to work, driving a car or sitting on a ski lift.”<sup>17</sup> In addition, there are also the obvious safety and security attributes of a mobile telephone. Not only do consumer habits of today support an expanded role for wireless telephony, but the future also appears to be even more promising for wireless technology.

Inherently flexible, wireless services make new service offerings possible as consumer demands grow and change.<sup>18</sup> Moreover, given the advancements in mobile phones, which allow for the sending and receiving of electronic mail and the browsing of the Internet along with countless other services, the utilization of wireless services will no doubt escalate at an alarming rate. “The result is ‘better, faster, cheaper’—the battle-cry of the communications revolution.”<sup>19</sup> Given these inherent characteristics of mobile telephony, the advantages for local communities and their citizens make a well-developed and fully deployed wireless infrastructure vital.

To fully realize the benefits of wireless communications, service providers and communities need to work together. The objectives of both community leaders and planners and service providers are reconcilable with proper communication and planning. The primary concern of service providers is to begin offering service in as expeditious fashion as possible,<sup>20</sup> while community leaders and planners want to create as inviting an environment as possible to residents. These seemingly simplistic objectives provide great insight into the issues of tower siting. “Communities can provide incentives that will encourage wireless service providers to design facilities that are consistent with community character.”<sup>21</sup> Tower placement can be encouraged or discouraged by the manner in which the city handles the approval process.<sup>22</sup>

The problems facing the deployment of a wireless infrastructure able to support PCS have been summarized as follows:

- (1) the *absence of a process*, in some jurisdictions, for granting the necessary permits to build these facilities;
- (2) the *presence of a process*, in some jurisdictions, which actually hampers deployment by imposing unnecessary delays and transaction costs; and
- (3) *some short-sighted actors* who, in some jurisdictions, actually seek to

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17. *Id.* at 19.

18. WIRELESS TELECOMM. BUREAU, FCC, FACT SHEET #2, at 5 (Sept. 17, 1996) [hereinafter WTBF ACT SHEET #2].

19. *Telecommunications: A Connected World*, *supra* note 8, at 1.

20. Lisa Verner, *Model Wireless Communications Ordinance Framework* (visited Mar. 15, 1999) <<http://www.mrsc.org/legal/telecomm/wireless.htm>>.

21. *Id.*

22. *Id.*

prohibit competition or restrict the build-out of wireless services by imposing unscientific "local technical standards" on RF emissions.<sup>23</sup>

Once state and local governments recognize and gain an understanding of the shortcomings of each of the potential problem areas in light of the current federal regulatory environment, full deployment of a wireless infrastructure becomes a desirable and attainable goal.

### III. FEDERAL LAW

Given the more than 30,000 zoning jurisdictions in the United States and the resulting patchwork of zoning laws that cover the country,<sup>24</sup> federal intervention is likely to be necessary at some level. The 1996 Act, which seeks to "encourage the rapid deployment of new telecommunications technologies,"<sup>25</sup> and attempts to minimize any potential hindrances, including potential delays at the local level, provides a starting point. Communities and service providers must be cognizant of the role of the federal government, including the Federal Communications Commission (FCC or Commission). While "FCC officials have explained that strong and often emotional opposition to tower siting has made the commission reluctant to dictate tower siting decisions to local officials,"<sup>26</sup> the Commission may "utilize the preemptory authority granted by Section 704[] to quell barriers to PCS expansion and tower siting."<sup>27</sup> As a result, "the affected groups should anticipate working cooperatively, collocating towers and educating each other to narrow the gap between their respective polarized views."<sup>28</sup>

#### A. *The Telecommunications Act of 1996*

The Second Circuit recently observed that section 704 "bristles with potential issues, from the proper allocation of the burden of proof through the available remedies for violation of the statute's requirements."<sup>29</sup> The 1996 Act "specifies procedures which must be followed for acting on a request to place these kinds of facilities, and provides for review in the courts or the FCC of any decision by a zoning authority that is inconsistent

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23. *National Information Infrastructure (NII) White Paper: Recognizing What the NII Is, What It Needs, and How to Get It* (visited Mar. 15, 1999) <<http://www.wow-com.com/index.cfm>>.

24. *Cell Clusters*, *supra* note 3.

25. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 56.

26. *Tower Siting Permission Remains a Thorn in the Side of the Wireless Industry; Congress May Finally Help*, PCS WEEK, Jan. 28, 1998, at 1.

27. Jalloh, *supra* note 7, at 115.

28. *Id.*

29. *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999).

with Section 704.”<sup>30</sup> With the passage of the 1996 Act, “Congress . . . created a national mandate for more favorable land use regulation pertaining to wireless communications. That mandate, however, is neither absolute nor unlimited. Congress did not supplant, in general, local decision-making prerogatives.”<sup>31</sup> Local governments are not completely preempted from making decisions regarding the placement of wireless communications facilities within their jurisdictions, but the Act offers five substantial protections for telecommunications providers.

Specifically, section 704 of the Act provides: “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 (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”<sup>32</sup> As a third protection, the Act provides: “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 . . . , taking into account the nature and scope of such request.”<sup>33</sup>

The Act then states that: “Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.”<sup>34</sup> As a final protection, “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.”<sup>35</sup>

### 1. Unreasonable Discrimination Among Providers of Functionally Equivalent Services

With regard to section 704(a)(7)(B)(i) of the Act, which refers to discrimination among functionally equivalent providers, “the articulated

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30. WIRELESS TELECOMM. BUREAU, FCC, FACT SHEET: NEW NATIONAL WIRELESS TOWER SITING POLICIES 1 (Apr. 23, 1996) [hereinafter WTB FACT SHEET].

31. *AT&T Wireless Serv., Inc. v. Orange County*, 982 F. Supp. 856, 860 (M.D. Fla. 1997).

32. Telecommunications Act of 1996, Pub. L. No. 104-104, § 704, 110 Stat. 56, 151 (codified at 47 U.S.C. § 332(c)(7)(B)(i) (Supp. II 1996)).

33. *Id.* (codified at 47 U.S.C. § 332(c)(7)(B)(ii)).

34. *Id.* (codified at 47 U.S.C. § 332(c)(7)(B)(iii)).

35. *Id.* 110 Stat. at 152 (codified at 47 U.S.C. § 332(c)(7)(B)(iv)).



intent of this specific protection is to prohibit a land use decision or series of land use decisions that would decrease or deter competition in the telecommunications industry and thereby frustrate the purpose of the Act.”<sup>36</sup> Local governments are forbidden from making decisions that favor one provider over another. They are not, however, prohibited from differentiating between sites that create varying safety, visual, or aesthetic effects.<sup>37</sup> So while the Act preserves certain discretion at the local zoning level, that discretion is severely limited.

In a recent analysis of subsection (B)(i)(I), the U.S. Court of Appeals for the Fourth Circuit referenced the ambiguity surrounding what it means to “discriminate among providers.”<sup>38</sup> In *AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach (Virginia Beach)*, the appellant city council advocated using “the traditional lenient standard for reviewing local zoning decisions under the Due Process and Equal Protection Clauses.”<sup>39</sup> Alternatively, AT&T and PrimeCo argued “that the City Council’s approach would reduce subsection (B)(i)(I) to superfluity,” and pushed instead for a more stringent interpretation.<sup>40</sup>

The court did not resolve the issue and instead found that even if the city council did discriminate, such discrimination was not unreasonable. The court emphasized that “the Act explicitly contemplates that some discrimination ‘among providers of functionally equivalent services’ is allowed.”<sup>41</sup> The court further provided that there was no indication that the city council intended to discriminate, as the application was denied based on concerns for preserving the character of the neighborhood and avoiding aesthetic blight, both traditional justifications for zoning decisions.<sup>42</sup> The court reasoned: “If such behavior is unreasonable, then nearly every denial

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36. Peter M. Degnan et al., *The Telecommunications Act of 1996: § 704 of the Act and Protections Afforded the Telecommunications Provider in the Facilities Siting Context*, 3 MICH. TEL. TECH. L. REV. 1, ¶ 8 (1997) <[http://www.law.umich.edu/mttlr/volthree/mclaren\\_art.html](http://www.law.umich.edu/mttlr/volthree/mclaren_art.html)>. See generally *Sprint Spectrum L.P. v. Town of Easton*, 982 F. Supp. 47 (D. Mass. 1997) (finding zoning board’s decision denying provider’s application on basis that wireless communications services were already available to the public constituted “unreasonable discrimination” between providers of functionally equivalent services in violation of the Act); *Western PCS II Corp. v. Extraterritorial Zoning Auth.*, 957 F. Supp. 1230 (D.N.M. 1997) (finding that denial of special exception request to place antenna on water tank amounted to unreasonable discrimination that denied company ability to compete with its competitors).

37. H.R. CONF. REP. NO. 104-458, at 208 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 222.

38. *AT&T Wireless PCS, Inc. v. City Council*, 155 F.3d 423, 426-27 (4th Cir. 1998).

39. *Id.* at 426 (citation omitted).

40. *Id.*

41. *Id.* at 427.

42. *Id.*

of an application such as this will violate the Act, an obviously absurd result.”<sup>43</sup>

The circuit court’s determination that the city council did not discriminate against functionally equivalent services was correct, but not for the foregoing reasons. Rather, there was no unreasonable discrimination because the area in question contained no commercial towers; a justification that merited a single textual sentence of the court’s multi-paragraph analysis of subsection (B)(i)(I).<sup>44</sup> Certainly, if there are *no* towers, there can be *no* discrimination among providers.

Congress clearly did not intend for service providers to be subjected to traditional zoning standards, as subsection (B)(i)(I) is specifically listed as an exception to such traditional state and local zoning authority.<sup>45</sup> The court’s meandering rhetoric was what Congress no doubt sought to exclude from rational decision making regarding the placement of WCFs. The court’s rhetoric with regard to subsection (B)(i)(I) was obviously meant to buttress its suspect analysis with regard to subsection (B)(i)(II). Where as here, there are no towers and hence no discrimination among service providers, subsection (B)(i)(II) is surely implicated, as personal wireless services have been effectively prohibited.

## 2. Prohibition of the Provision of Personal Wireless Services

The inability of states or localities to prohibit or effectively prohibit the provision of personal wireless services may prove to be one of the most contentious issues surrounding section 704. The language of the Act simply states that state and local government regulation “shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”<sup>46</sup> Congress intended “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.”<sup>47</sup>

The cases interpreting subsection (B)(i)(II) tend to follow one of two general approaches. The first line of cases holds that the denial of a particular tower-siting request that leaves an area without a particular wireless service amounts to an effective prohibition of service.<sup>48</sup> The

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43. *Id.*

44. *Id.* at 428.

45. 47 U.S.C. § 332(c)(7)(A) (Supp. II 1996).

46. *Id.* § 332(c)(7)(B)(i)(II).

47. H.R. CONF. REP. NO. 104-458, at 208 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 223.

48. *See* *Western PCS II Corp. v. Extraterritorial Zoning Auth.*, 957 F. Supp. 1230 (D.N.M. 1997).

second approach is to find that a blanket ban on the provision of wireless services is a necessary predicate for a determination that the provision of personal wireless services has been effectively denied.<sup>49</sup> The former approach is more attuned to the statutory language.

Requiring a blanket ban on the siting of WCFs would certainly violate subsection (B)(i)(II) as a prohibition of personal wireless services. However, the statutory language goes further than simply forbidding state or local action that explicitly bans the provision of personal wireless services. The Act also forbids state or local action that has the “*effect of prohibiting the provision of personal wireless service.*”<sup>50</sup> The Supreme Court recently reviewed the proper paradigm for interpreting a statute.

Writing for the Court in *United States v. Turkette*, 452 U.S. 576, 593 (1981), Justice White reminded us that the language of the statutes that Congress enacts provides “the most reliable evidence of its intent.” For that reason, we typically begin the task of statutory construction by focusing on the words that the drafters have chosen. In interpreting the statute at issue, “[w]e consider not only the bare meaning” of the critical word or phrase “but also its placement and purpose in the statutory scheme.” *Bailey v. United States*, 516 U.S. 137, 145 (1995).<sup>51</sup>

The language of the statute, which reads “[t]he regulation . . . by any State or local government . . . shall not . . . have the *effect of prohibiting the provision of personal wireless services,*” is clear.<sup>52</sup> The 1996 Act certainly prohibits a blanket ban on the provision of wireless services as well as any state or government action that effectively prohibits the provision of such services. In light of the explicit statutory language (most importantly the inclusion of the words “effect of”) and the overarching statutory purpose, which seeks to “encourage the rapid deployment of new telecommunications technologies”;<sup>53</sup> an effective ban, which would include individual denials that leave an area without a particular wireless service, would be prohibited pursuant to the statutory language. Congress sought to prohibit effective prohibitions of wireless services, in whatever form.

By the circuit court’s admission in *Virginia Beach*, the area in question had “*no commercial towers.*”<sup>54</sup> Therefore, contrary to the circuit court’s finding, there had been a *de facto* prohibition on the provision of wireless services in violation of the Act.

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49. See *AT&T Wireless PCS*, 155 F.3d at 428.

50. 47 U.S.C. § 332(c)(7)(B)(i)(II) (emphasis added).

51. *Holloway v. United States*, 119 S. Ct. 966, 969 (1999).

52. 47 U.S.C. § 332(c)(7)(B)(i) (emphasis added).

53. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 56.

54. *AT&T Wireless PCS*, 155 F.3d at 428 (emphasis added).

Whether a particular zoning authority has formally enacted a complete ban on WCFs or simply denied all applications within a particular area, the result is the same—a denial of the provision of personal wireless services. The justifications cited by the court for the denial included the remarks of certain remonstrators, which amounted to “not in my backyard.”<sup>55</sup> This phenomenon underlies the need for federal intervention. Wireless communication, with its associated benefits, requires a well-developed infrastructure, and unending denials that amount to effective prohibition of personal wireless services are no doubt prohibited by the Act.

### 3. State or Local Government Action Within a Reasonable Period of Time

The Act requires the governing entity to act on a request “within a reasonable period of time.”<sup>56</sup> In enacting this provision, Congress did not intend that wireless service providers be given preferential treatment. Rather, it intended that such requests be acted upon within such a time frame as is customary for ruling on applications.<sup>57</sup> Since the passage of the Act, it has been estimated that some 300 communities nationwide have enacted moratoria.<sup>58</sup> Many local authorities enacted moratoria as a means to buy time to study the issues surrounding the siting of WCFs. Unfortunately, some communities’ motives were not as justifiable, and moratoria were utilized by some communities to effectively halt the often unpopular tower construction.

In 1996, the U.S. District Court for the Western District of Washington addressed the legality of a City of Medina ordinance that established a six-month moratorium on the issuance of permits for WCFs.<sup>59</sup> The court held that the ordinance

is not a prohibition on wireless facilities, nor does it have a prohibitory effect. It is, rather, a short-term suspension of permit-issuing while the City gathers information and processes applications. Nothing in the record suggests that this is other than a necessary and *bona fide* effort to act carefully in a field with rapidly evolving technology. Nothing in the moratorium would prevent Sprint’s application, or anyone else’s, from being granted.<sup>60</sup>

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55. *Id.* at 427-28.

56. 47 U.S.C. § 332(c)(7)(B)(ii).

57. H.R. CONF. REP. NO. 104-458, at 208 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 223.

58. Thomas York, *FCC Seeks Happy Medium in Cellular Tower Disputes*, INVESTOR’S BUS. DAILY, Aug. 12, 1998, at A8.

59. *Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. 1036 (W.D. Wash. 1996).

60. *Id.* at 1040.

While the facts of *Medina* involved a six-month moratorium,<sup>61</sup> it was not entirely clear if a longer moratorium would have violated the Act. The court did, however, suggest that if all of the applications had been denied during the moratorium period, the Act would have been violated.<sup>62</sup>

The *Medina* court also addressed industry concerns that the six-month moratorium prohibited action within a "reasonable period of time," in violation of the Act. The court held that

[t]here is nothing to suggest that Congress, by requiring action "within a reasonable period of time," intended to force local government procedures onto a rigid timetable where the circumstances call for study, deliberation, and decision-making among competing applicants. The City is seeking to determine, among other things, whether tall antenna towers are still necessary for the purpose at hand. It is entitled to find that out. The "generally applicable time frames" for zoning decisions, in Washington, may include reasonable moratoria adopted in compliance with state law. To hold otherwise would afford telecommunications applicants the "preferential treatment" that Congress sought to avoid. *Medina's* moratorium, coupled with its ongoing investigation and its processing of applications, is consistent with this part of the [Act].<sup>63</sup>

Other courts have been less forgiving than the *Medina* court concerning delays caused by local authorities. In *Sprint Spectrum L.P. v. Jefferson County*, the district court noted that "[t]he delay created by the [Jefferson County] Commission's moratorium 'has the effect of denying the provision of this new [wireless] technology and its advantages' to consumers."<sup>64</sup> While litigation concerning provisions included in the 1996 Act is still in its infancy, the reasoning of *Jefferson County* seems to provide a clearer indication of the direction of subsequent decisions.

*Jefferson County* appears to be a more typical factual setting as the City of Medina issued its moratorium only five days after the 1996 Act became law.<sup>65</sup>

In contrast, the Jefferson County Commission's *third* moratorium was issued approximately fifteen months after the Act became law, and approximately fourteen months after the Commission adopted a comprehensive regulatory scheme based on the requirements of the Act. [Jefferson County's] reaction can hardly be considered a "necessary and bona fide effort to act carefully."<sup>66</sup>

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61. *Id.* at 1037.

62. *Id.* at 1040.

63. *Id.*

64. *Jefferson County*, 968 F. Supp. 1457, 1468 (N.D. Ala. 1997) (citing *Western PCS II Corp. v. Extraterritorial Zoning Auth.*, 957 F. Supp. 1230, 1238 (D.N.M. 1997)).

65. *City of Medina*, 924 F. Supp. at 1037.

66. *Jefferson County*, 968 F. Supp. at 1466.

In addition, another relevant factual distinction existed between the City of Medina's moratorium and that of Jefferson County. The City of Medina suspended "only the issuance of permits, not the processing of applications,"<sup>67</sup> while Jefferson County's third moratorium suspended the processing of certain applications.<sup>68</sup> The factual distinctions between the two cases clearly justify their divergent results and, given *Medina's* proximity to the passage of the 1996 Act, leave the outcome and analysis of *Jefferson County* as the more appropriate paradigm for judicial decision making.

Freezes in the processing of applications trouble service providers for a number of reasons, the most salient of which includes a substantial disruption to their business plans and uneasiness as a result of being uninformed as to what the locality is doing during the delay.<sup>69</sup> A result equally troubling to providers and the community at large is the disproportionate impact on some providers. These providers "may be effectively blocked from entering the market during the pendency of the freeze, or may be inhibited from further deployment or improvement of existing service."<sup>70</sup> Delays reduce the projected returns on enormous capital investments in licenses,<sup>71</sup> but more importantly, the impact of delays causes substantial reduction in and postponement of the competitiveness of the greater communications market.

While moratoria have become a much-debated issue between local governments and the wireless industry, they were also the basis for a joint effort to ease siting disputes. The wireless industry, through the Cellular Telecommunications Industry Association (CTIA) and other industry groups, agreed to withdraw a petition filed with the FCC that sought nationwide preemption of local moratoria.<sup>72</sup> In exchange, local governments, through the Local and State Government Advisory Committee of the FCC, agreed to a voluntary dispute resolution process to

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67. *City of Medina*, 924 F. Supp. at 1037.

68. *Jefferson County*, 968 F. Supp. at 1466.

69. WTB FACT SHEET #2, *supra* note 18, at 9-10.

70. *Id.*

71. Companies paid more than \$18 billion for the frequencies. York, *supra* note 58. Delay caused by the imposition of a moratorium cost Sprint Spectrum nearly \$2.7 million a month. Gregory M. Kratofil, Jr., Note and Comment, *The Telecommunications Act of 1996 and Section 704: A "Boom" or "Bust" for the Mobile Telephone Industry*, 16 ST. LOUIS U. PUB. L. REV. 499, 511 (1997) (citation omitted).

72. *FCC Praises Voluntary Agreement: Wireless Industry and Local Govts. Announce Pact to Ease Siting Disputes*, COMM. DAILY, Aug. 6, 1998, at 1. The dispute resolution process was agreed to by the Local and State Government Advisory Committee of the FCC, the CTIA, the Personal Communications Industry Association, and the American Mobile Telecommunications Association. *Id.*

be used in disputes involving tower moratoria.<sup>73</sup> While the agreement was limited to tower moratoria, many feel that the process could be extended to other areas.<sup>74</sup>

#### 4. A Writing Supported by Substantial Evidence Contained in a Written Record

The substantial evidence standard should play a significant role in assisting telecommunications providers with the siting of WCFs.<sup>75</sup> Congress intended the phrase “‘substantial evidence contained in a written record’ [to have] the traditional standard used for judicial review of agency actions.”<sup>76</sup> Although the court reviewing the denial is not free to substitute its judgment for that of the denying local entity, it must overturn the local entity’s decision under the substantial evidence test “if it ‘cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the’” denying entity’s view.<sup>77</sup>

“Substantial evidence, in the usual context, has been construed to mean less than a preponderance, but more than a scintilla of evidence. ‘It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’”<sup>78</sup> What amounts to substantial evidence is not always clear. The U.S. District Court for the Eastern District of Pennsylvania has held that “unsubstantiated personal opinions” relating to “[g]eneralized concerns . . . about the aesthetic and visual impacts on the neighborhood do not amount to substantial evidence.”<sup>79</sup> However, the Fourth Circuit in *Virginia Beach* found that constituents’ concerns regarding the aesthetic impact of a proposed tower could constitute “compelling” evidence for the city council.<sup>80</sup>

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73. *Id.*

74. *Id.*

75. *BellSouth Mobility, Inc. v. Gwinnett County*, 944 F. Supp. 923, 928 (N.D. Ga. 1996) (“[T]he critical question before the court is whether the board of commissioner’s decision to deny plaintiffs’ application is supported by ‘substantial evidence contained in a written record.’” (citing 47 U.S.C. § 332(c)(7)(B)(ii) (Supp. II 1996)).

76. H.R. CONF. REP. NO. 104-458, at 208 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 223.

77. *BellSouth Mobility*, 944 F. Supp. at 928 (quoting *Bickerstaff Clay Prod. Co., Inc. v. NLRB*, 871 F.2d 980, 984 (11th Cir. 1989)).

78. *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (internal citation omitted)).

79. *Omnipoint Corp. v. Zoning Hearing Bd.*, 20 F. Supp.2d 875, 880 (E.D. Pa. 1998) (citation omitted).

80. *AT&T Wireless PCS, Inc. v. City Council*, 155 F.3d 423, 430 (4th Cir. 1998).

In *AT&T Wireless Services, Inc. v. Orange County*, the U.S. District Court for the Middle District of Florida found that the Board of County Commissioner's written denial of the service provider's application for a special exception and variance to obtain the necessary building permit for its tower failed to meet the requirements of the 1996 Act.<sup>81</sup> The Commissioner's denial contained no findings of fact, citations to evidence, or any other explanation.<sup>82</sup> "Merely putting the word 'Denied' on a piece of paper is not sufficient to meet the requirements of this [Act]."<sup>83</sup> The court had sharp words for local governments denying applications in such a manner, saying, "local governments may not mask hostility to wireless communications facilities with unreasoned denials that make only vague references to applicable legal standards."<sup>84</sup>

## 5. The Effects of Radio Frequency Emissions

Section 704(a)(7)(B)(iv) of the Act prohibits denial of an application based on the environmental effects of radio frequency emissions that comply with the FCC's guidelines.<sup>85</sup> "As written, the purpose of the requirement is to prevent telecommunications siting decisions from being based upon unscientific or irrational fears that emissions from telecommunications sites may cause undesirable health effects."<sup>86</sup> Congress is attempting to remove barriers to PCS expansion and in doing so has removed a very large hurdle, unquestionably expediting the opening of markets to competition.<sup>87</sup>

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81. *AT&T Wireless Servs., Inc. v. Orange County*, 982 F. Supp. 856 (M.D. Fla. 1997).

82. *Id.* at 859. *See also* *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732 (C.D. Ill. 1997) (finding county violated Telecommunications Act by failing to issue statement of its reasons for denying provider's petition to construct tower); *Western PCS II Corp. v. Extraterritorial Zoning Auth.*, 957 F. Supp. 1230 (D.N.M. 1997) (concluding that the Board's opinion provided nothing more than conclusory statements for which no explanations are provided).

83. *Orange County*, 982 F. Supp. at 859.

84. *Id.* at 860.

85. 47 U.S.C. § 332(c)(7)(B)(iv) (Supp. II 1996); *see also* *Illinois RSA No. 3*, 963 F. Supp. at 745 (holding that generalized health concerns are not sufficient to rise to the level of substantial evidence); *City Council*, 155 F.3d at 431 n.6 (noting that the 1996 Act precludes consideration of "health concerns from radio emissions"). *See generally* Guidelines for Evaluating the Environmental Effects of Radio Frequency Radiation, *Report and Order*, 11 F.C.C.R. 15,123, app. C, 3 Comm. Reg. (P & F) 1092 (1996) [hereinafter *RF Report and Order*]; *see* 47 C.F.R. § 1.0307(b) (1998).

86. Degan et al., *supra* note 36, ¶ 17. *Cf.* *Smart SMR v. Zoning Comm'n*, 995 F. Supp. 52, 58 (D. Conn. 1998) (pointing out that a locality does not violate the Act by "merely inquiring into the safety of emissions from a wireless facility").

87. Jalloh, *supra* note 7, at 114.



Health and environmental concerns are atop the list of justifications community groups offer in opposition to towers.<sup>88</sup> Former Commissioner Rachelle Chong encouraged PCS providers to “reassure local agencies and local citizens that [their] project meets the national RF standards.”<sup>89</sup> She also encouraged providers to “[b]e proactive in educating and in sharing information with . . . local agencies.”<sup>90</sup> “The requirements set forth in the Act give a telecommunications provider protection from the sometimes mercurial temperaments of local governments as they relate to zoning and planning.”<sup>91</sup> In yet another respect, the 1996 Act provides substantial assistance to service providers seeking to site towers opposed by local citizens, effectively quieting the proverbial battle cry of remonstrators. This is an area where community education can substantially reduce community resistance to tower siting. Once public misconceptions about the adverse health effects are dispelled, cooperative solutions become more plausible.

### B. *The Denial of an Application*

There are also procedural considerations contained in the Act. “Any person adversely affected by any final action or failure to act by a State or local government” may file an action based on the denial of an application.<sup>92</sup> Such action must be filed within thirty days after denial or failure to act with any court of competent jurisdiction.<sup>93</sup> According to the legislative history, final action refers to “final administrative action at the State or local government level so that a party can commence action under the [Act] rather than waiting for the exhaustion of any independent State court remedy otherwise required.”<sup>94</sup> “[T]he court to which a party appeals a decision . . . may be the Federal district court in which the facilities are located or a State court of competent jurisdiction.”<sup>95</sup> In addition, denials subject to the Act “are reviewed . . . more closely than standard local zoning decisions.”<sup>96</sup>

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88. *Panelists Say Education, Not Legislation, Will End Fights for Tower Sites*, PCS WEEK, Apr. 3, 1996, at 4.

89. Remarks of Commissioner Rachelle Chong to the Personal Communications Industry Association '96 Conference San Francisco, CA, *Speech*, 1996 FCC LEXIS 5235, \*13-\*14 (Sept. 19, 1996).

90. *Id.* at \*14.

91. Degnan et al., *supra* note 36, ¶ 39.

92. 47 U.S.C. § 332(c)(7)(B)(v) (Supp. II 1996).

93. *Id.*

94. H.R. CONF. REP. NO. 104-458, at 209 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 223.

95. *Id.*

96. *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 493 (2d Cir. 1999).

When appealing the denial of an application, the appellant should consider a number of issues when selecting the court in which the action will be filed. A rudimentary analysis of the nature of the controversy and local political environment should not be overlooked. Local judges that are elected may be susceptible to sympathizing with the uninformed views of local voters or of local governments.<sup>97</sup> Often times, a federal district court provides the most neutral venue.

A wireless service provider will likely raise three issues when appealing the denial or lack of action on the part of the local government. First, the service provider will allege that the locality's action amounts to a prohibition or effective prohibition of personal wireless services. The second count will relate to the unreasonable discrimination of functionally equivalent services, while the third will allege the local governing entity erred in determining that the location of the tower site was incompatible with prior existing uses.<sup>98</sup> Most city attorneys will have a natural inclination to defend the denial based on traditional land-use mechanisms, which primarily address only the third issue to the dereliction of the two federal law issues.<sup>99</sup> This would prove to be a fatal mistake. "Only after the federal issues are resolved, will the determination of the state or land-use issue become relevant."<sup>100</sup>

When addressing these issues, it is critical that the record be developed at the local level. "The procedural requirement of a written decision with articulated reasons based on record evidence forces local governments to rely on supportable neutral principles if they wish to deny a particular wireless installation."<sup>101</sup> As an appeal, "the court, in reviewing the denial of the application, is limited to the evidence and argument presented to the state or local government below. Efforts to bolster the position of either the communications provider or the government subsequent to the denial of the application will be futile."<sup>102</sup> Hence, the procedural nature of the appeal necessitates a comprehensive application process for a fair resolution of the controversy.

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97. Degnan et al., *supra* note 36, ¶ 26.

98. Mitchell K. Wyatt, *Denying Tower Applications: Documentation Is the Best Defense*, INFOTECH REPORT, Aug. 1997, at 2-3.

99. *Id.* at 2.

100. *Id.* at 3.

101. AT&T Wireless Servs., Inc. v. Orange County, 982 F. Supp. 856, 860 (M.D. Fla. 1997).

102. Degnan et al., *supra* note 36, ¶ 24.

### C. *The Response of Vermont's Congressional Delegation*

On October 30, 1997, Senators Patrick Leahy and James Jeffords, both of Vermont, introduced legislation in the U.S. Senate that would repeal provisions of the 1996 Act that affect local placement of telecommunications towers. Specifically, the bill would repeal selected provisions of section 332(c)(7)(B) of the Communications Act of 1934,<sup>103</sup> and prohibit the adoption of the FCC's *Proposed Rule*, set forth in "Preemption of State and Local Zoning and Land Use Restrictions on Siting, Placement and Construction of Broadcast Transmission Facilities,"<sup>104</sup> from being adopted as a final rule.<sup>105</sup> The purposes of the proposed legislation are to repeal any limitations on state and local authorities with regard to siting of personal wireless service facilities; to permit state and local regulation on the basis of environmental effects; and to prohibit the FCC from adopting rules that would preempt state and local regulation of such facilities.<sup>106</sup> Representative Sanders, also from Vermont, introduced a nearly identical bill in the House of Representatives in early November of 1997.<sup>107</sup> Neither bill was passed.

Senator Leahy continued his push to restrict federal preemption of local zoning authority. In September of 1998, he introduced another bill to amend the Communications Act of 1934.<sup>108</sup> The bill would "clarify State and local authority to regulate the placement, construction, and modification of broadcast transmission and telecommunications facilities."<sup>109</sup> Citing low-level satellites and PCS-over-cable, Senator Leahy believes that other technologies offer the benefits associated with traditional PCS service, without the shortcomings associated with tower siting.<sup>110</sup> While these services do offer particular advantages, they also have their shortcomings—most notably the costs associated with satellite communications. The competition provided by a fully deployed digital

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103. 47 U.S.C. § 332(c)(7)(B) (Supp. II 1996).

104. Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities, *Notice of Proposed Rulemaking*, 12 F.C.C.R. 12,504 (1997). This proposed rule deals specifically with preemption of local authorities that present an obstacle to the rapid implementation of digital television.

105. S. 1350, 105th Cong. § 2 (1997).

106. *Id.* § 1.

107. H.R. 3016, 105th Cong. (1997).

108. S. 2514, 105th Cong. (1998).

109. 144 CONG. REC. S10,921, S10,921 (daily ed. Sept. 24, 1998) (statement of Sen. Leahy).

110. *Id.*

wireless infrastructure will only benefit consumers, forcing competitors to reduce the cost of their new services to compete with PCS.

The Vermont congressional delegation's response is ill suited to addressing the problems inherent in the full deployment of a wireless infrastructure. While the 1996 Act may initially appear as an unnecessary usurpation of state and local zoning authority, without such strong support for providers, the provision of wireless services would no doubt be substantially delayed, if not denied. "After receiving billions in wireless auction revenues, it is incumbent upon the Federal government to exercise its preemptive authority to assure that the provision of wireless service to consumers is not hamstrung by local politics."<sup>111</sup> Given the prominent role of PCS in the burgeoning telecommunications market, expeditious deployment is vital. Removing the federal incentive to site towers does not provide a constructive solution to the problems that face states, localities, and providers. Education and cooperation offer a more mutually advantageous alternative.

#### IV. RECOMMENDATIONS FOR WORKING WITH LOCAL AND STATE AUTHORITIES

For a great deal of time, mutual distrust and skepticism plagued the siting process, hampering creative and cooperative solutions. As a result, the FCC found itself in the middle of two seemingly adversarial positions. Service providers, which recently spent billions on licenses, and local governments, which are charged with creating and administering land-use policies, initially developed polarized views as a result of an underestimate of the impact of the wireless revolution.<sup>112</sup> An understanding of the relevant issues on both sides is critical to developing viable solutions. Service providers, which have made substantial capital investments, are concerned about delays as projected returns are deteriorating.<sup>113</sup> Financial constraints on providers are considerable, as they seek to provide a return to their stakeholders on their investment in licenses.

Carriers are also cognizant of the benefits that they bring to cities. "To the extent that wireless dealer networks, system maintenance and other activities are supported by local residents the city will see an increase in overall employment and the economic multiplier effect which comes

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111. *CTIA Asks FCC to Issue Advisory Opinion Defining the Scope of Local and State Regulatory Authority over Sites and Fees* (visited Mar. 15, 1999) <<http://www.wow-com.com/index.cfm>>.

112. Bennett, *supra* note 15.

113. Kratofil, *supra* note 71.

along with such activity.”<sup>114</sup> Even more important is the potential economic impact of a well-developed wireless infrastructure to attract business.<sup>115</sup>

The position of cities is often one of bewilderment with the dynamic change within the wireless industry. The rapid deregulation of the industry as a result of the Telecommunications Act of 1996 has stretched zoning ordinances to the point that they “cannot, without amendment, incorporate the land-use requirements of wireless networks.”<sup>116</sup> However, “there are now emerging model ‘team work’ agreements which allow both carriers, cities and the general public to gain access to competitive wireless services in a timely manner.”<sup>117</sup> The benefits to consumers are numerous and include a reduction in wireless rates and the potential reduction in landline rates. The FCC has also offered the universal benefit of modern public safety systems and educational technologies as assets that a carrier can bring to a community.<sup>118</sup> Given all that states, localities, and providers have at stake, education and cooperation are essential. According to Chairman Kennard: “[Siting] is a solvable problem, . . . [w]e can find a win-win here. Local municipal governments are being bombarded with requests for tower siting, and they need the assistance of [the FCC] and the industry to develop a management plan to accommodate these things.”<sup>119</sup>

#### A. *Education and Cooperation*

Commission Chairman William Kennard has said, “The answer . . . is not for the FCC, the heavy hand of the federal government, to just roll over local municipalities. The goal here is to find a way that local zoning authorities can work with the wireless industry to make sure that their tower siting needs are accommodated.”<sup>120</sup> However, considering the billions of dollars that carriers paid for PCS licenses, some in the industry are calling for a more proactive response from the Commission.<sup>121</sup>

The FCC has encouraged the mutual benefits of education and collaboration. Former Commissioner Rachelle Chong has urged service

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114. Bennett, *supra* note 15.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. Kennard Says FCC's Role in Tower Siting to Bring Parties Together, Not Dictate Policy, PCS WEEK, Feb. 4, 1998, at 4.

120. *Id.*

121. *Id.*

providers to work cooperatively with local jurisdictions.<sup>122</sup> At the outset of the process, local governments should provide as much information about the zoning authorization process as is possible. Likewise, service providers should recognize the strong interest that local governments have in viewing the "big picture" so that they are aware of the long-term effects facilities siting will have on their communities.<sup>123</sup> However, in their efforts to disclose as much information as possible, both parties must not lose sight of the dynamic nature of the wireless telecommunications industry, which can change dramatically with new developments.<sup>124</sup> In organizing meetings that bring government officials, service providers, and consumer groups together to share information, the public is in a better position to make decisions about PCS.<sup>125</sup>

Communities and service providers need to work together to educate one another and to determine the land requirements and concerns of the public prior to applying for tower sites; if they do, "polarization and opposition will be minimal and the Commission's goal of encouraging wireless expansion will be achieved."<sup>126</sup>

When speaking with both carriers and cities many refer back to the time when the electrical infrastructure was first being installed in the United States. Others reference the cable industry buildout as well. Both events while challenging at the time had significant impacts on economic growth and standard of living. The wireless revolution promises similar benefit. But it can only be accomplished through teamwork and cooperation of all members of the team.<sup>127</sup>

An important step for local communities is the development of ordinances that are capable of responding to the demands of tower siting. In updating zoning ordinances, local officials develop an understanding of the relevant issues, while simultaneously enabling providers to assess their expectations.

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122. Remarks of Commissioner Rachelle Chong to the Personal Communications Industry Association's PCS '95 Conference, Orlando, FL, *Speech*, 1995 FCC LEXIS 6318, \*15 (1995).

123. WTB FACT SHEET #2, *supra* note 18, at 7. *See also* Bennett, *supra* note 15 ("Advance city-wide plans presented by a carrier as opposed to piecemeal site by site requests appear to be more welcomed by the cities. The area wide plans allow the city to understand the longer term impact on the community.").

124. WTB FACT SHEET #2, *supra* note 18, at 8.

125. *Government Seeks Advice from Wireless Reps on Zoning*, MOBILE PHONE NEWS, Apr. 22, 1996, at 12.

126. Jalloh, *supra* note 7, at 123.

127. Bennett, *supra* note 15.

### B. *Local Issues Including Ordinances*

Cities should consider a multitude of factors when drafting an ordinance. The National League of Cities recommends that an ordinance should begin by explicitly defining what the ordinance is intended to cover.<sup>128</sup> In addition, the creation of a stand-alone ordinance as opposed to the inclusion of the new ordinance within existing sections is preferable because it enhances the readability of the ordinance, presenting a clearer picture.<sup>129</sup> “[A] community should provide *clear performance standards* to minimize potential visual impacts of WCFs. Clear, objective performance standards will assist not only the jurisdiction but the wireless industry and the public in understanding and applying these standards.”<sup>130</sup> Keeping the underlying objectives of education and cooperation at the forefront, a clear picture of the locality’s objectives assists providers in meeting those expectations. There are many potential approaches to addressing siting issues. Collocation, however, has become an extremely popular approach included in many ordinances.

Given the technological possibility for cellular and PCS providers to share structures, or to collocate, the number of facilities can be reduced.<sup>131</sup> Collocation can be an effective means of reducing the number of siting facilities. However, collocation does have its limitations.

The City of Bloomington, Minnesota, enacted an ordinance that included a collocation provision to facilitate the expansion of communications services while protecting the general welfare of its community. The city council found that such an ordinance was necessary to:

- (1) facilitate the provision of wireless telecommunication services to the residents and businesses of the City;
- (2) minimize adverse visual effects of towers through careful design and siting standards;
- (3) avoid potential damage to adjacent properties from tower failure through structural standards and setback requirements; and
- (4) maximize the use of existing and approved towers and buildings to accommodate new wireless telecommunication antennas in order to reduce the number of towers needed to serve the community.<sup>132</sup>

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128. NATIONAL LEAGUE OF CITIES, LOCAL OFFICIALS GUIDE, SITING CELLULAR TOWERS: WHAT YOU NEED TO KNOW, WHAT YOU NEED TO DO 10 (1997).

129. Verner, *supra* note 20.

130. *Id.*

131. WTB FACT SHEET, *supra* note 30, at 11.

132. BLOOMINGTON, MN., CODE § 19.63.05(a)(1)-(4) (1996).

The City of Bloomington also requires that a wireless tower be designed to accommodate multiple users.<sup>133</sup> This is but one means of encouraging collocation among service providers.

There are additional means of promoting collocation. "Generally, collocation on existing broadcast and relay towers is encouraged by fewer standards and less complex permit procedures."<sup>134</sup> Specific examples of incentives include providing expedited approval; permitting certain facilities outright (requiring only a building permit);<sup>135</sup> utilizing an administrative review process;<sup>136</sup> allowing conditional use permits; and allowing height bonuses for desired sites.<sup>137</sup> Through the use of "incentives, a community can meet the federal requirement to allow the provision of service while maintaining the character of the community. Both the community and the wireless industry can meet the common goal of siting WCFs in a manner which is consistent with community character and local concerns."<sup>138</sup> Another potential benefit to collocation is the reduction in costs for service providers. Through collocation, providers would be able to share the cost of studies to evidence compliance with radio frequency guidelines.<sup>139</sup> However, allowances for technical, practical, and economic feasibility are critical to the success of collocation.<sup>140</sup>

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133. The ordinance reads as follows:

Any proposed commercial wireless telecommunication service tower shall be designed, structurally, electrically, and in all respects, to accommodate both the applicant's antennas and comparable antennas for at least two additional users if the tower is over 100 feet in height or for at least one additional user if the tower is over 60 feet in height. Towers must be designed to allow for future rearrangement of antennas upon the tower and to accept antennas mounted at varying heights.

*Id.* § 19.63.05(c)(2).

134. REDMOND, WASH., REDMOND COMMUNITY DEVELOPMENT GUIDE § 20D:170.45-030(2) (1997).

135.

Permit WCFs outright if the proposed antenna array is collocated on an existing tower or located on an existing building or structure, including public rights of way occupied by power lines or public utility properties such as electrical substations and power generation plants, and does not increase building/structure height more than 10 feet.

Verner, *supra* note 20.

136. Utilize an administrative review process when the proposed WCFs involve existing nonresidential structures and add less than twenty feet to the existing height. *Id.*

137. *Id.*

138. *Id.*

139. *RF Report and Order*, *supra* note 85, app. C.

140. Section 00.00.070(A) of AT&T's model ordinance states: "FCC Licensed Wireless Communication providers are encouraged to construct and site their WCFs with a view towards sharing facilities with other utilities, to collocation with other existing WCFs and accommodating the future collocation of other future WCFs, where technically, practically,



Collocation is not a perfect solution as there are potential drawbacks. Collocation "should not be viewed as a complete solution to all land use concerns associated with the deployment of personal wireless services."<sup>141</sup> Collocation may not be technically feasible or practical in certain circumstances, and competitors may be reluctant to share business plans.<sup>142</sup> There is also the possibility of antitrust limitations.<sup>143</sup> Municipalities need to be sensitive to these issues and, to the fullest extent possible, attempt to work around them through the establishment of independent and confidential relationships with service providers.<sup>144</sup> Nevertheless, collocation often provides an effective solution, minimizing the number of structures. However, to effectively utilize collocation, cooperation between localities and providers is essential.

### C. State Action

States can also help to facilitate the tower-siting process. Many states have taken an active role in the siting of telecommunications towers on state properties and as a result have helped to create a more cordial relationship with service providers. The State of Maryland has made a list of potential government-owned sites available to service providers and permits providers to submit proposals for use of other sites that are not included on the list. The state acts on the requests within a sixty-day time period. In return, the state may require the provider to make repairs to the site or to install equipment.<sup>145</sup>

As another example of effective state action, the Vermont legislature enacted a statute designating the Secretary of Administration as the exclusive agent for the state to contract for the use of state-owned properties.<sup>146</sup> In addition, the secretary was to "create a work group of state officials and the private sector to assist the secretary in developing standard contracting terms and procedures."<sup>147</sup> The contracting procedure was to provide for, *inter alia*, "final consideration of each completed facility development proposal within 60 days of the proposal's

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and economically feasible." AT&T, *Model Wireless Communication Facility Siting Ordinance* (on file with the *Federal Communications Law Journal*).

141. WTB FACT SHEET #2, *supra* note 18, at 8.

142. *Education, Meetings, Co-Location: Three Solutions to Tower Siting*, LAND MOBILE RADIO NEWS, Feb. 14, 1997, at 8.

143. WTB FACT SHEET #2, *supra* note 18, at 9.

144. Bennett, *supra* note 15.

145. State of Maryland, project No. AST-9505-RSSC, Department of General Services Procurement and Contracting Office.

146. VT. STAT. ANN. tit. 30, § 227b(a)(1) (1997).

147. *Id.* § 227b(a)(3).

submission”;<sup>148</sup> “appropriate public benefits as compensation for the use of state properties, including public use of increased telecommunications capacity [and] direct compensation”;<sup>149</sup> restoration of an abandoned site;<sup>150</sup> and the “encouragement of the use of advanced technology, and the collocation of facilities whenever feasible, in order that the number of wireless telecommunications facilities can be minimized.”<sup>151</sup>

Finally, a study conducted by the Secretary of Administration for the Governor and General Assembly of Virginia encourages siting of telecommunications towers on state-owned lands for numerous reasons. The justifications include reduced costs to consumers through increased competition among providers, increased availability of wireless services, and potential state income through land-use arrangements with service providers.<sup>152</sup> The actions of these three states exemplify the multiple benefits of an active response in cooperation with service providers on the part of state and local governments.

## V. CONCLUSION

Given the increasing prominence of wireless communications within the broader realm of technological advancement, the deployment of a national infrastructure capable of meeting the demands of PCS is critical. When enforced as written, the Telecommunications Act of 1996 takes substantial steps to ensure the expeditious deployment and ultimate success of such technology. The spur of the 1996 Act is necessary to bring otherwise disinterested communities to the table with providers. While the 1996 Act greatly enhances the position of service providers as they deal with local communities, education and cooperation between federal, state and local governments, and service providers offer the greatest potential for effective resolution of problems. States and municipalities working with providers in the crucible of their jurisdictions continue to develop innovative solutions to the complex issues that they face. As a result, their profound contributions have and will continue to advance the communications revolution.

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148. *Id.* § 227b(b)(2).

149. *Id.* § 227b(b)(3).

150. *Id.* § 227b(b)(4).

151. *Id.* § 227b(b)(6).

152. Commonwealth of Virginia, *A Study on the Feasibility and Desirability of Leasing State-Owned Properties to Wireless Telecommunications Providers*, House Document No. 32.

