Alice in Towerland: Judicial Review of Land Use Decisions on Cellular Telecommunications Facilities under the Telecommunications Act of 1996

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I. Introduction.

Section 704 of the Telecommunications Act of 1996, codified at 47 U.S.C. § 332(c)(7) ("TCA"), gives courts the authority to review a local zoning authority's denial of an application for a cellular telephone tower or facility. Since 1996, courts have worked to find the right balance between its sometimes contradictory goals. As the First Circuit describes, the TCA "works like a scale that, inter alia, attempts to balance two objects of competing weight: on the one arm sits the need to accelerate the deployment of telecommunications technology, while on the other arm rests the desire to preserve state and local control over land use matters."[2] In 2006, courts struggled to adjust both to changing interpretations of the TCA and changing methods in the telecommunications industry for siting wireless facilities. These changing standards, applied to new methods, have left some providers to argue that they have entered "Alice in Wonderland."[3] The courts beg to differ.[4] Like Lewis Carroll's heroine, courts and litigants continue to navigate a "curiouser and curiouser" world using their old good sense.[5]

[1] The authors gratefully acknowledge the assistance of Mark A. Partin of Vedder, Price, Kaufman & Kammholz, P.C., in the research and preparation of this report.
[2] *ATC Realty, LLC v. Town of Kingston*, 303 F.3d 91, 94 (1st Cir. 2002); *see, e.g.*, *United States Cellular Corp. v. City of Wichita Falls*, 364 F.3d 250, 253 (5th Cir. 2004).
[3] GTE Mobilnet of Cal. Ltd. P'ship v. City & County of San Francisco, 440 F. Supp. 2d 1097, 1106 (N.D. Cal. 2006).
[4] *Id*. at 1106 n.7.
[5] Lewis Carroll, Alice's Adventures in Wonderland 15 (1865).

II. The Telecommunications Act.

The TCA does not completely preempt local zoning authority. Rather, it places certain restrictions on the authority of local bodies to regulate the zoning of telecommunications service facilities. The TCA provides that "[e]xcept 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 services facilities."[6] The TCA goes on to limit a municipality's power to regulate tower siting with three substantive and two procedural limitations. The first substantive restriction bars localities from "unreasonably discriminat[ing] among providers of functionally equivalent services."[7] The second substantive restriction complements the first: "[t]he regulation of the placement, construction and modification of personal wireless service facilities . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[8] The third substantive restriction bars localities from regulating on the basis of environmental effects of radio frequency emissions to the extent such facilities comply with FCC regulations.[9]

Procedurally, the TCA requires that an applicant's request be acted upon within a reasonable period of time and any permit denial by a locality "be in writing and supported by substantial evidence contained in a written record."[10] Finally, the TCA provides that any person adversely affected by a final action or failure to act on a siting application may bring an action in a court of competent jurisdiction, which must be considered on an expedited basis.[11] This report will discuss recent decisions interpreting these various substantive and procedural provisions.

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[6] 47 U.S.C. § 332(c)(7)(A).
[7] 47 U.S.C. § 332(c)(7)(B)(i)(I).
[8] 47 U.S.C. § 332(c)(7)(B)(i)(II).
[9] 47 U.S.C. § 332(c)(7)(B)(iv).
[10] 47 U.S.C. §§ 332(c)(7)(B)(ii), 332(c)(7)(B)(iii).
[11] 47 U.S.C. § 332(c)(7)(B)(v).

III. Prohibiting Service: Local Regulation of Wireless Services Shall Not Prohibit or Have the Effect of Prohibiting the Provision of Personal Wireless Services.

By the end of 2005, the circuit courts had *four* different interpretations of what would constitute the prohibition of personal wireless services in violation of the TCA. The Fourth Circuit continued to maintain that only a general ban on all wireless facilities by a town could constitute prohibition of service.[12] Courts in other Circuits had held that an individual denial could be deemed an effective prohibition of wireless service in a particular area, but applied three different tests for determining whether a denial had the effect of prohibiting service. The Second and Third Circuits used a two-pronged test: (1) whether the proposed facility fills a significant existing gap in the ability of remote users to access the national telephone network (a gap in service generally, not just for the provider seeking the facility); and (2) whether the manner in which the provider proposes to fill the gap in service is the least intrusive on the values which the municipality's denial sought to serve.[13] The First and Seventh Circuits used a different two-pronged test that required a provider to show that: (1) the town's zoning criteria, or the administration of the zoning criteria, effectively preclude towers (e.g., no alternative sites are available), with the gap in service measured as a gap in the provider's service rather than in service generally; and (2) further efforts by the provider to obtain a permit would be fruitless.[14] In 2005, in *MetroPCS, Inc. v. City & County of San Francisco*,[15] the Ninth Circuit created a third two-prong test by combining elements of the First and Third Circuit tests: (1) that the provider

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[12] *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423, 428 (4th Cir. 1998); *USCOC of Va. RSA#3, Inc. v. Montgomery County Bd. of Supervisors*, 343 F.3d 262, 268 (4th Cir. 2003).

[13] *See Nextel West Corp. v. Unity Tp.*, 282 F.3d 257, 265-66 (3d Cir. 2002); *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 642-43 (2d Cir. 1999); *APT Pittsburgh L.P. v. Penn Tp.*, 196 F.3d 469, 478-79 (3d Cir. 1999).

[14] *See Voicestream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 834-35 (7th Cir. 2003); *Second Generation Props., L.P. v. Town of Pelham*, 313 F.3d 620, 633 (1st Cir. 2002); *Town of Amherst v. Omnipoint Communications Enters., Inc.*, 173 F.3d 9, 14-15 (1st Cir. 1999).

[15] 400 F.3d 715 (9th Cir. 2005).

was prevented from filling a significant gap in its own service; and (2) that the proposal for filling the gap is least intrusive on the values that the denial sought to serve.[16]

In its *MetroPCS* decision, the Ninth Circuit remanded the case to the district court. In 2006, the district court held a trial on the prohibition and unreasonable discrimination issues, and issued its findings of fact and conclusions of law.[17] In its ruling on MetroPCS's prohibition claim, the court struggled to apply the Ninth Circuit's test. The city's board of supervisors had denied MetroPCS's application for a conditional use permit ("CUP") for a facility on a parking garage on Geary Boulevard in San Francisco. MetroPCS had chosen this site, which it previously deemed too low, after its first choice faced significant community opposition and it realized it could put its antenna on a light pole on top of the parking garage.[18]

The service gap that MetroPCS was seeking to fill with the facility was not a general gap, but a gap only in in-building coverage—that is, wireless service inside buildings.[19] In a ruling of first impression, the court ruled that an in-building coverage gap, standing alone, was sufficient to constitute a "significant" gap in service under the Ninth Circuit test.[20] The court then turned to the question of whether the Geary Boulevard site was least intrusive on the values that the city's denial sought to serve. To prove this, MetroPCS was required to show that it had made a meaningful comparison of alternate sites and that its chosen site was the best solution for the community. On this test, the court found that MetroPCS fell short.[21]

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[16] *Id.* at 733-35.
[17] *MetroPCS, Inc. v. City & County of San Francisco*, No. C 02-3442 PJH, 2006 U.S. Dist. LEXIS 43985 (N.D. Cal. June 16, 2006).
[18] *Id.* at *6-12.
[19] *Id.* at *20-22, 26-27.
[20] *Id.* at *28-31.
[21] *Id.* at *34.

MetroPCS had compared its original site, the Geary Boulevard site, and 17 other sites on the basis of their technological feasibility. The court found that this comparison was insufficient. First, the court noted that the Geary Boulevard site had originally not been "technologically feasible" (only becoming feasible after MetroPCS's original site faced opposition), and raised the unanswered question of whether any of the other 17 previously-rejected sites might also be technologically feasible.[22] The court further noted that an analysis of technological feasibility was not the same as an analysis of whether a site was the best community solution.[23] Finally, the court relied on the strong community opposition to the Geary Boulevard site as evidence that the site was not the best community solution. The court justified its reliance on evidence of community opposition by holding that whether a site is least intrusive must be measured as of the date of the city's decision, not the date of application, and on that date there was significant opposition.[24] Thus, the court found, MetroPCS's prohibition claim must fail.

The court's application of the Ninth Circuit standard is troubling. Most denials of applications for a wireless facility are made in the face of community opposition. If that community opposition is then evidence against a finding of one of the prongs of the prohibition test, it becomes difficult to see how a provider can ever prove a prohibition claim.

IV. Unreasonable Discrimination: Local Regulation of Wireless Services Shall Not Unreasonably Discriminate Among Providers of Functionally Equivalent Services.

It has always proved difficult for providers to raise successful claims of unreasonable discrimination under the TCA, as courts emphasize that the TCA bars only *unreasonable* discrimination, thus contemplating some discrimination among providers, so long as that

[22] *Id.* at *35-36.
[23] *Id.* at *36-37.
[24] *Id.* at *38-39.

discrimination is based on generally applicable zoning requirements.[25] In *MetroPCS*, the Ninth Circuit elaborated that providers alleging unreasonable discrimination must show that they have been treated differently from other providers whose facilities are similarly situated in terms of the structure, placement, or cumulative impact of the facilities in question.[26] In the trial after remand, the district court had to apply this "similarly situated" standard.

The court divided the standard into a two-part test: (a) whether the provider's proposed facility is similarly situated to other providers in structure, placement and cumulative impact; and (b) whether it has been subjected to differential treatment by the municipality.[27] On the first test, the court found that MetroPCS had to do more than compare the location and zoning district of the sites in question. It was obligated to show that the sites were similar in how they met the various standards of the applicable provisions of the zoning code—here, "the element of neighborhood desirability and compatibility."[28] On the second test, the court found that while MetroPCS had proved differential treatment by the city, it had not proved that the differential treatment was unreasonable. Differential treatment based on traditional bases for zoning regulation is inherently reasonable, and here the city had relied on the traditional bases of considerations for community and neighborhood.[29] Thus, the court concluded, MetroPCS's discrimination claim also failed.

The court's application of this unreasonable discrimination standard raises questions similar to those raised by its application of the prohibition test. First, by measuring both the similarly situated prong and the differential treatment prong by the provisions of the zoning

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[25] *See, e.g., MetroPCS*, 400 F.3d at 727.
[26] *Id.* at 727-28.
[27] *MetroPCS, Inc.*, 2006 U.S. Dist. LEXIS at *42-43.
[28] *Id.* at *47-50.
[29] *Id.* at *51.

code, the court has collapsed the two-part test into a single test of whether the zoning code was properly applied. Second, in relying on "consideration for community and neighborhood,"[30] the court has again elevated community opposition into a position of veto power over a siting application.

A more straightforward case of unreasonable discrimination was presented in *Ogden Fire Co. No. 1 v. Upper Chichester Tp.*[31] In *Ogden*, the plaintiff, a volunteer fire company, was denied a permit for a 130-foot tower that it intended to use for its emergency radio system and also for a co-located commercial wireless antenna.[32] The fire company claimed that it was unreasonably discriminated against, pointing to the local board's approval of another volunteer fire company's permit application for a 180-foot tower with a commercial co-locater in the same zoning district,[33] and its permit of a 180-foot stand-alone tower in a zoning district with the same restrictions on towers as the fire company's district.[34] The court had little difficulty in concluding that the municipality had unreasonably discriminated against the fire company.[35]

V. Written Decision: A Locality's Denial Shall Be in Writing.

The TCA requires that a locality's denial "be in writing."[36] In 2001, the First Circuit interpreted this provision to require boards to issue a written decision separate from the written record, containing "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," with review limited to the substantial evidence supporting the reasons contained in the decision.[37] This

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[30] *Id.*
[31] No. 05-1031, 2006 U.S. Dist. LEXIS 14863 (E.D. Pa. Mar. 30, 2006).
[32] *Id.* at *2-9.
[33] *Id.* at *16-20.
[34] *Id.* at *25-26.
[35] *Id.* at *24-27.
[36] 47 U.S.C. § 332(c)(7)(B)(iii).
[37] *Southwestern Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 59-60 (1st Cir. 2001).

middle ground standard has continued to be adopted by other courts.[38] A court of the Eastern District of Missouri addressed an issue not previously made explicit: whether there is a time limit for issuing a written decision. In *Sprint Spectrum L.P. v. City of Dardenne Prairie*,[39] the court held that § 332(c)(7)(B)(iii), when read in light of the short 30-day appeal period in § 332(c)(7)(B)(v), required localities to issue a written decision within 30 days of their final decision on the application.[40] Relying on a 2005 decision of the same court, *Sprint Spectrum L.P. v. County of St. Charles*, [41] the court noted four reasons why permitting a written decision after more than 30 days was problematic: (a) it precluded the provider from attempting to remedy the concerns of the zoning authority without litigation; (b) delayed findings raised reliability concerns and evaded substantive review; (c) the evasion of expeditious substantive review thwarted the intent of Congress in the TCA; and (d) it allowed municipalities to avoid their duty to issue written findings by giving them a chance to wait to see if the decision was challenged.[42]

VI. Substantial Evidence: A Locality's Denial Shall Be Supported By Substantial Evidence Contained in a Written Record.

A new question has arisen as a result of providers finding new methods for locating antennas. In California, providers have begun seeking to locate antennas on existing or new poles within public rights-of-way.[43] The providers are attempting to take advantage of § 7901 of the California Public Utilities Code, which provides:

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[38] *See, e.g., MetroPCS*, 400 F.3d at 722; *New Par v. City of Saginaw*, 301 F.3d 390, 395 (6th Cir. 2002).
[39] No. 4:06CV-00095 JCH, 2006 U.S. Dist. LEXIS 67006 (E.D. Mo. Sept. 19, 2006).
[40] *Id.* at *13.
[41] No. 4:04CV1144RWS, 2005 WL 1661496 (E.D. Mo. July 6, 2005).
[42] *Dardenne Prairie*, 2006 U.S. Dist. LEXIS 67006 at *13-15.
[43] *See, e.g., GTE Mobilnet of Cal. Ltd. P'ship v. City & County of San Francisco*, 440 F. Supp. 2d 1097, 1099 (N.D. Cal. 2006).

> Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.[44]

Municipalities have countered by pointing to the "incommode" provision of § 7901 and to § 7901.1 of the Code, which provides: "It is the intent of the Legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed."[45]

In 2006, several California courts were called on to assess the scope of §§ 7901 and 7901.1, and to answer questions about the interaction between these statutes and wireless providers, local zoning codes, and the TCA. Some of these questions include whether wireless providers are "telephone corporations" subject to § 7901, whether local regulations of wireless providers are precluded by § 7901, and whether the substantial evidence provisions of the TCA apply to permits under the Public Utilities Code.

The first court to confront these issues was the Ninth Circuit. In *Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge*,[46] the city denied the provider's two applications for facilities in city rights-of-way.[47] The city based its denial on its moratorium ordinance that

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[44] Cal. Pub. Util. Code § 7901 (2005).
[45] Cal. Pub. Util. Code § 7901.1(a) (2005).
[46] No. 05-55014, 2006 U.S. App. LEXIS 12871 (9th Cir. May 23, 2006) (*La Canada I*) and 2006 U.S. App. LEXIS 12607 (9th Cir. May 23, 2006) (*La Canada II*). *La Canada* has a complex decisional history. The Ninth Circuit originally issued an opinion on January 17, 2006, that was published at 435 F.3d 993. On May 23, 2006, the court amended and replaced that opinion with *La Canada I* and *La Canada II*, and withdrew the opinions from publication. *See* Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge, 2006 U.S. App. LEXIS 12614 (9th Cir. May 23, 2006).
[47] *La Canada II*, at *2.

allowed it to bar structures in rights-of-way on aesthetic grounds.[48] The court first considered whether § 7901 pre-empted the city's moratorium. It held that § 7901 gave telephone companies, including Sprint, the right to install fixtures in the right-of-way, so long as they did not "incommode" or, in other words, interfere with public use of the roads.[49] The court further held that while § 7901.1 did expand the power of the city to regulate the time, place, and manner of the use of public ways, that authority extended only to regulating how roads are accessed, and not to any regulation based on aesthetics.[50] Thus, the court held, the city's moratorium was pre-empted by California law, and its denial was not valid. The court then considered whether the denial was supported by substantial evidence. It began by saying that to be supported by substantial evidence, a denial had to have some weight under state and local law.[51] The court then noted the provisions of § 332(c)(7)(A) of the TCA, which provides that "[e]xcept as provided in this paragraph, nothing in this Chapter shall limit or affect the authority of a State or local government . . . over decisions regarding the placement, construction and modification of personal wireless service facilities."[52] The court found that because § 332(c)(7)(A) protected state law as well as local law, it preserved the preclusive effect of § 7901 from the constraints of the TCA. Any other result would be antithetical to the purposes of the TCA.[53]

Shortly afterward, the California Court of Appeal took up the issue. In *Sprint Telephony PCS, L.P. v. County of San Diego*, the court affirmed the county's denial of the provider's

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[48] *La Canada I*, at *2-3.
[49] *Id.* at *4-6.
[50] *Id.* at *6-8.
[51] *La Canada II*, at *7.
[52] 47 U.S.C. § 332(c)(7)(A); *La Canada II* at *7.
[53] *La Canada II* at *7-10.

application to place towers in rights-of-way.[54] The county relied on its authority under its Wireless Telecommunications Ordinance ("WTO") to regulate the placement and aesthetics of wireless facilities.[55] The court addressed two issues. First, it considered whether § 7901 applies to wireless providers.[56] Reviewing the history of § 7901, it found that the statute dated back to 1872 and was amended to include telephone companies in 1905. In 1951, the definition of telephone line was amended add the clause "whether such communication is had with or without the use of transmission wires."[57] On the basis of this amendment, the court held that wireless companies were telephone companies enjoying "the privileges bestowed by section 7901 to install wireless communication equipment in [rights-of-way]."[58]

The court then addressed whether "the scope of privileges accorded by section 7901 preclude local governments from imposing design and siting restrictions" on a provider seeking to locate in a right-of-way.[59] The court first found that local governments do have the authority under §§ 7901 and 7901.1, as well their own police power, to regulate the location and appearance of telephone equipment in rights-of-way.[60] The court then went on to explicitly disagree with the Ninth Circuit and held that § 7901 does not preempt all other local regulation of right-of-way installations. Section 7901 does not fully occupy the field, and "evinces a legislative intent that the state-conferred franchise to use the [right-of-way] would coexist with, rather than preempt, local regulation promoting the convenience of the general public in matters

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[54] 44 Cal. Rptr. 3d 754, 770 (Cal. Ct. App. 2006), *review granted & removed from publication*, 143 P.3d 654 (Cal. 2006).
[55] *Id.* at 758.
[56] *Id.* at 761.
[57] *Id.* at 762.
[58] *Id.* at 764.
[59] *Id.* at 761.
[60] *Id.* at 764-67.

involving the use of the [right-of-way] for equipment."[61] Section 7901.1 was simply consistent with this intent.[62] The California Supreme Court has granted review of the Court of Appeal's decision,[63] but has not issued a decision yet.

The issue then returned to federal court. In *GTE Mobilnet of California Ltd. P'ship v. City & County of San Francisco*,[64] the provider sought a utility conditions permit ("UCP") from San Francisco, which was the only prerequisite to a telephone company's installing equipment in the right-of-way under § 7901. In turn, San Francisco's only requirement for issuing a UCP was that the provider obtain a certificate of public convenience and necessity ("CPCN") from the California Public Utilities Commission. Unfortunately, the Commission no longer issues CPCNs to wireless providers because federal law preempted its authority to regulate those providers.[65] Because GTE did not include a CPCN as required under the ordinance, its application was denied.[66]

The court first found that the TCA does apply to the city's decision. While the title to § 332(c)(7) refers to zoning, the statute more broadly applies to "regulation of the placement . . . of personal wireless facilities."[67] The term "placement" was broad enough to include applications governed by § 7901 and the city ordinance.[68] The court then examined if the denial was supported by substantial evidence. It agreed with the California Court of Appeal that § 7901 applied to wireless providers but did not preempt the city's ordinance.[69] Finally, it upheld the

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[61] *Id.* at 769-70.
[62] *Id.* at 769 n.15.
[63] *Sprint Telephony PCS, L.P. v. County of San Diego*, 143 P.3d 654 (Cal. 2006).
[64] 440 F. Supp. 2d 1097 (N.D. Cal. 2006).
[65] *Id.* at 1099-1100.
[66] *Id.* at 1100.
[67] *Id.* at 1101-02. See 42 U.S.C. §§ 332(c)(7)(A), (c)(7)(B)(i), (c)(7)(B)(iii).
[68] *Id.* at 1102.
[69] *Id.* at 1102-06.

validity of the city ordinance itself. The court rejected GTE's contention that an ordinance that required as a prerequisite the issuance of a CPCN that the Commission no longer issued was an "Alice in Wonderland" result.[70] It noted that the city ordinance did allow providers to otherwise demonstrate that they have been authorized to occupy public rights-of-way by the Commission, and that GTE had not attempted to make that showing. It found that there was an issue of fact as to whether this process was so burdensome as to bar GTE from obtaining a permit and, therefore, violating § 7901.[71]

VII. Conclusion

> "I don't think they play at all fairly," Alice began, in rather a complaining tone, "and they all quarrel so dreadfully one ca'n't hear oneself speak—and they don't seem to have any rules in particular: at least, if there are, nobody attends to them—and you've no idea how confusing it is all the things being alive: for instance, there's the arch I've got to go through next walking about at the other end of the ground—and I should have croqueted the Queen's hedgehog just now, only it ran away when it saw mine coming!"[72]

Alice's rant about the croquet game—in which the balls were hedgehogs, the mallets flamingos, and the arches playing-card soldiers[73]— may unfortunately seem all too familiar to those dealing with how to apply the TCA to changing telecommunications technology. New methods of siting wireless facilities and new interpretations of the provisions of the TCA have only complicated the struggle between municipalities and providers to balance the rights and obligations created by the "refreshing experiment in federalism" that is the TCA.[74] The issues addressed by courts in 2006, like the scope of the privilege to locate facilities in public rights-of-

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[70] *Id.* at 1106.
[71] *Id.* at 1106-07.
[72] Lewis Carroll, Alice's Adventures in Wonderland 124 (1865).
[73] *Id.* at 121.
[74] *Town of Amherst v. Omnipoint Communications Enters., Inc.*, 173 F.3d 9, 17 (1st Cir. 1999).

way that is to be addressed by the California Supreme Court, are far from resolved. Thus, both the providers and municipalities are left to ask if they have, indeed, entered Wonderland and, how they might get out.