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Preemption of Local Governments' Authority to Limit Wireless Phone Service Is a Tough "Cell" Under the Telecommunications Act

*Sprint Spectrum, L.P. v. Willoth*¹

I. INTRODUCTION

Today's society is on the go, and telecommunication's answer to keeping up with the busy pace has been the advent of wireless communications systems.² The concept of the American dream is founded in principles of innovation, determination, and competition; it is embodied in the constant quest to build a better mouse trap and sell it to the consumer. To sell to consumers, one must offer the best product at the lowest price. Congress sought to promote these values by enacting the Telecommunications Act of 1996 ("TCA").³ The stated purpose of the TCA is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."⁴

Competition fosters improvements in technology. Wireless phone services are but one example of such innovation. As the demand for wireless phone service grows, wireless service providers obtain licenses from the Federal Communications Commission ("FCC") and apply to local zoning boards for the right to locate wireless antennae towers within local municipalities. Some local governing boards are hesitant to allow the necessary facilities because of aesthetic and safety concerns surrounding the location of the towers.⁵

1. 176 F.3d 630 (2d Cir. 1999).

2. There are two types of wireless technologies: cellular and personal communications services ("PCS"). Cellular technology is further divided into digital and analog. See Lynn Hanley, *Wireless Communications and the Telecommunications Act of 1996: An Experiment in Federalism*, 12 LOY. CONSUMER L. REV. 48, 49 (1999).

3. Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of 47 U.S.C.).

4. Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56, pmb1. (1996). The TCA merely continues the purpose of the Federal Communications Act of 1934, which was enacted in response to AT&T's monopoly in long distance phone service. See T. Jason White, *Tearing Down A Fence That Is Hog Tight, Horse High & Bull Strong: The Supreme Court Reshapes Jurisdiction of Local Telephone Markets*, 11 LOY. CONSUMER L. REV. 188, 188 (1999) (citing John T. Soma et al., *The Essential Facilities Doctrine in Deregulated Telecommunications Industry*, 13 BERKELEY TECH. L.J. 565, 568 (1998) (discussing Telecommunications Act of 1934, 47 U.S.C. § 151 (1994))).

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

A debate currently exists as to the scope of land use control rights that Congress intended to provide local governments.⁶ The debate centers on whether Section 332 of the TCA, regulating mobile services, has the effect of preempting states' rights to exercise police powers of zoning regulations.⁷ The power of local zoning governance is limited by Section 332(c)(7)(B).⁸ The substantive limitations of Section 332(c)(7)(B), the main focus of this Note, prevent local government from unreasonably discriminating among providers and from prohibiting the provision of services in decisions regarding the

6. See Leonard Kennedy & Heather A. Purcell, *Section 332 of the Communications Act of 1934: A Federal Regulatory Framework that Is "Hog Tight, Horse High, and Bull Strong"*, 50 FED. COMM. L.J. 547, 587-88 (1998) (asserting that the legislative history of the 1993 and 1996 Acts indicate that Congress, in enumerating a general authority and then placing specific limitations on that authority, in effect reduced the power provided to the states to control local land use). "Although section 332(c)(7)(A) initially appears to preserve unfettered state regulatory discretion, the long list of exceptions in section 332(c)(7)(B) reveals that the limiting phrase '[e]xcept as provided in this paragraph,' actually signals a significant shrinking of state regulatory authority. In essence, the exceptions swallow the grant of authority." *Id.* But see H.R. CONF. REP. NO. 104-458, at 208 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 222 (standing for the general proposition that Congress intended for states to have the right to favor providers that better satisfy local interest in visual or aesthetic pleasantness and safety concerns). See also *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 428 (4th Cir. 1998) (reasoning that states must have some right to prohibit placement and construction because if states were required to rubber stamp requests of providers under Section 332(c)(7)(B)(i)(II), which disallows state actions that prohibit provision of services, there would be no need for Section 332(c)(7)(B)(iii), which requires denials to be in writing and supported by substantial evidence in a written record).

7. Section 332 of the TCA addresses mobile services and Section 332(c)(7) specifically outlines a local government's authority to regulate land use within its borders. Although the Section grants control over the "placement, construction, and modification of personal wireless service facilities," this is not a complete grant of general authority. 47 U.S.C. § 332(c)(7)(A) (Supp. II 1996). The power of the local zoning governance is limited by 47 U.S.C. § 332(c)(7)(B) (Supp. II 1996). The substantive limitations prevent the local government from unreasonable discrimination among providers and from prohibition of provision of services in decisions of the placement, construction, and modification of personal wireless facilities. See 47 U.S.C. § 332(c)(7)(B)(i)(I), (II) (Supp. II 1996). The Section also imposes procedural requirements on the states or local governments in response to a service provider's application for construction or placement of such facilities. See 47 U.S.C. § 332(c)(7)(B)(iii) (Supp. II 1996). The Section further limits state control by preempting state power to deny an application "on the basis of environmental effects of radio emissions to the extent that such facilities comply with the [FCC's] regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(iv) (Supp. II 1996). Lastly, it allows a cause of action to be brought and heard "on an expedited basis," where the local government has abused the limited power under the Act. 47 U.S.C. § 332(c)(7)(B)(v) (Supp. II 1996).

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

placement, construction, and modification of personal wireless facilities.⁹ Courts have addressed claims of unreasonable discrimination and prohibition of provision of services with a variety of results. Competing interpretations of the TCA have blurred the function and power of state and local governments in deciding whether to approve personal wireless service applications for construction or modification of towers. *Sprint Spectrum, L.P. v. Willoth* provides a consumer-centered interpretation of the limitations on local governments and allows a broader discretion in denial of construction applications than was previously allowed.

II. FACTS AND HOLDING

The FCC licensed Sprint Spectrum, L.P. ("Sprint") to provide personal communications services ("PCS") to an area including Ontario, New York.¹⁰ Provision of such services required Sprint to strategically place antennae in formations called cells¹¹ in order to transmit the signals of users within the calling area. The size of the cell, which determines how closely the antennae must be arranged, is affected by: (1) whether the signal is digital, as with PCS, or analog, as with some cellular phones; (2) topography; (3) building density; and (4) population density.¹² Lucent Technologies¹³ used these factors to

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

10. See *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 634 (2d Cir. 1999).

11. *Id.*

Both PCS and cellular services require the user to be within range of a wireless telecommunications facility called a cell site. The geographic area covered by a particular cell site is called a cell, and a provider achieves seamless coverage throughout a greater area by constructing a grid-pattern of adjacent honey-comb shaped cells. Each cell site requires antennae and equipment to provide reliable coverage throughout the cell and to switch the signal from one cell to the next as a PCS user moves through an area. . . . The antennae may be placed on preexisting structures But absent suitable preexisting structures within 25[%] of the cell radius, it is necessary to erect a tower for the antennae.

Id. at 634-35.

12. *Id.* at 635.

Population density tends to factor into the cell size in two ways: (1) it is a rough measure of building density and type, and (2) it is also an indicator of how many telephone users will be located within a cell. . . . In addition to signal strength, the limited bandwidth available to PCS providers can accommodate only a certain number of wireless phone calls within a particular cell at any one time. Therefore, as phone use within an area increases, it may become necessary to shrink the cell to ensure that the system has sufficient capacity to provide reliable service.

Id.

13. Lucent Technologies designed Sprint's PCS system in the area to be served by

develop guidelines, which indicated proper cell size.¹⁴ Sprint subsequently used these guidelines to determine that with a population density of 261 per square mile, Ontario qualified as a suburban, rather than rural, area.¹⁵ A suburban area required more cell sites to provide service. Consequently, in May 1996, Sprint made a presentation to local Ontario representatives and proposed a plan to build three cell sites.¹⁶ Sprint then filed three applications with the Town Board ("Board") to build 150 foot antennae towers, one in each of the planned cell sites.¹⁷ The Board scheduled a town meeting and asked Sprint to provide a "Full Environment Assessment Form ("FEAF") and visual addendum for each application" so that it could determine if further environmental impact reports¹⁸ were necessary¹⁹ pursuant to New York State law.²⁰

The Board held meetings in August and September of 1996 to discuss alternative sites and heights of towers and "adopted a resolution 'to declare a positive environmental impact.'"²¹ The resolution indicated that the towers

the FCC license. *Id.*

14. *Id.*

Lucent defines a rural morphology as an area in which the population density is less than 250 people per square mile, and the recommended cell radius is set at 4 miles. A suburban morphology corresponds to a population density between 250 and 1778 people per square mile, and a cell radius of 1.5 miles. . . . Since Ontario has a population density of approximately 261 per square mile, it is just within the numerical limits for a suburban morphology according to Lucent's criteria. The Lucent Technology criteria are only estimates of use and building size and type, and where the population density is near the line between two morphologies, the smaller cell and larger number of cells may constitute a substantial overbuild.

Id.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* The purpose of these reports is to determine if the proposed actions would have a significant environmental impact. *Id.* at 636. If the reports indicate to the Board that there is a significant consequence to the environment, the Board is required to begin an Environmental Impact Statement procedure. *Id.* This procedure has two phases: (1) DEIS, which is a draft environmental impact statement; and (2) FEIS, which is a final environmental impact statement. *Id.* The environmental impact statements aid in determining the extent of environmental impact and evaluating mitigating actions that may be taken. *Id.*

19. *Id.* (citing *Vill. of Westbury v. Dep't of Transp.*, 549 N.E.2d 1175, 1177 (N.Y. 1989); *Soc'y of the Plastics Indus., Inc. v. County of Suffolk*, 573 N.E.2d 1034, 1038-39 (N.Y. 1991); N.Y. ENVTL. CONSERV. LAW § 8-0109 & n.C8-0109:1 (McKinney 1997) (Background, Purpose and Construction)).

20. State Environmental Quality Review Act ("SEQRA"), N.Y. ENVTL. CONSERV. LAW § 8-0101-0117 (McKinney 1997).

21. *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 636 (2d Cir. 1999).

could adversely affect property values in areas surrounding the cell sites.²² There was also evidence that there might be negative visual and cumulative impacts from “the proposed facilities and possible future facilities.”²³ Sprint submitted a “visual impact analysis,”²⁴ in February 1997, and a Draft Environmental Impact Statement (“DEIS”)²⁵ in May 1997.²⁶ The Board accepted the DEIS and submitted the Final Environmental Impact Statement (“FEIS”) in August 1997.²⁷

On August 26, 1997, the Board considered Sprint’s applications in light of information provided by Sprint indicating the signals that it would need for suburban area coverage, the FEIS, and independent data on area coverage of weaker signals used in neighboring towns.²⁸ On September 25, 1997, the Board denied Sprint’s applications, concluding that three towers were not necessary and would be overly intrusive.²⁹

Sprint initiated an action under the TCA³⁰ and New York State law³¹ in the United States District Court for the Western District of New York challenging

22. *Id.*

23. *Id.*

24. The visual impact analysis performed by Sprint included balloon tests and photographic simulations of the proposed sites. *Id.*

25. The Board submitted this statement in accordance with SEQRA. *See supra* note 20.

26. *See Sprint*, 176 F.3d at 636.

27. *Id.*

28. *Id.*

29. *Id.*

30. Section 332(c)(7) states:

(7) Preservation of local zoning authority

(A) General Authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority . . . thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

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

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

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

. . . .

(iii) Any decision by a State or local government . . . to deny a request to place, construct, or modify personal wireless service facilities shall be . . . supported by *substantial evidence* contained in a written record.

47 U.S.C. § 332(c)(7)(A), (B)(i) & (iii) (Supp. II 1996) (emphasis added).

31. This Note, however, will not address the merits of the New York State law. *See N.Y. ENVTL. CONSERV. LAW § 8-0101-0117 (McKinney 1997).*

the Board's denial of its applications.³² The district court granted summary judgment for the Board.³³ Sprint appealed to the United States Court of Appeals for the Second Circuit claiming that the Board exceeded its authority by denying the level of service Sprint deemed necessary, that the Board's decision unreasonably discriminated against Sprint given that the Board had previously approved a different provider's application for a tower,³⁴ and that the denial constituted a prohibition or had the effect of prohibiting services.³⁵

The Second Circuit found that states could reasonably consider the proposed location of towers when deciding (1) whether a more probing inquiry is needed and (2) whether to approve construction applications.³⁶ The court interpreted the language of the TCA to mean that (1) a local government may prohibit personal wireless service when service may be provided "by less intrusive means," (2) a local government may deny applications to build more towers than are necessary to fill gaps in service, and (3) a local government's right to deny applications expands once an area is "sufficiently serviced by a wireless service provider."³⁷ The court held that the ban on prohibiting personal wireless services extended only to the denial of applications "for a facility using the least restrictive means to close a significant gap in a user's ability to reach a cell site that provides access to land-lines."³⁸

III. LEGAL BACKGROUND

The TCA represents Congress's intent to update the Communications Act of 1934.³⁹ In the field of wireless services, the interest in the promotion of competition outlined in the preamble of the TCA is tempered by the reservation of local government's power to control zoning applications for new mobile service facilities.⁴⁰ However, the reservation of power is not complete.⁴¹

32. See *Sprint Spectrum, L.P. v. Willoth*, 996 F. Supp. 253, 259 (W.D.N.Y. 1998), *aff'd*, 176 F.3d 630 (2d Cir. 1999).

33. *Id.*

34. It should be noted that the prior approval was for a different form of wireless technology. The approval was for a cellular provider, rather than a PCS provider such as Sprint. *Id.*

35. See *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 636-37 (2d Cir. 1999).

36. *Id.* at 639.

37. *Id.* at 643.

38. *Id.*

39. See Hanley, *supra* note 2, at 52.

40. "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A) (Supp. II 1996).

41. See *Smart SMR of New York, Inc. v. Zoning Comm'n of Stratford*, 995 F. Supp. 52, 56 (D. Conn. 1998) (citing *BellSouth Mobility, Inc. v. Gwinnett County, Ga.*,

Congress placed limitations on the ability of local governments to deny zoning applications by providing a cause of action against the locality for unreasonable discrimination and for prohibiting or having the effect of prohibiting the provision of personal wireless services.⁴² Since the enactment of the TCA in 1996, courts have struggled to define what “unreasonable discrimination”⁴³ means and when a state action “prohibit[s] or ha[s] the effect of prohibiting” the provision of service.⁴⁴

A. Unreasonable Discrimination

In *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*,⁴⁵ the Fourth Circuit held that discrimination is not unreasonable when there is no proof that the local government intended to favor one provider or form of service over another.⁴⁶ In that case, AT&T brought suit against the Virginia Beach City Council when its application to construct two towers was denied. The towers were to service one analog and one digital provider each.⁴⁷ AT&T sought relief alleging that the denial was unreasonable discrimination.⁴⁸ In addressing the

944 F. Supp. 923, 927 (N.D. Ga. 1996)). “Although the Act does not ‘completely preempt the authority of state and local governments to make decisions regarding the placement of wireless communications service facilities within their borders, it does impose some limitations.’” *Id.*

42. See 47 U.S.C. § 332(c)(7)(B)(i), (v) (Supp. II 1996).

43. See *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 426 (4th Cir. 1998); *Omnipoint Communications, Inc. v. Penn Forest Township*, 42 F. Supp. 2d 493, 497-98 (M.D. Pa. 1999); *Cellco P’ship v. Town Plan & Zoning Comm’n of Farmington*, 3 F. Supp. 2d 178, 184-85 (D. Conn. 1998); *Smart*, 995 F. Supp. at 57; *Omnipoint Communications, Inc. v. Port Auth. of N.Y. & N.J.*, No. 99CIV.00660(BJS), 1999 WL 494120, at *12 (S.D.N.Y. July 13, 1991).

44. See, e.g., *APT Pittsburgh Ltd. P’ship v. Penn Township Butler County, Pa.*, 196 F.3d 469, 474 (3d Cir. 1999); *Town of Amherst, N.H. v. Omnipoint Communications Enters., Inc.*, 173 F.3d 9, 13 (1st Cir. 1999); *AT&T Wireless*, 155 F.3d at 426, 429; *Penn Forest*, 42 F. Supp. 2d at 508; *Cellco*, 3 F. Supp. 2d at 184-85; *Smart*, 995 F. Supp. at 58; *Port Auth.*, 1999 WL 494120, at *12.

45. 155 F.3d 423 (4th Cir. 1998).

46. *Id.* at 427. The district court relied on *Sprint Spectrum, L.P. v. Jefferson County*, 968 F. Supp. 1457, 1467-68 (N.D. Ala. 1997), which found that actions are reasonable if the governing body presents a legitimate basis for the denial. *AT&T Wireless*, 155 F.3d at 428.

47. See *AT&T Wireless*, 155 F.3d at 425.

48. AT&T asserted a second claim that the denial of the application violated Section 332(c)(7)(B)(i)(II) because it prohibited the provision of services. *Id.* at 428. This claim will be addressed in the next section of this Note. AT&T also alleged violation of Section 332(c)(7)(B)(iii) claiming that the city council failed to issue a denial in writing with substantial evidence to support the decision. *Id.* at 429. Although the issue is not important to the arguments expressed in this Note, the court found that there

unreasonable discrimination claim, the court relied on a house conference report,⁴⁹ which indicated congressional intent to allow state and local governments to reasonably consider relative aesthetics and safety of proposed facilities when granting or denying applications.⁵⁰ The court found that the denial was not intended to favor any one provider or form of service and therefore could not be considered to be discrimination.⁵¹ The court further concluded that even were the state to discriminate, the drafters of the TCA intended states to provide different treatment to different services as long as such treatment was reasonable.⁵² The court emphasized that zoning is traditionally a state power, and zoning decisions are traditionally based on aesthetics and safety; to define such considerations as unreasonable would necessitate that any denial be deemed unreasonable and would be in violation of the TCA.⁵³ The court found that this could not have been an intended result of the TCA.⁵⁴ Thus, in the Fourth Circuit, disparate treatment does not violate the TCA, as long as it is reasonable.⁵⁵ The court did not address what constituted reasonable discrimination.

In *Smart SMR of New York, Inc. v. Zoning Commission of Stratford*,⁵⁶ the United States District Court of Connecticut further fleshed out the reasonableness requirement, providing that a denial is reasonable if there is a legitimate basis for such denial. Disparate treatment of providers alone does not provide a cause of action under the reasonability mandate of Section 332(c)(7)(B)(i)(I).⁵⁷ The court found that the proper test for whether a denial of a zoning application by a local government constitutes unreasonable discrimination should be whether there is a legitimate basis for the denial. In that case, the court found that it would have been legitimate to consider visual, aesthetic, or safety concerns; but that it was unreasonable to deny an application to modify a tower, rather than construct one, where the legitimate concerns were minimal.⁵⁸

There is, however, an alternative line of cases discussing the test for unreasonable discrimination. These cases find unreasonable discrimination whenever there is disparate treatment, rather than evaluating whether a legitimate

was no violation of Section 332(c)(7)(B)(iii). *Id.*

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

50. See *AT&T Wireless*, 155 F.3d at 427 n.3.

51. *Id.* at 427.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. 995 F. Supp. 52 (D. Conn. 1998).

57. *Id.* at 59 (citing *Sprint Spectrum, L.P. v. Jefferson County*, 968 F. Supp. 1457, 1467 (N.D. Ala. 1997)).

58. *Id.*

basis for denial of an application exists. In *Cellco Partnership v. Town Plan & Zoning Commission of Farmington*,⁵⁹ the United States District Court of Connecticut found that unreasonable discrimination may be found where there is evidence that the local governance treated providers differently.⁶⁰ According to the court, this occurs when one provider's application is granted and a subsequent application by a different provider is denied.⁶¹ In *Cellco*, Cellco had applied for a permit to reconstruct a church steeple with six telecommunications antennae inside.⁶² Cellco argued that because the commission had approved a permit for SNET Mobility, a competing provider, the denial of the steeple application was unreasonable discrimination in violation of the TCA.⁶³ The court applied the disparate treatment test, but found that there was no disparate treatment where the commission had previously approved an application for a Cellco business, doing business as Bell Atlantic NYNEX Mobile.⁶⁴ Because the commission had approved applications for each of the providers, there was no indication that the commission favored any provider over Cellco, and the specific denial did not constitute unreasonable discrimination. Other courts apply the disparate treatment test finding unreasonable discrimination where there is evidence that the government intended to favor one provider over another.⁶⁵

A final alternative view, a hybrid between disparate treatment and legitimate basis denial, is outlined in *BellSouth Mobility, Inc. v. Parish of Plaquemines*.⁶⁶ In that case, the United States District Court of Louisiana upheld the disparate treatment test but found that the local government had the right to deny a permit based on traditional local concerns such as aesthetic appeal and safety.⁶⁷ BellSouth made five applications for towers in the Parish area. All five

59. 3 F. Supp. 2d 178 (D. Conn. 1998).

60. *Id.* at 185; *see also* Gearon & Co. v. Fulton County, 5 F. Supp. 2d 1351, 1355 (N.D. Ga. 1998) (finding no discrimination where denial of application appeared to affect all providers equally); *Cellco P'ship v. Hess*, No. CIV.A.98-3985, 1999 WL 178364 (E.D. Pa. March 30, 1999) (holding that disparate treatment is unreasonable discrimination).

61. *Cellco*, 3 F. Supp. 2d at 185.

62. *Id.* at 181.

63. *Id.* at 185.

64. *Id.* at 185-86.

65. *See, e.g.*, Nat'l Telecomm. Advisors, L.L.C. v. Bd. of Selectmen of W. Stockbridge, 27 F. Supp. 2d 284, 287 (D. Mass. 1998); *Cellular Tel. Co. v. Zoning Bd. of Adjustment of Ho-Ho-Kus*, 24 F. Supp. 2d 359, 374 (D.N.J. 1998), *rev'd in part*, 197 F.3d 64 (3d Cir. 1999); *Gearon & Co. v. Fulton County*, 5 F. Supp. 2d 1351, 1355 (N.D. Ga. 1998) (finding no discrimination where denial of application appeared to affect all providers equally).

66. 40 F. Supp. 2d 372 (E.D. La. 1999).

67. *Id.* at 379-80.

towers were necessary to provide reliable service to the area.⁶⁸ Three applications were approved.⁶⁹ BellSouth brought suit contesting the denial of the remaining two applications claiming that the denials constituted unreasonable discrimination.⁷⁰ The court found that the claim lacked foundation. Specifically, there was no evidence that the commission favored another provider for the proposed sites.⁷¹ Likewise, there was no evidence that similar structures had been allowed near the proposed site.⁷² The court then looked to the commission's reasons for denying the application and stated that property values and aesthetic concerns are legitimate reasons for the denial of an application.⁷³ Because there was no disparate treatment and the evidence indicated that the proposed towers would adversely affect neighboring property values, the court found that the commission did not unreasonably discriminate against BellSouth.⁷⁴

B. Prohibiting Services

In defining when a locality has "prohibited or had the effect of prohibiting services" in violation of Section 332(c)(7)(B)(i)(II) of the TCA, most courts have interpreted Section 332(c)(7)(B)(i)(II) to be violated when the principality's denials result in a blanket prohibition of services.⁷⁵ For example, in *AT&T*

68. *Id.* at 375.

69. *Id.* at 380.

70. *Id.*

71. *Id.*

72. *Id.* at 381.

73. *Id.* (citing *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 427 (4th Cir. 1998)).

74. *Id.* at 380-81.

75. *See, e.g., AT&T Wireless*, 155 F.3d at 428 (affirming the district court's holding that Section 332(c)(7)(B)(i)(II) only applies to "blanket prohibitions" and "general bans or policies"); *Omnipoint Communications, Inc. v. Penn Forest Township*, 42 F. Supp. 2d 493, 499 n.6 (M.D. Pa. 1999) (the test for prohibition is whether there is a general ban); *Cellco P'ship v. Hess*, No. CIV.A.98-3935, 1999 WL 178364, at *4 (E.D. Pa. Mar. 30, 1999) (citing *Flynn v. Burman*, 30 F. Supp. 2d 68, 75 (D. Mass. 1998)) (must show "blanket prohibition or general ban"); *BellSouth Mobility, Inc. v. Parish of Plaquemines*, 40 F. Supp. 2d 372, 381 (E.D. La. 1999) ("The denial of a single zoning application cannot, by itself, amount to a prohibition of cellular services. Subsection (B)(i) only applies to 'blanket prohibitions,' not individual zoning decisions."); *Cellco P'ship v. Town Plan & Zoning Comm'n of Farmington*, 3 F. Supp. 2d 178, 184-85 (D. Conn. 1998) ("[A] zoning commission violates section 332(c)(7)(B)(i)(II) only if it has a general ban or policy that prohibits or has the effect of prohibiting the provision of personal wireless services."); *Smart SMR of New York, Inc. v. Zoning Comm'n of Stratford*, 995 F. Supp. 52, 57 (D. Conn. 1998) ("[T]o prevail under section 332(c)(7)(B)(i)(II), it must be demonstrated that the Commission has a general policy against granting special case permits for personal wireless service facilities in residential

Wireless, the Fourth Circuit upheld a decision narrowly interpreting limitations imposed on states by the TCA.⁷⁶ Because the section only refers to general bans on provisions of services and not to individual denials,⁷⁷ the Fourth Circuit held that there was no violation of Section 332(c)(7)(B)(i)(II) unless the service provider could show that the local government had a policy of denying the provision of wireless services or had denied multiple applications.⁷⁸ This decision provides a broad scope for states and their land use controls. *Smart* also upheld the "general ban" prohibition as a proper interpretation of Section 332(c)(7)(B)(i)(II). Later that same year, the United States District Court of Connecticut heard similar arguments in *Cellco*. The court reiterated that the denial of an application does not violate Section 332(c)(7)(B)(i)(II) unless it is part of a general ban on the provision of personal wireless services.⁷⁹

The First Circuit addressed the prohibition provision of Section 332(c)(7)(B)(i)(II) in March 1999. In *Town of Amherst, New Hampshire v. Omnipoint Communications Enterprises, Inc.*,⁸⁰ the court found that although one denial did not necessitate a finding that the TCA prohibited or had the effect of prohibiting, evidence of a general ban was not required.⁸¹ The court effectively restricted states land use control because evidence of general policy or multiple denials of applications was no longer required to find a violation by the board.⁸² In *Amherst*, the board denied an application for 190 foot towers. The board found that shorter towers were an alternative that would allow Omnipoint to provide service. Omnipoint argued that although the shorter towers would work, they would not allow providers to share tower space and would therefore necessitate the building of more towers to provide the same service. The court found that although the tall towers would be less costly to Omnipoint and require fewer towers, it was within the board's discretion to favor the shorter towers, which were more aesthetically pleasing. The court stated that the TCA reserved to the local governments the power to balance these types of competing interests.⁸³

areas.").

76. See *AT&T Wireless*, 155 F.3d at 431 n.6.

77. *Id.* at 428-29. The court mentions other district court cases supporting this view. *Id.* at 429 (citing *Cellco*, 3 F. Supp. 2d at 184-85; *Virginia Metronet, Inc. v. Bd. of Supervisors of James City County*, 984 F. Supp. 966, 971 (E.D. Va. 1998); *AT&T Wireless Services of Fla., Inc. v. Orange County*, 982 F. Supp. 856, 860 (M.D. Fla. 1997)).

78. *Id.* at 428.

79. See *Cellco*, 3 F. Supp. 2d at 178.

80. 173 F.3d 9 (1st Cir. 1999).

81. *Id.* at 14.

82. *Id.*

83. *Id.* at 15.

IV. INSTANT DECISION

A. *Unreasonable Discrimination*

Section 332(c)(7)(B)(i)(I) of the TCA prevents local governing boards from unreasonably discriminating among providers of functionally equivalent services.⁸⁴ Sprint claimed that the denial of its applications constituted two forms of unreasonable discrimination under the TCA. First, Sprint argued that it was discriminatory for the board to require Sprint to endure the expense and time of the environmental impact studies when such action was not required of Frontier, a cellular provider whose application to build one analog tower in an industrial sector of the town was approved.⁸⁵ Sprint also argued that the denial of its applications was discriminatory because it favored Frontier's analog service and prevented the construction of three PCS towers that Sprint would need in order to provide competitive coverage.⁸⁶

Sprint failed to provide evidence that it would not be able to compete with the analog provider were it not authorized to construct three PCS towers in the requested locations.⁸⁷ The court was unconvinced by the provision of general information that analog systems have stronger signals and operate on a different frequency thereby requiring fewer towers to provide service.⁸⁸ The court found the evidence insufficient to conclude that discrimination had occurred, and that even if there were such discrimination, it would not have been unreasonable under the TCA.⁸⁹ The court reviewed a house conference report, which defined "functionally equivalent" service providers as those in direct competition with one another.⁹⁰ Utilizing a disparate treatment test, the court found that PCS was functionally equivalent to analog, so that the board's actions did fit within the scope of Section 332(c)(7)(B)(i)(I).⁹¹ The court concluded, however, that the house conference report contemplated that discrimination would and should occur in order to promote development of new technologies that would be more aesthetically pleasing and less intrusive. The court relied on *AT&T Wireless* and concluded that the board's denial of Sprint's applications was a reasonable action, and therefore, it was not a violation of Section 332(c)(7)(B)(i)(I) for the state to consider the location of the tower in determining whether further inquiry

84. See 47 U.S.C. § 332(c)(7)(B)(i)(I) (Supp. II 1996).

85. See *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 638 (2d Cir. 1999). This is a disparate treatment between providers argument.

86. *Id.* This is a disparate treatment between services argument.

87. *Id.*

88. *Id.*

89. *Id.*

90. See *id.* at 640 (citing H.R. CONF. REP. NO. 104-458, at 208 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 222).

91. *Id.* at 638-39.

was necessary or when deciding whether to approve construction of a new tower.⁹²

B. Prohibiting Services Claim

Sprint asserted an argument akin to the business judgment rule claiming that the TCA allows a provider to construct any and all towers the provider deems necessary to compete effectively with other telecommunications providers, wireless or not.⁹³ The board argued that under *AT&T Wireless* only general bans are prohibited and because the board had already approved one application, there was no evidence of a general policy to ban service.⁹⁴ The court determined that the proper interpretation of Section 332(c)(7)(B)(i)(II) lay somewhere between those polar opposite assertions.⁹⁵

The court rejected the business judgment argument, concluding that although no business would go to the expense of constructing more towers than would be necessary to effectively compete, the existence of Section 332(c)(7)(B)(iii)⁹⁶ would be absurd if states were not allowed to deny applications.⁹⁷ The court recognized that the TCA sought to balance competing interests, specifically, the promotion of competition and technology, and the zoning control of state and local governments.⁹⁸ The court further concluded that the interests enumerated in the preamble of the TCA⁹⁹ should not outweigh the interests of the states,¹⁰⁰ given that Section 332(c)(7)(A)¹⁰¹ of the TCA preserves

92. *Id.* at 639 (citing *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 427 (4th Cir. 1998)).

93. *Id.*

94. *Id.* at 640.

95. *Id.* at 641.

96. See 47 U.S.C. § 332(c)(7)(B)(iii) (Supp. II 1996) ("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.").

97. See *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 639 (2d Cir. 1999) (citing *AT&T Wireless*, 155 F.3d at 428).

98. *Id.* (citing *Town of Amherst, N.H. v. Omnipoint Communications Enters., Inc.*, 173 F.3d 9, 13 (1st Cir. 1999)).

99. See *supra* text accompanying note 4.

100. See *Sprint*, 176 F.3d at 639.

101. Section 332(c)(7)(A) provides:

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

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

local zoning authority limited only by Section 332(c)(7)(B).¹⁰² The court further reasoned that requiring states to issue blanket approval would not further the interests of the TCA. Providers would have no incentive to develop technologies capable of better service by less intrusive means unless the board was able to prohibit the more intrusive services.¹⁰³

The court also rejected the board's argument that Section 332(c)(7)(B)(i)(II) prohibits only blanket bans of service noting that such a construction would "simply convert subsection B(i)(II) into a simple directive to consider applications on a case-by-case basis."¹⁰⁴ Because other provisions of the statute require local governments to consider each application on a case-by-case basis, the court found that such an interpretation would render Section 332(c)(7)(B)(i)(II) superfluous and therefore could not be the proper meaning of the provision.¹⁰⁵ The court supported this conclusion by examining the overall

102. Section 332(c)(7)(B) provides:

(B) Limitations

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

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

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

(ii) A State or local government or instrumentality thereof shall act . . . within a reasonable period of time after the request is duly filed . . .

(iii) Any decision . . . to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

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

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

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

103. See *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 640 (2d Cir. 1999) (citing Elizabeth A. Norwicki, *Competition in the Local Telecommunications Market: Legislate or Litigate?*, 9 HARV. J.L. & TECH. 353 (1996)).

104. *Id.* (citing *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 428 (4th Cir. 1998)).

105. *Id.* (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992); *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990); *Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp.*, 964 F.2d 85, 89 (2d Cir. 1992)).

spirit of Section 332(c)(7)(B)(v), which requires that claims brought under the TCA be handled on an expeditious basis.¹⁰⁵ The court reasoned that if the general ban interpretation was correct, then absent a local government's express policy of prohibiting all services, a court would have to wait for multiple denials by a local government before it could provide a solution.¹⁰⁷ A general ban interpretation hinders providers' ability to bring suit because they would have to wait and accumulate evidence of a blanket prohibition before they would be able to prove the board's denial had the effect of prohibiting service. The court found that this would be contrary to the expeditious basis requirement of Section 332(c)(7)(B)(v).¹⁰⁸

To discern the proper interpretation of Section 332(c)(7)(B)(i)(II) the court set out to define "personal wireless services" with the hope of finding implicit intent.¹⁰⁹ The court used the definition to find that the proper focus of Section 332(c)(7)(B)(i)(II) is on a user's ability in a remote location to access the national telephone network.¹¹⁰

The Second Circuit then outlined what local government action is *prohibited* under Section 332(c)(7)(B)(i)(II). The court stated that local governments are prohibited from denying construction applications to fill an existing gap in service where the least intrusive means are used and the application does not seek more than the minimum construction required to provide coverage.¹¹¹ The court then shifted its focus to the *powers* of the local government, finding that where there is no gap in existing coverage, the local

106. *Id.* at 641.

107. *Id.* at 640-41. It is widely held that Section 332(c)(7)(B)(v) allows courts to take action that would not otherwise be a normal course of action in review of zoning denials; the courts have tended to grant injunctive relief to parties bringing suit under this Section rather than remanding the case for further consideration by the zoning board. *See Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2d Cir. 1999); *Sprintcom, Inc. v. Vill. of Mundelein*, No. 98C4451, 1999 WL 652032, at *8 (N.D. Ill. Aug. 20, 1999); *Omnipoint Communications, Inc. v. Port Auth. of N.Y. & N.J.*, No. 99CIV.0060(BJS), 1999 WL 494120, at *13-14 (S.D.N.Y. July 13, 1999) (finding that although an injunction is the proper form of relief, plaintiff was not entitled to injunction because it failed to show violation of Section 332(c)(7)(B)(iii)); *Primeco Pers. Communications, L.P. v. Vill. of Fox Lake*, 26 F. Supp. 2d 1052, 1066 (N.D. Ill. 1998); *Cellco P'ship v. Town Plan & Zoning Comm'n of Farmington*, 3 F. Supp. 2d 178, 187 (D. Conn. 1998); *United States Cellular Corp. v. Bd. of Adjustment of Des Moines*, 589 N.W.2d 712, 719 (Iowa 1999) (upholding district court decision not to remand because it would not be consistent with the expeditious requirements of Section 332).

108. *See Sprint*, 176 F.3d at 640-41.

109. *Id.* at 641-42.

110. *Id.* at 642-43. "In other words, local governments must allow service providers to fill gaps in the ability of wireless telephones to have access to land-lines." *Id.* at 643.

111. *Id.*

government's right to deny applications increases and it may refuse an application without violating Section 332(c)(7)(B)(i)(II).¹¹²

Applying these findings to the facts of the case, the court determined that the applications made by Sprint were not for the least intrusive facilities and therefore denial of the applications did not violate the TCA.¹¹³

V. COMMENT

The scope of unreasonable discrimination provided in *Sprint* is more workable than the previous disparate treatment test in that the court focused on disparate treatment between types of services rather than between providers. Previous cases stated that unequal treatment could be found where a local government approved one provider's application but denied another's.¹¹⁴ This could not have been the intent of Congress in enacting the TCA.¹¹⁵ *Sprint* explains that such an interpretation would be inconsistent with Section 332(c)(7)(B)(i)(II) under which a local government is not allowed to deny applications in a way that prohibits the provision of services. The TCA mandates that local governments approve some service to fill gaps in coverage. Were disparate treatment among providers the proper test for unreasonable discrimination, once a local government met its obligation to approve a service coverage application, *any* future denial would necessarily result in a violation of the TCA.

The ruling of *Sprint* makes the proper definition or test of "unreasonable discrimination" exceedingly important, as the definition acts as the primary substantive limitation¹¹⁶ of local zoning control over wireless communications facility locations. The court appears to adopt a hybrid test for unreasonable

112. *Id.*

113. *Id.* at 643-44.

114. *See, e.g.,* Cellco P'ship v. Hess, No. CIV.A.98-3985, 1999 WL 178364, at *3-4 (E.D. Pa. Mar. 30, 1999); Gearon & Co. v. Fulton County, 5 F. Supp. 2d 1351, 1355 (N.D. Ga. 1998); Cellco P'ship v. Town Plan & Zoning Comm'n of Farmington, 3 F. Supp. 2d 178, 185 (D. Conn. 1998).

115. The preamble to the TCA declares an interest in fostering competition to provide improvements in technology. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56, pmb1. (1996). To do this, there must be a choice between types of services. If the focus were merely disparate treatment of providers, competition could be limited to competition between providers of the same type of service. This would not serve the purpose of development of competing technologies.

116. The two substantive limitations are unreasonable discrimination and prohibition of services. Under the opinion in *Sprint*, the unreasonable discrimination test provides the main restraint on local governments' zoning powers to deny applications for tower sites. The best chance for a provider to challenge a local government's denial is now based on unreasonable discrimination because the new interpretation of prohibition of services allows local governments much more room to deny applications.

discrimination. After determining that two providers are directly in competition with one another, the board is obligated to consider whether denial of an application would result in the denied provider being unable to compete. Upon determining that cellular and PCS technologies are substantially similar, and therefore are in direct competition, the board may not deny the less advanced PCS application if doing so would leave no alternative sites for towers that would allow the PCS provider to compete. This indicates that local governments are not allowed to discriminate against different forms of service provision, i.e., cellular or PCS. Disparate treatment among different services only violates the TCA if unreasonable. The court mentioned that local governments were allowed to discriminate for legitimate reasons such as visual, aesthetic, or safety concerns. The decision narrowed the powers of the local governments by allowing disparate treatment between competing services only on a legitimate basis, thereby broadening the definition of what constitutes unreasonable discrimination.

The decision makes the unreasonable discrimination prohibition the only substantive limitation with teeth. Though the *Sprint* decision restrains the powers of local governments under the unreasonable discrimination prong, it reduces the substantive limitation on local governments to "prohibit" construction and location of towers under Section 332(c)(7)(B)(i)(II). The court established hurdles to providers' ability to argue a local government has prohibited services. Under the court's holding, three questions must be answered in the affirmative before Section 332(c)(7)(B)(i)(II) applies to local governments: (1) Is there a gap in service coverage that the application seeks to fill?; (2) Does the application implement the least intrusive means necessary to provide service to the area?; and (3) Does the request limit the number of towers to the minimum necessary to provide service to the area?¹¹⁷ Unless the answer to all three questions is "yes," the local government cannot be said to have violated Section 332(c)(7)(B)(i)(II).

This means that if there is no gap in service, a local government will be able to deny applications for tower sites without being said to have prohibited service under the TCA. The court stressed that the "unreasonable discrimination" limitation is always applicable to local governments, so the court did not remove the substantive limitations imposed by Congress. However, the court also mentioned that it was not unreasonable to deny a later application if the structure, placement, or cumulative impact of the site would be more intrusive than an existing cell. This essentially allows a local government to discriminate against less technologically advanced PCS providers because they will necessarily require more sites than an existing cellular site. The only way for a PCS provider to compensate and effectively compete would be to camouflage the antennae by placing them in existing structures. This would allow for the promotion of local visual and aesthetic concerns.

117. See Appendix *infra* p. 224.

Where there is a gap in service, the local government still has some control. A local government is able to deny an application without prohibiting service where there are less intrusive means¹¹⁸ or where the application is for more towers than the minimum necessary to provide service to an area.¹¹⁹ Although this is a more narrow reading of Section 332(c)(7)(B)(i)(II), it allows a bright line test to be used in evaluating a prohibition claim. The interpretation seems to favor states rights to zoning control over the competition interest expressed in the purpose of the TCA. But, close examination reveals that the result allows for both local control and competition. Although competition is not direct with the public, it is indirect for the application approval. Service providers must seek the least intrusive sites and only the minimum number required to provide service, or their applications will be denied and those of competitors granted. The public is not faced with the choice between those who provide service in the least intrusive ways and those who locate towers in unfavorable positions in the area. Instead, there is a filtration. The public chooses between providers who clear the first hurdle of competition for the right to locate towers in the area. Because local boards have more specialized knowledge than the general public, this will likely result in advancements in less intrusive means of service technology, while allowing local control of siting facilities until such technology is developed.

VI. CONCLUSION

Sprint interpreted the TCA to balance interests in competition between service providers and the needs of local residents. The hybrid test, combining the disparate treatment among services and the legitimate basis test, for “unreasonable discrimination” is more consumer centered than the provider focused disparate treatment test. The test does not consider the relationship between two providers, rather it focuses on the relationship between a provider and local residents allowing the states to promote more aesthetically pleasing and less intrusive means of personal wireless service. While the disparate treatment test focuses on competition of providers, an aim which is announced in the preamble to the TCA, the interpretation given in *Sprint* better effectuates the goal of competition and technological advance, while balancing local government’s interest in preserving land use control.

118. See *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999) (citing *Town of Amherst, N.H. v. Ommipoint Communications Enters., Inc.*, 173 F.3d 9, 14-15 (1st Cir. 1999) (less intrusive means available where it is possible to shorten the height of the tower); *Gearon & Co. v. Fulton County*, 5 F. Supp. 2d 1351, 1355 (N.D. Ga. 1998) (aesthetic concerns could be mitigated where less sensitive sites are available); *Cellco P’ship v. Town Plan & Zoning Comm’n of Farmington*, 3 F. Supp. 2d 178, 187 (D. Conn. 1998) (use of a preexisting structure, church steeple, to hide the antennae)).

119. *Id.*

The court's interpretation of "prohibit or have the effect of prohibiting," though in line with the intent of Congress, indicates that the preemption of state control over land use is more narrow than an initial reading would suggest. The interpretation of "prohibit," like that of "unreasonable discrimination," is also focused on the consumer. It allows the local governments, elected by the people, to determine what facilities will exist in their neighborhoods, and is more in line with the traditional concepts of federalism, reserving a state's ability to control issues that are normally considered police powers. There is only a preemption of states rights where there is a gap in service. This ensures that a user in a remote location has access to the national telephone network. Where the consumer is able to access the system, a local government cannot be said to be prohibiting service under Section 332(c)(7)(B)(i)(II). This interpretation does not allow service providers to compete with each other for the consumer's business; rather, providers compete with one another at the application stage *before* they are allowed to present a product to the consumer. Allowing local zoning boards to deny applications where there is already service provided takes some choice away from the consumer, but the "unreasonable discrimination" ban ensures that the denials are based on traditional zoning concerns and allows the choices ultimately offered to the consumers to be of quality.

JENNIFER A. FLOYD

Appendix: Prohibition of Services Test Under *Sprint Spectrum*

