

The Disentanglement of Wireless Telecommunications and Local Zoning Two Years into the Federal Telecom Act

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More than two years have passed since Congress enacted the Telecommunications Act of 1996¹ (the “1996 Act” or the “Act”) to promote competition among providers in the telecommunications industry. In that time, the most visually noticeable result of the Act has been the proliferation of wireless telecommunications facilities, or “towers.” Since passage of the Act in February 1996, towers have sprung up along highways, and in industrial, agricultural and even residential areas, as personal wireless service providers, having paid billions of dollars to the Federal Communications Commission (the “FCC”) for their licensed service areas, answer the call to competition and attempt to build out their systems and provide service in as short a period of time as possible. Accordingly, it is the rare local government that has not seen at least one application, and many local governments have faced numerous applications, from personal wireless service companies to place tower facilities within their borders.

Congress enacted Section 704(a) of the 1996 Act² to amend Section 332(c) of the Federal Communications Act by adding a new paragraph (7). Although Section 704(a) purports to preserve zoning authority by state and local governments over the placement, construction and modification of personal wireless service facilities, it also places significant restrictions on, and provides

¹Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151, et seq. (1996)).

²Codified at 47 U.S.C. § 332(c)(7).

procedures for, local zoning authorities to ensure that competition among wireless service providers takes place on a nationwide level. Section 704(a) provides:

(7) Preservation of local zoning authority

(A) General authority

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

(B) Limitations

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

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

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

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

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

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

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

(C) Definitions

For purposes of this paragraph--

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

- (ii) the term “personal wireless service facilities” means facilities for the provision of personal wireless services; and
- (iii) the term “unlicensed wireless service” means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)).

While Section 704(a) of the 1996 Act caught many local governments unprepared to deal with an onslaught of tower applications at the same time they were trying to determine the effect of the new federal requirements limiting their options to respond, case law during the past two and one half- years has fleshed out the Act’s major “wireless” issues, providing guidance for local government officials and wireless services providers alike. Some of the major developments follow.

REASONABLE PERIOD OF TIME / MORATORIUM

One of the first areas offering fertile ground for litigation under the 1996 Act was the requirement that local government act upon applications for wireless service facilities “within a reasonable period of time.”³ Municipalities all over the country began imposing short-term, or not so short-term, moratoria ordinances to stop the issuance of construction permits for wireless towers until planning studies could be accomplished and new local regulations put in place to strike a delicate balance between the 1996 Act’s provisions and traditional local zoning concerns related to health, safety, aesthetics and property values.

The first such litigation under the 1996 Act dealing with a moratorium ordinance was *Sprint v. City of Medina*⁴, in which the federal district court upheld the city’s six-month moratorium on the

³47 U.S.C. § 332(c)(7)(B)(ii).

⁴924 F.Supp. 1036 (W.D. Wash. 1996).

issuance of new special use permits for wireless telecommunications facilities. In *Medina*, the court held that the moratorium was a “necessary and *bona fide* effort to act carefully in a field with rapidly evolving technology.”⁵ The court found nothing in the 1996 Act to indicate that Congress intended to force local governments into a rigid or expedited timetable in processing requests for personal wireless service facilities. Instead, the legislative history suggests that Congress intended that local zoning authorities process tower applications within generally applicable time frames for zoning decisions.⁶ Because a Washington state statute provided that a moratorium for a period of six months was a permissible zoning tool, the court found that the six-month moratorium was a “reasonable period of time.”⁷ The court also noted that the city’s moratorium only suspended the issuance of permits; nothing prevented Sprint from filing an application during the six-month period. Therefore, the City had not violated the 1996 Act.⁸

More recently, district courts have struck down moratoria as violating the 1996 Act. In *Sprint Spectrum L.P. v. Jefferson County*⁹, the County issued a third moratorium suspending the processing of tower applications as well as the issuance of permits fifteen months after the 1996 Act was enacted and fourteen months after the County Commission had adopted a comprehensive regulatory scheme based on the Act’s requirements. The Court found that the moratorium, especially suspending the processing of applications, effectively prohibited Sprint from entering the market.¹⁰

⁵*Id.* at 1040.

⁶*Id.* (quoting the Joint Explanatory Statement of the Committee of Conference at 208).

⁷*Id.* at 1039-40.

⁸*Id.* at 1040.

⁹968 F.Supp. 1457 (N.D. Ala. 1997).

¹⁰*Id.* at 1466, 1468.

Likewise, in *Sprint Spectrum L.P. v. Town of Farmington*¹¹, the court held that a nine-month moratorium on the submission of applications, issued sixteen months after the 1996 Act and nine months after Sprint submitted its tower application, was a pretext.

On the other hand, in *Cellco Partnership v. Russell*¹², the district court upheld a moratorium enacted by Haywood County, North Carolina, more than a year following the 1996 Act's passage. The court concluded that the County, like the City of Medina, had made a good faith effort to temporarily suspend the issuance of permits for wireless facilities while it worked to create an ordinance that would adequately address the complex technical and legal issues involved.¹³ The court was persuaded by the unique circumstances surrounding Haywood County's moratorium, particularly the fact that Haywood County is a "scenic, mountainous, and rural county in western North Carolina, [that] derives substantial income from tourism."¹⁴ Furthermore, the court continued, at the time the county enacted the moratorium, the only regulations for the placement, construction or modification of wireless facilities were state and local building codes, under which the County had "limited ability to alter the location or design of towers based upon their effect on public health, safety, welfare and aesthetic environs of the County."¹⁵

Quite recently, the FCC, the Local and State Government Advisory Committee ("LSGAC")¹⁶ and various wireless industry trade associations reached an agreement to work cooperatively to set

¹¹3:97 CV 863 (GLG), 1997 U.S. Dist. LEXIS 15832 (D. Conn. October 6, 1997).

¹²Civil No. 1:98CV23, 1998 U.S. Dist. LEXIS 11639 (W.D.N.C June 24, 1998) at *10.

¹³*Id.* at *13-14.

¹⁴*Id.* at *12.

¹⁵*Id.* at *12-13.

¹⁶The LSGAC is a body of elected and appointed local and state officials, appointed by the chairman of the FCC, to advise the FCC on local and state government issues.

guidelines for local governments instituting moratoria.¹⁷ According to the nonbinding agreement, local governments adopting moratoria should work with the affected wireless service providers to expeditiously and effectively address the issues involved. Moratoria should be for a fixed period of time, which in most cases should not exceed 180 days. While the moratorium is in effect, the local government should continue to accept, process and review applications. The parties to the agreement also agreed to a informal dispute resolution process.¹⁸

Because the agreement comes more than two years after the effective date of the 1996 Act, it will probably have little practical significance. By now, most communities have revised their zoning regulations to incorporate the limitations and procedures required by the Act. On the other hand, as in *Russell*¹⁹, moratoria may still be appropriate in some cases. Perhaps most significant is the fact that wireless industry trade organizations and the LSGAC have agreed to work together on issues where the tension between the competing interests of the two groups is inherent. Furthermore, the Cellular Telecommunications Industry Association (“CTIA”) has agreed to withdraw without prejudice its petition asking the FCC to preempt local zoning moratoria all together.²⁰

STANDARD OF REVIEW / SUBSTANTIAL EVIDENCE

¹⁷Guidelines for Facility Siting Implementation and Informal Dispute Resolution, FCC release at <http://www.fcc.gov/statelocal/agreement.html>.

¹⁸*Id.*

¹⁹LEXIS 11639 at *12-14.

²⁰Guidelines for Facility Siting Implementation and Informal Dispute Resolution, FCC release at <http://www.fcc.gov/statelocal/agreement.html>.

The first case to discuss the appropriate standard of review under the 1996 Act was *Bellsouth Mobility Inc. v. Gwinnett County*.²¹ The court relied on legislative history for the 1996 Act, which stated that “[t]he phrase ‘substantial evidence contained in the written record’ is the traditional standard used for judicial review of agency actions.”²² Under the substantial evidence standard, the court must determine whether the board’s written decision is supported by “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”²³ Therefore, where the court would generally defer to the county commissioner’s decision rather than substituting its own judgment, the substantial evidence test requires the court to overturn the board’s decision 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 Board’s view”.²⁴ Here the court found that the record did not support the board’s reasons for denying the application, but did, in fact, contain evidence refuting the board’s reasons.²⁵

Other courts have elaborated on the standard of review. In *Century Cellunet v. City of Ferrysburg*²⁶, the court found that the Planning Commission’s decision to deny an application for a wireless facility was supported by substantial evidence. In addition to relying on *Bellsouth*, the

²¹944 F.Supp. 923 (N.D.Ga. 1996).

²²*Id.* at 928, (quoting H.R.Conf. No. 104-458, 104th Congress, 2d Sess. 208 (1996), *reprinted* in 1996 U.S.C.A.A.N. 222).

²³*Id.* (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 95 LED. 456, 71 S.C. 456 (1952)).

²⁴*Id.* (quoting *Bickerstaff Clay Products Co., Inc. v. N.L.R.B.*, 871 F.2d 980, 984 (11th Cir. 1989)). *See also* *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 979 F.Supp. 416 (E.D.Va. 1997); *Cellco Partnership v. Town of Farmington*, 3:97 CV 2155 (GLG), 1997 U.S. Dist. LEXIS 6166 (D. Conn. April 13, 1998).

²⁵*Id.*

²⁶4:96 CV 232, 1997 U.S. Dist. LEXIS 20553 (W.D. Mich. November 10, 1997) at *15.

court stated that the substantial evidence standard is limited only to an examination of the record and does not include a de novo review, credibility determinations or weighing of evidence.²⁷ Substantial evidence means "more than a scintilla of evidence but less than a preponderance and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."²⁸ Furthermore, the court must affirm the commission's decision if it is supported by substantial evidence even if the applicant's position is also supported by substantial evidence.²⁹ The burden of proof of showing a decision is not supported by substantial evidence rests with the party seeking to overturn the decision of the agency.³⁰ In this case the court found that Century Cellunet had not provided any documentation to counter the substantial evidence supporting the commission's decision that the tower would pose an unreasonable risk to adjacent properties and would not be in harmony with the surrounding area.³¹

Several courts have explicitly recognized that the 1996 Act and its legislative history demonstrate Congressional intent for local governments to continue to make decisions about personal wireless facilities based on traditional land use principles and that judicial deference to a local zoning authority's decision is still appropriate within the parameters of the 1996 Act. In *AT&T*

²⁷*Id.* at *14 (quoting *Brainard v. Secretary of Health and Human Serv.*, 889 F.2d 679, 681 (6th Cir. 1989)).

²⁸*Id.*

²⁹*Id.*

³⁰*Id.*

³¹*Id.* at *15. See also *Gearon & Co. v. Fulton County*, Civil Action File No. 1:97-CV-3231-WBH, 1998 U.S. Dist. LEXIS 8088 (N.D. Ga. April 23, 1998) ("Because Gearon bore the burden of demonstrating that denial of its application would result in the imposition of an unnecessary hardship, this lack of evidence constitutes substantial evidence in support of the BZA's denial of the application.").

*Wireless Services of Florida, Inc. v. Orange County*³², the court held that even though the county had failed to produce reasons for its denial of AT&T's tower application, AT&T also had failed to show that its application complied with the height and setback requirements of the zoning code or met the requirements for a special exception. Refusing to simply order the county to allow the placement of the tower, the court stated that the Act "includes appropriate deference to the traditional decision making prerogatives of local governments."³³

The court in *Sprint Spectrum L.P. v. Willoth*³⁴, also recognized that traditional principles of zoning law were still appropriate under the 1996 Act. The court reasoned that neither the 1996 Act nor Sprint's status as a public utility under New York law gave it "carte blanche authority to dictate the number and location of cell towers in any locality."³⁵ Sprint argued that the town exceeded its authority under the Act by considering Sprint's 'business decision' that three towers, rather than one, were necessary to provide service in the community.³⁶ The court disagreed. Under New York zoning law, Sprint was required to show "compelling reasons, economic or otherwise," to justify its request for the location of three towers rather than the alternative location of one tower that the town had determined would be sufficient.³⁷ "Localities are still left to determine the location and number of towers needed to provide adequate service to their residents. Congress did not intend to pre-empt

³²982 F.Supp. 856, 859, 861 (M.D.Fla. 1997).

³³*Id.* at 861-862.

³⁴97-CV-6473T, 1998 U.S. Dist. LEXIS 2143 (W.D.N.Y February 19, 1998).

³⁵*Id.* at *9-10.

³⁶*Id.* at *9.

³⁷ *Id.* at *11.

the authority of state and local governments to regulate the location of cell towers within their communities.”³⁸

On the other hand, the court in *AT&T Wireless PCS, Inc. v. The Winston-Salem Zoning Board of Adjustment*³⁹, overturned the Board of Adjustment’s decision to deny a wireless facility application where the Board’s written explanation of its decision came months after it had issued its decision and plaintiff’s thirty day time limit in which to appeal that decision under the 1996 Act had elapsed. In this case, the court determined that a de novo review of the record and the Board’s written decision was appropriate.⁴⁰ This allowed the court to track the Board’s explanation “without the deference normally afforded to determinations made in accordance with statutory requirements.”⁴¹ No deference is due, the court concluded, where the is likelihood of pretext is significant.⁴²

WRITTEN DECISION

The 1996 Act’s requirement that any decision by local government to deny a request for a wireless telecommunications facility “shall be in writing and supported by substantial evidence contained in the written record”⁴³ is one with which local governments should feel quite comfortable. Local codes and state administrative procedure acts usually require local planning and zoning boards

³⁸*Id.* at *11-12 (citing *Consolidated Edison of New York v. Hoffman*, 374 N.E.2d 105 (1978)).

³⁹1:97CV01246, 1998 U.S. Dist. LEXIS 9304 (M.D.N.C. June 12, 1998) at *8, *11.

⁴⁰*Id.* at *11.

⁴¹*Id.* (footnote omitted).

⁴²*Id.*

⁴³47 U.S.C. § 332(c)(7)(B)(iii).

to memorialize their decisions and reasoning on land use applications in writing. As stated above, standards of review of administrative agencies' decisions in the court systems often require affirmation of a board's decision so long as they are supported by substantial evidence in the record.

Courts, however, have differed over the interpretation of the Act's requirement that the local zoning authority's decision to deny a request to place, construct, or modify personal wireless service facilities must be in writing and supported by substantial evidence contained in the written record. In *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*⁴⁴, City Council denied the plaintiff's wireless tower facility application with the word "Denied" rubber-stamped at the bottom of the agenda item containing the City Planning Commission's recommendations.⁴⁵ The court rejected the City's argument that the Act only requires the decision itself to be in writing, without any reasoning, findings, or assertions. "A rubber stamp with the word 'denied,' or a record of the names of City Council members voting against an application does not merely impede judicial investigation into a decision; it prevents it."⁴⁶ The court also held that the Act's requirement of a written decision could not be satisfied by the minutes or transcript of the hearing, because "these documents suffer from the same deficiencies as the rubber stamp. They impart no information to permit a reviewing court to ascertain the rationale behind the decision."⁴⁷

⁴⁴979 F.Supp. 416 (E.D.Va. 1997).

⁴⁵*Id.* at 423.

⁴⁶*Id.* at 427.

⁴⁷*Id.* See also *Winston-Salem* LEXIS 9304 at *7-8 ("one-word, rubber-stamped denial" did not meet the Act's requirement, nor did the Board's argument that its written decision coming after plaintiff's appeal time had expired complied with the Act); *AT&T Wireless Service of Florida, Inc. v Orange Count*, 982 F.Supp. 856 (M.D.Fla. 1997) ("Merely putting the word 'Denied' on a piece of paper is not sufficient to meet the requirements of these provisions; the decision must contain written findings of fact tied to the evidence of record. . . . [L]ocal governments may not mask hostility to wireless communications facilities with unreasoned denials that make only vague references to applicable legal standards. The procedural requirement of a written decision with

On the other hand, in *Gearon & Co., Inc. v. Fulton County*⁴⁸, the court held that the Board of Zoning Appeals' brief written decision stating that the plaintiffs' appeal for a variance was denied "as a result of the public hearing held by the Fulton County Board of Zoning Appeals" did meet the requirements of the 1996 Act.⁴⁹ Although the court admitted that a discussion of the Board's decision would have made the court's review easier, it concluded that "brevity of the written notice" did not require reversal of the Board's decision.⁵⁰ Instead, the court relied on a transcript of the public hearings to find that the board's decision was supported by substantial evidence in the written record.⁵¹

EFFECTIVE PROHIBITION

Personal wireless service providers often allege that the local zoning authority's regulations on wireless facilities violates the 1996 Act in that it "has the effect of prohibiting the provision of personal wireless services."⁵² Relying on legislative history of the Act, the Court in *Virginia Beach*⁵³ found that Congress had intended this section of the Act to limit only general bans or policies that prohibit or have the effect of prohibiting the provision of personal wireless services. The court

articulated reasons based on record evidence forces local governments to rely on supportable neutral principles if the wish to deny a particular wireless installation.").

⁴⁸Civil Action File No. 1:97-CV-3231-WBH, 1998 U.S. Dist. LEXIS 8088 (N.D. Ga. April 23, 1998).

⁴⁹*Id.* at *3, *6.

⁵⁰*Id.*

⁵¹*Id.* at *6-9.

⁵²47 U.S.C. § 332(c)(7)(B)(i)(II).

⁵³979 F.Supp 416 at 426-27.

rejected Plaintiff AT&T's argument that the city violated the Act just because it denied the application for a wireless facility in an area where AT&T had gaps in its service coverage.⁵⁴ This interpretation would mean that the local authority would be completely at the mercy of the wireless service provider, with no discretion to deny the application regardless of issues such as site, size and appearance.⁵⁵ Therefore, the court concluded, the Act's limitation on effective prohibition simply meant that local governments could not implement bans or policies with the effect of banning personal wireless services and that decisions must be made on a case-by-case basis.⁵⁶ Notwithstanding this conclusion, the court determined that the city had violated the Act because its decision to deny AT&T's application for a wireless facility was not in the form of a written decision supported by substantial evidence in the written record as the Act requires.⁵⁷

DISCRIMINATION AMONG PROVIDERS OF SIMILAR SERVICES

The 1996 Act provides that local governments “shall not unreasonably discriminate among providers of functionally equivalent services” in regulating the placement, construction, and modification of personal wireless service facilities.⁵⁸ However, courts have held that local zoning authorities have discretion to treat functionally equivalent facilities differently to the extent they create different visual, aesthetic, or safety concerns, and only as permitted under generally applicable

⁵⁴*Id.*

⁵⁵*Id.*

⁵⁶*Id.* (quoting H.R. Conf. rep. No. 104-458, 104th Cong., 2d Sess. 208 (1996), 1996 U.S.C.C.A.N. 124, 222); see also *AT&T Wireless Services of Florida, Inc. v. Orange County*, 982 F.Supp. 856 at 860 (“While the Board’s action certainly prohibited the construction of this proposed tower, the record does not indicate a general hostility to any tower in the area”).

⁵⁷*Id.* at 427.

⁵⁸47 U.S.C. § 332(c)(7)(B)(i)(I).

zoning requirements.⁵⁹ In other words, a local government's decision that has the effect of favoring one wireless competitor over another may appear at odds with the Act's intent to increase competition, but may still be reasonable if the local authority has a legitimate basis for its actions.⁶⁰

In the *Virginia Beach* case, the only evidence in the record for the denial of AT&T's request for a conditional use permit for a wireless tower facility was a statement by a councilman that residents of the area were satisfied with their current analog service and did not need, or want, the digital service that AT&T proposed to offer.⁶¹ The court found that refusing AT&T entry into the market because competitors already offer other services in the area was not a legitimate basis and was in direct conflict with the intent of the 1996 Act.⁶² Similarly, the court in *Jefferson County* held that the county's moratorium violated the Act because by keeping out new entrants, the moratorium sheltered incumbent providers from competitive market forces and effectively denied consumers access to new technology.⁶³

A reasonable justification was found for the Planning Board's treatment of Sprint's three tower, "all or nothing" proposal, in *Sprint Spectrum L.P. v. Willoth*.⁶⁴ Sprint argued that the Town

⁵⁹*Sprint Spectrum v. Town of Easton*, 982 F.Supp. 47, 51 (quoting H.R. Rep No.458, 104th cong., 2d Sess.208 (1996)); see also *Sprint Spectrum L.P. v. Willoth*, 97-CV-6473T, 1998 U.S. Dist. LEXIS 2143 (W.D.N.Y 1998) at *16, *17.

⁶⁰*AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 979 F.Supp. 416, 425 (E.D.Va. 1997); see also *Sprint v. Jefferson County*, 968 F.Supp. at 1467-68.

⁶¹*Virginia Beach*, 979 F.Supp. at 425.

⁶²*Id.* See also *Sprint Spectrum v. Town of Easton*, 982 F.Supp. 47 ("The Board determined, in effect, that the existing cellular service in Easton is all that is necessary and that no further competition from Plaintiff, or presumably any other new entrant whose network would require a site within Easton, will be permitted. This reasoning frustrates the primary purpose of the [1996 Act] to increase competition in the telecommunications industry.").

⁶³*Jefferson County*, 968 F.Supp at 1467-68.

⁶⁴97-CV-6473T, 1998 U.S. Dist. LEXIS 2143 (W.D.N.Y 1998) at *16, *17.

of Ontario, New York, discriminated against it by requiring lengthy supporting documentation for its application that was not required of other providers.⁶⁵ The court held that the town's approval of a single tower in the public utility corridor of an industrial zone and denial of Sprint's application for three towers in residential zones did not constitute unreasonable discrimination even if it put Sprint at a competitive disadvantage.⁶⁶

REMEDIES FOR VIOLATION OF THE ACT.

The 1996 Act provides that any person adversely affected by a local governments actions that are inconsistent with the Act's provisions may file an action in a court of competent jurisdiction and that the court should hear and decide the action on an "expedited basis."⁶⁷ The Act, however, does not specify the type of relief a court may grant if it finds a violation. This question was addressed for the first time in *Bellsouth Mobility Inc. v. Gwinnett*⁶⁸, where the court held that the 1996 Act vests a court with the authority to grant a plaintiff's request for mandamus relief if the circumstances of the case warrant it.⁶⁹ The defendant county argued that the court should abstain from ordering the county to grant the plaintiff's permit application, and should remand the case to the board of commissioners to allow them to make a decision supported by substantial evidence.⁷⁰ The court

⁶⁵*Id.* at *18.

⁶⁶*Id.*

⁶⁷47 U.S.C. § 332(c)(7)(B)(v).

⁶⁸944 F.Supp. at 929.

⁶⁹*Id.*

⁷⁰*Id.*

disagreed. To remand the issue to the board would only frustrate the Act's clear intent to provide aggrieved parties with relief on an expedited basis.⁷¹

The *Virginia Beach* court agreed⁷², stating that the Act's mandate to decide the action on an expedited basis compelled the court to order the city to approve the plaintiff's application for a conditional use permit rather than remand the issue to the city. Because council had already had an opportunity to render a decision supported by substantial evidence, a remand would only delay proper resolution of the case.⁷³ Furthermore, the court stated, "remand to a body that has already demonstrated its lack of concern for the requirements of federal law, and has suggested that further applications or debate, even for alternative sites, would 'mean nothing' would be a pointless gesture."⁷⁴

Not all courts agree, however, that remand to the local zoning authority is inappropriate in the face of a 1996 Act violation. In *AT&T Wireless Services of Florida v. Orange County*⁷⁵, the court determined that an injunction requiring the board to issue a special permit was inappropriate. Even though the court found that the board had violated the Act by failing to produce a written decision supported by substantial evidence, the court was "loathe to trespass on the board's authority [g]iven the traditional judicial deference accorded to local land use regulations [T]he Board retains considerable authority over the placement of and requirements for a proposed tower" even within

⁷¹*Id.*

⁷²979 F.Supp. at 430-31.

⁷³*Id.*

⁷⁴*Id.* See also *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Board of Adjustment*, LEXIS 9304 at *10 ("Remanding the case for a proper disposition would have the effect of condoning the Board's method by allowing it to reissue its post hoc explanation, effectively rendering innocuous Congress' procedural requirements.").

⁷⁵982 F.Supp. 856 at 862.

the Act's limitations.⁷⁶ The court retained jurisdiction over the case but gave the board thirty-five days to provide a written decision, after which the court would perform an expedited review.⁷⁷

RADIO FREQUENCY EMISSIONS

At least two cases have touched on the Act's provision that local zoning authority's may not regulate wireless tower facilities based on the environmental effects of radio frequency emissions ("RF Emissions").⁷⁸ In *Sprint Spectrum L.P. v. Town of Farmington*⁷⁹, the court held that Planning and Zoning Commission had improperly based its decision on the effects of RF Emissions. Defendants argued that they had not based their decision on the environmental effects of RF Emissions, but had instead based their decision on the fact that unfounded fears of RF Emissions would have a negative effect on property values.⁸⁰ The court was not persuaded and found that the commission had violated the Act by even partially basing its denial on the effects of RF Emissions.⁸¹ Likewise, in *Smart SMR of New York, Inc. v. Borough of Fair Lawn Board of Adjustment*⁸², the court found that the board exceeded its authority in giving credence to the perception held by the proposed tower's neighbors that RF Emissions might have long term health effects. The court noted that in

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸47 U.S.C. § 332(c)(7)(B)(iv).

⁷⁹LEXIS 15832 at *12, *13.

⁸⁰*Id.*

⁸¹*Id.*

⁸²704 A.2d 1271, ____ (N.J. 1997).

addition to the 1996 Act's preemption of consideration of RF Emissions, the New Jersey Radiation Act also preempted consideration of RF Emissions.⁸³

CONCLUSION

The trend of modern technology toward telecommunications without the necessity of wires or cables has led to a direct conflict between the facilities required for such technologies and local government land use regulation. Narrow public rights-of-way are not generally feasible, at this time, for tall towers and land-based equipment facilities currently used by wireless telecommunication providers and, therefore, the regulation of the use of private property, and to some extent government-owned property, comes into play. What appeared to many with the passage of the 1996 Federal Telecom Act two and one-half years ago to be a chaotic entanglement of wireless telecommunication facilities and local governments' land use policies and goals has now evolved into a reasonably workable set of standards for local government land use decisions related to such facilities. As evidenced by the lack of federal courts of appeals decisions with respect to Section 704 actions, the Act is achieving its goal of resolution of conflicts between the telecommunications industry and local governments in an "expedited basis". Flesh is being put on the bare bones of the various provisions of the Act by local federal district courts and decisions of local government administrative agencies are beginning to be upheld when they are adequately reasoned and supported by evidence.

Perhaps the most telling evidence of the success of the 1996 Act is that neither local governments nor the wireless industry are completely satisfied with the Acts' provisions or the

⁸³*Id.*

interpretation given to it by the courts. Such discontent is usually the substance of a fair and reasonable settlement of an issue which is a “no win” situation for each party.