# THE TELECOMMUNICATIONS ACT OF 1996: § 704 OF THE ACT AND PROTECTIONS AFFORDED THE TELECOMMUNICATIONS PROVIDER IN THE FACILITIES SITING CONTEXT

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## I. FOREWORD

As the wireless telecommunications revolution has expanded, so has the demand for wireless communications facilities.[1] The number of cellular subscribers in the U.S. has exploded in the past fifteen years from zero to a current level of over 25 million.[2] In order to keep up with the demand for service, cellular providers have installed some 22,000 radio transmission sites nationwide during the past 15 years.[3] Increasing

* Peter M. Degnan, Scott A. McLaren and T. Michael Tennant, all with Alston & Bird in Atlanta, Georgia, were the first to successfully litigate a claim on behalf of a telecommunications provider under Section 704 of the Telecommunications Act of 1996 ("Telecommunications Act" or "Act"). Upon filing suit under Section 704 of the Act, Degnan, McLaren and Tennant persuaded the United States District Court for the Northern District of Georgia, Judge G. Ernest Tidwell, to force a local county government to grant the cellular provider a permit to construct a cellular communications tower that had previously been denied by the county. *See* BellSouth Mobility v. Gwinnett County, Georgia, 944 F. Supp. 923 (N.D. Ga. 1996). Degnan, McLaren and Tennant have also advised GTE Mobilnet, Inc. and other wireless providers on Telecommunications siting issues outside the State of Georgia, specifically in Alabama, Florida, North Carolina, and Wisconsin.

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified at 47 U.S.C. § 609 et. seq.) (stating that the Act seeks to in part "encourage the rapid deployment of new telecommunications technologies").

2. Microwave Journal, July 1, 1996, Vol. 39, No.7.

3. John J. Keller, *With Cellular Towers Sprouting All Over, Towns Begin to Rebel*, Wall St. J., Jul. 2, 1996, at A1.

demand for telecommunications services will require another 100,000 antennae installations in the coming years.[4]

The reason that increased consumer demand requires a corresponding increase in the number of cellular transmission sites is simple. A cellular network is much like a honeycomb. As a cellular user travels from one area to another, the transmission of a telephone call is shifted from one transmission site to the next. As demand increases, the area over which the site can effectively transmit shrinks, causing gaps between the sites, or gaps in the "honeycomb." In order to fill these gaps, cellular service providers must build additional sites to accommodate the increased demand without eroding the quality of service.

Across the U.S., this wireless telecommunications revolution has encountered significant resistance at the grassroots level.[5] Although consumers enjoy the flexible advantages of mobile communications, they also express a "not in my backyard" attitude towards the infrastuctural requirements associated with cellular telephone service. For example, in many localities, tower construction is bogged down in a quagmire of community complaints and politically motivated governmental reviews. Thus, cellular providers are saddled with increasing demands of customers and federal licenses that require the cellular company to provide adequate service[6] in the face of increasing opposition to telecommunications siting.

The Telecommunications Act of 1996, signed into law by President Clinton in February, addresses, among many other important subjects, some of the technical problems that have arisen from the increasing popularity of mobile communications. This article will provide an overview of the Act and will focus specifically on the protections afforded a telecommunications provider in § 704 of the Act.

## II. Overview and Background of the Act

On February 8, 1996, President Clinton signed into law the Telecommunications Act of 1996. The Telecommunications Act of 1996 ("Telecommunications Act" or "Act") is "expansive legislation designed primarily to increase competition in the telecommunications

4. *Id.*

5. *Id. See also* Spring Spectrum, L.P. v. City of Medina, 924 F. Supp. 1036 (W.D. Wash. 1996) (resulting from City of Medina's enactment of a six-month moratorium on issuing permits for wireless communications facilities such as cellular towers).

6. FCC licenses for cellular providers typically grant a provider the privilege of providing wireless communications services, while at the same time *require* that quality services be provided by the licensee.

industry."[7] The legislative history of the Act evidences this competitive objective: "[t]he managers on the part of the House and Senate [intend] . . . to provide for a pro-competitive, de-regulatory, national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . ."[8] In fact, the House Report articulates that the "enormous benefits to American businesses and consumers from lifting the shackles of monopoly regulation will almost certainly earn the [Telecommunications Act] the distinction of being the most deregulatory bill in history."[9]

## III. Section 704 of the Act: Protections Afforded the Provider in The Telecommunications Facility Siting Context

When attempting to locate a wireless telephone communications facility, such as a cellular transmission tower, a service provider typically has to apply for and receive either a permit to construct the tower or a rezoning of the land at issue to allow for such construction. Section 704 of the Act, to be codified at 47 U.S.C. § 332(c), provides certain statutory protections to an applicant who applies for such a permit or rezoning, provided the application involves the siting of a personal wireless service facility such as a cellular tower.[10] These protections, of course, are in addition to the standard protections afforded by equal

7. BellSouth Mobility, 944 F. Supp. at 927.

8. H.R. Conf. Rep. No. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124.

9. H.R. Rep. No. 104-204, at 47–48 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 11. Section 253 of the Act accomplishes this purpose by removing barriers to entry. Section 253(a) states that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." § 253(a), 110 Stat. 70 (to be codified at 47 U.S.C. § 253(a)). As stated in the legislative history of section 253, this section is "intended to remove all barriers to entry in the provision of telecommunication services. [This new section] preempts any State and local statutes and regulations, or other State and local legal requirements, that may prohibit or have the effect of prohibiting any entity from providing interstate or intrastate telecommunications services." H.R. Conf. Rep. No. 104-458, at 126 (1996), *reprinted in* 1996 U.S.C.C.A.N. 138.

10. The term "personal wireless service facility" is defined in the Act as a facility for the provision of "commercial mobile services, unlicensed wireless services, and common-carrier wireless exchange access services" which, of course, encompasses cellular transmission towers. § 704(c)(7)(C)(i–ii), 110 Stat. 152 (to be codified at 47 U.S.C. § 332(c)(7)(C)(i–ii)).

protection, due process, and applicable state law doctrines such as mandamus.[11]

Without completely preempting the authority of local governments to make decisions regarding the placement of wireless communications facilities,[12] the Act provides five separate and substantial protections for the telecommunications facility applicant in the amended 47 U.S.C. § 332 (entitled National Wireless Telecommunications Siting Policy).[13] Section 332 provides that:

> (A) the regulation of placement, construction, and modification of personal wireless services facilities by any state or local government shall not unreasonably discriminate among providers of functionally equivalent services;
>
> (B) the regulation of the placement, construction, and modification of personal wireless service facilities by any state or local government shall not prohibit or have the effect of prohibiting the provision of personal wireless services;
>
> (C) once an applicant files a request for authorization to place, construct, or modify a personal wireless service facility, the governmental entity shall act on the application "within a reasonable period of time after the request is duly filed";
>
> (D) no state or local governmental entity may regulate the placement, construction, or modification of personal wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent that such emissions comply with FCC regulations; and
>
> (E) any decision by a state or local governmental entity to deny an application to place, construct, or modify a personal wireless service facility shall be in writing and supported by substantial evidence contained in a written record.[14]

The application of these protections is, of course, dependent upon the context in which they are applied.

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11. *See* BellSouth Mobility, 944 F. Supp. at 929 (granting relief under both the Act and state mandamus law).

12. *See id.*

13. § 704(a)(7)(B), 110 Stat. 151–52 (to be codified at 47 U.S.C. § 332(a)(7)(B)).

14. *Id.*

### A. *Governmental Action Shall Not Discriminate*

The Act provides that the regulation of the placement, construction, and modification of a telecommunications facility shall not unreasonably discriminate among providers of functionally equivalent services.[15] The term "functionally equivalent services" refers only to services that directly compete against one another.[16] A governmental authority is prohibited from decisions that favor one telecommunications competitor over another, while it is allowed some flexibility to treat differently facilities that create different visual, aesthetic, or safety effect, at least to the extent permitted under generally applicable zoning requirements.[17] For example, the Act does not contemplate that if a cellular tower is permitted in a commercial district, a tower of the same size and structure must also be allowed in a residential district.[18] Accordingly, the articulated intent of this specific protection is to prohibit a land use decision or series of land use decisions that would decrease or deter competition in the telecommunications industry and thereby frustrate the purpose of the Act.

### B. *Governmental Action Shall Not Prohibit or Have the Effect of Prohibiting the Provision of Personal Wireless Services*

Under 47 U.S.C. § 332(7)(B)(i)(II), governmental policies that explicitly or effectively ban personal wireless services or facilities violate of the Act, and governmental entities must treat each application to place or construct a facility independently.[19] Although a state or local government may deny an application based on stated objective criteria, the criteria upon which the denial is based cannot have the effect of banning telecommunications facilities, nor will a pattern of unsubstantiated denials be tolerated under the Act.

Interestingly, in *Spring Spectrum, L.P. v. City of Medina*, a plaintiff/appellant cellular provider filed suit under the Act claiming that a six-month moratorium on the issuance of permits for wireless communications facilities enacted by the defendant/appellee city violated subsection (B)(i)(II) of the Act because the ordinance's effect was prohibitory.[20] Because the moratorium was temporary in nature, however, the U.S. District Court for the Western District of Washington

15. *Id.* § 704(a)(7)(B)(i)(I) (to be codified at 47 U.S.C. § 332(a)(7)(B)(i)(I)).
16. H.R. Conf. Rep. No. 104-458, at 208 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 222.
17. *Id.*
18. *Id.*
19. *Id.*
20. Spring Spectrum, 924 F. Supp. at 1039–1040.

held that the moratorium was "not a prohibition on wireless facilities, nor does it have a prohibitory effect. It is, rather, a short-term suspension of permit-issuing while the City gathers information and processes applications. Nothing in the record suggests that this is other than a necessary and *bona fide* effort to act carefully in a field with rapidly evolving technology. Nothing in the moratorium would prevent Sprint's application, or anyone else's, from being granted."[21]

Although the *Medina* Court made it clear that temporarily suspending the granting of permits for telecommunications facilities does not violate the Act if it is of reasonable duration (six months), the Court suggested that if all applications would have been *denied* during this six-month period, the moratorium would have violated the Act.[22] Of course, any extension of the moratorium might also be violative of the Act, constituting an unreasonable delay in processing the application under subsection (B)(ii).

### C. *Upon Application for a Permit to Place, Construct, or Modify a Wireless Facility, a Government Shall Act Upon the Application Within a Reasonable Period of Time*

Subsection (B)(ii) prevents a governmental unit from sitting on, or refusing to rule on an application to place or construct wireless service facilities.[23] Under this requirement, the governmental entity must respond to the application within a reasonable time frame, "taking into account the nature and scope of each request."[24] If the application involves a permitting procedure, a public hearing, or comment process, the "reasonable period of time" requirement is satisfied if the period for review of the application is the usual period under the applicable ordinance or statutory scheme.[25] It is not the intent of this provision to give preferential treatment to the wireless communications industry in the processing of requests, or to subject their requests to anything other than the generally applicable time frame for ruling on applications.[26] Thus, a governmental entity need not rule more quickly than it would for an applicant in a non-telecommunications context.

In *City of Medina*, the plaintiff/appellant challenged the city's six-month moratorium on the issuance of permits for wireless communica-

21. *Id*. at 1040.
22. *Id*.
23. § 704(a)(7)(B)(ii), 110 Stat. 151 (to be codified at 47 U.S.C. § 332(c)(7)(B)(ii)).
24. H.R. Conf. Rep. No. 104-458, at 208 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 223.
25. *Id.*
26. *Id.*

tions facilities, alleging a violation of the "reasonable time" requirement.[27] Because the city's moratorium did significantly prolong the approval process for a special use permit, and because the moratorium applied only to "wireless communications facilities"[28], plaintiff/appellant seemed to have a strong claim that a violation of subsection (B)(ii) had occurred.[29]

The District Court for the Western District of Washington, however, held to the contrary:

> [t]here is nothing to suggest that Congress, by requiring action "within a reasonable period of time," intended to force local government procedures onto a rigid timetable where the circumstances call for study, deliberation and decision-making among competing applicants. The City is seeking to determine, among other things, whether tall antenna towers are still necessary for the purpose at hand. It is entitled to find that out. The "generally applicable time frames" for zoning decisions, in Washington, may include reasonable moratoria adopted in compliance with state law. To hold otherwise would afford telecommunications applicants the "preferential treatment" that Congress sought to avoid. Medina's moratorium, coupled with its ongoing investigation and its processing of applications, is consistent with this part of the [Act].[30]

In so holding, the *Medina* court relied heavily on a statement within the city's moratorium indicating that the purpose of the moratorium was to study the Telecommunications Act, and the city's ability to regulate wireless communications facilities in light of the Act.[31] The court, therefore, left open the question as to what delays will be considered unreasonable under the Act.

### D. *State or Local Governments May Not Regulate Wireless Facilities on the Basis of Environmental Effects of Radio Frequency Emissions if the Applicant Demonstrates Compliance with FCC Regulations*

From an applicant's perspective, the key to enforcing this requirement, codified in subsection (B)(iv), is to provide the governmental decision-maker with evidence (field tests, engineering, specifications,

27. Spring Spectrum, 924 F. Supp. at 1040.
28. *Id.* at 1037.
29. *Id.*
30. *Id.* at 1040.
31. *Id.* at 1038.

etc.) demonstrating emissions from the protected facility are within FCC limits. This evidence must be provided, of course, prior to any decision on the application in question. The protection of subsection (B)(iv) is applicable once these tasks have been accomplished by the communication provider.

As written, the purpose of the requirement is to prevent telecommunications siting decisions from being based upon unscientific or irrational fears that emissions from telecommunications sites may cause undesirable health effects. In a surprising number of public hearings on the issue of cellular siting, individuals appear and complain of allegedly harmful health effects, although the authors know of no studies substantiating such claims.[32]

### E. *Any Decision to Deny an Application to Place, Construct or Modify a Wireless Facility Must be in Writing and Supported by Substantial Evidence Contained in a Written Record*

The protection that arguably has the most significant impact upon the telecommunications industry is the "substantial evidence" standard, which gives the telecommunications provider valuable protection in the facilities siting context.[33] The terms "in writing" and "contained in a written record" are somewhat vague, but at the very least they require some record upon which the decision to deny an application could be based.[34] As set forth in the legislative history of the Act, the "substantial evidence" standard set forth in subsection(B)(iii) "is the traditional standard used for judicial review of agency actions."[35] Substantial evidence, as used in this context, means "more than a mere scintilla. It

32. *See, e.g., BellSouth Mobility*, 944 F. Supp. at 926 (describing comments made at permit hearing by a homeowner, who spoke in opposition to the construction of the proposed cellular monopole and claimed that its emissions might cause adverse health effects).

33. *See BellSouth Mobility,* 944 F. Supp. at 926 ("[T]he critical question before the court is whether the board of commissioner's decision to deny plaintiffs' application is supported by 'substantial evidence contained in a written record.' " (Internal citations omitted.))

34. Given the intent of the Act to accelerate the development of telecommunications technologies, the language "in writing" and "contained in a written record" appear to mandate that a governmental entity, when denying an application to place wireless facilities, must articulate the reasons for the denial and the evidence upon which said denial is based. H.R. CONF. REP. NO. 104-458 at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124. Absent this interpretation, the "written record" and "in writing" language appears to be superfluous. A contrary interpretation would violate the maxim of statutory construction which presumes that each word contained in a statute is to be given meaning and effect whenever possible. *See, e.g.*, Weinberger v. Hinson, Wescott & Dunning, Inc., 412 U.S. 609 (1973); Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961); D. Ginsberg and Sons v. Popkin, 285 U.S. 204 (1931).

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

means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[36]

In applying the substantial evidence standard, a court should not a merely rubber stamp a governmental entity's denial of an application. A court is in fact obligated to ensure that the denial is supported by substantial evidence: "the [state or local government denying the application] cannot rest its conclusions on a scintilla of evidence or even on any amount of evidence that is less than substantial. Instead, the [denial of an application] can be enforced only if [the court] find[s] in the record 'such relevant evidence as a reasonable mind might accept as adequate to support the conclusion.'"[37] Although a reviewing court is not free to substitute entirely its judgment for that of the governmental entity, it must overturn the denial of an application "under the substantial evidence test if it 'cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the denial.' "[38]

The stringent substantial evidence standard set forth in Section 704 of the Telecommunications Act must be distinguished from the much more lenient "arbitrary and capricious" standard set forth in the Administrative Procedure Act which also provides for judicial review of agency action.[39] The substantial evidence test requires the court to "take a harder look at [agency] action than [it] would if [the court] were reviewing the action under the more deferential arbitrary and capricious standard applicable to agencies governed by the Administrative Procedure Act."[40]

Another factor which may affect the level of scrutiny that the reviewing court will apply to an application to place or construct a wireless communications facility is the type of decision rendered by the state or local government—i.e., whether the denial is legislative, or whether it is administrative/quasi-judicial in nature. Determining whether governmental action is legislative or administrative/quasi-judicial turns on whether the governmental act involves policy-making

36. Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). *See also* America Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 522 (1981); Northport Health Servs., Inc. v. NLRB, 961 F.2d 1547, 1550 (11th Cir. 1992); Bickerstaff Clay Prods. Co. v. NLRB, 871 F.2d 980, 984 (11th Cir. 1989); BellSouth Mobility, 944 F. Supp. at 924.

37.. Northport Health Servs., Inc. v. NLRB, 961 F.2d 1547, 1550 (11th Cir. 1992).

38. BellSouth Mobility, 944 F. Supp. 923 (N.D.Ga. 1996) (quoting Bickerstaff Clay Prods. Co. v. NLRB, 871 F.2d 980, 984 (11th Cir. 1989).).

39. Administrative Procedure Act, 5 U.S.C. § 706(2)(A–E) (1988).

40. Color Pigments Mfrs. Ass'n v. OSHA, 16 F.3d 1157, 1160 (11th Cir. 1994) (quoting Asbestos Info. Ass'n v. OSHA, 727 F.2d 415, 421 (5th Cir. 1984)).

or constitutes mere administrative application of existing policies.[41] If the governmental act involves policy-making, it is more likely legislative; if the act involves administrative application of existing policies, the decision is more likely quasi-judicial or administrative in nature.[42] Additionally, if the facts utilized by the government in making a determination are specific, rather than general, the decision is more likely administrative or quasi-judicial. This is also true if the decision impacts specific individuals rather than the general population.[43]

If the court determines that the governmental action in question is an administrative or quasi-judicial permitting decision, the court must conduct a more stringent analysis of the governmental denial than it would in the case of a decision involving legislative re-zoning. Courts are more reluctant to overturn local land use decisions by governmental entities when the decisions are legislative in nature. As stated by the Supreme Court in *New Orleans v. Dukes*, 427 U.S. 297 (1976), "the judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect governmental rights nor proceed along suspect lines."[44] It

41. Minton v. St. Bernard Parish School Bd., 803 F.2d 129, 135 (5th Cir. 1986) (quoting Hornsby v. Allen, 326 F.2d 605, 608–09 (5th Cir. 1964); Crymes v. DeKalb County, 923 F.2d 1482, 1485 (11th Cir. 1991).

42. *Id. See also* Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, Va., 865 F.2d 77 (4th Cir. 1989) (acts of zoning enforcement rather than rule-making are not legislative); Smith v. Lomax, 45 F.3d 402 (11th Cir. 1995) (firing of clerk involved the application of policy to a specific party and was not legislative in nature); Triomphe Investors v. City of Northwood, 835 F. Supp. 1036 (N.D. Ohio 1993), aff'd, 49 F.3d 198 (6th Cir.), *cert denied,* 116 S.Ct. 70 (1995) (city council was acting in administrative or quasi-judicial capacity in denying property owner's application for a land use permit). *But see* Corn v. City of Lauderdale Lakes, 997 F.2d 1369 (11th Cir. 1993) (city council passed a new ordinance blocking plaintiff's development, which was legislative in nature); City of New Orleans v. Duke's, 427 U.S. 297 (1976) (city council acted legislatively in amending ordinance which prevented plaintiff from conducting her business); Sprint Spectrum, L.P. v. City of Medina, 924 F.Supp. 1036 (W.D. Wash. 1996) (in enacting ordinance declaring six-month moratorium on communications facilities, city acted in its legislative capacity); Nasser v. City of Homewood, 671 F.2d 432 (11th Cir. 1982) (rezoning of plaintiff's property was legislative act); South Gwinnett Venture v. Pruitt, 491 F.2d 5 (5th Cir. 1974) (refusal to rezone property was legislative act).

43. *See generally Developments in the Law-Zoning,* 91 Harv. L. Rev., 1427, 1510–11 (1978); Cutting v. Muzzey, 724 F.2d 259 (1st Cir. 1984); Crymes v. DeKalb County, Ga., 923 F.2d 1482, 1485 (11th Cir. 1991).

44. *See also* Corn v. City of Lauderdale Lakes, 997 F.2d 1369, 1389 (11th Cir. 1993) ("The district court appears to have put itself in the place of the city council and made a de novo review of whether it would have taken the same action the city council did. Such scrutiny impinges upon the right and authority of municipalities to make land use decisions and would alter the allocation of functions between municipal governments and federal courts. This Court has admonished district courts not to usurp the role of city councils and zoning boards."); Spence v. Zimmerman, 873 F.2d 256 (11th Cir. 1989) (holding that federal courts

remains to be seen, however, what level of scrutiny will be applied to a legislative zoning decision in the face of the stringent substantial evidence standard prescribed by the Act.

## IV. FILING SUIT: § 332(C)(7)(B)(V) OF THE ACT AUTHORIZES A DIRECT APPEAL FROM THE DECISION OF A STATE OR LOCAL GOVERNMENT

Subsection (B)(v) states, in pertinent part, as follows:

> Any person adversely affected by any final action or failure to act by state or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within thirty 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.[45]

### A. *Type of Action and Evidentiary Questions*

Although the Act describes the action to be filed by a jilted applicant very generically, the legislative history of the Act makes clear that the action should be couched in the terms of an appeal.[46] Given the fact that the action is an appeal, the court, in reviewing the denial of the application, is limited to the evidence and argument presented to the state or local government below. Efforts to bolster the position of either the communications provider or the government subsequent to the denial of the application will be futile.[47] It is therefore imperative that the communications provider present the entirety of its evidence and argument during the application process below. Like the appeal of a civil trial, an

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do not sit as zoning boards of review and should be most circumspect in determining that rights have been violated in quarrels over legislative zoning decisions).

45. 47 U.S.C. § 332(c)(7)(B)(v).

46. "The conferees intend that the court to which a party *appeals* a decision under § 332(c)(7)(B)(v) may be the Federal district court in which the facilities are located or in a State court of competent jurisdiction, at the option of the party making the *appeal* . . ." H.R. CONF. REP. NO. 104-458, at 209 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 223 (emphasis supplied).

47. In *BellSouth Mobility*, the county that had denied plaintiffs/appellants' application for a permit to place a cellular tower attempted to file expert affidavits supporting its position *after* rendering the denial, and during the pendency of the appeal under the Act. The Court refused to consider the expert affidavits and based its decision only on the evidence presented to the governmental decision-maker below.

appeal under the Act will be decided solely on the basis of the record below.[48]

### B. *Parties for Whom the Act Provides Protection*

The specific language of the Act authorizes an appeal by numerous potential claimants. The Act specifically provides that any person adversely affected by a denial may file an appeal.[49] The Act, therefore, contemplates suits by appellants other than the individual/entity that filed for governmental approval of the proposed facility. For instance, a landowner's right to receive rentals for allowing a communication facility on his/her property may be foreclosed by a governmental denial. Such an individual is protected by the Act.[50] Although an interested party does not necessarily have to file the application in question in order to seek relief under the Act, if the party wants to ensure a successful appeal, attention to the amount and type of evidence presented during the application process is important.

### C. *Jurisdictional Issues*

The Act authorizes appeal in "a court of competent jurisdiction." As stated in the legislative history, a court of competent jurisdiction "may be the Federal district court in which the facilities are located or a State court of competent jurisdiction, at the option of the party making the appeal . . . ."[51] In determining which court is more advantageous to the

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48. In *BellSouth Mobility*, a county ordinance authorized grant of a tall structure permit if certain criteria were met by the applicant. The plaintiff/appellant cellular provider submitted, with its application for a permit to construct a cellular monopole, overwhelming evidence which satisfied the stated criteria including: evidence showing that the proposed monopole posed no hazard to navigable airspace; evidence indicating that the monopole would have no adverse effect upon residential property values; evidence demonstrating that the cellular monopole's radio frequency emissions would be well within FCC limits; and that the structure would be aesthetically compatible with the surrounding landscape. Because of this overwhelming evidence submitted to the county, the court held that generalized concerns stated in an argument against the monopole were not sufficient to authorize the county's denial of the permit. *Id*.

49. 47 U.S.C. § 332(c)(7)(B)(v).

50. In *BellSouth Mobility*, the applicant was a cellular communications company that wished to construct a cellular monopole on a specific site in Gwinnett County, Georgia. The applicant entered into a lease agreement with individuals that owned the proposed site. This option and lease agreement authorized rental payments to the landowners should the monopole be constructed. Although the landowners never applied for any permit to construct the facility, when the cellular provider was denied its permit, the landowners filed suit under the Act along with the provider. The Court ruled in favor of both the provider and the landowners in ordering the county to grant them a permit to construct the monopole.

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

potential plaintiff/appellant, an analysis of the political climate surrounding the governmental denial should be conducted. Telecommunications facilities are often controversial and if local judges are elected, the desires of local voters could play a major part in the judicial decision. Further, the potential claimant should consider whether local courts will be deferential to the actions of local governments with whom they may be, and often are, closely aligned. Finally, the potential plaintiff/appellant should take into consideration the sophistication of local judges and their ability to properly apply federal law.

### D. *Time for Judicial Review*

The Act specifically requires that a court hearing an appeal under its provisions "*shall* hear and decide such action on an expedited basis."[52] No matter what forum is chosen, the plaintiff/appellant should attempt to forego any discovery period and request an immediate hearing. This request is not unreasonable because the appeal will be decided solely on the basis of the evidence presented below, and no discovery is necessary. Given the Congressional mandate of an expedited hearing *and decision*,[53] the plaintiff/appellant should be successful in getting a decision within a matter of months.[54]

### E. *Ripeness: Filing an Appeal Within the Required Time Period*

Finally, and very importantly, the plaintiff/appellant must determine when the appeal is ripe for consideration by the reviewing court. In order to be appealable, the Act requires that the governmental denial be a final action or failure to act[55] and that the plaintiff/appellant must commence the appeal within thirty days of such action or failure to act.[56] As stated in the legislative history, the term "final action" means "final administrative action at the State or local government level so that the

52. 47 U.S.C. § 332(c)(7)(B)(v).

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

54. In *BellSouth*, the Appeal and Complaint was filed on May 21, 1996. A hearing on the issues was scheduled on an emergency basis and took place on August 1, 1996, at time in which almost all courts were closed during the Atlanta Olympic Games. Judge G. Ernest Tidwell certified his decision on August 13, 1996. Thus, the District Court, acting in its appellate capacity under the Act, rendered a final decision less than three months from the date the Appeal of Complaint was filed. See BellSouth Mobility, Inc. v. Gwinnett County, 944 F. Supp. 923, 925–926 (N.D.Ga. 1996).

55. § 704(a)(7)(B)(v), 110 Stat. 152.

56. *Id*.

party can commence action under the [Act] rather than waiting for the exhaustion of any independent State court remedy otherwise required."[57]

After the plaintiff/appellant receives notice that the application to place the communications facility has been denied, the plaintiff/appellant must exhaust all available state and local administrative remedies prior to filing an appeal under the Act. Once administrative relief is exhausted, the appeal is ripe even if the plaintiff/appellant has not utilized all available judicial remedies.[58] A plaintiff/appellant should, therefore, analyze the applicable ordinance or local statute governing the application to determine whether an administrative appeal is provided. If so, the plaintiff/appellant must exhaust the administrative remedies prior to filing suit under the Act. Once administrative remedies have been exhausted, the plaintiff/appellant must appeal within thirty days of a denial.

## V. *BellSouth v. Gwinnett County*: A Case Study

*BellSouth Mobility* was the first case in which a claimant successfully obtained judicial relief under Section 704 of The Telecommunications Act of 1996. Because this case of first impression will have significant impact on future claims brought under the Act, a brief analysis of the decision is important.

In *BellSouth*, plaintiff/appellant BellSouth Mobility Inc. ("BellSouth") sought to construct a cellular communications monopole upon a designated site in Gwinnett County, Georgia.[59] The height of the tower required that BellSouth obtain a tall structure permit prior to construction.[60] The county ordinance governing the issuance of tall structure permits authorized the county to deny an application for a tall structure

57. H.R. Conf. ep. No. 104-458, at 9 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 223.

58. Determining whether or not administrative remedies have been exhausted can be quite tricky. For instance, if a party is aggrieved by a decision of a local zoning board in Alabama, Section 11-52-81 of the Alabama Code authorizes a direct appeal to a state circuit court. Alabama decisional law interpreting this remedy holds that the appeal is purely administrative in nature. *See City of Gadsden v. Entrekin*, 387 So.2d 829 (Ala. 1980) where party was required to pursue and exhaust the administrative remedy contained in Section 11-52-81, prior to seeking judicial relief. Arguably, then, this remedy must be exhausted prior to filing suit under the Act. However, § 11-52-81 by requiring de novo review requires full-blown discovery and authorizes a jury trial to review the decision of the local zoning board. Given this fact, the Alabama scheme for reviewing a decision of a local zoning board in the telecommunications context very well may violate the Supremacy Clause as it is directly in conflict with the expedited treatment to be given applications for telecommunications facilities articulated by the Act. *See* Ala. Code § 11-52-81; § 704(a)(7)(B)(v), 110 Stat. 152.

59. Bellsouth Mobility, 944 F. Supp. at 923.

60. *Id.* at 924–925.

permit when: (1) the proposed structure could interfere with air facilities located within the county; (2) the structure could endanger person or property within the county, or (3) the structure would not be compatible from an aesthetic viewpoint with surrounding area.[61]

In preparing to construct the monopole, BellSouth leased the subject property from the owners of the site and filed their application for a tall structure permit with the county.[62] The application was supported by numerous evidentiary exhibits indicating that: (1) the monopole would not interfere with navigable airspace in the area; (2) the monopole would not endanger persons or property nearby; and (3) the structure would be compatible from an aesthetic viewpoint with the existing facilities.[63] No exhibit or documentary evidence was submitted in opposition to the application.

A hearing was scheduled before the county's board of commissioners and each side presented a five-minute argument. In opposition to the application, a representative from a surrounding neighborhood voiced concerns that the monopole would pose a safety threat to children, that the monopole might cause damage during a storm, and that the monopole would be aesthetically incompatible with existing structures in the area. BellSouth also presented a five-minute argument which was based primarily upon the documentary evidence previously submitted in support of the application.[64] At the conclusion of the argument, and without further discussion, the county board of commissioners voted to deny the application.[65] BellSouth subsequently received a letter informing it of the permit denial, but the letter did not give any reasons therefor, nor did it specify any evidence upon which the denial had been based.[66]

Because the ordinance in question did not authorize an administrative remedy if an application was denied, BellSouth, along with the owners of the site upon which the monopole was to be constructed,

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61. *Id*.

62. *Id*. at 925.

63. *Id*. at 924–926. The documentary evidence filed by BellSouth in support of its application included line-of-sight photographs illustrating the view of the proposed monopole from various surrounding locations; an appraisal report evidencing that the monopole would have no adverse effect upon property values; a report indicating that the monopole would present no hazard to navigable airspace in the area; and boundary survey and site plans which demonstrated the nature of the proposed structure and which evidenced the distances from the proposed site to adjacent parcels of land and residential dwellings.

64. Bellsouth Mobility, 944 F. Supp. at 925–926.

65. *Id*. at 926.

66. *Id*. at 926 (quoting letter formally notifying plaintiffs that their "application for a Tall Structure Permit was denied at the Board of Commissioners meeting on April 23, 1996").

filed an appeal from the county's decision in the Federal District Court in which the monopole was to be constructed.[67] In bringing the Telecommunications Act claim, plaintiffs/appellants relied exclusively on the requirement of 47 U.S.C. § 332(c)(7)(B)(iii) [§ 704c(7)(B)(v), 110 Stat.], mandating that any denial "shall be in writing and supported by substantial evidence contained in a written record."[68] Along with the appeal under the Telecommunications Act, plaintiffs/appellants prosecuted the action under a state-law mandamus theory, arguing that the county's board of commissioners abused its discretion in denying the permit because the evidence clearly supported approval of the application.[69]

In limiting its review to the evidence and argument presented to the county below, the court ruled as follows on plaintiffs'/appellants' "substantial evidence" claims under the Telecommunications Act:

> [T]he court cannot conscientiously find that the evidence supporting the board's decision to deny the plaintiffs a tall structure permit is substantial. On the contrary, the court finds that the record evidence supports plaintiffs' application.[70]

The critical issue, however, was not whether the county had violated the Telecommunications Act, but the relief that would be granted to plaintiffs/appellants. Fearing that remand of the application to the county would result in an attempt by the county to bolster their decision by hearing additional evidence from the opposition, plaintiffs/appellants argued vehemently that the Act prohibited remand because it would frustrate Congressional intent to provide an aggrieved party full relief on an expedited basis.[71] Additionally, plaintiffs/appellants argued that remanding the case to the county would frustrate the purpose of the Act because the board of commissioners would still be influenced by the impermissible factors that caused them to deny the application in the first instance—community opposition and political pressure.

The county contended that the Court should simply remand the matter to the county and allow it to make a decision supported by substantial evidence.[72] The county argued that it was improper for Federal

67. BellSouth Mobility, 944 F. Supp. at 926. *See also* H.R. Conf. Rep. No. 104-458, at 209 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 223 authorizing an appeal in the Federal District where the facility is to be constructed.

68. BellSouth Mobility, 944 F. Supp. at 928. (internal citations omitted).

69. *Id*. at 929. *See also* O.C.G.A. § 9-6-20 ("whenever, from any cause, a defect of legal justice would ensue from a failure to perform or from improper performance, the writ of mandamus may issue to compel a due performance . . .").

70. Bellsouth Mobility, 944 F. Supp. at 928.

71. *Id*. at 929.

72. *Id*.

courts to usurp local government authority by directing issuance of a permit, and that the Act did not authorize the Court to issue such an order.

The Court held as follows:

> Section 704(a) of the [Telecommunications Act] does not speak to the issue of what relief a court may grant to remedy violations of the [Act]. Although it permits any person who has been adversely affected by actions that are inconsistent with its provisions to 'commence an action in any court of competent jurisdiction,' it does not specify an appropriate remedy. The [Telecommunications Act], however, does mandate that '[t]he court shall hear and decide such action on an expedited basis.' Indeed, the legislative history of the [Telecommunications Act] makes it clear that its drafters intended that 'the court to which a party appeals a decision under section 332(c)(7)(B)(v) may be the Federal district court in which the facilities are located or a State court of competent jurisdiction, at the option of the party making the appeal, and that the courts act expeditiously in deciding such cases.'
>
> In the court's view, simply remanding the matter to the board of commissioners for their determination would frustrate the [Telecommunications Act's] intent to provide aggrieved parties full relief on an expedited basis. Therefore, defendants' abstention argument notwithstanding, the court finds that the [Telecommunications Act] vests the court with sufficient authority to grant plaintiffs' request for mandamus relief if such relief would be warranted under the circumstances.[73]

Accordingly, the *BellSouth* Court not only found that defendants'/appellees' decision violated the Act because it was not based upon substantial evidence, but also specifically ordered the county to grant the application for the permit in question.[74]

## VI. Conclusion

There can be no doubt that the Telecommunications Act of 1996 will have a significant impact upon facility siting decisions made by local governments. The requirements set forth in the Act give a telecommunications provider protection from the sometimes mercurial

73. *Id.* (internal citations omitted).
74. *Id.*

temperaments of local governments as they relate to zoning and planning. The *BellSouth* decision provides additional protection because it indicates that the judiciary should be aggressive in carrying out the articulated Congressional desire to reduce barriers to entry and increase competition in the telecommunications industry.