MILLER & STARR
REAL ESTATE NEWSALERT

Reprinted in part from
Volume 21, Number 6, July 2011
(Article starting on page 569 in the actual issue)

ARTICLE

LOCAL MATTER OR FEDERAL CASE? THE NETWORK OF CELL TOWER REGULATION IN CALIFORNIA

By Arthur F. Coon and Sean Marciniak*

I. INTRODUCTION.

Few planning and zoning decisions generate more controversy than the placement of cellular phone antennas.[1] If the proposed site lies near a residential area, neighbors often will organize for purposes of challenging the proposal and, more often than not, they are sophisticated. In the City of San Francisco, one resident successfully challenged the placement of a tower after he switched his mobile device into "field test" mode, systematically recorded his carrier's signal strength in the vicinity, demonstrated signal strength was good to excellent in most of the area, and thereby convinced the City that his carrier did not need another tower.[2]

These contests will continue to grow in complexity and in number. Population growth means more users,[3] and more users will sustain demand for more towers.[4] Moreover, the newest technology that is capable of handling the many functions that consumers now demand and expect—pictures, movies, video conferencing—utilizes higher

* Arthur F. Coon a shareholder and Sean Marciniak is an associate and in the Walnut Creek office of Miller Starr Regalia. Both concentrate in the areas of land use and environmental law. Arthur Coon is also the author of Chapter 25, Subdivisions, Land Use Planning, and Approvals, and Chapter 25A, CEQA of Miller & Starr, California Real Estate 3d.

WEST®

frequencies, which translates into smaller coverage areas. Thus, more towers will prove necessary to serve the existing user population.[5]

Numerous questions surface in this type of land use decision. To what extent may a local city or county regulate the process? What are the bounds of its discretion? What is an agency to make of community concerns about electromagnetic energy associated with an antenna? The issues that emerge in siting cell phone antennas are among the many that the federal government has sought to address through regulation. And the government has been attempting to perfect the regulation of telecommunications for some time.

A. Overview of Federal Telecommunications Act of 1996.

The U.S. government first attempted to regulate the telecommunications industry during the Great Depression, when it created a statutory framework, known as the Communications Act of 1934, in order to promote competition among telephone companies and radio broadcasters.[6] But as decades passed, it became clear that monopolies were continuing to form.[7] Moreover, technology was advancing in unanticipated ways, such that laws designed to regulate the invention of Alexander Graham Bell now had to accommodate creatures such as the Internet and wireless phone service. Another problem that surfaced was that technology, particularly digital innovations, began allowing certain carriers—e.g., a telephone company—to offer services usually associated with a different industry—e.g., cable television service. As a result, several different industries began offering the same services, but remained subject to the distinct regulatory regimes that governed them at their formation.[8]

In 1996, the U.S. Congress undertook its "first major overhaul" of the telecommunications law in 62 years.[9] Lawmakers intended the Federal Telecommunications Act of 1996 ("1996 Telecommunications Act," or "Act")[10] primarily to encourage competition, but also to contemplate and regulate the provision of new technologies. In terms of competition, for instance, the Act obligated telecommunications carriers to interconnect directly or indirectly with the facilities and equipment of other carriers, subject to reciprocal compensation agreements.[11] Meanwhile, existing carriers had to accommodate new entrants in that these "incumbents" had a duty to provide newcomers with interconnection for the transmission and routing of telephone and other services.[12]

In terms of new technologies, the Act now contemplated the Inter-

net,[13] the proliferation of wireless services, and the development of the facilities that delivered them—e.g., cell phone towers.[14] Regulating the latter posed a particularly difficult challenge, as the U.S. Congress had to balance two somewhat contradictory purposes affecting these facilities. First, Congress had expressed an intention "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."[15] This policy, in turn, contemplated that various states had "longstanding practice of granting and maintaining local exchange monopolies."[16] On the other hand, Congress sought "to preserve the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement."[17]

B. Overview of cell phone tower regulation under the Act.

Section 332 of the Act contains the byproduct of Congress' effort to balance local and federal control in the siting of wireless facilities. In terms of delegation, state or local governments can be extremely flexible in their decisions. For instance, a city may adopt an ordinance that regulates the placement of towers according to open-ended considerations such as "necessity" and "community character."[18] Nor are considerations such as property values and aesthetics impermissible.[19] Moreover, the jurisdictions' decisions need only be supported by "substantial evidence," which is not a difficult standard to satisfy—i.e., it is more than a scintilla and less than a preponderance of evidence.

As described in this article, however, Congress did restrict local authorities in some important respects.[20] For instance:

- State and local governments may not reject the siting of a tower on the basis of radio frequency emissions—i.e., radiation—unless a tower exceeds standards set forth by the Federal Communications Commission ("FCC").[21]
- State or local governments may not ban, either outright or de facto, the siting of towers in their jurisdiction. Similarly, a jurisdiction may not cause a provider to have a "significant gap" in its coverage.[22]
- State and local governments may not unreasonably discriminate among providers of functionally equivalent services, but can treat facilities differently where they create different visual, aesthetic, or safety concerns.[23]

Aside from these more substantive restrictions, there are procedural considerations at work. For instance, a jurisdiction's decision must be in writing and consist of a certain amount of detail.[24] Time also is of the essence, as a jurisdiction must process tower applications in 90 to 150 days, depending on whether the equipment is merely an addition to an existing facility—a process known as "collocation"—or constitutes an entirely new facility.[25]

This article discusses the 1996 Telecommunications Act primarily as it has been applied in California courts and the Ninth Circuit Court of Appeals. However, where another jurisdiction has explored an issue that California authority does not address, or has influenced a California opinion, such authority also is discussed. Also warranting attention are some California state regulations that have developed that address a local agency's ability to consider an application for a cell phone tower.

Section II of this article discusses the flexibility that local jurisdictions enjoy in regulating the siting of cell phone towers; Section III discusses federal limitations and preemptions that local jurisdictions face; Section IV discusses federal procedural regulations concerning findings and timing; and Section V discusses limitations on, and the preemption of, actions by local jurisdictions imposed by statewide legislation in California.

II. THE BOUNDS OF LOCAL AUTHORITY

A. Local control preserved.

Section 332(c)(7)(A) of the 1996 Telecommunications Act preserves local governments' authority over zoning decisions regarding placement and construction of wireless service facilities, subject to enumerated limitations in §332(c)(7)(B).[26] In accordance with this statutory mandate, courts have approved a wide variety of grounds upon which a local jurisdiction may regulate the siting of a cell phone tower, and require only that local decisions be supported by "substantial evidence."

1. Substantial evidence.

The Act mandates that a state or local government's cell phone tower decision be "supported by substantial evidence contained in a written record."[27] Such a standard is not difficult to meet, and there appears to be universal agreement among the circuits as to the substantive content of this requirement. In sum, the "substantial evidence" quantum implies "less than a preponderance, but more than a scintilla

of evidence. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[28] Review under this standard is essentially "deferential," such that courts may "neither engage in [their] own fact-finding nor supplant [a local government's] reasonable determinations."[29]

This standard of review is a familiar one in California insofar as planning and zoning decisions are concerned.[30]

2. Bases of decision are broad.

A local agency need not muster any great quantum of proof to support its decision, nor does the agency face any great restrictions in picking the substantive grounds for decision on which it may rely. For instance, the agency may adopt ordinances that regulate the placement of towers according to broad considerations such as "necessity" and "community character,"[31] which demand a considerable amount of discretion. An agency also may base decisions on property values, aesthetics, and environmental concerns.[32] Moreover, an agency may structure an ordinance according to a "tiered" framework, such that towers proposed in certain areas (e.g., industrial or commercial zones) face lesser substantive and procedural restrictions than those placed in more sensitive communities (e.g., residential zones).[33] What follows is a non-exclusive list of considerations that courts have approved:

Necessity. A city is permitted to regulate a tower application on the basis of whether "the proposed use…is necessary or desirable for, and compatible with, the neighborhood or the community."[34] "Necessity" can focus on the existing adequacy of a given carrier's service; in one case, a single consumer did in fact manage to defeat an application where he used a "field test" mode on his cellular phone to systematically record his carrier's signal strength and show its adequacy.[35] "Necessity" also may concern the cumulative need for service in light of multiple providers—i.e., the circumstance where competitors of a tower proponent have a proliferation of towers in a given area. However, even if an agency complies with the substantial evidence test in showing such a proposed tower is unnecessary because competitors have the area well-covered, it will be difficult for that locality to pass the "discrimination" and "substantial gap" tests discussed further below in Section IV.[36]

Aesthetics. Numerous decisions from the Ninth Circuit approve a

local agency's consideration of how a cell phone tower affects the visual resources of a community, such as a scenic viewshed.[37] Requiring visual impact studies, screening, and other types of camouflage has met court approval.[38]

Community character. A number of decisions from the Ninth Circuit approve a local agency's consideration of how a cell phone tower harmonizes with the surrounding neighborhood.[39] From a practical standpoint, a cell phone tower is less likely to be deemed compatible with a residential neighborhood than with a commercial or industrial neighborhood.

Height, setbacks, and other traditional zoning considerations. A number of decisions from the Ninth Circuit approve a local agency's decision to subject cell phone antennas to traditional zoning considerations like the above.[40]

Property values. It appears that California courts recognize property values as a legitimate consideration in regulating the siting of cell phone towers, though such values may not support rejection of a facility if the fear of property value depreciation is based on concern about the health effects caused by radio frequency emissions.[41] It would appear a proponent of property value evidence must adhere to some rigor in its analysis, and show not only radio frequency energy levels, but also how such levels would affect market appraisals.[42] At the same time, this consideration is likely to generate controversy due to a California Supreme Court decision holding that electromagnetic radiation from power lines does not damage property, and that evidence supporting its contribution to health risks is unreliable.[43] Of course, that decision was published in 1996, and it is unclear, and beyond the scope of this article, what supplemental evidence has arisen in the past 15 years. At the same time, another California decision has held that, where a taking is established, a party's fears of electromagnetic energy, regardless of their reasonableness, may affect the calculus of what amount of just compensation is due.[44]

Historic considerations. Historic considerations concern the impact of a cell phone tower on historic resources, such as the impacts of construction or operation of a facility on a historic building or historic neighborhood. For instance, many cell phone facilities are collocated on building tops, and proposing

to do so on an historic structure would raise the prospect that the tower could destroy the cultural value of that resource. The Ninth Circuit has not expressly adopted this as a factor that agencies may consider in accepting or rejecting a facility application, but other circuits have.[45]

Environment. It does not appear a California court has addressed the issue of environmental conditions, but courts in other jurisdictions have recognized that cell phone towers may have impacts in areas such as slope stability, soil erosion, hydrology, and interference with flood management.[46] Cell phone towers also have been shown to impact biological resources, such as birds and migration routes, and the FCC acknowledges that species and habitat concerns may warrant the preparation of an environmental document.[47] It should be noted that any application for a cell phone tower also may need to undergo review under the National Environmental Policy Act ("NEPA")[48] and the California Environmental Quality Act ("CEQA").[49] Unless consideration of an environmental concern is specifically preempted by the 1996 Telecommunications Act (e.g., consideration of radio frequency emissions outside specific limitations), it would appear that any environmental topic arising through these review processes would qualify as adequate criteria in evaluating the siting of a cell phone tower. Providers and agencies may consider whether smaller facilities would be eligible for exemption from these environmental review frameworks under specific provisions in each act or their implementing regulations.[50]

Cumulative impact. It appears that if evidence shows a proposed tower, when considered in combination with other existing, proposed, or foreseeable towers, has a cumulative effect on a community resource, such an evidentiary showing could support an agency's decision to reject the proposed tower. However, the record must contain evidence of such a cumulative impact.[51] Note that the radiofrequency emission standards, set by the FCC, do address cumulative concerns, and that compliance with such standards will preempt further consideration of this issue by a local government agency, as is discussed further below.

The individual considerations listed above may be mixed and combined in a variety of frameworks, such that a state or local agency may

vary requirements in certain areas or zones so as to provide incentives or disincentives for proposals in that vicinity. The Ninth Circuit approved such a framework in *Sprint Telephony PCS, L.P. v. County of San Diego*.[52]

In that case, the City of San Diego enacted an ordinance that categorized applications for wireless telecommunications facilities into four "tiers," depending primarily on the visibility and location of a proposed facility. Depending on the tier, different requirements would apply. For example, an application for a low-visibility structure in an industrial zone generally had to satisfy lesser requirements than an application for a large tower in a residential zone.[53] While the court did not identify and itemize the requirements, it appeared they were substantive in nature. Presumably, an agency could also vary its procedural requirements in a like fashion; for instance, it likely could streamline review in industrial zones by delegating decisions to an administrator, but posit review authority in a planning commission or other advisory or legislative body where a tower is proposed in a residential zone.

3. Conclusion.

The above examples illustrate that a state or local government has great flexibility in deciding whether or not it may permit or reject an application to construct and operate a cell phone tower. Even such open-ended considerations as "necessity" and "community character" may guide an agency decision, and the decision-making body need only ensure there is "substantial evidence" in the record supporting its decision.

That said, the space in which an agency may exercise this considerable discretion is a bounded one. As the next section discusses, the 1996 Telecommunications Act establishes limits and controls that a local agency cannot escape with regard to certain topical areas.

III. LIMITATIONS ON AN AGENCY'S DISCRETION IN CONSIDERING TOWERS.

Though state and local governments enjoy a broad degree of discretion in approving or rejecting applications for cell phone towers, the 1996 Telecommunications Act provides for a number of limitations that preempt local decision making. Essentially, an agency cannot reject an application if:

(1) The agency does so on the basis of radio frequency emissions where evidence shows the proposed power will meet federal standards;

(2) Rejection would implement a ban on cell phone towers, effectively constitute a ban, or create a significant gap in a provider's service; or

(3) Rejection would constitute unreasonable discrimination among providers of functionally equivalent services.

Per federal law, state and local agencies also must ensure their decision is in writing, though existing California law already contains such a requirement.[54] More significant is that agencies must make their decision within prescribed time limits (i.e., 90 to 150 days, depending on facility), or they will suffer a presumption that delay was unreasonable. At the same time, an agency can rebut that presumption, presumably through a showing of diligent efforts to complete environmental review or some other entitlement process.

A. Radio frequency emissions.

1. Factual background.

Aside from aesthetics, perhaps no aspect of a cell phone tower will raise more opposition than the prospect of exposing neighbors to radio frequency ("RF") emissions. Such emissions consist of electric and magnetic energy moving at the speed of light, and can be further characterized by their wavelength and frequency. As the FCC explains, "the wavelength is the distance covered by one complete cycle of the electromagnetic wave, while the frequency is the number of electromagnetic waves passing a given point in one second."[55] Opponents of cell towers simply call it radiation.

In theory, biological effects of exposure can result. Just as microwave ovens cook food by subjecting it to electromagnetic waves, RF energy can heat tissue rapidly when exposure levels are high. Under such conditions, tissue damage occurs because the human body cannot cope with or dissipate this excessive heat. However, the FCC acknowledges that at "relatively low levels of exposure to RF radiation… the evidence for production of harmful biological effects is ambiguous and unproven," including increases in the risk of cancer.[56] The uncertainties of RF energy levels associated with wireless antennae often spawn widespread opposition, and constitute the real motivation behind challenges to cell tower proposals.[57]

2. FCC sets standards on RF emissions.

Section 332(c)(7)(B)(iv) of the Act provides that no state or local government may regulate the siting of a cell phone tower based on

"the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC's] regulations concerning such emissions."[58] The FCC's guidelines, adopted in 1996, have a two-fold purpose in that they: (1) identify acceptable exposure levels, and (2) identify which transmitting facilities, operations and devices will be "categorically excluded" from performing routine, initial evaluations.

The exposure levels are based on maximum RF exposure and the FCC asserts they "are designed to protect the public health with a very large margin of safety."[59] The Environmental Protection Agency and the Food and Drug Administration have endorsed this calculus, and a federal court of appeals upheld the adoption of these standards, under the "substantial evidence" standard of review discussed above.[60] The actual requirements can be found in the following regulations and policy documents: Sections 1.1307(b) and 1.1310 of the FCC's Rules and Regulations [47 C.F.R. §§1.1307(b), 1.1310]; the FCC's OET Bulletin 65, "Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields," August 1997 ("Bulletin 65"); and an interpretive guide of Bulletin 65 the FCC published in 2000, entitled "A Local Government Official's Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures, and Practical Guidance." ("LSGAC Guide").

The FCC standards also identify cellular facilities that will qualify for a "categorical exclusion" from further review. These generally include low-powered, intermittent, or inaccessible RF transmitters and facilities. For instance, facilities that qualify include conventional cellular facilities which generate 1,000 watts of power or less; conventional cellular facilities that are not mounted on a building and sit 10 meters above ground level; PCS facilities that generate 2,000 watts of power or less; or PCS facilities that are not mounted on a building and sit at least 10 meters above ground.[61]

Per FCC regulation, an Environmental Assessment ("EA"), pursuant to NEPA, must be prepared where a tower proponent cannot show the facility in question will qualify for a categorical exclusion or otherwise comply with the exposure standards.[62] An applicant should have little difficulty determining whether a categorical exclusion applies because the FCC provides a number of tables designed to streamline this process; however, determining exposure levels for non-qualifying facilities is not always a simple matter. Several factors govern this calculus, including the frequency of the RF signal, the operating power of the transmitting station, the actual power radiated from the antenna, the duration

of exposure at a given distance from the antenna, and the number and location of other antennas in the vicinity.[63]

This latter factor—what neighboring towers exist—raises the prospect of a cumulative analysis, and the FCC regulations appear to require it. Where more than one antenna is collocated, an applicant "must take into consideration *all* of the RF power transmitted by all of the antennas when determining maximum exposure levels."[64] Bulletin 65 states that "***all*** significant contributors to the ambient RF environment should be considered, including those otherwise excluded from performing routine RF evaluations, and applicants are expected to make a good-faith effort to consider these other transmitters."[65] In defining a "significant" contributor, the FCC contemplates those producing more than 5 percent of the applicable exposure limit.[66] And while the regulations focus on single towers with multiple antennas, Bulletin 65 also contemplates receptors situated between two towers.[67]

However, note that qualifying for a categorical exclusion would appear to make further cumulative analysis unnecessary; Bulletin 65 provides a decision tree meant to help agencies and carriers navigate the RF evaluation process, and qualifying for a categorical exclusion obviates further discussion.[68] Thus, it appears that qualifying for a categorical exclusion is synonymous with making a determination that, borrowing California state environmental law terminology, a facility will make no cumulatively considerable contribution to a cumulative impact.[69]

3. Where a proposed tower complies with FCC regulations, a state or local government is preempted from considering the issue further.

Section 332(c)(7)(B)(iv) of the Act provides that no state or local government may regulate a cell phone tower 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." In other words, agencies may not regulate cell phone towers to the extent their radiation complies with FCC standards, as set forth in Sections 1.1307(b) and 1.1310 of the FCC's Rules and Regulations and the FCC's OST/OET Bulletin Number 65. This prohibition covers even "indirect" environmental effects of RF emissions.[70]

Only a handful of cases that treat the issue have emerged in California, and they provide little guidance beyond the Act's statutory language.[71] Courts in other jurisdictions, too, generally have been respectful of the

statutory mandate, holding that an agency's authority is limited to verifying compliance with FCC rules.[72] But it may be the case that, where an agency is faced with alternative sites, it may select one over another on the basis of exposure levels.[73]

B. Interference with other transmissions.

Aside from affecting human health, RF emissions also have the potential to interfere with the operation of other radio waves, including those emanating from emergency communications, consumer electronic equipment, and other wireless services. However, while state and local governments may regulate cell phone towers on the basis of public safety considerations, an agency may not reject an application on the basis it will interfere with the radio frequencies of emergency communication devices and other systems.[74] The FCC since has ruled that local agencies are preempted from regulating in this area.[75]

C. Prohibition against unreasonable discrimination.

The Act mandates that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof…shall not unreasonably discriminate among providers of functionally equivalent services."[76] Conversely, "the Act explicitly contemplates that some discrimination 'among providers of functionally equivalent services' is allowed. Any discrimination need only be reasonable."[77]

As the Ninth Circuit has observed, almost all federal courts have held 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*' as the facilities in question."[78] With regard to justifying a rejection based on a cumulative impact, the only federal district court case from the Ninth Circuit on this issue held that a mere increase in the number of wireless antennas in a given area over time can justify differential treatment of providers.[79]

To demonstrate that an agency has unreasonably discriminated against a carrier, the carrier must make some "systematic comparison" of other sites that have received approvals.[80] Merely demonstrating there are competing facilities in the area, without a detailed inquiry into the similarity of those existing facilities in terms of structure, placement, and cumulative impact, will not suffice.[81]

D. Agency cannot ban or effectively prohibit provision of wireless service; agency cannot create a substantive gap in service.

1. Bans and moratoriums.

a. Bans.

The Act provides that the "regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or any instrumentality thereof…shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[82] In other words, an agency may not institute a general ban on new service providers or otherwise effectively prohibit the provision of wireless services.[83]

The courts have not been particularly receptive to petitioners who make a facial challenge to an ordinance. Where the plain language of an ordinance does not make obvious an outright prohibition, a challenger must meet a high burden of proving that "no set of circumstances exists under which the [ordinance] would be valid."[84] That an agency theoretically could exercise its discretion to reject every proposed facility has no bearing on this calculus. Thus, where the City of San Diego set forth a number of requirements and considerations for siting cell phone towers, the Ninth Circuit, in validating the ordinance, held: "It is certainly true that a zoning board *could* exercise its discretion to effectively prohibit the provision of wireless services, but it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the competing goals of an ordinance—the provision of wireless services and other valid public goals such as safety and aesthetics."[85] In a different opinion, the Ninth Circuit provided examples in which a ban might be established. "If an ordinance required, for instance, that all facilities be underground and the plaintiff introduced evidence that, to operate, wireless facilities must be above ground, the ordinance would effectively prohibit it from providing services. Or, if an ordinance mandated that no wireless facilities be located within one mile of a road, a plaintiff could show that, because of the number and location of roads, the rule constituted an effective prohibition."[86]

It appears a party also can use an agency's permitting history to show that a ban has or has not been instituted; for instance, the Ninth Circuit held no ban existed where evidence showed a city authorized the installation of some 2,000 antennas at about 450 sites, including 30 of the complaining carrier's own facilities.[87]

b. Moratoria.

An agency may institute a moratorium on the approval of cell phone towers as it contemplates the adoption of planning and zoning rules that address their siting, but only in a limited manner. Any moratorium must comply with the Act's requirement that local officials must evaluate applications for wireless facilities "within a reasonable period of time."[88] In fact, Congress implemented the Act's "reasonable period of time" provision to "stop local authorities from keeping wireless providers tied up in the hearing process through invocation of state procedures, moratoria, or gimmicks."[89]

A leading case on this issue is *Sprint Spectrum, L.P. v. City of Medina*, in which the United States District Court for the Western District of Washington held that a city's six-month moratorium did not constitute an illegal ban.[90] However, other courts have rejected different moratoria in different circumstances.[91] On August 5, 1998, a committee of the FCC composed of state and local government officials entered into an agreement with industry groups that established guidelines that (1) encouraged the parties to cooperate to facilitate the siting of wireless facilities, and (2) established that 180 days constituted a reasonable period for moratoria.[92] The guidelines recognize that moratoria sometimes may need to endure beyond 180 days, but that these devices "should not be used to stall or discourage the placement of wireless telecommunications facilities within a community…."[93] Where disputes arise, the parties agreed to an informal dispute resolution process that involves the participation of local government experts and industry representatives, who consider the circumstances and make non-binding recommendations.[94]

It is unclear to what extent this informal dispute resolution process has been successful, or utilized. However, in the past ten years, there appears to have been only one case addressing moratoria.[95]

c. Courts no longer allow more relaxed standard for challenge under section 253.

In previous years, carriers had challenged state and local regulations on the basis of Section 253 of the Act, rather than Section 332.[96] Whereas Section 332 concerns itself with local zoning and cellular facilities, Section 253(a) more broadly preempts regulations which "may prohibit, or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications ser-

vices." The reason that carriers preferred a challenge under Section 253 is because the Ninth Circuit had interpreted it as preempting not only regulations that "in fact" ban cellular services, but also regulations that "may have" the effect of prohibiting service.[97] However, this distinction has been erased.

In an en banc 2009 decision, the Ninth Circuit overruled its previous decision and explained that, under both provisions, "a plaintiff must establish either an outright prohibition or an effective prohibition on the provision of telecommunications services; a plaintiff's showing that a locality could *potentially* prohibit the provision of telecommunications services is insufficient."[98] The court explained that it had misread the plain language of the statute in rendering its previous decision, and that its new ruling correctly harmonized this section with Section 332, and better implemented the motivating policies of the Act.

2. Agency may not create "significant gap" in service.

Several courts—including the Ninth Circuit—have held that even in the absence of a "general ban" on wireless services, a locality can violate the Act where it prevents a wireless provider from "closing a 'significant gap' in service coverage."[99] The inquiry generally "involves a two-pronged analysis requiring (1) a showing of the existence of a 'significant gap' in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations."[100]

a. What constitutes a significant gap.

The test employed by some circuits holds that a "significant gap" in service exists only if *no provider* is able to serve the "gap" area in question.[101] This test is sometimes referred to as the "one provider" rule since, "if any single provider offers coverage in a given area, localities may preclude other providers from entering the area (as long as the preclusion is a valid, nondiscriminatory zoning decision that satisfies the other provisions of the [Act])."[102] The Ninth Circuit does not follow this thinking, and has held that that a local regulation creates a "significant gap" if "the *provider in question* is prevented from filling a significant gap *in its own* service network."[103]

Courts have held the inability to cover "a few blocks in a large city" does not, as a matter of law, constitute a "significant gap," and that small "dead spots" are permissible.[104] The Ninth Circuit has declined to create a blanket rule, and has held that "significant gap" determinations are extremely fact-specific.[105]

b. Alternatives analysis.

Once a carrier has established the existence of a "significant gap," it must then make some showing as to the intrusiveness or necessity of its proposed means of closing that gap.[106] The Ninth Circuit has adopted the test of other circuits which requires the carrier to show that "the manner in which it proposes to fill the significant gap in service is the *least intrusive on the values that the denial sought to serve*."[107]

The court adopted the "least intrusive" test because it felt this approach "allows for a meaningful comparison of alternative sites before the siting application process is needlessly repeated. It also gives providers an incentive to choose the least intrusive site in their first siting applications, and it promises to ultimately identify the best solution for the community, not merely the last one remaining after a series of application denials."[108]

The "least intrusive" test hinges on the availability and technological feasibility of the alternatives.[109] Per decisional law, the carrier has the burden of showing the proposed site is the least intrusive, which it does through submission of a "comprehensive application."[110] An agency is not compelled to accept the provider's representations but, should the agency reject a *prima facie* showing, it must show that there are some potentially available and technologically feasible alternatives.[111] The carrier should then "have an opportunity to dispute the availability and feasibility of the alternatives favored by the locality."[112]

The decision in *T-Mobile USA, Inc. v. City of Anacortes* is the leading case addressing this issue in the Ninth Circuit. In that opinion, the carrier satisfied its burden by submitting a detailed analysis of eighteen alternative sites, but the city contended that a half dozen alternative sites remained available.[113] The city, however, had failed to take into account evidence in the record that the school sites it had counterproposed were not viable because the school district had rejected such overtures. Moreover, the city had failed to rebut evidence that an additional alternative, which would have required two towers, would pose heightened environmental and cost concerns.[114] Thus, while the test adopted by the Ninth Circuit focuses on the availability and technological feasibility of alternative sites, it appears that environmental and economic considerations can inform the calculus.

Finally, while a state or local agency is extremely restricted in rejecting a cell tower application on the basis of RF emissions, there is some persuasive authority that an agency may select an alternative based on exposure levels where "no other factor differentiate[s] the two finalists."[115]

IV. PROCEDURAL REQUIREMENTS AND REMEDIES

A. Writing requirement.

Under the Act, any "decision by a State or local government…to deny a request to place, construct, or modify personal wireless service facilities shall be in writing."[116]

The writing requirement is not onerous. Recognizing that local agencies often are staffed with lay-persons who are ill-equipped to draft complex legal decisions, the Ninth Circuit held that a written decision need not contain detailed findings of fact or conclusions of law, but must only "be robust enough to facilitate meaningful judicial review."[117] Under this standard, citations to specific evidence in the record are unnecessary.[118]

B. Timing.

The Act provides that a state or local government "shall act on any request for authorization…within a reasonable period of time after the request is duly filed…."[119] Originally, no definite timetables were provided or intended.[120] But that is no longer the case.[121]

The FCC ruled that a state or local government has 90 days to process a personal wireless service facility siting application requesting a collocation, and 150 days to process all other applications. If the government does not act upon applications within those timeframes, then the carrier may seek redress in a court of competent jurisdiction within 30 days, as provided in Section 332(c)(7)(B)(v). The government, however, will have an opportunity to rebut the presumption of reasonableness.[122] Presumably, diligence, pursuance of entitlement processes, and environmental review procedures pursuant to NEPA or CEQA would be sufficient to rebut the presumption.

If a telecommunications provider believes that the zoning board is using its procedural rules to delay unreasonably an application, or is using its discretionary authority to deny an application unjustifiably, the Act provides an expedited judicial review process in federal or state court.[123]

C. Injunction, not damages as remedy.

Where a state or local government fails to comply with the Act, the appropriate remedy is an injunction compelling the local authority to act.[124] Damages and attorney's fees are not available as a remedy.[125]

V. STATE PREEMPTION: CALIFORNIA'S STREAMLINING PROVISIONS REGARDING COLLOCATION FACILITIES, FACILITIES IN A STATE RIGHT OF WAY, AND LIMITATIONS ON CONDITIONS OF APPROVAL.

A. Regulating towers in a right of way.

Some controversy has arisen with regard to the extent to which a city or county may regulate a cell phone tower proposed for construction in a public right of way. The "ground zero" for such disputes focuses on section 7901 of the California Public Resources Code, which permits telephone corporations to construct facilities along any public road or highway in such a manner as not to "incommode" the public use of the road or highway. Carriers have argued this provision preempts local regulation in public rights of way.

The Ninth Circuit first considered the issue in 2006, and initially held that section 7901 occupied the field of regulation and preempted local ordinances except to the extent that they protected against telecommunications equipment interfering with use of a roadway.[126] However, the Ninth Circuit then amended the opinion and removed the preemption discussion from the published opinion, instead placing it in an unpublished memorandum disposition.[127]

Later in 2006, in an opinion that was subsequently vacated by the California Supreme Court, a California Court of Appeal reached an opposite conclusion, finding that section 7901 did not preempt local regulation of the placement of telecommunications equipment on public rights of way.[128] Instead, the court found that local governments continued to possess a limited ability to regulate the placement and appearance of wireless facilities.[129]

Perhaps settling the controversy (though perhaps not), the United States District Court for the Northern District of California most recently has sided with the now-vacated state court decision. It held there is no evidence that section 7901 "fully and completely" occupies the field, because the section is not "couched in terms to indicate clearly that a paramount state concern will not tolerate further or additional local action."[130] The court noted that related provisions of state law confer on localities a great

measure of control over the time, place, and manner on which roads or highways are accessed.[131] The court held it was not bound by the Ninth Circuit decision since the federal appellate court had relegated its contrary holdings to an unpublished memorandum.[132]

For its part, California's executive branch has authority over utility approvals, but in fact does not appear to exercise its authority over wireless facilities.[133] The California Public Utilities Commission ("CPUC") has adopted a general order in which it relinquished authorization powers in most circumstances, reserving the right to preempt a local determination only where "there is a clear conflict with the Commission's and/or statewide interests." Otherwise, the CPUC merely requires a carrier to notify the commission by mail when the carrier has obtained all applicable local land use entitlements, and do so within 15 days of issuance.[134]

B. California streamlining provisions for collocation facilities.

In 2006, the California Legislature sought to streamline the local entitlement process for collocated wireless facilities. "Collocated facilities" is a term describing situations where multiple antennas and other wireless equipment are sited in the immediate vicinity of each other. The streamlining provisions essentially require that cities and counties administratively approve—i.e., refrain from exercising discretionary review over—the placement of new transmitters on already approved wireless towers.[135] In doing so, the state declared that "a collocation facility…has a significant economic impact in California and is not a municipal affair …, but is a matter of statewide concern."[136]

The streamlining provisions apply in limited circumstances. The new facilities must be consistent with specified local and state requirements that apply to the existing structure.[137] Further, the existing tower or facility must:

- Have been entitled pursuant to a discretionary permit;
- Have undergone CEQA review to the extent that either a negative declaration, a mitigated negative declaration, or environmental impact report was prepared (and circumstances surrounding the new facility must not trigger the preparation of a subsequent CEQA document);[138]
- Be consistent with local requirements addressing the nature, height, location, size, design, and other aspects of the facility; and

- Be consistent with the State Planning and Zoning Law.[139]

In addition, the city or county must have held at least one public hearing on the discretionary permit for the existing facility. Note that these state enactments do not conflict with the federal prohibitions on consideration of RF emissions.[140]

C. California limitations on conditions of approval.

In addition to the streamlining provisions, the California Legislature also sought to restrict the conditions of approval that a local agency may impose on wireless facilities. Government Code section 65964 provides that a locality may not:

- Require an escrow deposit for removal of the facility or any component thereof. However, the local government may require a performance bond or other surety if the amount is "rationally related to the cost of removal;"
- Unreasonably limit the duration of any permit for the facility; a limit of less than 10 years is presumed to be unreasonable absent public safety or substantial land use reasons; or
- Require that all wireless facilities be limited to sites owned by particular parties within the jurisdiction of the city or county.

VI. CONCLUSION

A state or local government may regulate cell phone towers on numerous bases, and exercise considerable discretion in doing so. However, the 1996 federal law imposes several clear rules in terms of what a local agency *cannot* do, such as discriminate among carriers or cause a carrier to suffer a significant gap in its service. Perhaps the most significant limitation, from a practical standpoint, is the federal preemption that prohibits local and state governments from considering RF emissions in evaluating a siting proposal, given that such emissions have the greatest likelihood of generating community opposition to a wireless facility.

NOTES

1. This article repeatedly uses the terms "cell phone antenna," "cell phone tower" or some analog. In fact, current law more broadly regulates "the placement, construction, and modification of personal wireless service facilities," which means "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services." 47 U.S.C.A. §332(c)(7)(C)(i). For narrative convenience, the terms cell phone "antennae" or "tower" will be used to signify all "personal wireless facilities" contemplated by the Federal Telecommunications Act of 1996.

2. *T-Mobile West Corp. v. City and County of San Francisco*, 52 Communications Reg. (P & F) 606, 2011 WL 570160 (N.D. Cal. 2011) (Carrier did not dispute information, and other data showed that less than one quarter of one percent of calls were dropped).
3. Whereas some 34 million U.S. citizens used mobile phones in 1995, nearly ten times that number of individuals utilizes the technology today. That usage translates to 2.2 trillion minutes of use, not to mention 2.1 trillion text messages—a concept unknown during the mid 1990s. International Association for the Wireless Telecommunications Industry, http://www.ctia.org/consumer_info/index.cfm/AID/10323.
4. Whereas there were some 23,000 towers in 1995, that number had expanded to 253,000 by December 2010. *Id*.
5. Wireless phone, paging, messaging, and data service can be bundled in a technology known today as "Personal Communications Services" ("PCS"). But while technology has expanded the variety of services available to consumers, it has not managed to reduce the number of facilities required to deliver these services. PCS technology operates at a higher frequency than traditional cellular equipment, resulting in a smaller sphere of coverage from any given transmitter. While actual coverage will depend on factors such as population, density, and topography, PCS towers have a range—generally—of 0.5 to 2 miles, compared to the 3- to 15-mile halo emanating from conventional cellular facilities.
6. 47 U.S.C.A. §§151 *et seq.*
7. For instance, in 1984, AT&T had a long distance market share of 85 percent. Nicholas Economides, *The Telecommunications Act of 1996 and its Impact* (September 1998) (available at http://www.stern.nyu.edu/networks/telco96.html). The reason for the failures of the Communications Act of 1934 to address monopolies in the telecommunications industry is beyond the scope of this article.
8. CRS Report for Congress, *Telecommunications Act: Competition, Innovation, and Reform*, p. 1 (January 13, 2006), available at http://net.educause.edu/ir/library/pdf/EPO0635.pdf.
9. FCC, description of the Act, available at http://transition.fcc.gov/telecom.html.
10. Pub. L. No. 104-104, 110 Stat. 56 (1996), codified throughout Title 47 of the United States Code ("47 U.S.C.A.").
11. 47 U.S.C.A. §251(a)(1), (b)(5).
12. 47 U.S.C.A. §251(c)(2).
13. *E.g.*, 47 U.S.C.A. §230.
14. 47 U.S.C.A. §332.
15. *Id*.
16. *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 576 (9th Cir. 2008), cert. denied, 129 S. Ct. 2860, 174 L. Ed. 2d 576 (2009) (*"Sprint II"*).
17. *Sprint II*, 543 F.3d at 576; 47 U.S.C.A. §332(c)(7); *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 991-92 (9th Cir. 2009) ("*Anacortes*").
18. E.g., *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 723 (9th Cir. 2005).
19. *Id*. at 727.
20. *Id*. at 725.
21. 47 U.S.C.A. §332(c)(7)(B)(iv).
22. 47 U.S.C.A. §332(c)(7)(B)(i)(II).
23. 47 U.S.C.A. §332(c)(7)(B)(i)(I).
24. 47 U.S.C.A. §332(c)(7)(B)(i)(I).
25. 47 U.S.C.A. §332(c)(7)(B)(ii); FCC, Declaratory Ruling, Nov. 18, 2009, WT Docket No. 08-165. FCC 09-00. Paragraph 4, 32.
26. 47 U.S.C.A. §332(c)(7)(A), (B).
27. 47 U.S.C.A. §332(c)(7)(B)(iii).
28. *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d at 725; *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999) (*"Town of Oyster Bay"*).

29. *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 723 (9th Cir. 2005) (quoting *Town of Oyster Bay*, 166 F.3d at 494).
30. *See, e.g., Harris v. City of Costa Mesa*, 25 Cal. App. 4th 963, 969, 31 Cal. Rptr. 2d 1 (4th Dist. 1994) (applying substantial evidence standard to the denial of plaintiff's application for a conditional use permit); *AT&T Wireless Services of California LLC v. City of Carlsbad*, 308 F. Supp. 2d 1148, 1158 (S.D. Cal. 2003) ("*Carlsbad*").
31. *MetroPCS, supra*, 400 F.3d at 723.
32. *See* footnotes 36, 39-42, and 45-48, *infra*.
33. *Sprint II*, 543 F.3d at 574.
34. *Id* at 725.
35. *T-Mobile West Corp. v. City and County of San Francisco*, 52 Communications Reg. (P & F) 606, 2011 WL 570160 (N.D. Cal. 2011) (Carrier did not dispute information, and other date showed that less than one quarter of one percent of calls were dropped).
36. *MetroPCS, supra*, 400 F.3d at 724, 726, 732-33 (zoning decisions explicitly based on redundancy of service are not per se invalid, but they are subject to discrimination and significant gap tests).
37. *MetroPCS, supra*, 400 F.3d at 727; *AT & T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 155 F.3d 423, 427 (4th Cir. 1998) (rejected by, PrimeCo Personal Communications, L.P. v. Village of Fox Lake, 26 F. Supp. 2d 1052 (N.D. Ill. 1998)); *Anacortes*, 572 F.3d at 994-95 (residents testimony that tower would not be completely screened and would interfere with views constituted substantial evidence); *Sprint II, supra*, 543 F.3d at 574, 580 (requiring camouflage under certain circumstances and visual impact analysis; aesthetics not too "malleable and open-ended").
38. *Id*.
39. *Airtouch Cellular v. City of El Cajon*, 83 F. Supp. 2d 1158, 1166 (S.D. Cal. 2000) ("*El Cajon*") (sevenfold increase in facilities changed character of neighborhood); *MetroPCS, supra*, 400 F.3d at 727; *AT & T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 155 F.3d 423, 427 (4th Cir. 1998) (rejected by, PrimeCo Personal Communications, L.P. v. Village of Fox Lake, 26 F. Supp. 2d 1052 (N.D. Ill. 1998)); *Sprint II, supra*, 543 F.3d at 574-580 (harmony in scale, bulk, coverage, and density; community character not too "malleable and open-ended"); *but see Town of Oyster Bay*, 166 F.3d at 496 (generalized expressions of concern cannot serve as substantial evidence).
40. *Sprint II, supra*, 543 F.3d at 574 (height and setback restrictions applying in residential zones).
41. *Carlsbad, supra*, 308 F. Supp. 2d at 1159.
42. *See Town of Oyster Bay, supra*, 166 F.3d at 496 (generalized concerns about potential decrease in property values may not qualify as substantial evidence); *U.S. v. 87.98 Acres of Land More or Less in the County of Merced*, 530 F.3d 899, 904-07 (9th Cir. 2008) (in eminent domain action, probative value of testimony on diminution in property value due to specific levels of electromagnetic energy was substantially outweighed by unfairly prejudicial effect of misleading or confusing jury by inviting unsupported inferences about radiation levels that were not tied to public perceptions, making testimony excludable; developer perceptions based on levels, while probative, represented a small segment of population and also was outweighed by prejudicial effect, and was excludable).
43. *See San Diego Gas & Electric Co. v. Superior Court*, 13 Cal. 4th 893, 935-42, 55 Cal. Rptr. 2d 724, 920 P.2d 669 (1996). In that case, the California Supreme Court held that concerns about cancer from electromagnetic radiation from power lines cannot sustain an action for personal injury, trespass, nuisance, or inverse condemnation. In denying the viability of a trespass cause of action, the Court held there is no evidence electromagnetic radiation causes any physical damage to property. In denying the nuisance cause of action, the Court held the available evidence did not support a reasonable belief that electric and magnetic fields presented a substantial risk of physical harm. Finally, regarding the inverse condemnation claim, the court held no action would lie because

plaintiffs could not show electric and magnetic fields cause physical damage, or that such fields resulted in a burden on the property that is direct, substantial, and peculiar. At the same time, where plaintiffs directly raised the issue of property value, the Court did not consider this factor because it construed it as an element of the measure of damages or just compensation where plaintiffs managed to prove the elements of the cause of action.

44. *San Diego Gas & Electric Co. v. Daley*, 205 Cal. App. 3d 1334, 1346-49, 253 Cal. Rptr. 144 (4th Dist. 1988) (disapproved of by, Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp., 16 Cal. 4th 694, 66 Cal. Rptr. 2d 630, 941 P.2d 809 (1997)) (considered but undisturbed by the California Supreme Court's decision in *See San Diego Gas & Electric Co. v. Superior Court*, 13 Cal. 4th 893, 55 Cal. Rptr. 2d 724, 920 P.2d 669 (1996)).
45. E.g., *Town of Amherst, N.H. v. Omnipoint Communications Enterprises*, Inc., 173 F.3d 9, 16 (1st Cir. 1999).
46. *360 degrees Communications Co. of Charlottesville v. Board of Sup'rs of Albemarle County*, 211 F.3d 79, 85 (4th Cir. 2000); 47 C.F.R. §1.1307(a).
47. 47 C.F.R. §1.1307(a).
48. As explained in the FCC's NEPA compliance guide (http://wireless.fcc.gov/siting/npaguid.html): 47 C.F.R. §1.1305 says that the Commission "has found no common pattern which would enable it to specify" any particular Commission action as a "major action" under NEPA. Thus, 47 C.F.R. §1.1306 "categorically excluded from environmental processing" all Commission actions except for those specifically identified in 47 C.F.R. §1.1307. If a licensee's proposed action falls within one of the categories of section 1.1307, section 1.1308(a) requires the licensee to consider the potential environmental effects from its construction of antenna facilities or structures, and disclose those effects in an environmental assessment (EA) which is filed with the Commission for our review. 42 U.S.C.A. §§4321 *et seq.*; Pub. L. No. 91-190, 83 Stat. 852 (1969).

    As summarized on the FCC's NEPA compliance guide, Section 1.1307 is divided into four parts:

    (1) 1.1307(a): Lists eight areas or situations which are considered environmentally sensitive and requiring preparation of an EA prior to construction, such as facilities located in wilderness areas, facilities that may affect endangered species of habitats, facilities that may affect historical or cultural resources, and others.

    (2) 1.1307(b): Requires an EA if the antenna transmitter would cause exposure of workers or the general public to levels of radiofrequency (RF) radiation in excess of certain guidelines. These guidelines were recently revised. See *Report and Order in ET Docket No. 93-62, FCC 96-326 (released Aug. 1, 1996)*.

    (3) 1.1307(c): Allows "an interested person" to petition the Commission to require environmental consideration in its decision-making process where such analysis would not otherwise be required by the rules. The petition must be in writing and detail the reasons justifying such an analysis. The Commission then reviews the petition and will either require an EA or it may proceed with an environmental analysis.

    (4) 1.1307(d): Allows the Bureau responsible for processing an action which may otherwise be excluded from an EA, to require environmental consideration of that action upon its own motion.
49. Pub. Resources Code, §§21000 *et seq.*
50. 40 C.F.R. §1508.4 (NEPA categorical exclusion set by federal agencies); 47 C.F.R. §§1.1301 to 1.1319 (FCC rules implementing NEPA; all FCC actions categorically excluded except those listed in section 1.1307, including situations where radiofrequency radiation exceeds FCC guidelines); 14 Cal. Code Regs. §15303 (categorically exempting from CEQA new construction or conversion of small structures, including utility exemptions); 14 Cal. Code Regs. §15061(b)(3) (common sense exemption).
51. *Carlsbad*, 308 F. Supp. 2d at 1162-63 (rejecting cumulative argument in which petitioners claims area would transform into "antenna alley," as record showed no evidence that

multiple carriers planned to propose towers, and otherwise that no aesthetic or character impacts would occur).

52. *Sprint II, supra*, 543 F.3d at 574.
53. *Id*.
54. See, e.g., *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 513-17, 113 Cal. Rptr. 836, 522 P.2d 12 (1974).
55. Radio Frequency Safety FAQ, http://www.fcc.gov/oet/rfsafety/rf-faqs.html#Q1.
56. *Id*.; see *San Diego Gas & Electric Co. v. Superior Court*, 13 Cal. 4th 893, 908, 55 Cal. Rptr. 2d 724, 920 P.2d 669, 677 (1996) (discussing effect of radiation in tort context).
57. *See e.g., Carlsbad, supra*, 308 F. Supp. 2d at 1165 (no substantial evidence supporting city's rejection of tower, "especially in light of the high degree of attention drawn to the concern over the health effects of RF emissions by the residents, planning commission, and city council").
58. 47 U.S.C.A. §332(c)(7)(B)(iv).
59. FCC, "A Local Government Official's Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures, and Practical Guidance" ("LSGAC Guide"), p. 1. http://wireless.fcc.gov/siting/FCC_LSGAC_RF_Guide.pdf.
60. *Cellular Phone Taskforce v. F.C.C.*, 205 F.3d 82 (2d Cir. 2000).
61. More exclusions are set forth in Table 1 of Section 1.1307(b)(1) of the FCC's rules and Appendix A of the LSGAC Guide.
62. 47 C.F.R. §1.1307.
63. LSGAC Guide, p. 4.
64. LSGAC Guide, p. 8 (emphasis added).
65. Bulletin 65, pp. 33 (emphasis added).
66. Bulletin 65, pp. 33.
67. Bulletin 65, pp. 37-38.
68. Bulletin 65, pp. 34-35; LSGAC Guide, p. 8.
69. *See* 14 Cal. Code Regs. §15130.
70. *Carlsbad*, 308 F. Supp. 2d at 1159.
71. *Id*. (indirect effects of RF emissions cannot be a basis of consideration); *MetroPCS, Inc., supra*, 400 F.3d at 736-737 (though mention of RF emissions existed in the record, challenger to carrier's application clarified his appeal to granting of use permit was not based on environmental concerns, and extraneous information in record not sufficient to overturn city's decision).
72. *Sprint Spectrum, L.P. v. Township of Warren Planning Bd.*, 325 N.J. Super. 61, 737 A.2d 715 (Law Div. 1999) (an agency can inquire about RF emissions and require an explanation of the applicant's RF study to ensure the FCC's standards are followed).
73. *New York SMSA Ltd. Partnership v. Town of Clarkstown*, 99 F. Supp. 2d 381 (S.D. N.Y. 2000) (one tower over multiple towers on basis of "prudent avoidance") ("*Town of Clarkstown*").
74. See Paul M. Valle-Riestra, Telecommunications The Governmental Role in Managing the Connected Community, §VII.C (Solano Press 2002); *Southwestern Bell Wireless Inc. v. Johnson County Bd. of County Com'rs*, 199 F.3d 1185 (10th Cir. 1999) (FCC has exclusive jurisdiction over radiofrequency interference).
75. In the Matter of Cingular Wireless L.L.C for a Declaratory Ruling that Provisions of the Anne Arundel County Zoning Ordinance are Preempted as Impermissible Regulation of Radio Frequency Interference Reserved Exclusively to the Federal Communications Commission, WT Docket No. 02-100, Memorandum Opinion and Order, Released July 7, 2003 (citing *Southwestern Bell Wireless*, 199 F.3d 1185).
76. 47 U.S.C.A. §332(c)(7)(B)(i)(I).
77. *MetroPCS, Inc., supra*, 400 F.3d at 726-27; *AT & T Wireless*, 155 F.3d at 427; *see also Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Bd. of Easttown Tp.*, 331 F.3d 386, 395, 33 Envtl. L. Rep. 20218 (3d Cir. 2003) (citing *AT & T Wireless*, 155 F.3d

at 427), cert. denied, 540 U.S. 1108, (2004)); *Nextel West Corp. v. Unity Township*, 282 F.3d 257, 267 (3d Cir. 2002) (rejected by, Independent Wireless One Corp. v. Town of Charlotte, 242 F. Supp. 2d 409 (D. Vt. 2003)) (same); *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 638 (2d Cir. 1999) ("*Willoth*").

78. *MetroPCS, Inc., supra*, 400 F.3d at 727-28 (citing *APT Pittsburgh Ltd. Partnership v. Penn Tp. Butler County of Pennsylvania*, 196 F.3d 469, 480 (3d Cir. 1999) (rejected by, Independent Wireless One Corp. v. Town of Charlotte, 242 F. Supp. 2d 409 (D. Vt. 2003)); *Willoth, supra*, 176 F.3d at 643 ("[I]t is not unreasonably discriminatory to deny a subsequent application for a cell site that is substantially more intrusive than existing cell sites by virtue of its structure, placement or cumulative impact."); *Omnipoint*, 331 F.3d at 395 ("Permitting the erection of a communications tower in a business district does not compel the [zoning board] to permit a similar tower at a later date in a residential district."); *Unity Township*, 282 F.3d at 267 (discrimination claim requires a showing that the other provider is similarly situated)).
79. *El Cajon, supra*, 83 F. Supp. 2d at 1166 (S.D. Cal. 2000) (evidence of "over-intensification" of facilities associated with sevenfold increase).
80. *MetroPCS, supra*, 400 F.3d at 729.
81. *Id*.
82. 47 U.S.C.A. §332(c)(7)(B)(i)(II).
83. *MetroPCS, supra*, 400 F.3d at 730.
84. *Sprint II, supra*, 543 F.3d at 580; *U.S. v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).
85. *Sprint II, supra*, 543 F.3d at 580; *see also Anacortes*, 572 F.3d at 993-94.
86. *Sprint II, supra*, 543 F.3d at 574.
87. *MetroPCS, supra*, 400 F.3d at 731.
88. 47 U.S.C.A. §332(c)(7)(B)(ii).
89. *Masterpage Communications, Inc. v. Town of Olive, NN*, 418 F. Supp. 2d 66, 77 (N.D. N.Y. 2005) ("*Olive*") (citations omitted).
90. *Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. 1036, 1040 (W.D. Wash. 1996) (*"City of Medina"*).
91. *See* Jonathan Kramer and John Pestle, *Current Issues in Cell Tower Regulation*, pp. 30-31 (Lorman Education Services 2008) (providing for a compendium of cases addressing moratoria); *Lucas v. Planning Bd. of Town of LaGrange*, 7 F. Supp. 2d 310 (S.D. N.Y. 1998); *Sprint Spectrum L.P. v. Jefferson County*, 968 F. Supp. 1457 (N.D. Ala. 1997), as amended, (Aug. 1, 1997); *Sprint Spectrum, L.P. v. Town of West Seneca*, 172 Misc. 2d 287, 659 N.Y.S.2d 687 (Sup 1997); *Sprint Spectrum L.P. v. Town of Farmington*, 1997 WL 631104 (D. Conn. 1997).
92. FCC Moratorium Guidelines, Paragraphs A & B, http://www.fcc.gov/statelocal/agreement.html.
93. *Id*., paragraph B.
94. *Id*., paragraph C.
95. *Olive, supra*, 418 F. Supp. 2d at 78 (N.D. N.Y. 2005) (ruling that consideration of a two-year ban was moot given it had expired prior to adjudication).
96. 47 U.S.C.A. §§253, 332.
97. *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001) (overruled by, Sprint Telephony PCS, L.P. v. County of San Diego, 543 F.3d 571 (9th Cir. 2008)).
98. *Sprint II, supra*, 543 F.3d at 577-78; *see also Anacortes*, 572 F.3d at 990-91.
99. *MetroPCS, supra*, 400 F.3d at 731.
100. *Id*.; *Anacortes, supra*, 572 F.3d at 995.
101. *MetroPCS, supra*, 400 F.3d at 731.
102. *Id*.
103. *Id*. at 732.

104. *Id*. at 733.
105. *Id*.
106. *Id*. at 734.
107. *Id*.; *Penn Township, supra*, 196 F.3d at 480 (emphasis added); *see also Omnipoint*, 331 F.3d at 398; *Unity Township, supra*, 282 F.3d at 266; *Willoth*, 176 F.3d at 643. By contrast, the First and Seventh Circuits require a showing that there are "no alternative sites which would solve the problem." *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620, 635 (1st Cir. 2002); *see also VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 834-35 (7th Cir. 2003) (adopting the First Circuit test and requiring providers to demonstrate that there are no "viable alternatives") (citing *Second Generation Properties*).
108. *MetroPCS, supra*, 400 F.3d at 734-35.
109. *Anacortes, supra*, 572 F.3d at 996; *Sprint II*, 543 F.3d at 579; *MetroPCS*, 400 F.3d at 734.
110. *Anacortes, supra*, 572 F.3d at 998; *Sprint II*, 543 F.3d at 579.
111. *Anacortes, supra*, 572 F.3d at 998.
112. *Id*.
113. *Id*. at 995-996.
114. *Id*. at 998.
115. *New York SMSA Ltd. Partnership v. Town of Clarkstown*, 99 F. Supp. 2d 381, 392 (S.D. N.Y. 2000).
116. Gov. Code, §65850.6, subd. (f); see *MetroPCS, supra*, 400 F.3d at 721.
117. *MetroPCS, supra*, 400 F.3d at 722.
118. *T-Mobile West Corp. v. City and County of San Francisco*, 52 Communications Reg. (P & F) 606, 2011 WL 570160 (N.D. Cal. 2011).
119. *Sprint II, supra*, 543 F.3d at 579; *MetroPCS*, 400 F.3d at 734.
120. *City of Medina, supra*, 924 F. Supp. at 1040.
121. *Sprint II, supra*, 543 F.3d at 579; *MetroPCS*, 400 F.3d at 734.
122. FCC, Declaratory Ruling, Nov. 18, 2009, WT Docket No. 08-165. FCC 09-00. Paragraph 4, 32.
123. *See* 47 U.S.C.A. §332(c)(7)(B)(ii) & (v).
124. *Carlsbad, supra*, 308 F. Supp. 2d at 1166-67 (S.D. Cal. 2003); *Town of Oyster Bay*, 166 F.3d at 497 (noting that a majority of district courts have held injunction appropriate to remedy a violation of the Act and holding injunction imposed by district court appropriate since this best serves the purpose of the "TCA's stated goal of expediting this type of action.").
125. *Kay v. City of Rancho Palos Verdes*, 504 F.3d 803, 813-14 (9th Cir. 2007) (no damages available under 42 U.S.C.A. §1983; *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 580-81 (9th Cir. 2008), cert. denied, 129 S. Ct. 2860, 174 L. Ed. 2d 576 (2009).
126. *Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge*, 435 F.3d 993, 997-98, (9th Cir. 2006), opinion amended and superseded on denial of reh'g, 448 F.3d 1067 (9th Cir. 2006), for additional opinion, see, 182 Fed. Appx. 688, 250 Pub. Util. Rep. 4th (PUR) 420 (9th Cir. 2006).
127. See *Sprint PCS Assets L.L.C. v. City of La Cañada Flintridge (amended)*, 448 F.3d at 1069; see *GTE Mobilnet of Cal. Ltd. Partnership v. City and County of San Francisco*, 440 F. Supp. 2d 1097, 1104 (N.D. Cal. 2006).
128. *Sprint Telephony PCS v. County of San Diego*, 44 Cal. Rptr. 3d 754 (Cal. App. 4th Dist. 2006), review granted and opinion superseded, 49 Cal. Rptr. 3d 653, 143 P.3d 654 (Cal. 2006) and review dismissed, cause remanded, 71 Cal. Rptr. 3d 251, 175 P.3d 1 (Cal. 2008) ("[W]e believe the federal ipse dixit is wrong and should not be followed.").
129. *Id*. at 768-69 ("[T]here is no general state law regulating the siting or appearance of [telephone equipment].").

130. *GTE Mobilnet, supra*, 440 F. Supp. 2d at 1104 (citing *Sprint Telephony, supra*, 140 Cal. App.4th at 768-69).
131. *Id*.
132. *Id*. at n. 4.
133. *See San Diego Gas & Elec. Co., supra*, 13 Cal. 4th at 924 (the California Public Utilities Commission has comprehensive jurisdiction over questions of public health and safety arising from utility operations)
134. CPUC General Order No. 159-A (May 8, 1996); http://162.15.7.24/PUBLISHED/Graphics/611.PDF.
135. Gov. Code, §§65850.6, 65964.
136. Gov. Code, §§65850.6, subd. (e).
137. Gov. Code, §65850.6, subd. (a)(1).
138. Pub. Resources Code, §21166.
139. Gov. Code, §65850.6, subds. (a)(2), (b).
140. Gov. Code, §65850.6, subd. (f).

Miller & Starr Real Estate Newsalert

Managing Editor:	**Karl E. Geier**
Executive Editor:	**Karen Turk**
Editor Emeritus:	**Edmund L. Regalia**
Founding Editors:	**Harry D. Miller & Marvin B. Starr**
Attorney Editor:	**John Frey**
Production Assistant:	**Cortney Carter**
Design & Layout:	**Specialty Composition/Rochester DTP**

Miller & Starr Real Estate Newsalert (USPS # pending) is issued six times per year, published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Application to mail at periodic rate is pending as St. Paul, MN. POSTMASTER: Send address changes to: Miller & Starr Real Estate Newsalert, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

The law firm of Miller Starr Regalia, founded by Edmund Regalia, Marvin Starr, and Harry Miller is headquartered in Walnut Creek. Members of the firm have been writing and editing the treatise, Miller & Starr, since shortly after the firm was founded in 1964. Karl E. Geier, a shareholder of the firm, is the current editor-in-chief of the treatise.

MILLER STARR
REGALIA