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March 18, 2021

Louisville Metro Planning Commission
c/o Zach Schwager
Metro Development Center
444 S. 5th Street, Suite 300
Louisville, KY 40202

RE: Federal Law Substantial Evidence Requirements / Public Utility Status
(Docket Number 21CELL0001)
Location: 4513 Blevins Gap Road, Louisville, KY 40272
Applicant: New Cingular Wireless, PCS, LLC, d/b/a AT&T Mobility
Site Name: Headley Hollow

Dear Commission Members:

I am providing this correspondence for inclusion in the administrative record of the above proceeding to provide information regarding standards and considerations unique to applications for approval of wireless communications facilities ("WCFs") in accordance with the federal Telecommunications Act ("TCA") and Kentucky law as applicable to public utilities.

I. SUBSTANTIAL EVIDENCE REQUIREMENT

The TCA at 47 U.S.C.S. § 332(c)(7)(B)(iii) provides expressly that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing ***and supported by substantial evidence*** contained in a written record" (emphasis added). KRS 100.987(2)(G) even expressly incorporates 47 U.S.C.S. § 332(c)(7)(B)(iii) into Kentucky law. Accordingly, it is critical for the Commission in considering the subject application and possible arguments against approval to ensure that it gives proper and appropriate deference to evidence that qualifies as "substantial evidence" and does not base its decision on evidence that does not so qualify.

Based on our extensive prior experience handling similar applications, we have come to anticipate the possibility that those who oppose new WCF construction often do so on the basis of aesthetic concerns and the presumed effects from the proposed WCF on property values. While it is understandable that property owners would have concerns about these issues, the Commission should be aware that the federal courts apply

specific and well-defined standards to the evidence that may be considered by a land use decision maker with respect to them in the unique context of WCF applications. Given this uniqueness, and since WCFs are a land use that is infrequently reviewed by the Commission in comparison with other typical uses, it may be helpful for the Commission (and its legal counsel) to review this summary prior to the Commission issuing a decision on the subject application.

Case law precedent from the federal Sixth Circuit Court of Appeals (to which Kentucky is subject) explicitly prohibits consideration of aesthetics evidence as a basis to deny approval of a WCF application. In particular, the United States District Court for the Eastern District of Kentucky has held claims that a tower is unsightly are generalized expressions of aesthetical concerns. See *Cellco Partnership v. Franklin County*, 553 F. Supp. 2d 838 at 852(E.D. Ky 2008), which follows the Sixth Circuit Court of Appeals' holding that general concerns that the tower is ugly or unwanted near an individual's residence are not sufficient to constitute substantial evidence (*T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield*, 691 F.3d 794 at 800 (6th Cir. 2012)). Accordingly, the Commission should be aware that any denial of the subject application on aesthetic grounds or general public opposition to towers would not be based on substantial evidence as required by the TCA.

In the Sixth Circuit, lay opinion is not substantial evidence that may be relied upon by a decision maker to reject a WCF application. This is a very different and more stringent standard than that which applies to zoning map amendments, conditional use permits or variances pursuant to Kentucky law. Applying this controlling federal standard, the District Court in *Cellco* stated:

> [Lay opponents to the site] objected primarily because they would see the tower from their houses and the tower would be "unsightly." These objections represent "generalized expressions of concern with aesthetics." The same objection could be made by any resident in any area where a tower was proposed. The Sixth Circuit has never found that lay opinion evidence alone constitutes substantial evidence supporting the denial of an application. See *MIOP, Inc. v. City of Grand Rapids*, 175 F.Supp.2d 952, 956-57 (W.D. Mich. 2001) (stating that, "[c]onsistent with Sixth Circuit precedent, this Court does not find lay opinion evidence sufficient to satisfy the substantial evidence requirement.")
>
> Even if the objections of some of these residents should be considered as specific objections to the placement of the tower in this particular area because it is rural and residential, the objections of a few residents is not substantial evidence warranting the denial of an application where there is uncontradicted evidence that the tower is necessary and there is no other suitable location. *Cellco Partnership* at 852.

Furthermore, where substantial evidence such as expert testimony is introduced into the record, it cannot be contradicted by lay opinion. The Sixth

Circuit Court of Appeals provided the following guidance regarding the proper weight to be given to lay evidence in *T-Mobile Cent., LLC*, as follows:

> The only evidence in the record that the Township cites to support the assertion that there was not a sufficient need for the tower was testimony from Mr. Dave Crook at the February 24, 2009, Planning Commission meeting. Mr. Crook stated that the proposed facility would only address 15% of T-Mobile's coverage problem. Mr. Crook provided no explanation of how he reached this number, nor did he dispute any of the facts in the RF engineer's report. Nothing in the record suggests what qualifications Mr. Crook possessed or whether he had any expertise to opine on the coverage gap in the area. His ostensibly lay opinion is not substantial evidence. *MIOP, Inc. v. City of Grand Rapids*, 175 F. Supp. 2d 952, 956-57 (W.D. Mich. 2001) (citing *Telespectrum*, 227 F.3d at 424) ("Instead, the cases cited by the Sixth Circuit remark that opinion is not sufficient to meet the substantial evidence requirement. Consistent with Sixth Circuit precedent, this Court does not find lay opinion evidence sufficient to satisfy the substantial evidence requirement."). *T-Mobile Cent., LLC* at 804.

One area where this particular issue frequently arises is with regard to property value concerns. Experts who have studied the effects of WCFs on property values have concluded that such concerns are unfounded. Since it is quite possible that these concerns may be raised in the proceedings on the present application, we have provided the Commission with a detailed report prepared by an expert in the field of real estate appraisal to address this point.[1]

This report includes specific examples and findings, along with a description of methodology used by the credentialed expert who authored it. Accordingly, it qualifies as substantial evidence as to the question of property valuation in connection with the subject proposal. On the other hand, lay evidence as to the impact of WCFs on real estate valuation is a mere proxy for generalized aesthetic concerns and, accordingly, is not substantial evidence. Consequently, lay opinion regarding effects of WCFs on property values cannot be the basis for a rejection of an application under the federal law standard applied in the Sixth Circuit.

II. WIRELESS CARRIERS ARE PUBLIC UTILITIES

Another unique facet of the local regulation of wireless communications facilities is the fact that wireless carriers such as New Cingular Wireless PCS, LLC in the present case are public utilities. Accordingly, legal precedent and public policies favoring expanded availability and access to utility service are applicable to the subject Uniform Application.

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[1] See accompanying Real Estate Value Impact Study prepared by Glen D. Katz, MAI, SRA, AI-GRS, AI-RRS dated February 25, 2021.

Applicant New Cingular Wireless PCS, LLC, a Delaware limited liability company, d/b/a AT&T Mobility is registered as a utility with the Kentucky Public Service Commission ("PSC") as Utility ID No. 4202400. Under Kentucky law, wireless communications providers satisfy the applicable definition for utilities and are regulated as such. The statutory basis for local regulation of wireless communications facilities, KRS 100.987(2), specifically references "a utility that proposes to construct an antenna tower for cellular communication services." Furthermore, KRS 278.010(3) defines a utility as "any person...who owns, controls, operates, or manages any facility used or to be used for or in connection with ... transmission or conveyance over wire, in air, or otherwise, of any message by telephone or telegraph for the public, for compensation."

KRS 278.546(1) even includes a finding of the General Assembly that "state-of-the-art telecommunications is an essential element to the Commonwealth's initiatives to improve the lives of Kentucky citizens, to create investment, jobs, economic growth, and to support the Kentucky Innovation Act of 2000" and KRS 278.546(3) describes telecommunications technologies to include "... traditional telephony, cable television, Internet and other wireless technologies."

Accordingly, wireless facilities are necessary public infrastructure, and public policy considerations favoring availability and access to service apply. Furthermore, such facilities should not be disfavored relative to those for land line telephone service under Kentucky law.

III. CONCLUSION

As you can see from the foregoing, applications for new wireless communications facilities differ significantly from other land uses typically reviewed by the Commission based on the unique implications of the Federal Telecommunications Act and applicable statutory law and case law precedent governing public utilities. Accordingly, the Commission should take special care to be aware of these considerations and to apply the proper standards set forth by applicable law and the federal courts when reviewing the subject Uniform Application.

I have included copies of the statutes and cases referenced herein with this correspondence for your further information. Please file this correspondence and enclosures in the administrative case file for this matter, and do not hesitate to contact me should you have any questions or comments concerning this information.

Sincerely,

David A Pike

David A. Pike
Attorney for Applicant

Enclosures

47 USCS § 332

Current through Public Law 116-344, approved January 13, 2021, with gaps of Public Laws 116-260, 116-283, and 116-315.

United States Code Service > TITLE 47. TELECOMMUNICATIONS (Chs. 1 — 15) > CHAPTER 5. WIRE OR RADIO COMMUNICATION (§§ 151 — 646) > SPECIAL PROVISIONS RELATING TO RADIO (§§ 301 — 399b) > GENERAL PROVISIONS (§§ 301 — 343)

§ 332. Mobile services

(a) Factors which Commission must consider. In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 1 of this Act [*47 USCS § 151*], whether such actions will—

(1)promote the safety of life and property;

(2)improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and market-place demands;

(3)encourage competition and provide services to the largest feasible number of users; or

(4)increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees.

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of title 5, United States Code [*5 USCS §§ 2101* et seq.], or section 3679(b) of the Revised Statutes (31 U.S.C. 665(b)) [*31 USCS § 1342*].

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act [5 USCS Appx].

(c) Regulatory treatment of mobile services.

(1) Common carrier treatment of commercial mobile services.

(A)A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this Act [*47 USCS §§ 151* et seq.], except for such provisions of title II [*47 USCS §§ 201* et seq.] as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify

any provision of section 201, 202, or 208 [*47 USCS § 201*, *202*, or *208*], and may specify any other provision only if the Commission determines that—

(i)enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii)enforcement of such provision is not necessary for the protection of consumers; and

(iii)specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this Act [*47 USCS § 201*]. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act.

(C) As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after the date of enactment of this subparagraph [enacted Aug. 10, 1993], complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services. A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this Act. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to the enactment of the Omnibus Budget Reconciliation Act of 1993 [enacted Aug. 10, 1993]) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption.

(A) Notwithstanding sections 2(b) and 221(b) [*47 USCS §§ 152(b)* and *221(b)*], no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at

affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

(i)market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii)such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after the date of enactment of the Omnibus Budget Reconciliation Act of 1993 [enacted Aug. 10, 1993], petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation. Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [*47 USCS §§ 741* et seq.] of the corporation authorized by title III of such Act [*47 USCS §§ 731* et seq.].

(5) Space segment capacity. Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership. The Commission, upon a petition for waiver filed within 6 months after the date of enactment of the Omnibus Budget Reconciliation Act of 1993 [Aug. 10, 1993], may

waive the application of section 310(b) [*47 USCS § 310(b)*] to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) [*47 USCS § 310(b)*].

(7) Preservation of local zoning authority.

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

(B) Limitations.

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

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

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

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

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

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

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

(C) Definitions. For purposes of this paragraph—

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

(ii)the term “personal wireless service facilities” means facilities for the provision of personal wireless services; and

(iii)the term “unlicensed wireless service” means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) [*47 USCS § 303(v)*]).

(8) Mobile services access. A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers’ choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers’ choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions. For purposes of this section—

(1)the term “commercial mobile service” means any mobile service (as defined in section 3 [*47 USCS § 153*]) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2)the term “interconnected service” means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B); and

(3)the term “private mobile service” means any mobile service (as defined in section 3 [*47 USCS § 153*]) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

History

HISTORY:

Act June 19, 1934, ch 652, Title III, Part I, § 332 [331], as added Sept. 13, 1982, *P. L. 97-259*, Title I, § 120(a), *96 Stat. 1096*; Oct. 5, 1992, *P. L. 102-385*, § 25(b), *106 Stat. 1502*; Aug. 10, 1993, *P. L. 103-66*, Title VI, § 6002(b)(2)(A), *107 Stat. 393*; Feb. 8, 1996, *P. L. 104-104*, § 3(d)(2), Title VII, §§ 704(a), 705, *110 Stat. 61*, 151, 153; March 23, 2018, *P. L. 115-141*, Div P, Title IV, § 402(g), *132 Stat. 1089*.

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Cellco P'ship v. Franklin County

United States District Court for the Eastern District of Kentucky, Central Division

April 18, 2008, Decided; April 18, 2008, Filed

CIVIL ACTION NO. 3:07-34

Reporter
553 F. Supp. 2d 838 *; 2008 U.S. Dist. LEXIS 32324 **

CELLCO PARTNERSHIP, PLAINTIFF v. FRANKLIN COUNTY, KENTUCKY, et al., DEFENDANTS

Core Terms

tower, planning commission, minutes, uniform application, zoning, substantial evidence, construct, residents, residential, Planning, visual impact, reasons, sites, immunity, Rural, proposed site, final decision, aesthetic, cell, written record, facilities, summary judgment motion, commission's denial, grounds, entity, feet, wireless communication, local government, meeting minutes, failure to act

Case Summary

Procedural Posture

Plaintiff wireless communications company sued defendants, a county and a planning commission, alleging that the denial of its application to construct a cell phone tower violated the Telecommunications Act (TCA), *47 U.S.C.S. § 151 et seq.*, and that a local zoning ordinance should be declared void and their application approved under *Ky. Rev. Stat. Ann. § 100.987(4)(c)*. Both sides moved for summary judgment.

Overview

The company entered into a lease agreement with property owners to construct a 307 foot cell phone tower on their property. The company submitted an application to construct the tower to the planning commission. The planning commission denied the application. The company asserted that defendants violated *47 U.S.C.S. § 332(c)(7)(B)(iii)* because their decision was neither in writing, nor supported by substantial evidence. The court found that because the company filed this action within 30 days of the planning commission's failure to act as the parties had agreed it would, the action was timely. Defendants were not immune from suit under the *Eleventh Amendment*. The meeting minutes were not a separate written record because they encompassed all the various items that were on the agenda. Considering the record as a whole, including the objections of area residents, the evidence regarding the rural residential character of the area, and the evidence supporting the application presented by the company, substantial evidence did not support the denial of the application. The proper remedy was to issue an injunction to compel defendants to issue the requested permits.

Outcome

The company's motion for summary judgment was granted with respect to its claim that defendants violated *47 U.S.C.S. § 332(c)(7)(B)(iii)*. The motion was in all other respects denied. The state law claims were dismissed without prejudice. Defendants were ordered to grant the company's uniform application and to issue all permits necessary for the company to construct the tower as proposed in the uniform application.

LexisNexis® Headnotes

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN1 **Telephone Services, Cellular Services**

With regard to an application for placement of a wireless communication facility, under *Ky. Rev. Stat. Ann. § 100.987(4)(c)*, a planning commission must advise the applicant in writing of its final decision within 60 days, commencing from the date the uniform application is submitted to the planning commission or within a date certain specified in a written agreement between the planning commission and the applicant. If the planning commission fails to issue a final decision within 60 days and if there is no written agreement between the local planning commission and the applicant providing for a specific date for the planning commission to issue a decision, the uniform application shall be deemed approved.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN2 **Telephone Services, Cellular Services**

Franklin County, Ky., Zoning Ordinance § 6.304(E)(5) states that one of the criteria to be used in evaluating an application for placement of a wireless communication facility is the extent to the which the proposal responds to the impact of the proposed development on adjacent land uses, especially in terms of visual impact.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN3 **Telephone Services, Cellular Services**

Franklin County, Ky., Zoning Ordinance § 6.304(D)(6) states that a residential area is the least preferred location for a wireless communication facility.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN4 **Telephone Services, Cellular Services**

47 U.S.C.S. § 332(c)(7)(B)(iii) of the Telecommunications Act (TCA), *47 U.S.C.S. § 151 et seq.*, provides that any decision by a state or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and

supported by substantial evidence contained in a written record.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN5 **Telephone Services, Cellular Services**

Ky. Rev. Stat. Ann. § 100.987(4)(c) provides that, if a planning commission fails to issue a final decision within 60 days on an application to construct a cellular antenna tower, and if there is no written agreement to the contrary, the uniform application shall be deemed approved.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN6 **Summary Judgment, Entitlement as Matter of Law**

Under Fed. R. Civ. P. 56, summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN7 **Burdens of Proof, Movant Persuasion & Proof**

With regard to a motion for summary judgment, the moving party bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrates the absence of a genuine issue of material fact. The movant may meet this burden by demonstrating the absence of evidence supporting one or more essential elements of the non-movant's claim. Once the movant meets this burden, the opposing party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e).

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Evidentiary Considerations > Scintilla Rule

HN8 **Burdens of Proof, Nonmovant Persuasion & Proof**

With regard to a motion for summary judgment, once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient simply to show that there is some metaphysical doubt as to the material facts. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. Fed. R. Civ. P. 56(e) requires the nonmoving party to go beyond the pleadings and present some type of evidentiary material in support of its position. Summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Civil Procedure > ... > Summary

Judgment > Entitlement as Matter of Law > Appropriateness

HN9[] Entitlement as Matter of Law, Appropriateness

In considering a motion for summary judgment, a court must view the facts and draw all inferences therefrom in a light most favorable to the nonmoving party. The moving party must show conclusively that there is no genuine issue of material fact. However, at the summary judgment stage, the judge's function is not to weigh the evidence and determine the truth of the matter. The court is not to judge the evidence or make findings of fact. Ultimately, a court must determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN10[] Summary Judgment, Entitlement as Matter of Law

With regard to a motion for summary judgment, a trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact. The nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN11[] Telephone Services, Cellular Services

The Telecommunications Act (TCA), 47 U.S.C.S. § 151 et seq., provides that any person adversely affected by any final action or failure to act by a state or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. 47 U.S.C.S. § 332(c)(7)(B)(v).

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN12[] Telephone Services, Cellular Services

With regard to the Telecommunications Act (TCA), 47 U.S.C.S. § 151 et seq., a city council's vote to deny an application to construct a cell phone tower becomes final when the minutes are approved.

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN13[] Federal Acts, Telecommunications Act

The Telecommunications Act (TCA), 47 U.S.C.S. § 151 et seq., allows applicants to contest an action or failure to act.

Constitutional Law > State Sovereign Immunity > General Overview

Governments > State & Territorial Governments > Claims By & Against

Constitutional Law > State Sovereign Immunity > Waiver > General Overview

HN14 **Constitutional Law, State Sovereign Immunity**

The *Eleventh Amendment* prohibits the judicial power of the United States from extending to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state. *U.S. Const. Amend. XI*. Unless *Eleventh Amendment* immunity is expressly waived, a state and its agencies are immune from an action for damages or injunctive relief in federal court. This jurisdictional bar also immunizes a state entity that is an "arm of the state."

Constitutional Law > State Sovereign Immunity > General Overview

Governments > State & Territorial Governments > Claims By & Against

HN15 **Constitutional Law, State Sovereign Immunity**

The entity asserting *Eleventh Amendment* immunity has the burden to show that it is entitled to immunity, i.e., that it is an arm of the state. Sovereign immunity will be denied if an entity fails to show what degree of control the state maintains over the entity, where the funds for the entity are derived, and who is responsible for the judgment against the entity.

Constitutional Law > State Sovereign Immunity > General Overview

Governments > Local Governments > Claims By & Against

HN16 **Constitutional Law, State Sovereign Immunity**

The United States Supreme Court has repeatedly refused to extend sovereign immunity to counties even where such entities exercise a "slice of state power." Likewise, the United States Court of Appeals for the Sixth Circuit holds that counties are not entitled to sovereign immunity under the *Eleventh Amendment*.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN17 **Telephone Services, Cellular Services**

The United States Court of Appeals for the Sixth Circuit holds that for a decision by a state or local government or instrumentality thereof denying a request to place, construct, or modify personal wireless service facilities to be "in writing" for the purposes of *47 U.S.C.S. § 332(c)(7)(B)(iii)*, it must (1) be separate from the written record; (2) describe the reasons for the denial; and (3) contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN18 **Telephone Services, Cellular Services**

With regard to the writing requirement under *47 U.S.C.S. § 332(c)(7)(B)(iii)*, the United States Court of Appeals for the Sixth Circuit has rejected the

concept that a resolution in meeting minutes will never meet the separate writing requirement, if it otherwise allows meaningful judicial review, simply because the minutes contained other dispositions or resolutions dealing with other subjects.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN19[] Telephone Services, Cellular Services

The United States Court of Appeals for the Sixth Circuit recognizes that *47 U.S.C.S. § 332(c)(7)* is a deliberate compromise between two competing aims -- to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Communications Law > Federal Acts > Telecommunications Act > Federal Preemption

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN20[] Telephone Services, Cellular Services

The Telecommunications Act (TCA), *47 U.S.C.S. § 151 et seq.*, does not preempt all authority of state or local governments over the regulation of wireless towers. The TCA specifically provides that nothing in this chapter shall limit or affect the authority of a state or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities. *47 U.S.C.S. § 332(c)(7)(A)*. Nevertheless, the TCA imposes several substantive and procedural requirements upon the state or local government's consideration of permit applications. These constraints include a prohibition against state and local governments acting in a way that (1) unreasonably discriminates among providers of functionally equivalent services, or (2) prohibits or has the effect of prohibiting the supplying of personal wireless services. *47 U.S.C.S. § 332(c)(7)(B)(I)*.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN21[] Telephone Services, Cellular Services

47 U.S.C.S. § 332(c)(7)(B)(iii) requires that any decision by a state or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN22[] Telephone Services, Cellular Services

With regard to a claim brought under the Telecommunications Act (TCA), *47 U.S.C.S. § 151 et seq.*, the "substantial evidence" standard of *47 U.S.C.S. § 332* is the traditional standard employed by the courts for review of agency action. Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The court reviews the entire record, including evidence opposed to the result of

the decision. A court looks to whether the agency explained any credibility judgments it made and whether it gave reasons for crediting one piece of evidence over another. A court must examine the evidence as a whole, taking into account whatever in the record fairly detracts from its weight.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN23 **Telephone Services, Cellular Services**

The substantial evidence requirement of the Telecommunications Act (TCA), *47 U.S.C.S. § 151 et seq.*, surely refers to the need for substantial evidence under the criteria laid down by the zoning law itself. The substantial evidence test applies to the locality's own zoning requirements.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN24 **Telephone Services, Cellular Services**

With regard to construction of communication towers and application of the Telecommunications Act (TCA), *47 U.S.C.S. § 151 et seq.*, concerns based upon conjecture or speculation lack probative value and will not amount to substantial evidence.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN25 **Telephone Services, Cellular Services**

Franklin County, Ky., Ordinance No. 15, 1999 Series, § 6.30 Wireless Communications Facilities, § 6.304(D)(6), p. 14 provides that, unless the applicant is co-locating, the application for the construction of a cellular antenna tower must include a statement, supported by evidence, that "there is no other site which is materially better from a land use perspective within the immediate area for the location of the telecommunications facility." The application must include a list of potential sites within a one-mile radius of the proposed tower location, a description of potential sites, and a discussion of the ability or inability of the sites to host a cellular antenna tower.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN26 **Telephone Services, Cellular Services**

See Franklin County, Ky., Ordinance No. 15, 1999 Series, § 6.30 Wireless Communications Facilities, § 6.304(D)(6), p. 14.

Real Property Law > Zoning > General Overview

HN27 **Real Property Law, Zoning**

Franklin County, Ky., Zoning Ordinance 4.11, § 4.111 states that a "rural residential" zoning district is intended to establish and preserve a quiet single family home neighborhood, free from other uses except those which are convenient to and compatible with the residences of such neighborhood. This district is intended to be very low density and will customarily be located in areas

where public sewer facilities are not available or planned. The general uses of such zoning districts are single family homes. Home occupations, nursery schools and day care centers, elementary and secondary schools, parks and public recreation facilities are permitted with the Board of Adjustments' approval.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Real Property Law > Zoning > General Overview

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN28 **Telephone Services, Cellular Services**

Franklin County, Ky., Zoning Ordinance 4.11, § 4.111 does not prohibit the construction of a communications tower in areas zoned rural residential.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN29 **Telephone Services, Cellular Services**

With regard to construction of communication towers and application of the Telecommunications Act (TCA), *47 U.S.C.S. § 151 et seq.*, a few generalized expressions of concern with "aesthetics" cannot serve as substantial evidence on which the town could base the denials.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN30 **Telephone Services, Cellular Services**

With regard to construction of communication towers and application of the Telecommunications Act (TCA), *47 U.S.C.S. § 151 et seq.*, because few people would argue that telecommunications towers are aesthetically pleasing, a local zoning board's aesthetic judgment must be grounded in the specifics of the case.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN31 **Telephone Services, Cellular Services**

With regard to construction of communication towers and application of the Telecommunications Act (TCA), *47 U.S.C.S. § 151 et seq.*, the United States Court of Appeals for the Sixth Circuit has never found that lay opinion evidence alone constitutes substantial evidence supporting the denial of an application.

Communications Law > ... > Regulated Entities > Telephone Services > Cellular Services

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN32 **Telephone Services, Cellular Services**

The Telecommunications Act (TCA), *47 U.S.C.S. § 151 et seq.*, does not state the appropriate remedy for violations of *47 U.S.C. § 332(c)(7)(B)(iii)*. Nevertheless, the United States Court of Appeals for the Sixth Circuit has repeatedly concluded that

where the defendant denied a permit application, and that denial violated the TCA's "in writing" and "substantial evidence" requirements, the proper remedy is injunctive relief compelling the defendant to issue the requested permit.

Counsel: **[**1]** For Cellco Partnership, a Delaware General Partnership, doing business as Verizon Wireless, Julia Perkins, Zelma Perkins, Plaintiffs: David A. Pike, Floyd Keith Brown, Robert W. Grant, LEAD ATTORNEYS, Pike Legal Group, PLLC, Shepherdsville, Ky.

For Franklin County, Kentucky, Franklin County Fiscal Court, The Frankfort/Franklin County Planning Commission, Defendants: Richard M. Sullivan, LEAD ATTORNEY, Wendell Lloyd Jones, Conliffe, Sandmann & Sullivan, Louisville, KY.

Judges: Karen K. Caldwell, United States District Judge.

Opinion by: Karen K. Caldwell

Opinion

[*839] OPINION AND ORDER

This matter is before the Court on the parties' cross-motions for summary judgment (Rec. Nos. 26 and 27). The Plaintiffs challenge the Frankfort/Franklin County Planning Commission's denial of an application to construct a cell phone tower. For the following reasons, the Court will grant the Plaintiffs' Motion for Summary Judgment with regard to their claim under the Telecommunications Act, *47 U.S.C. § 151 et seq.*, and will otherwise deny it; and the Court will deny the Defendants' Motion for Summary Judgment.

I. FACTS.

The Plaintiff Cellco Partnership d/b/a Verizon Wireless ("Verizon") is licensed by the Federal Communications Commission to **[**2]** provide wireless communications services within its licensed area, including Franklin County, Kentucky. Co-Plaintiffs Julian and Zelma Perkins own real estate in Franklin County. The Perkins and Verizon have entered into a lease agreement which would permit Verizon to construct a 307-foot cell phone tower on the Perkins' property.

A. Verizon Agrees to Extensions of Time for Planning Commission to Act.

Verizon submitted an application to construct the tower to the Frankfort/Franklin County Planning Commission (the "Planning Commission") on July 31, 2006 (Rec. No. 26, Defs.' Mem., Ex. 1, Uniform Application). ***HN1***[⬆] Under *KRS § 100.987(4)(c)*, a Kentucky state statute, a planning commission must:

> [a]dvise the applicant in writing of its final decision within sixty (60) days, commencing from the date the uniform application is submitted to the planning commission or within a date certain specified in a written agreement between the planning commission and the applicant. If the planning commission fails to issue a final decision within sixty (60) days and if there is no written agreement between the local planning commission and the applicant providing for a specific date for the planning commission **[**3]** **[*840]** to issue a decision, the uniform application shall be deemed approved.

Verizon and the Planning Commission repeatedly agreed in writing to dates beyond the 60-day period for the Planning Commission to issue a final decision. On March 8, 2007, the Planning Commission conducted a public hearing on Verizon's application to construct the cell tower. At the hearing, Verizon orally agreed that it "would

waive the sixty days . . . .". (Rec. No. 26, Defs.' Mem., Ex. 3, March 8, 2007 Minutes at 9). The Planning Commission voted to postpone the matter until April 26, 2007. (Rec. No. 26, Defs.' Mem., Ex. 3, March 8, 2007 Minutes at 9). The following day, Verizon sent the Planning Commission a letter stating:

> On behalf of the applicant it is agreed that a final decision of the above referenced application to construct a wireless telecommunications facility may be made on or before April 26, 2007 as provided by *KRS 100.987(4)*.

(Rec. No. 26, Defs.' Mem., Ex. 12).

B. April 26, 2007 -- Planning Commission Votes to Deny Application.

At the April 26, 2007 meeting, the Planning Commission denied Verizon's application on the basis of the following factual findings:

> (1) § 6.304(E)(5) of ***HN2*** the Franklin County Zoning **[**4]** Ordinance states that one of the criteria to be used in evaluating an application for placement of a wireless communication facility is the "extent to the which the proposal responds to the impact of the proposed development on adjacent land uses, especially in terms of visual impact." Statements received from several of the persons who spoke before the Planning Commission on this matter showed their objection to the visual impact that this tower would have on their enjoyment of their property; and
>
> (2) § 6.304(D)(6) of the ***HN3*** Franklin County Zoning Ordinance states that a residential area is the "least preferred location for a wireless communication facility." The proposed location is zoned rural residential, and statements made at the hearing show that the proposed location is in the midst of a number of residences.

(Rec. No. 27, Pfs.' Mem, Ex. A, Meeting Transcript at 103-04).

C. May 25, 2007 -- Plaintiff's Complaint.

The Plaintiffs filed this action on May 25, 2007. They argue that the Planning Commission's denial of Verizon's application to construct the tower violates ***HN4*** the Telecommunications Act ("TCA") at *47 U.S.C. § 332(c)(7)(B)(iii)* which provides that "[a]ny decision by a State or **[**5]** local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." The Plaintiffs argue that the Planning Commission's denial violates the TCA because it was neither "in writing" nor "supported by substantial evidence."

The Plaintiffs also argue that the local zoning ordinance upon which the Planning Commission based its decision should be declared void and that their application should be deemed approved under Kentucky state statute ***HN5*** *KRS § 100.987(4)(c)* which, as discussed above, provides that, if a planning commission fails to issue a final decision within sixty days on an application to construct a cellular antenna tower, and if there is no written agreement to the contrary, the uniform application shall be deemed approved.

D. Planning Commission Approves Minutes of April 26, 2007 Meeting.

On June 14, 2007, the Planning Commission approved the minutes of its April 26, **[*841]** 2007 meeting. (Rec. No. 26, Defs.' Mem., Ex. 10, Hewitt Aff., Ex. B). On June 25, 2007, Robert Hewitt, Director of Franklin County Planning, Zoning and Building Enforcement, **[**6]** sent a memorandum to Verizon's legal counsel stating "[a]ttached are the Planning Commission meeting minutes from March 8 & April 26, 2007, which memorializes in writing the Commission's final decision regarding [Verizon's] application." (Rec. No. 27, Pfs.' Mem., Ex. B, Hewitt Memo). The referenced meeting minutes were attached. (Rec. No. 26, Defs.' Mem., Ex. 10, Hewitt Aff., P 8 & Att. C).

II. STANDARD ON SUMMARY JUDGMENT.

HN6[] Under Fed. R. Civ. P. 56, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

HN7[] The moving party bears the initial responsibility of "informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The movant may meet this burden by demonstrating **[**7]** the absence of evidence supporting one or more essential elements of the non-movant's claim. Id. at 322-25. Once the movant meets this burden, the opposing party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

HN8[] Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Rule 56(e) "requires the nonmoving party to go beyond the pleadings" and present some type of evidentiary material in support of its position. Celotex, 477 U.S. at 324. Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that **[**8]** party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

HN9[] In considering a motion for summary judgment, the Court must view the facts and draw all inferences therefrom in a light most favorable to the nonmoving party. 60 Ivy Street Corp. v. Alexander, 822 F.2d 1432, 1435 (6th Cir. 1987). The moving party must show conclusively that there is no genuine issue of material fact. *Id.* However, at the summary judgment stage, the judge's function is not to weigh the evidence and determine the truth of the matter. Wiley v. United States, 20 F.3d 222, 226 (6th Cir. 1994) (quoting Anderson, 477 U.S. at 249). The Court is not to judge the evidence or make findings of fact. 60 Ivy Street Corp., 822 F.2d at 1435-36. Ultimately, this Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52.

[*842] "HN10[] The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479-80 (6th Cir. 1989). "The nonmoving party has an affirmative **[**9]** duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact." In re Morris, 260 F.3d 654, 665 (6th Cir. 2001).

III. ANALYSIS.

A. Whether the Plaintiffs' Action is Timely under the TCA.

HN11[] The TCA provides that any "person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction." 47 U.S.C. § 332(c)(7)(B)(v).

The first issue before the Court is whether the Plaintiffs have filed this action within 30 days of the

Planning Commission's "final action" or "failure to act." The Defendants argue that the commission's decision to deny Verizon's application was not "final" until June 14, 2007, when the commission approved the minutes of the April 26, 2007 meeting at which it denied the application. The Plaintiffs filed this action on May 25, 2007, about three weeks before the Planning Commission's June 14, 2007 action. The Defendants argue that this action should therefore be dismissed because **[**10]** it did not occur after a "final action" by the commission. They argue that the Plaintiffs never filed an action after the commission's only "final action" in this matter which occurred on June 14, 2007.

The Plaintiffs do not contest that the Planning Commission's action was not "final" until June 14, 2007 when the commission approved the April 26, 2007 meeting minutes. *See also* Omnipoint Holdings, Inc. v. City of Southfield, 355 F.3d 601, 603, 605 (6th Cir. 2004)(stating that **HN12**[↑] a city council's vote to deny an application became final when the minutes were approved). The Plaintiffs argue that their Complaint is nonetheless timely because it was filed within 30 days of the commission's "failure to act" on April 26, 2007 as the parties agreed it would.

The parties agreed, as reflected in the March 8, 2007 hearing minutes and transcript and Verizon's March 9, 2007 letter, that the Planning Commission would make a final decision on Verizon's application by April 26, 2007. There is no dispute that the Planning Commission did not do so. This constitutes a "failure to act," entitling the Plaintiffs to file a complaint in this Court under the TCA.

The Plaintiffs' only other option would have been **[**11]** to allow their 30-day window to expire after the Planning Commission failed to make a final decision on April 26, 2007 on the gamble that the Planning Commission would make a final decision that they could challenge at some point in the future. If the Planning Commission had never done so, then the Plaintiffs would have lost their only opportunity to contest the Planning Commission's action.

The TCA does not require applicants to gamble in such a manner. Instead, it **HN13**[↑] allows applicants to contest an action or *failure to act.* Because the Plaintiffs filed this action within 30 days of the Planning Commission's failure to act on April 26, 2007, as the parties had agreed it would, this action is timely.

B. Whether the Defendants are Entitled to *Eleventh Amendment* Immunity.

The Defendants next argue that they are immune from suit under the *Eleventh Amendment*. **[*843]** **HN14**[↑] The *Eleventh Amendment* prohibits the "Judicial power of the United States" from extending to "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *U.S. Const. Amend. XI*. Unless *Eleventh Amendment* immunity is expressly waived, a **[**12]** state and its agencies are immune from an action for damages or injunctive relief in federal court. *See* Papasan v. Allain, 478 U.S. 265, 276, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986); Thiokol Corp. v. Dep't of Treasury, State of Mich., Revenue Div., 987 F.2d 376, 381 (6th Cir. 1993). This jurisdictional bar also immunizes a state entity that is an "arm of the State." *See* Northern Ins. Co. of N.Y. v. Chatham County, Ga., 547 U.S. 189, 193, 126 S. Ct. 1689, 164 L. Ed. 2d 367 (2006).

"[T]he **HN15**[↑] entity asserting *Eleventh Amendment* immunity has the burden to show that it is entitled to immunity, i.e., that it is an arm of the state." Gragg v. Ky. Cabinet for Workforce Dev., 289 F.3d 958, 963 (6th Cir.2002). In *Gragg,* sovereign immunity was denied to an entity because it failed to show "what degree of control the state maintains over the entity, where the funds for the entity are derived, and who is responsible for the judgment against the entity." *Id.*

HN16[↑] The Supreme Court has "repeatedly refused to extend sovereign immunity to counties" even where "such entities exercise a 'slice of state power.' "Northern Ins. Co., 547 U.S. at 193 (citations omitted). Likewise, the Sixth Circuit has

held that counties are not entitled to sovereign immunity under the *Eleventh Amendment*. **[**13]** *Hall v. Medical College of Ohio at Toledo, 742 F.2d 299, 301 (6th Cir. 1984)*; *Brown v. Marshall County, 394 F.2d 498, 500 (6th Cir. 1968)*.

The Defendants have not set forth any reason why, in this particular action, the County should be deemed an "arm of the state." Accordingly, the Court cannot find that the County is immune from suit under the *Eleventh Amendment*. Likewise as to the Planning Commission and the Fiscal Court, the Defendants have put forth no reason why either of these entities should be deemed an "arm of the state." Accordingly, the Court cannot find that they are entitled to immunity under the *Eleventh Amendment*.

C. Whether the Defendants Satisfied the TCA's Writing Requirement.

Turning to the substance of the Plaintiff's Complaint, the Plaintiffs assert that the Planning Commission's denial of their application violates the TCA because it was not "in writing" as required by *47 U.S.C. § 332(c)(7)(B)(iii)*.

In *New Par v. City of Saginaw, 301 F.3d 390 (6th Cir. 2002)*, the Sixth Circuit held:

> [F]or ***HN17***[] a decision by a State or local government or instrumentality thereof denying a request to place, construct, or modify personal wireless service facilities to be "in writing" for **[**14]** the purposes of *47 U.S.C. § 332(c)(7)(B)(iii)*, it must (1) be separate from the written record; (2) describe the reasons for the denial; and (3) contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons.

Id. at 395-96.

In this action, on June 25, 2007 -- after the Plaintiffs had filed their Complaint -- Robert Hewitt, Director of Franklin County Planning, Zoning and Building Enforcement, sent a memorandum to Verizon's legal counsel stating "[a]ttached are the Planning Commission meeting minutes from March 8 & April 26, 2007, which memorializes in writing the Commission's **[*844]** final decision regarding [Verizon's] application." (Rec. No. 26, Defs.' Mem., Ex. 10, Hewitt Aff., P 8 & Att. C). There is no question that this memorandum does not meet the *New Par* requirements. While it is separate from the written record, it does not state that the application was denied nor describe the reasons for the denial sufficiently to permit judicial review.

The Defendants argue, however, that the commission's April 26, 2007 meeting minutes which were attached to Hewitt's memorandum meet the *New Par* requirements. **[**15]** They argues these minutes were "separate from the March 8, 2007 minutes that set forth the written record summarizing the evidence and proof taken at the public hearing." (Rec. No. 26, Defs.' Mem. at 23). They further argue that these minutes describe the reasons for the Planning Commission's denial and explain the reasons in sufficient enough detail to allow a reviewing court to evaluate the evidence in the record that supports the reasons.

Under the Sixth Circuit's rulings, however, the April 26, 2007 minutes cannot be considered "separate from" the written record. Instead, the minutes *are* the written record of the commission's denial of the application. *See T-Mobile Central, LLC v. Grand Rapids, 2007 U.S. Dist. LEXIS 32199, 2007 WL 1287739, at * 2 (W.D. Mich. 2007)*. In *Laurence Wolf,* the Sixth Circuit looked at the minutes of two separate meetings of the local zoning board of appeals to determine whether they satisfied the TCA's writing requirement. At the first meeting, the board denied the applicant's request to construct a cellular tower. The court determined that the minutes of this meeting did not satisfy *New Par* because they were not "separate from the meeting's written record concerning other board issues." **[**16]** *Laurence Wolf, 61 Fed. Appx. at 211*. At the second meeting, the board clarified the reasons for its denial. The court determined that these minutes satisfied the TCA's writing requirement because the minutes "concern only

the denial of the variance, describe the reasons for the denial, and contain a sufficient explanation of the reasons." *Id.* [1]

In *Omnipoint Holdings, Inc. v. City of Southfield, 355 F.3d 601 (6th Cir. 2004)*, the Sixth Circuit reviewed a formal city council resolution denying an applicant's request to construct a cell tower. The court determined that the "formal resolution is a writing separate from the hearing record" because the records made of the hearings held by the city council and planning commission were separate from the city council's resolution. *Id. at 606*. "Although the *minutes* of a council meeting will encompass all the matters considered by the council at that meeting, each resolution deals with only one discrete subject. In our view this is sufficient to meet the 'separate **[**17]** writing' requirement of *New Par." Id.*

In this case, the April 26, 2007 meeting minutes encompass all the various items that were on the agenda at the April 26, 2007 meeting, not just the Verizon application. (Rec. No. 26, Defs.' Mem., Ex. 13). The Court recognizes that in *Omnipoint Holdings,* in a footnote discussing the *Laurence Wolf* decision, the ***HN18***[⬆] Sixth Circuit stated that it rejected "the concept that a resolution in meeting minutes will never meet the separate writing requirement, if it otherwise allows meaningful judicial review, simply because the minutes contained other dispositions or resolutions dealing with other subjects." *355 F.3d at 606 n.6*. Nevertheless, the court did not elaborate on what instances such a resolution **[*845]** might meet the separate writing requirement.

In *Omnipoint Holdings,* in finding that the resolution in that case met the separate writing requirement, the court specifically noted that the resolution dealt "with only one discrete subject" while the minutes included all the matters considered at the particular meeting. *Id. at 606*. In accordance with that distinction and with the Sixth Circuit's decision in *Laurence Wolf,* the April 26, 2007 meeting minutes are not **[**18]** "separate from the written record" and they do not satisfy *New Par.*

[1] The Sixth Circuit ultimately determined that the minutes were an impermissible "retroactive cure" because they were issued only in response to a court order after the applicant sued.

D. Whether the Denial is Supported by Substantial Evidence.

The next issue is whether the Planning Commission's denial of Verizon's application is supported by "substantial evidence." ***HN19***[⬆] The Sixth Circuit has recognized that "*section 332(c)(7)* is a deliberate compromise between two competing aims -- to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers." *Telespectrum, Inc. v. Public Service Com'n, 227 F.3d 414, 423 (6th Cir. 2000)*(quotations and citation omitted).

HN20[⬆] "The TCA does not preempt all authority of state or local governments over the regulation of wireless towers." *Tenn. ex rel. Wireless Income Prop., LLC v. City of Chattanooga, 403 F.3d 392, 398 (6th Cir.2005)*. The Act specifically provides that "nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." *47 U.S.C. § 332(c)(7)(A)*. Nevertheless, the TCA "imposes several substantive and procedural requirements upon the state **[**19]** or local government's consideration of permit applications ." *Wireless Income Prop., 403 F.3d at 398*.

These constraints include a prohibition against state and local governments acting in a way that (1) unreasonably discriminates among providers of functionally equivalent services or (2) prohibits or has the effect of prohibiting the supplying of personal wireless services. *47 U.S.C. § 332(c)(7)(B)(I)*. As discussed, the constraint at issue in this case ***HN21***[⬆] requires that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." *47 U.S.C. § 332(c)(7)(B)(iii)*.

HN22[] "[T]he 'substantial evidence' standard of section 332 is the traditional standard employed by the courts for review of agency action." Telespectrum, 227 F.3d at 423. "Substantial evidence is 'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' "New Par, 301 F.3d at 396 (quoting Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971)).

> This Court reviews the entire record, including **[**20]** evidence opposed to the result of the decision. We look to whether the agency explained any credibility judgments it made and whether it gave reasons for crediting one piece of evidence over another. This Court must examine the evidence as a whole, taking into account whatever in the record fairly detracts from its weight.

Telespectrum, 227 F.3d at 423 (citations omitted).

HN23[] The TCA's substantial evidence requirement "surely refers to the need for substantial evidence under the criteria laid down by the zoning law itself." Town of Amherst, N.H. v. Omnipoint Communications, 173 F.3d 9, 14 (1st Cir. 1999). "The substantial evidence test applies to the locality's **[*846]** own zoning requirements. . . ." Id. at 16.

In determining whether the Planning Commission's decision is supported by substantial evidence, the court has reviewed the entire record. Below is a summary of the relevant portions.

1) The Evidence in the Record.

a) The Uniform Application.

In this case, Verizon stated in its Uniform Application that the proposed tower would be a "300-foot lattice self-support tower, with a 7-foot lightning arrestor attached at the top, for a total structure height of 307 feet." (Rec. No. 26, Defs.' Mem., Ex. **[**21]** 1, Uniform Application, P 4). Verizon also noted that the land use of the property on which the tower would be constructed was agricultural and residential. (Rec. No. 26, Defs.' Mem., Ex. 1, Uniform Application, P 17). Verizon stated that the tower was necessary to provide or improve wireless service coverage in the area and that it would provide wireless customers in the area with access to and more reliable emergency 911 services. (Rec. No. 26, Defs.' Mem., Ex. 1, Uniform Application, P 18).

Verizon stated that its radio frequency engineers had evaluated the service requirements to be addressed by the facility and determined a search area in which the new facility had to be located to meet service objectives for the site to provide the best quality service to customers in the service area. (Rec. No. 26, Defs.' Mem., Ex. 1, Uniform Application, P 19). The application included a search map depicting the area within which the new tower should be located to satisfy radio frequency requirements. (Rec. No. 26, Defs.' Mem., Ex. 1, Uniform Application, P 19).

Verizon stated that there was no more suitable location reasonably available from which it could provide adequate service to the area. **[**22]** Verizon also stated that there were no suitable co-location opportunities available to meet its service objectives. (Rec. No. 26, Defs.' Mem., Ex. 1, Uniform Application, P 20). Co-location is the placement of antennas on an existing structure. (Rec. No. 27, Pfs.' Mem., Ex. A, March 8, 2007 T'script at 13). The application included a list of antenna support structures within a 3-mile radius of the proposed site and an explanation as to why none was a suitable co-location opportunity. (Rec. No. 26, Defs.' Mem., Ex. 1, Uniform Application, P 20). The application stated that the proposed facility would provide or improve Verizon's service in the area. (Rec. No. 26, Defs.' Mem., Ex. 1, Uniform Application, P 23).

b) The Staff Report.

On March 8, 2007, Hewitt, Director of Franklin County Planning, Zoning & Building Enforcement, issued a Staff Report to the Planning Commission stating that Verizon's application required a waiver/modification of two provisions of the Franklin County Zoning Ordinance. (Rec. No. 26, Defs.' Mem., Ex. 2, Staff Report).

The first provision states that a cellular antenna tower can only be a maximum of 200 feet. The second provision states that, in residential districts, **[**23]** all antenna towers must comply with the setback of that district or a minimum of 25 feet which ever is greater, plus one foot for each two feet of height the tower exceeds the maximum allowable building height. The report stated that the required setback for the proposed tower would be 161 feet and that Verizon was requesting a 101 foot waiver for the north side of the site and a 79 foot waiver for the east side.

The Staff Report recommended that the Planning Commission approve the 307-foot height for the tower on condition that Verizon construct a landscape screen of at least 20 feet in width surrounding the area. **[*847]** The Staff Report also recommended that the commission deny the request for the reduction in setbacks for the north and east sides.

c) Evidence Presented by Verizon at the March 8, 2007 Meeting.

At the March 8, 2007 Planning Commission meeting, David Pike, Verizon's attorney, stated that if the tower were moved to meet the setback requirements, then the tower would have to be taller because the property slopes. (Rec. No. 26, Ex. 3, March 8, 2007 Minutes; Rec. No. 27, Ex. A, March 8, 2007 T'script at 7). Pike stated that the proposed service area was an area of "little or no **[**24]** service" and that, with the proposed tower, Verizon was trying to provide comprehensive coverage in the area. (Rec. No. 26, Ex. 3, March 8, 2007 Minutes; Rec. No. 27, Ex. A, March 8, 2007 T'script at 11). Pike stated that, in order for that to occur, the proposed tower had to be near the center of the area to be served. (Rec. No. 27, Ex. A, March 8, 2007 T'script at 11).

Pike stated that Martin Brown, a real estate appraiser, had conducted a large number of studies on the impact of telecommunications towers on property values. Pike stated that these studies uniformly conclude that telecommunications towers do not impact property values. (Rec. No. 26, Ex. 3, March 8, 2007 Minutes; Rec. No. 27, Ex. A, March 8, 2007 T'script at 16). Pike stated that Brown had determined that the proposed tower would not affect surrounding property values. (Rec. No. 26, Ex. 3, March 8, 2007 Minutes; Rec. No. 27, Ex. A, March 8, 2007 T'script at 16).

Pike testified that William Grigsby, a certified structural engineer, had submitted a report indicating that the tower would exceed all state and federal design requirements and that it would be able to withstand sustained wind speeds of 75 miles per hour or **[**25]** sustained wind speeds of 65 miles an hour with a half inch of radial ice over the whole structure. Grigsby concluded that if there were ever a wind strong enough to bring down the tower, "there would be nothing left standing around it for it to fall onto." (Rec. No: 27, Ex. A, March 8, 2007 T'script at 17). Pike testified that the nearest residential structure to the tower is 450 feet away. (Rec. No. 27, Ex. A, March 8, 2007 T'script at 17).

Cory Kilstrom, a radio-frequency design engineer for Verizon, explained that a 300-foot tower was necessary because it would allow Verizon to interconnect calls or pass calls from one cell to another. He testified that, if the tower were shorter, then there would be a coverage gap between the two cell towers in the area. (Rec. No. 27, Ex. A, March 8, 2007 T'script at 26-27). He also testified that the 200-foot tower would provide service to approximately half the area that a 300-foot tower would cover. (Rec. No. 27, Ex. A, March 8, 2007 T'script at 30).

At the end of Pike's testimony, radio frequency design engineer Kilstrom, real estate appraiser Brown; and certified structural engineer Grigsby adopted Pike's testimony as their own. (Rec. No. 27, **[**26]** Ex. A, March 8, 2007 T'script at 22).

d) Opposition Testimony at the March 8, 2007 Meeting.

At the hearing, Ethel Lee, who resides on the same road as the proposed tower site, presented a petition signed by residents in the area, stating that they did not want the tower to be constructed at the proposed site. In their memorandum in support of their motion for summary judgment, the Defendants state that the petition was signed by 72

residents including 13 residents of the properties immediately surrounding the site and sixty (60) other **[*848]** residents of the adjacent Farmdale subdivision. (Rec. No. 26, Defs. Mem. at 24; Rec. No. 26, Defs.' Mem. Ex. 10, Hewitt Aff., Ex.1; Rec. No. 27, Pfs.' Mem., Ex. A, March 8, 2007 T'script at 56). Ethyl Lee testified that her quality of life had already been decreased by the placement of another cell tower within one mile of the proposed site. She testified that she would see the proposed tower when sitting in her backyard. (Rec. No. 27, Pfs.' Mem., Ex. A, March 8, 2007 T'script at 55-56).

Mary Pieratt stated that she and her husband own a farm adjacent to the proposed cell tower and that they had subdivided the farm but not sold any of it. (Rec. No. 27, Pfs'. **[**27]** Mem., Ex. A, March 8, 2007 T'script at 65-66). She stated that she could not "imagine that anyone would want to buy land that has a cell tower right beside it." (Rec. No. 27, Pfs.' Mem., Ex. A, March 8, 2007 T'script at 66). The Pieratts also sent letters to the Planning Commission before the March 8, 2007 hearing in which they stated that the tower would be "unsightly and a potential health hazard" and that it would have a substantial negative impact upon the market value of the residential lots of the Pieratts' farm and would make the lots "virtually unmarketable." (Rec. No. 26, Defs.' Mem., Ex. 11).

Jim Rector testified that when he looked out his back door, the tower would be right in the line of sight. He testified that he moved to the area for its "rural charm" and that his view from his back porch is currently "serene and virtually unobstructed for miles." (Rec. No. 27, Pfs.' Mem., Ex. A., March 8, 2007 T'script at 67). He also stated that he believed the tower would put those in his backyard in "imminent danger of being struck by parts or all of the tower when that structure falls." He testified that the tower would be "unsightly" and that he believed the tower would decrease **[**28]** the "perceived value" of his property. (Rec. No. 27, Pfs.' Mem., Ex. A., March 8, 2007 T'script at 69).

Jesse Lee testified that when he looks out his back door, he sees a 265-foot tower and that, if the Verizon tower were constructed, he would have to look at two towers from his back door. (Rec. No. 27, Pfs.' Mem., Ex. A., March 8, 2007 T'script at 70). He also testified that he guaranteed that the wildlife who now come to his backyard would cease coming. (Rec. No. 27, Pfs.' Mem., Ex. A., March 8, 2007 T'script at 70-71). Holly Pieratt testified that he had spoken with the owners of another farm in the area who had expressed an interest in placing the tower on it. (Rec. No. 27, Pfs.' Mem., Ex. A., March 8, 2007 T'script at 71-72).

e) The April 26, 2007 Meeting.

At the April 26, 2007 meeting, the Planning Commission made a factual finding that section 6.304(E)(5) of the local zoning ordinance states that one of the criteria to be used in evaluating an application for a wireless communication facility is the "extent to which the proposal responds to the impact of the proposed development on adjacent land uses, especially in terms of visual impact." The commission also made the finding **[**29]** that several of the persons who spoke before it objected to the "visual impact" the tower would have on their enjoyment of their property. (Rec. No. 27, Pfs.' Mem., Ex. A, April 26, 2007 T'script at 104).

The commission also voted to make the factual finding that section 6.304(D)(6) of the zoning ordinance states that a residential area is the "least preferred location for a wireless communication facility" and that the proposed location was zoned "Rural Residential." Further, the commission voted to find that statements made at the hearing showed that the proposed location is in the midst of a number of residences. **[*849]** (Rec. No. 27, Pfs.' Mem., Ex. A, April 26, 2007 T'script at 104).

The commission also made the finding that information received at the hearing included a printout from the applicant's own website which purported to show that Verizon's service already covers the southern portion of Franklin County. (Rec. No. 27, Pfs.' Mem., Ex. A, April 26, 2007 T'script at 105).

A member of the commission moved that the commission deny the application based on all three of the above factual findings but that motion failed. (Rec. No. 27, Pfs.' Mem., Ex. A, April 26, 2007

T'script at 107-08). **[**30]** Another member of the commission noted that the commission had ceased findings of fact and that it had made no findings that would support approving the application, adding "I think we're stuck." (Rec. No. 27, Pfs.' Mem., Ex. A, April 26, 2007 T'script at 108). A member of the commission then moved that the application be denied based on only the first and second findings discussed above. (Rec. No. 27, Pfs.' Mem., Ex. A, April 26, 2007 T'script at 109). That motion carried.

2) Analysis of the Evidence.

Thus, the evidence in the record before the Planning Commission consisted of the testimony and report of a radio-frequency engineer demonstrating the need for the proposed tower and that there was no other suitable location. Likewise, the record included the testimony and report of a structural engineer attesting to the structural soundness and safety of the proposed tower. Finally, the record included the report and testimony of a real estate appraiser concluding that the proposed tower would not decrease property values in the area.

Area residents questioned the safety of the proposed tower, the need for it, whether there were other suitable locations for it, and whether it would affect **[**31]** property values. There is no evidence, however, that any of these residents had any personal knowledge regarding these issues. Nor did any of these residents offer any evidence in support of their concerns. Thus, this testimony is "unsupported opinion," and does not constitute evidence supporting the Planning Commission's denial of the application. *Telespectrum, 227 F.3d at 424*; *see also New Par, 301 F.3d at 399 n. 4* (community ***HN24***[⬆] concerns based upon conjecture or speculation lack probative value and will not amount to substantial evidence).

Accordingly, the testimony presented by Verizon regarding the safety of the tower, the need for it, whether there were other suitable locations for it and its affect on property values was uncontradicted. But the Planning Commission did not deny the application on any of these grounds. Instead, it denied the application on the grounds that the local zoning ordinance requires it to consider the visual impact of the proposed tower and that several of the persons who spoke before it objected to the visual impact of the tower. The Planning Commission also denied the application on the grounds that the zoning ordinance provides that a residential area is **[**32]** the least preferred place to locate a communications tower, that the proposed site was zoned Rural Residential, and there were many residences in the area.

As to the second grounds for denial, ***HN25***[⬆] subsection 6.304(D)(6) provides that, unless the applicant is co-locating, the application for the construction of a cellular antenna tower must include a statement, supported by evidence, that "there is no other site which is materially better from a land use perspective within the immediate area for the location of the telecommunications facility." (Rec. No. 26, Defs.' Ex. 8, Ordinance No. 15, 1999 Series, Section 6.30 Wireless Communications Facilities, Subsection **[*850]** 6.304(D)(6), p. 14). The application must include a list of potential sites within a one-mile radius of the proposed tower location, a description of potential sites, and a discussion of the ability or inability of the sites to host a cellular antenna tower.

The zoning provision also states that the following with regard to potential sites for the tower:

> ***HN26***[⬆] Potential sites that should be considered (in order from most preferred to least preferred) include: existing utility towers, highway rights-of-way (except designated parkways), industrial **[**33]** districts, airports, public facilities, office towers, commercial districts and commercial centers, agricultural districts and *residential towers.* Desirable locations include water towers, radio, and television towers, tall buildings, signs, steeples, and flag poles. Stealth technology is encouraged.

(Rec. No. 26, Defs.' Ex. 8, Ordinance No. 15, 1999 Series, Section 6.30 Wireless Communications Facilities, Subsection 6.304(D)(6), p. 14)(emphasis added).

Thus, subsection 6.304(D)(6) does indicate that a residential area is the least preferred location for a

communications tower. Nevertheless, this alone is not substantial evidence supporting the denial of the application. The ordinance does not provide that an application must be denied simply because it is located in a residential area. In fact, the Uniform Application indicates that there are at least four other towers within a three-mile radius of the proposed site, one of which is approximately 265 feet tall. (Rec. No. 26, Defs.' Mem., Ex. 1, Uniform Application, Ex. K; Rec. No. 27, Pfs. Mem., Ex. A, March 8, 2007 T'script at 38). Thus, without some additional evidence as to how Verizon's proposed tower would negatively impact the **[**34]** residential character of the proposed site, the fact that the proposed site is located in a residential area is not substantial evidence supporting the denial of the application.

The commission also found that the proposed site was zoned Rural Residential. A local zoning ordinance explains that a ***HN27***[⬆] "Rural Residential" zoning district is "intended to establish and preserve a quiet single family home neighborhood, free from other uses except those which are convenient to and compatible with the residences of such neighborhood. This district is intended to be very low density and will customarily be located in areas where public sewer facilities are not available or planned." (Rec. No. 26, Defs.' Mem., Ex. 4, Franklin County Zoning Ordinance 4.11, Subsection 4.111). The General Uses of such zoning districts are single family homes. Home occupations, nursery schools and day care centers, elementary and secondary schools, parks and public recreation facilities are permitted with the Board of Adjustments' approval.

Again, however, the ordinance ***HN28***[⬆] does not prohibit the construction of a communications tower in areas zoned Rural Residential. Thus, without some evidence demonstrating that the proposed **[**35]** tower would be incompatible with the rural residential character of the proposed site, the simple fact that the proposed site is zoned Rural Residential is not a sufficient basis to deny the application.

There was some testimony regarding the "visual impact" of the proposed tower. This was the second grounds that the commission relied upon in denying the application. In analyzing the evidence regarding the visual impact of the tower, the Court first notes that the petition signed by 72 residents in the area does not constitute such evidence. The petition states only, "[w]e the undersigned property owners and/or citizens DO NOT WANT the [Verizon] Cell tower to be placed at" the proposed location. (Rec. No. 26, Defs.' Mem., **[*851]** Ex. 10, Hewitt Aff. Ex. A). While it is clear that the signers generally object to the placement of the tower, the petition does not state the specific grounds upon which they object to it. They may object to the tower on the basis of its visual impact or, like others who testified at the hearing, the petitioners may object to the tower on an unsupported belief that it is will decrease property values or pose a safety hazard; or the petitioners' may object to the tower **[**36]** on some other grounds not raised in the meeting. Thus, the petition does not constitute evidence of the tower's negative visual impact.

Five area residents did express some objection to the visual impact of the tower, either through testimony or letters to the Planning Commission: Ethyl Lee, Jesse Lee, Jim Rector, and the Pieratts. However, in *New Par,* the court stated that ***HN29***[⬆] "a few generalized expressions of concern with 'aesthetics' cannot serve as substantial evidence on which the Town could base the denials." *New Par, 301 F.3d at 398* (quoting *Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 496 (2d Cir. 1999)*. In that case, the court found that the fact that "aesthetic concerns were mentioned only a few times, and they were never discussed" at the local zoning board meetings was not substantial evidence of the proposed tower's negative visual impact. *Id.*

In *Cellular Tel. Co.,* upon which the court relied in *New* Par, the Second Circuit determined that the board's denial of an application lacked substantial evidence where "[v]ery few residents expressed aesthetic concerns at the hearings, and those who did express them did not articulate specifically how the proposed cell sites **[**37]** would have an adverse aesthetic impact on the community." *166 F.3d at 495*. The Second Circuit further noted that "a few comments suggested that the residents who expressed aesthetic concerns did not understand

what the proposed cell sites would actually look like." *Id.*

In *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Tp., 181 F.3d 403 (3rd Cir. 1999)*, which the Sixth Circuit also cited approvingly in *New Par,* the Third Circuit found the zoning board's decision lacked substantial evidence regarding the aesthetic impact of a proposed tower where "[e]leven neighbors asserted that the monopole would be visible over the tree line and would damage their property values. But [the person], who spoke for all eleven neighbors, addressed the visibility of the tower only briefly and presented no evidence regarding property values." *Id. at 409*.

In *Laurence Wolf,* the Sixth Circuit found that the fact that two citizens expressed aesthetic concerns with the placement of a tower and that the local board of zoning appeals expressed similar concerns based on computer-simulated before-and-after images of the proposed site did not constitute substantial evidence that the proposed tower would alter **[**38]** the character of the neighborhood. *61 Fed. Appx. at 219*.

HN30[] "Because 'few people would argue that telecommunications towers are aesthetically pleasing,' a local zoning board's 'aesthetic judgment must be grounded in the specifics of the case.'" *VoiceStream Minneapolis, Inc. v. St. Croix County, 342 F.3d 818 (7th Cir. 2003)*(quoting *Southwestern Bell Mobile Systems, Inc. v. Todd, 244 F.3d 51, 61 (1st Cir. 2001)*. [2]

[*852] In this case, only five residents explicitly objected to the visual impact of the tower. They objected primarily because they would see the tower from their houses and the tower would be "unsightly." These objections represent "generalized expressions of concern with aesthetics." The same objection could be made by any resident in any area where a tower was proposed. ***HN31***[] The **[**40]** Sixth Circuit has never found that lay opinion evidence alone constitutes substantial evidence supporting the denial of an application. *See MIOP, Inc. v. City of Grand Rapids, 175 F.Supp.2d 952, 956-57 (W.D. Mich. 2001)*(stating that, "[c]onsistent with Sixth Circuit precedent, this Court does not find lay opinion evidence sufficient to satisfy the substantial evidence requirement.")

Even if the objections of some of these residents should be considered as specific objections to the placement of the tower in this particular area because it is rural and residential, the objections of a few residents is not substantial evidence warranting the denial of an application where there is uncontradicted evidence that the tower is necessary and there is no other suitable location.

Looking at the Planning Commission's decision as announced at its April 26, 2007 meeting and as reflected in the meeting minutes, the Planning Commission does not appear to have considered any of the evidence presented by Verizon. If it did do so, it does not give any reason for giving the testimony by the individuals opposing the tower greater weight than the evidence presented by Verizon in support of the application.

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[2] In *VoiceStream,* the Seventh Circuit found substantial evidence supporting the county's conclusion that the proposed tower would have an adverse visual impact on the surrounding area, where the National Park Service "voiced strong opposition to the tower, asserting that the unspoiled view of the St. Croix River Valley was a unique natural resource that deserved unusual protection." *Id. at 832*. The park service "supported its position with maps. . . that showed that a tower. . . would be visible from locations up to four miles away on the St. Croix River and Minnesota Highway 95." *Id.* Further, the "City of Marine on St. Croix, the St. Croix River Association, the Minnesota-Wisconsin Boundary Area Commission and several members of the public expressed the view that the riverway was **[**39]** a unique scenic resource that would be harmed by [VoiceStream's] proposed tower. *Id. at 832*.

In *Southwestern Bell Mobile Systems,* the First Circuit found that the zoning board's denial of an application was supported by substantial evidence where, "[a]lthough some of the evidence before the Board did consist of general statements that the tower was an eyesore, these statements did not dominate the debate. The majority of the objections to the visual impact of the tower specifically addressed whether this 150-foot tower was appropriate for this particular location, on the top of a fifty-foot hill in the middle of a cleared field. The location has no trees, was in the geographic center of town, would be visible at all seasons of the year, and would be seen daily by approximately 25% of the Town's population." *Id. at 61*.

Further, **[**41]** as discussed, there are already towers located in the area, one of which is 265-feet tall. There is no evidence as to why the Planning Commission believed Verizon's tower was incompatible with the rural character of the area when other towers are located in the same vicinity.

Considering the record as a whole, including the objections of area residents, the evidence regarding the rural residential character of the area, and the evidence supporting the application presented by Verizon, the Court does not find substantial evidence supporting the denial of Verizon's application.

Given this conclusion, the Court need not address the Plaintiffs' state law claims that local zoning Ordinance No. 15, 1999 Series -- which includes the provisions upon which the Planning Commission based its denial of the Verizon application -- should be declared void, or that Verizon's application should be deemed approved under Kentucky state statute *KRS § 100.987(4)(c)*. These claims raise novel or complex issues of state law and, accordingly, the Court will dismiss them without prejudice pursuant to *28 U.S.C. § 1367(c)*.

[*853] 3) The Proper Remedy.

HN32[⬆] The TCA does not state the appropriate remedy for violations of *47 U.S.C. § 332(c)(7)(B)(iii)*. **[**42]** Nevertheless, the Sixth Circuit has "repeatedly concluded that where the defendant denied a permit application, and that denial violated the TCA's 'in writing' and 'substantial evidence' requirements, the proper remedy is injunctive relief compelling the defendant to issue the requested permit." *Wireless Income Props., 403 F.3d at 399*. Accordingly, the Court will issue an injunction compelling the Planning Commission to issue Verizon the permits necessary for the construction of the tower as proposed in its Uniform Application.

IV. CONCLUSION.

For all these reasons, the Court hereby ORDERS as follows:

1) the Plaintiffs' Motion for Summary Judgment (Rec. No. 27) is GRANTED in part and DENIED in part. The motion is granted as to the Plaintiffs' claim that the Defendants violated *47 U.S.C. § 332(c)(7)(B)(iii)* and is otherwise DENIED;

2) the Plaintiffs' state law claims that Ordinance No. 15, 1999 Series should be declared void pursuant to *section 2 of the Kentucky Constitution* and that their application should be deemed approved under Kentucky state statute *KRS § 100.987(4)(c)* are DISMISSED without prejudice pursuant to *28 U.S.C. § 1367(c)*;

3) the Defendants' Motion for Summary Judgment (Rec. **[**43]** No. 26) is DENIED;
4) the Defendants are hereby ORDERED to GRANT Verizon's Uniform Application; and to issue all permits necessary for Verizon to construct the tower as proposed in the Uniform Application; and
5) this matter is STRICKEN from the active docket of the Court.

Dated this 18th day of April, 2008.

Signed By:

Karen K. Caldwell

United States District Judge

JUDGMENT

In accordance with the opinion and order entered contemporaneously with this judgment, the Court HEREBY ORDERS AND ADJUDGES that:

(1) the Plaintiffs' Motion for Summary Judgment (Rec. No. 27) is GRANTED in part and DENIED in part. The motion is granted as

to the Plaintiffs' claim that the Defendants violated *47 U.S.C. § 332(c)(7)(B)(iii)* and is otherwise DENIED;

(2) the Plaintiffs' state law claims that Ordinance No. 15, 1999 Series should be declared void pursuant to *section 2 of the Kentucky Constitution* and that their application should be deemed approved under Kentucky state statute *KRS § 100.987(4)(c)* are DISMISSED without prejudice pursuant to *28 U.S.C. § 1367(c)*;
(3) the Defendants' Motion for Summary Judgment (Rec. No. 26) is DENIED;

(4) the Defendants SHALL GRANT Verizon's Uniform Application and issue all permits **[**44]** necessary for Verizon to construct the tower as proposed in the Uniform Application;
(5) this matter is STRICKEN from the active docket of the Court; and
(6) this judgment is FINAL and APPEALABLE.

Dated this 18th day of April, 2008.

Signed By:

Karen K. Caldwell

United States District Judge

End of Document

T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield

United States Court of Appeals for the Sixth Circuit

May 30, 2012, Argued; August 21, 2012, Decided; August 21, 2012, Filed

File Name: 12a0275p.06

No. 11-1568

Reporter
691 F.3d 794 *; 2012 U.S. App. LEXIS 17534 **; 2012 FED App. 0275P (6th Cir.) ***; 73 A.L.R. Fed. 2d 533; 56 Comm. Reg. (P & F) 1044; 2012 WL 3570666

T-MOBILE CENTRAL, LLC, Plaintiff-Appellee, v. CHARTER TOWNSHIP OF WEST BLOOMFIELD, Defendant-Appellant.

Prior History: [1]** Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 2:09-cv-13496—Denise Page Hood, District Judge.

T-Mobile Cent. LLC v. Charter Twp. of West Bloomfield, 2011 U.S. Dist. LEXIS 34596 (E.D. Mich., Mar. 31, 2011)

Core Terms

Township, tower, coverage, substantial evidence, collocate, carriers, gap, provider, wireless, wireless service, height, site, zoning ordinance, significant gap, facilities, zoning, build, feet, district court, ordinance, Circuits, cellular, pole, structures, reasons, aesthetically, ban, regulations, construct, maps

Case Summary

Procedural Posture

Appellee carrier sought to build a cellular tower in an area of appellant township that had a gap in coverage. The township denied the application and the carrier filed suit, alleging that the denial of the application violated the Telecommunications Act, *47 U.S.C.S. § 332 et seq.* The U.S. District Court for the Eastern District of Michigan granted partial summary judgment in favor of the carrier. The township sought review.

Overview

In denying the carrier's application, the township contended that the tower would adversely affect the neighborhood's aesthetic, that the structure was not aesthetically pleasing, that a 70 foot tower--rather than a 90 foot tower--could have been constructed, that the tower violated a zoning ordinance, and that the carrier did not show a need to build the tower. On appeal, the court found that these reasons did not constitute substantial evidence under *§ 332* to support denying the application. In particular, there was no record evidence supporting the asserted aesthetic reasons, the ordinance could not provide supporting evidence, and the record established that a 70 foot tower was not feasible and that the carrier presented evidence supporting a gap in coverage warranting erecting the tower. The court also found that denying the application resulted in a prohibition of the provision of personal wireless

services, contrary to § 332(c)(7)(B)(i)(II). In particular, the denial of a single application could constitute an effective prohibition, and the required significant gap in coverage focused on the coverage of the particular applicant, not coverage from an incumbent provider.

Outcome
The court affirmed the district court's decision.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

HN1 **Standards of Review, De Novo Review**

On appeal, an appellate court reviews a district court's grant of summary judgment de novo.

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN2 **Federal Acts, Telecommunications Act**

47 U.S.C.S. § 332(c)(7)(B)(iii) provides: Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > ... > Rules & Regulations > Regulated Entities > Wireless Services

HN3 **Standards of Review, Substantial Evidence**

The substantial evidence standard of 47 U.S.C.S. § 332 is the traditional standard employed by the courts for review of agency action.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN4 **Standards of Review, Substantial Evidence**

The substantial evidence standard of 47 U.S.C.S. § 332 requires a determination of whether a zoning decision is supported by substantial evidence in the context of applicable state and local law. On this analysis, § 332 does not introduce a new federal substantive standard by which to assess the validity of the local law. Rather, the limited focus is on the nature of the evidence before the local zoning board and whether it is substantial. Courts may not overturn a board's decision on substantial evidence grounds if that decision is authorized by applicable local regulations and supported by a reasonable amount of evidence, that is, more than a scintilla but not necessarily a preponderance.

Administrative Law > Judicial

Review > Standards of Review > Substantial Evidence

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN5[] Standards of Review, Substantial Evidence

The existence of substantial evidence in the record--as traditionally understood in the context of federal administrative law--is the standard against which federal courts consider whether a zoning board acted in conformity with the relevant local laws. So, for example, if the terms of a local zoning ordinance allow a zoning board to deny a permit based on less than substantial evidence, or no evidence at all, and a permit is denied on that basis, the record would lack substantial evidence to justify the decision. Federal review is limited to this evidentiary inquiry. The substantial evidence standard constructs a floor below which the justification for denying a permit cannot fall--if it does, the board's decision would violate *47 U.S.C.S. § 332(c)(7)(B)(iii)*.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN6[] Standards of Review, Substantial Evidence

Though a federal is court is interpreting state substantive law, it applies the familiar substantial evidence standard, which is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Courts look to whether the agency explained any credibility judgments it made and whether it gave reasons for crediting one piece of evidence over another and examine the evidence as a whole, taking into account whatever in the record fairly detracts from its weight.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN7[] Standards of Review, Substantial Evidence

How substantial must substantial evidence be? Substantial evidence should be substantiated. The unsupported testimony of a community resident, though credible and sympathetic, is no more than unsupported opinion and is not substantial evidence.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN8[] Standards of Review, Substantial Evidence

47 U.S.C.S. § 332(c)(7)(B)(iv) provides that no state or local government or instrumentality thereof may regulate the construction of personal wireless facilities on the basis of the environmental effects of RF emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions. *47 U.S.C.S. § 332(c)(7)(B)(iv)*; Concerns of health risks due to the emissions may not constitute substantial evidence.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN9[] Standards of Review, Substantial Evidence

General concerns from a few residents that the

tower would be ugly or that a resident would not want it in his backyard are not sufficient for denying a permit under 47 U.S.C.S. § 332(c)(7)(B)(iii). If, however, the concerns expressed by the community are objectively unreasonable, such as concerns based upon conjecture or speculation, then they lack probative value and will not amount to substantial evidence.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN10[] Standards of Review, Substantial Evidence

Substantial evidence, in the usual context, has been construed to mean less than a preponderance, but more than a scintilla of evidence.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN11[] Standards of Review, Substantial Evidence

Merely repeating an ordinance does not constitute substantial evidence.

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN12[] Federal Acts, Telecommunications Act

47 U.S.C.S. § 332(c)(7)(B)(i)(II) provides that the regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN13[] Federal Acts, Telecommunications Act

The U.S. Court of Appeals for the Fourth Circuit has held that only a general, blanket ban on the construction of all new wireless facilities would constitute an impermissible prohibition of wireless services under 47 U.S.C.S. § 332(c)(7)(B)(i)(II). However, the large majority of circuits have rejected this approach. There is a two-part test under MetroPCS to consider whether the denial of an application amounts to an effective prohibition under § 332(c)(7)(B)(i)(II): there must be (1) a showing of a significant gap in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations. The U.S. Court of Appeals for the Sixth Circuit adopts the MetroPCS standard and holds that the denial of a single application can constitute a violation of this portion of the Act.

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN14[] Federal Acts, Telecommunications Act

In 2009, the FCC issued a Declaratory Ruling that explained that the effective prohibition provision of 47 U.S.C.S. § 332(c)(7)(B)(i)(II) requires only a showing that a carrier has a significant gap in its own service coverage--the approach of the U.S. Court of Appeals for the First and Ninth Circuits: While we acknowledge that this provision could be interpreted in the manner endorsed by several courts--the U.S. Court of Appeals forSecond, Third, and Fourth Circuits)--as a safeguard against a complete ban on all personal wireless service within the State or local jurisdiction, which would have no further effect if a single provider is permitted to provide its service within the

jurisdiction--we conclude that under the better reading of the statute, this limitation of State/local authority applies not just to the first carrier to enter into the market, but also to all subsequent entrants. In light of the FCC's endorsement of the standards used by the First and Ninth Circuits, the U.S. Court of Appeals for the Sixth Circuit now adopts this approach.

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN15 **Federal Acts, Telecommunications Act**

There is no requirement under federal or state law that actual customer complaints need to be submitted to demonstrate a coverage gap under *47 U.S.C.S. § 332(c)(7)(B)(i)(II)*.

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN16 **Federal Acts, Telecommunications Act**

Under all existing versions of the *47 U.S.C.S. § 332(c)(7)(B)(i)(II)* significant gap test, once a wireless service provider has demonstrated that the requisite significant gap in coverage exists, it must then make some showing as to the intrusiveness or necessity of its proposed means of closing that gap. The circuits split at this fork. The U.S. Court of Appeals for the Sixth Circuit adopts the least intrusive standard from the U.S. Court of Appeals for the Second, Third, and Ninth Circuits.

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN17 **Federal Acts, Telecommunications Act**

The least intrusive standard of the *47 U.S.C.S. § 332(c)(7)(B)(i)(II)* significant gap test will require a showing that a good faith effort has been made to identify and evaluate less intrusive alternatives, for example, that the provider has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, and similar matters.

Counsel: ARGUED: Drew W. Broaddus, SECREST WARDLE, LYNCH, HAMPTON, TRUEX, and MORLEY, Troy, Michigan, for Appellant.

T. Scott Thompson, DAVIS WRIGHT TREMAINE LLP, Washington, D.C., for Appellee.

ON BRIEF: Drew W. Broaddus, SECREST WARDLE, LYNCH, HAMPTON, TRUEX, and MORLEY, Troy, Michigan, for Appellant.

T. Scott Thompson, Leslie G. Moylan, DAVIS WRIGHT TREMAINE LLP, Washington, D.C., for Appellee.

Judges: Before: BOGGS and COLE, Circuit Judges; and OLIVER, District Judge.*

Opinion by: BOGGS

Opinion

[*796] **[***2]** BOGGS, Circuit Judge. T-Mobile proposed to build a cellular tower in an area of West Bloomfield Township, Michigan, that had a

*The Honorable Solomon Oliver, Jr., Chief United States District Judge for the Northern District of Ohio, sitting by designation.

gap in coverage. The Township denied T-Mobile's application. T-Mobile brought suit, alleging that the denial of the application violated the Telecommunications Act, *47 U.S.C. § 332 et seq.* The district court granted partial summary judgment in favor of T-Mobile, and the Township appealed. There are three issues on appeal. First, whether **[**2]** the Township's denial of TMobile's application to install a cellular tower was supported by substantial evidence, as required by *47 U.S.C. § 332(c)(7)(B)(iii)*. Second, whether the Township's denial of T-Mobile's application had the effect of prohibiting T-Mobile from providing wireless services and thus violated *47 U.S.C. § 332(c)(7)(B)(i)(II)*. This issue, which has led to a split among the circuits, presents a case of first impression for this circuit. Finally, whether the district court should have granted summary judgment in favor of the Township on Count III of the complaint **[*797]** because the Township had discretion to grant or deny a special land use application under *Mich. Comp. Laws § 125.3504*. We affirm the judgment of the district court.

I

A

T-Mobile, a wireless communications carrier in Michigan, identified a gap in coverage in West Bloomfield Township that adversely affected customers in that area. To remedy this gap, T-Mobile sought to construct a new wireless facility. After initially considering several possible sites—none of which T-Mobile claimed were technically feasible or practically available—T-Mobile decided that the best option would be to construct a facility at a utility **[**3]** site on a property owned by Detroit Edison. The facility contained an existing 50-foot pole, which T-Mobile wanted to replace with a 90-foot pole disguised to look like a pine tree with antennas fashioned as branches **[***3]** (a "monopine"). This site was not located within the two cellular tower overlay zones designated in the Township's Zoning Ordinance (CT 1 and CT 2), where wireless facilities are considered a use permitted by right, subject only to site approval. Therefore, T-Mobile would have to seek special land-use approval and site-plan approval.

On December 17, 2008, T-Mobile filed an application with the Township to obtain special land-use approval for the proposed site. The Township Planning Commission held a hearing on February 24, 2009. At the hearing, T-Mobile presented testimony and evidence demonstrating its need to fill a gap in coverage, justification for the selection of that site and the height of the pole, an explanation of how the facility would provide for collocating[1] equipment for other cellular carriers, and a representation that the facility would have a minimal visual impact. Several members of the public spoke in opposition to granting the special land use. The **[**4]** areas to the north, east, and west of the proposed site were residential subdivisions, and there was a daycare center to the south. At the hearing, the Township Planning Commission passed a motion to recommend to the Board of Trustees of the Township that T-Mobile's application should be denied.

On May 27, 2009, T-Mobile submitted to the Board of Trustees additional materials in support of its application, which responded to the Township Planning Commission's objections. Specifically, T-Mobile contended that 90 feet would be the minimum height necessary in order to collocate two other carriers on the towers. Several people spoke in opposition to T-Mobile's application at the Board of Trustees hearing. On August 3, 2009, the Board denied T-Mobile's application in a letter with five stated reasons.

[***4] B

T-Mobile sought an injunction in district court that would direct the Board of Trustees to grant its application. The complaint raised three claims. First, that the denial of its application was not supported by substantial evidence, in violation of the Telecommunications Act, *47 U.S.C. §*

[1] The word "collocate" is also spelled as "colocate" and "co-locate" in the record.

332(c)(7)(B)(iii). Second, **[**5]** that the denial of its application had the "effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). Third, that the denial of the permit was a violation of the Township's duty under Mich. Comp. Laws § 125.3504(3) to approve special land use applications that meet the Township's zoning ordinance requirements.

[*798] The district court granted T-Mobile's motion for partial summary judgment. First, the district court held that the Township's grounds for denial were not supported by substantial evidence. Second, the district court held that T-Mobile could not feasibly locate the facility elsewhere and that the Township had effectively prohibited the provision of wireless services. Third, because the Township violated the Telecommunications Act, it was not necessary to construe state law, and thus the question of whether the Township complied with Mich. Comp. Laws § 125.3504(3) was moot.

The Township appealed the district court's order granting T-Mobile's motion for partial summary judgment. ***HN1***[↑] On appeal, this court reviews the district court's grant of summary judgment de novo. Sigley v. City of Parma Heights, 437 F.3d 527, 532 (6th Cir. 2006).

II

A

HN2[↑] 47 U.S.C. § 332(c)(7)(B)(iii) **[**6]** provides: "Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by *substantial evidence contained in a written record*." (emphasis added). When drafting this statute, Congress used the "substantial evidence" standard, well understood in appellate review **[***5]** of administrative proceedings but a novel concern for federal courts reviewing the proceedings of local zoning boards. This court, like all others,[2] has found that ***HN3***[↑] the "'substantial evidence' standard of § 332 is the traditional standard employed by the courts for review of agency action." Telespectrum, Inc. v. Pub. Serv. Comm'n of Kentucky, 227 F.3d 414, 423 (6th Cir. 2000).

However this court's precedents do not address "substantial evidence" of *what*? In other words, if there is a denial of an application to build a wireless facility, what must the substantial evidence in the record show in order to avoid a violation of § 332(c)(7)(B)(iii)? The Ninth Circuit—in an opinion by Judge Cudahy sitting by designation from the Seventh Circuit—explained that ***HN4***[↑] this standard "requires a determination whether the zoning decision at issue is supported by substantial evidence in **[**8]** the context of applicable state and local law." MetroPCS, Inc. v. City & Cnty. of San Francisco, 400 F.3d 715, 723-24 (9th Cir. 2005). On this analysis, § 332 does not introduce a new federal substantive standard by which to assess the validity of the local law. Rather, the limited focus is on the nature of the evidence before the local zoning board and whether it is substantial. The Ninth Circuit found that it "may not overturn the Board's decision on 'substantial **[*799]** evidence' grounds if that decision is authorized by applicable local regulations and supported by a reasonable amount

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[2] *See* USCOC of Greater Iowa v. Zoning Bd. of Adjustment of Des Moines, 465 F.3d 817, 821 (8th Cir. 2006) ("We agree with the Seventh Circuit that although 'it is unusual for a federal court to be reviewing the decision of a nonfederal agency, we are given no reason to suppose that the term "substantial evidence" in the Telecommunications Act bears a different meaning from the usual one.'") (quoting PrimeCo Pers. Commc'ns v. City of Mequon, 352 F.3d 1147, 1148 (7th Cir. 2003)); **[**7]** MetroPCS, Inc. v. City & Cnty. of San Francisco, 400 F.3d 715, 723 (9th Cir. 2005) (noting that "there appears to be universal agreement among the circuits" that the traditional "substantial evidence" standard applies to 47 U.S.C. § 332(c)(7)(B)(iii)); Preferred Sites, LLC v. Troup Cnty., 296 F.3d 1210, 1218 (11th Cir. 2002) (same); Sw. Bell Mobile Sys. v. Todd, 244 F.3d 51, 58 (1st Cir. 2001) ("The 'substantial evidence' standard of review is the same as that traditionally applicable to a review of an administrative agency's findings of fact."); Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 494 (2d Cir. 1999) (holding that "substantial evidence" implies this traditional standard).

of evidence (i.e., more than a 'scintilla' but not necessarily a preponderance)." *Id. at 725*.

HN5[] The existence of "substantial evidence" in the record—as traditionally understood in the context of federal administrative law—is the standard against which federal courts consider whether a zoning board acted in conformity with the relevant local laws. So, for example, if the terms of a local zoning ordinance allow a zoning **[***6]** board to deny a permit based on *less* than substantial evidence, or *no evidence* at all, and a permit is denied on that basis, the record would lack substantial evidence to justify the decision. **[**9]** Federal review is limited to this evidentiary inquiry. *See id. at 724* ("[W]e must take applicable state and local regulations as we find them and evaluate the City decision's evidentiary support (or lack thereof) relative to those regulations."); *ATC Realty, LLC v. Town of Kingston, 303 F.3d 91, 94 (1st Cir. 2002)* ("The TCA's substantial evidence test is a procedural safeguard which is centrally directed at whether the local zoning authority's decision is consistent with the applicable [local] zoning requirements."). The "substantial evidence" standard constructs a floor below which the justification for denying a permit cannot fall—if it does, the board's decision would violate *§ 332(c)(7)(B)(iii)*.

HN6[] Though this court is interpreting state substantive law, it applies the familiar substantial-evidence standard, which is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera v. NLRB., 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456 (1951)*. As this court noted in *Telespectrum*, we "look to whether the agency explained any credibility judgments it made and whether it gave reasons for crediting one piece of evidence over another" and "examine the evidence **[**10]** as a whole, taking into account whatever in the record fairly detracts from its weight." *Telespectrum, 227 F.3d at 423*.

B

The Township argues that its denial of T-Mobile's application was supported by substantial evidence. In a letter to T-Mobile, the Township Clerk offered five reasons for denying the application:

> 1. That the aesthetics of the surrounding neighborhood would be affected adversely; and,
> 2. That [T-Mobile] has not accomplished an aesthetically pleasing structure; and,
> 3. That a 70-foot cellular tower could be erected in the location rather than a 90-foot cellular tower; and,
>
> 4. That the Zoning Ordinance (Section 26-49 a.10) specifies that the Township Board found that the presence of numerous towers and pole **[***7]** structures, particularly if located within residential areas, would decrease the attractiveness of and destroy the character and integrity of the community; and,
> 5. T-Mobile has not presented a sufficient need to build the towers[.]

T-Mobile counters that the five reasons provided for denying the application were "conclusory, unsubstantiated assertions that do not cite any specific evidence and are not supported by substantial evidence in the record." None of these five **[**11]** reasons are supported by substantial evidence.

1

At the August 3, 2009, meeting before the Township Board, several comments were made regarding the aesthetics of the tower. Trustee Howard Rosenberg twice referred to the facility as an "ugly **[*800]** tower." After the hearing was opened for public comment, several residents expressed concerns about the aesthetics of the facility. Mr. Smith noted that the "existing pole was a wood pine pole with a whip antenna, [and was] very different from the proposed tower." Paul Grondin expressed concern that the tower would harm "conifers [that are] diseased and will die." Arthur White, who managed a daycare facility nearby, asked: "Would you want one of these cell towers in your back yard," and expressed concern

about the tower's emissions harming children.[3] The record reflects that two letters of objection were received, but the actual letters were not made part of the record.

On appeal, the Township asserts that these objections to the facility relate to standards in § 26-49(d)(1) of the local zoning ordinance, which requires facilities to **[**12]** be "located and designed to be harmonious with the surrounding areas." T-Mobile argues that the wireless facility would have been disguised as a tree on a property that has numerous existing trees and that already has a 50-foot pole, asserting that "there are few—if any—wireless support structures that could be more aesthetically pleasing."

[*8]** While the concerns brought before the Board certainly relate to building a wireless facility that is aesthetically pleasing and "harmonious with the surrounding area," the evidence in the record is hardly substantial. The generalized complaints effectively amount to NIMBY—not in my backyard.[4] *HN7*[↑] How substantial must substantial evidence be? Substantial evidence should be substantiated. *Telespectrum, 227 F.3d at 424* (noting that the unsupported testimony of a community resident, though "credible [and] sympathetic[,] . . . was no more than unsupported opinion" and was not substantial evidence). The evidence relied on by the Board of Trustees was merely alleged, not substantiated. There was no evidence whatsoever that the wireless facility would have any impact on the conifers, beyond Mr. Grondin's accusation. Further, concerns that the RF emissions could **[**13]** potentially impact trees or children at the daycare were prohibited by statute as grounds to deny a wireless permit. *HN8*[↑] "[N]o state or local government or instrumentality thereof may regulate the construction of personal wireless facilities on the basis of the environmental effects of RF emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." *47 U.S.C. § 332(c)(7)(B)(iv)*; *Telespectrum, 227 F.3d at 424* ("[C]oncerns of health risks due to the emissions may not constitute substantial evidence . . . .").

HN9[↑] General concerns from **[**14]** a few residents that the tower would be ugly or that a resident would not want it in his backyard are not sufficient. *New Par v. City of Saginaw, 301 F.3d 390, 399 n.4 (6th Cir. 2002)* (citing *Petersburg Cellular P'ship v. Bd. of Supervisors, 205 F.3d 688, 695 (4th Cir. 2000)* ("If, however, the concerns expressed by the community are objectively unreasonable, such as concerns based upon conjecture or speculation, then **[*801]** they lack probative value and will not amount to substantial evidence.")).

[*9]** If *§ 332* were read as broadly as the Township suggests and these generalized objections sufficed, any wireless facility could be rejected. Anyone who opposed a cell tower in their backyard could offer an excuse that it would be bad for the community, would not be aesthetically pleasing, or would be otherwise objectionable. But that by itself is not enough. There must be evidence. And not just any evidence—evidence that is *substantial*. And substantial evidence must be substantiated by something. *HN10*[↑] "Substantial evidence, in the usual context, has been construed to mean less than a preponderance, but more than a scintilla of evidence." *Cellular Tel. Co., 166 F.3d at 494*.

The fourth reason provided is **[**15]** that "the Zoning Ordinance (Section 26-49 a.10) specifies that the Township Board found that the presence of numerous towers and pole structures, particularly if located within residential areas, would decrease the attractiveness of and destroy the character and integrity of the community."

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[3] Similar comments were made to the Township Planning Commission on February 24, 2009, by several of the same people.

[4] Several of the concerned citizens and members of the Board specifically mentioned their backyards during the August 3, 2009, meeting. ("But I need to know if a resident says, you put an ugly tower in my *backyard* and you potentially decrease my property value; [m]y *backyard* is kind of where they're going to put this thing; [b]ut the final word is, would you want one of these cell towers in what would be, if I build a house there or build houses there, in my *backyard*?; [w]ould you want that in your *backyard*; [t]here will be towers and towers, and pretty soon I'll have Disneyland in my *backyard*.") (emphases added).

Section 26-49(a)(10) of the zoning ordinance states: "The township board finds that *the presence of numerous tower and/or pole structures, particularly if located within residential areas, would decrease the attractiveness and destroy the character and integrity of the community*." (emphasis added). The former stated reason simply parrots the language of the ordinance. ***HN11***[↑] Merely repeating an ordinance does not constitute substantial evidence. *See, e.g.,* *T-Mobile Ne. LLC v. City of Lawrence, 755 F. Supp. 2d 286, 291 (D. Mass. 2010)*. Further, the evidence in the record suggests quite the contrary. There were not numerous towers or poles in that area—in fact, the lack of wireless towers in that area was the reason why T-Mobile sought to build one.

The Township's reasons for denial concerning aesthetics were not based on substantial evidence in the record.

2

The Township asserts that there is substantial evidence **[**16]** in the record showing that a 70-foot tower would have sufficed rather than the proposed 90-foot tower. TMobile counters that under the local zoning ordinance, it was required to collocate other wireless carriers on a new tower and could not have feasibly done so on a 70-foot tower.

[*10]** The zoning ordinance states a goal of collocation—that is, locating several carriers on the same tower—and building only as many new wireless facilities as necessary. *See* Sections 26-49(a)(9) ("This contemplates the establishment of as few structures as reasonably feasible, and the use of structures which are designed for compatibility, including the use of existing structures"); 26-49(g)(3)c ("The policy of the community is to promote colocation"). Section 26-49(g)(3)b of the zoning ordinance states that "[a]ll new and modified wireless communication facilities shall be designed and constructed so as to accommodate colocation." Section 26-49(b)(4) defines collocation as "the location by *two (2) or more* wireless communications providers of wireless communication facilities on a common structure, tower, or building, *with the view toward reducing the overall number of structures required to support wireless* ***[**17]*** *communication antennas within the community*." (emphases added). Section 26-49(e)(1) of the ordinance provides that "[t]he maximum height of the new or modified support structure and antenna shall be the minimum height demonstrated to be necessary for reasonable communication by the applicant (and by other entities to collocate on the structure)."

[*802] By the terms of the ordinance, any new facility was required to collocate "two (2) or more wireless communications providers." Further, the structure would have to be tall enough in order to support "reasonable communication" for at least two carriers. The Township denied T-Mobile's application, in part, because the Township found that "a 70 foot cellular tower could be erected in the location rather than a 90 foot cellular tower." To support this reasoning, the record would have to contain substantial evidence that a 70-foot tower would have permitted two collocated carriers to engage in "reasonable communication."[5]

The record contains letters from AT&T and Verizon who expressed a desire to collocate with T-Mobile on the "90' monopine" tower. "There must be at least ten feet of vertical separation between the antennas of the various wireless companies **[***11]** collocating on the tower." The letter from Verizon requested to "occupy the second available level of this structure, which would be [at] approximately 77'." Verizon's letter noted that it had "been in search [sic] to construct such a facility in this area for a great amount of time." AT&T's letter expressed interest "on the condition that all zoning approvals are secured."[6]

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[5] On appeal, the Township suggests that a 75-foot or 80-foot tower could have also been appropriate. However, the reason in the denial letter concerned a 70-foot, rather than a 90-foot, tower. This is the issue before the court on **[**18]** appeal. Appellant Br. at 31.

[6] However, it seems AT&T's support may have waned after opposition emerged to the facility, as it did not participate in the Township Board meeting.

There is no evidence in the record to support the Township's position that a 70-foot tower would have been suitable to satisfy the zoning ordinance's requirement that two wireless providers, engaged in reasonable communication, could be collocated at this particular site. Appellant misreads the record when it claims that Verizon would have been willing to collocate on a 70-foot tower with Verizon's equipment **[**19]** placed at the 60-foot level. Here is the relevant colloquy from the Board of Trustees meeting:

> MR. DOVRE (Trustee): I'm asking if you're willing to co-locate that low?
> MR. ANDERS (Representative from Verizon): We're willing to co-locate on the tower at a height that the tower owner would provide to us.
> MR. DOVRE: As low as 70 feet?
> MR. ANDERS: Yes.
>
> MR. DOVRE: How long [*sic*—should be low] would you co-locate at?
> MR. ANDERS: As low as 70 feet.
> MR. DOVRE: 60?
> MR. ANDERS: I'd have to—70 feet is right now the—

The questions posed asked for the minimum height at which Verizon was willing to collocate, not for the height the structure would be. In the original letter, Verizon sought to collocate at around 80 feet but was willing to compromise at 70 feet (presumably because AT&T was no longer in the picture). Since Verizon was not building the structure—T-Mobile was—the ultimate height would have been mostly irrelevant to Verizon. What mattered was the height at which Verizon's equipment would be located.

A 70-foot tower, with Verizon collocated at 60 feet, would not, by Verizon's own admission, have worked. In other words, if Verizon's equipment was positioned as low **[***12]** as 70 feet, T-Mobile's equipment **[**20]** would be placed above it, making the height of the structure greater than 70 feet (likely 80 feet). Simply stated, the **[*803]** evidence in the record only shows that if T-Mobile were to build a tower with two collocated carriers as the ordinance requires, the height would *have* to be greater than 70 feet tall. The evidence does not show that a 70-foot tower would have been possible.

T-Mobile even offered to build a 70-foot tower if no other carriers collocated (while this arguably would have violated the ordinance's collocation requirement, it resulted from T-Mobile's trying to accommodate the Township). At the August 3, 2009, meeting, after Trustee Kaplan mentioned that "[w]e also felt that a 70 foot tower would have been sufficient," a representative of T-Mobile replied that if no other carriers were interested in collocating, "I would like to go on the record as saying, if you're willing to approve a 70 foot tower, I'm willing to take one." Following the colloquy with the Verizon representative, a motion was made to the Township Board to "remand the issue to the planning commission for consideration of a 70 foot tower." The motion was seconded but not approved.

The Township's position creates **[**21]** an untenable situation for T-Mobile. If TMobile built a 70-foot tower that only supported one provider (T-Mobile), it would violate the ordinance that requires collocation. If T-Mobile built a 70-foot tower that also collocated another provider (Verizon), it would violate the ordinance (Section 26-49(d)(1)e.1) that requires the structure to be the "minimum height demonstrated to be necessary for reasonable communication by the applicant (and by other entities to collocate on the structure)." The shorter collocated tower wouldn't work for Verizon. T-Mobile even offered to build a 70-foot tower if no other carriers were collocated, and the Board did not adopt this proposal. By the very terms of the ordinance and the Board's decisions, T-Mobile could not build the structure under any circumstances. Nothing in the record supports the ultimate decision that the Township made with respect to height. The Township's reason for denial of the application with respect to the height of the tower was not supported by substantial evidence.

[*13] 3**

The fifth reason offered for the denial of T-Mobile's application was that "TMobile has not presented a sufficient need to build the towers [*sic*]." During the

[22]** hearing, T-Mobile submitted a report from its RF engineer that contained coverage maps and other data. The Township raises several objections to the report. First, that the engineer's analysis about the coverage gap did not contain any actual customer complaints;[7] second, that the coverage maps "were not based upon any empirical data"; and third, that the "proposed tower would do nothing to improve coverage to the south and east."

These three objections were only raised during the course of litigation—none were stated in the record. Further, none of these arguments cite any evidence in the record—rather, the Township merely cites its own briefs from the district court.[8] These arguments are not properly before this court. The only issue before this **[*804]** court is whether substantial evidence existed to support the denial of the application based on need, as defined by the local zoning ordinance. *MetroPCS, 400 F.3d at 724* ("[W]e must take applicable state and local regulations as we find them and evaluate the City decision's evidentiary support (or lack thereof) relative to those **[**23]** regulations."). Section 26-49(d)(2)a lists several factors to consider in determining need:

> a. The applicant shall demonstrate the need for the proposed facility to be located as proposed based upon the presence of one or more of the following factors:
> 1. Proximity to an interstate or major thoroughfare.
> 2. Areas of population concentration.
> 3. Concentration of commercial, industrial, and/or other business centers.
> 4. Areas where signal interference has occurred due to tall buildings, masses of trees, or other obstruction.
>
> **[***14]** 5. Topography of the proposed facility location in relation to other facilities with which the proposed facility is to operate.
> 6. Other specifically identified reason(s) creating facility need.

The reason stated in the record with respect to this ground is that "T-Mobile has not presented a sufficient need to build the towers [*sic*]."

The only evidence in the record that the Township cites to support the assertion that there was not a sufficient need for the tower was testimony from Mr. Dave Crook at the February 24, 2009, Planning Commission meeting.[9] Mr. Crook stated that the proposed facility would only address 15% of T-Mobile's coverage problem. Mr. Crook provided no explanation of how he reached this number, nor did he dispute any of the facts in the RF engineer's report. Nothing in the record suggests what qualifications Mr. Crook possessed or whether he had any expertise to opine on the coverage gap in the area. His ostensibly lay opinion is not substantial evidence. *MIOP, Inc. v. City of Grand Rapids, 175 F. Supp. 2d 952, 956-57 (W.D. Mich. 2001)* (citing *Telespectrum, 227 F.3d at 424*) ("Instead, the cases cited by the Sixth Circuit remark that opinion is not sufficient to meet the substantial evidence requirement. Consistent with Sixth Circuit precedent, this Court does not find lay opinion evidence sufficient to satisfy the substantial evidence requirement.").

To the contrary, based on the terms of the Township's own zoning ordinance, TMobile introduced voluminous amounts of evidence to support its position that there was a sufficient need

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[7] There is no requirement in the ordinance, or in federal law, that requires the submission of consumer complaints.

[8] In its brief, the Township cites both Defendant's Answer to Plaintiff's Motion for Partial Summary Judgment and the Reply Brief to Plaintiff, T-Mobile Central, LLC's Answer to Defendant Charter Township of West Bloomfield's Motion for Summary Judgment to support these three positions. Appellant Br. at 31-32. The cited sections of the district-court **[**24]** filings included no citations to the record or any exhibits. These citations are inapposite for purposes of appellate review.

[9] It is unclear if the **[**25]** Board of Trustees voted on August 3, 2009, based on the comments made to the Township Planning Commission on February 24, 2009, or if the Board only considered the recommendation made by the Township Planning Commission. In any event, the comments made at the February 24, 2009, meeting are part of the record that this court can consider on appeal. This court "examine[s] the evidence as a whole, taking into account whatever in the record fairly detracts from its weight." *Telespectrum, 227 F.3d at 423*.

for the tower. The engineer's report went through each of the six factors listed in the ordinance and explained why the proposed facility met each requirement: (1) the proposed facility is in close proximity to major thoroughfares in the area; (2) the surrounding area is "heavily populated by subdivisions on both sides of the roads"; (3) the area is "composed of major township roads and an established residential **[***15]** population"; (4) "topography and the dense population of all types of trees do cause considerable **[**26]** signal interference in the area"; (5) "it's very difficult to find open level ground upon which to build such a facility"; and **[*805]** (6) noting that the lack of "coverage in this area is a long-standing issue," this proposal would "not only fill coverage gaps for in-car usage . . . [but also for] in-home coverage." These arguments were supported by detailed reports and coverage maps. There is not substantial evidence in the record to support the Township's denial of the application with respect to need.

4

Because the five stated reasons for denial of T-Mobile's application were not supported by substantial evidence, the district court correctly found that the Township's decision violated *47 U.S.C. § 332(c)(7)(B)(iii)*.

Summary judgment was appropriate for this claim.

III

A

Next, we consider whether the Township's denial of T-Mobile's application violated***HN12***[↑] *47 U.S.C. § 332(c)(7)(B)(i)(II)*, which provides 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 prohibit or *have the effect of prohibiting* the provision of personal wireless services." (emphasis added). The construction **[**27]** of this statute presents a question of first impression for this circuit.

As a threshold matter, we must first determine whether the denial of a *single application* from T-Mobile can constitute an effective prohibition. The Township places great stock in precedents from ***HN13***[↑] the Fourth Circuit, which has held that *only* a general, blanket ban on the construction of all new wireless facilities would constitute an "impermissible prohibition of wireless services under the TCA." *MetroPCS, 400 F.3d at 730* (citing *AT&T Wireless PCS v. City Council of Virginia Beach, 155 F.3d 423, 428 (4th Cir. 1998)* (holding that only "blanket prohibitions" and "general bans or policies" **[***16]** affecting all wireless providers count as effective prohibition of wireless services under the TCA)).

However, the large majority of circuits have rejected this approach. Most recently, the Ninth Circuit noted that, under such a strict construction, "persistent coverage gaps can never constitute a prohibition under the statute—courts must ask only whether local governments have (effectively) banned wireless services altogether. . . . The language of the TCA, while sparse, does not dictate such a narrow interpretation even under **[**28]** a plain meaning approach." *MetroPCS, 400 F.3d at 730*; *see also Second Generation Props., LP v. Town of Pelham, 313 F.3d 620, 629 (1st Cir. 2002)* (holding that the clause "is not restricted to blanket bans on cell towers" and that "[t]he clause may, at times, apply to individual zoning decisions."); *Voicestream Minneapolis, Inc. v. St. Croix Cnty., 342 F.3d 818, 830 (7th Cir. 2003)*; *APT Pittsburgh Ltd. P'ship v. Penn Twp. Butler Cnty., 196 F.3d 469, 479-80 (3d Cir. 1999)*; *Sprint Spectrum, L.P. v. Willoth, 176 F.3d 630, 640 (2d Cir. 1999)*. Judge Cudahy in *MetroPCS* formulated a two-part test to consider whether the denial of an application amounts to an effective prohibition: there must be (1) a "showing of a 'significant gap' in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations." *MetroPCS, 400 F.3d at 731*. Both the Township and T-Mobile urge this court to adopt this test.

The statute itself refers to actions that "have the

effect of prohibiting the provision of personal wireless services." (emphasis added.) Not simply *prohibiting it*, but effectively prohibiting it. Thus, actions short of a complete prohibition could have the effect **[**29]** of improperly hindering the construction **[*806]** of cellular towers. The cramped reading of the Fourth Circuit—which requires a blanket ban to trigger a violation of the statute—seems inconsistent both with the plain text of the statute as well as the broader goal of the TCA to promote the construction of cellular towers. We now adopt the *MetroPCS* standard and hold that the denial of a single application can constitute a violation of this portion of the Act.

[*17] B**

1

Next, we must determine, as a matter of first impression, whether the "significant gap" in service focuses on the coverage of the applicant provider (T-Mobile in this case) or whether service by any other provider (Verizon, AT&T, Sprint, etc.) is sufficient. That is, if an incumbent provider has coverage in a given area but a new provider seeking to construct a wireless facility does not, does a "significant gap" in coverage exist? The Second and Third Circuits have held that no "significant gap" exists if any "one provider" is able to serve the gap area in question. *See, e.g., APT Pittsburgh, 196 F.3d at 478-80*; *Willoth, 176 F.3d at 643*. Likewise, the Fourth Circuit adopted the "one provider rule," holding that allowing carriers an individualized **[**30]** cause of action "would effectively nullify local authority by mandating approval of all (or nearly all) applications." *AT&T Wireless, 155 F.3d at 428*. In other words, under this approach, if Verizon has coverage in an area but T-Mobile does not, T-Mobile cannot claim to have a service gap.

The Ninth Circuit rejected the "one provider" rule and adopted a standard that considers whether "a provider is prevented from filling a significant gap in *its own* service coverage." *MetroPCS, 400 F.3d at 733*. The First Circuit has also adopted this rule and observed that "[t]he fact that some carrier provides some service to some consumers does not in itself mean that the town has not effectively prohibited services to other consumers." *Second Generation Props., 313 F.3d at 634*. Under this approach, if Verizon had coverage in an area but T-Mobile did not, T-Mobile could still claim to have a service gap.

HN14[↑] In 2009, the FCC issued a Declaratory Ruling that explained that the effective prohibition provision requires only a showing that a carrier has a "significant gap" *in its own* service coverage—the approach of the First and Ninth Circuits:

> While we acknowledge that this provision could be interpreted **[**31]** in the manner endorsed by several courts [(the Second, Third, and Fourth Circuits)]—as a safeguard against a complete ban on all personal **[***18]** wireless service within the State or local jurisdiction, which would have no further effect if a single provider is permitted to provide its service within the jurisdiction—we conclude that under the better reading of the statute, this limitation of State/local authority applies not just to the first carrier to enter into the market, but also to all subsequent entrants.

In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B), 24 FCC Rcd. 13994, ¶ 57 (2009). The FCC found persuasive the First Circuit's reasoning:

> We reach this conclusion for several reasons. First, our interpretation is consistent with the statutory language referring to the prohibition of "the provision of personal wireless services" rather than the singular term "service." As the First Circuit observed, "[a] straightforward reading is that 'services' refers to more than one carrier. Congress contemplated that there be multiple carriers competing to provide services to consumers."

[*807] *Id. ¶ 58* (quoting *Second Generation Props., 313 F.3d at 634*). The FCC expressly **[**32]** rejected the "blanket ban" approach adopted by the Second, Third, and Fourth Circuits:

"Third, we find unavailing the reasons cited by the Fourth Circuit (and some other courts) to support the interpretation that the statute only limits localities from prohibiting all personal wireless services (i.e., a blanket ban or 'one-provider' approach)." *Id. ¶ 60*. From the perspective of a customer who has poor coverage with T-Mobile in a certain area, it is little consolation that another provider, Verizon for example, may have good service in the same area.

The Eastern District of Michigan found this FCC ruling dispositive in holding that the "significant gap" refers only to a carrier's *own* service, not that of any carrier. *T-Mobile Cent. LLC v. City of Fraser, 675 F. Supp. 2d 721, 729 (E.D. Mich. 2009)* (noting that "the Sixth Circuit has not spoken on this issue," but acknowledging the Declaratory Ruling and concluding that "the Court is not required to consider whether other carriers provide service in the area of the gap"). In light of the FCC's endorsement of the standards used by the First and Ninth Circuits, we now adopt this approach.

[*19] 2**

The analysis of whether a significant gap in coverage **[**33]** existed closely tracks our earlier discussion about whether T-Mobile demonstrated a need to build the facility. The Township raises two of the same three arguments to assert that T-Mobile failed to establish a coverage gap. First, that "the record was devoid of any evidence of actual customer complaints," and second, that the report was "not based upon any empirical data." Appellant Br. at 38.[10] Again, the Township merely cites its own briefs to support these arguments.

First, ***HN15***[⬆] there is no requirement under federal or state law that actual customer complaints need to be submitted to demonstrate a coverage gap. Second, it is unclear exactly what the Township means by asserting that the coverage maps were not based on any empirical data. The engineer's report was replete with coverage maps, measurements of signal strengths, and other calculations. The Township introduced no evidence into the record to show **[**34]** that the gap was not significant beyond general complaints and comments from citizens that other wireless carriers had good coverage in that area. In fact, several residents acknowledged that T-Mobile had poor coverage or "dead zones" in the area.

T-Mobile introduced into the record RF propagation maps and drive test data, along with a report by an RF engineer (which is discussed in detail *supra* Part II.B.3.). These types of evidence are suitable to support a claim for a substantial gap in coverage. *See, e.g.*, *MetroPCS, Inc. v. City & Cnty. of San Francisco, 2006 U.S. Dist. LEXIS 43985, 2006 WL 1699580, at *11 (N.D. Cal. June 16, 2006)* (finding that propagation maps can demonstrate the existence of a coverage gap). T-Mobile claims that the relevant evidence shows that the gap is "significant" because the "gap area includes both a major commuter highway and fully developed residential areas." As discussed in Part II.B.3 above, both of these assertions are amply supported by the RF engineer's affidavit.

[*20]** Based on the record, we find that the denial of T-Mobile's application "prevented **[*808]** [T-Mobile] from filling a significant gap in *its own* service coverage." *MetroPCS, 400 F.3d at 733*.

C

The second part of the *MetroPCS* **[**35]** inquiry focuses on whether there are feasible alternate locations. ***HN16***[⬆] "Under all existing versions of the 'significant gap' test, once a wireless service provider has demonstrated that the requisite significant gap in coverage exists, it must then make some showing as to the intrusiveness or necessity of its proposed means of closing that gap." *MetroPCS, 400 F.3d at 734*. The circuits split at this fork:

> The Second and Third Circuits require the provider to show that "the manner in which it

[10] Here, the Township does not make the third argument—"the maps indicate that the proposed tower would do nothing to improve coverage to the south and east, or anything greater than about 15%." In any event, that unsubstantiated argument is without merit, as discussed *supra* Part II.B.3.

> proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve." *Penn Township, 196 F.3d at 480* (emphasis added); *see also Omnipoint, 331 F.3d at 398*; *Unity Township, 282 F.3d at 266*; *Willoth, 176 F.3d at 643*. The First and Seventh Circuits, by contrast, require a showing that there are "no alternative sites which would solve the problem." *Second Generation Props., 313 F.3d at 635*; *see also St. Croix County, 342 F.3d at 834-35* (adopting the First Circuit test and requiring providers to demonstrate that there are no "viable alternatives"). . . .

MetroPCS, 400 F.3d at 734. The Ninth Circuit adopted the "least intrusive" standard. *Id. at 735*. Judge Cudahy **[**36]** found the precedents from the First and Seventh Circuit "too exacting." *Id. at 734*. The Second and Third Circuit's "least intrusive" standard "allows for a meaningful comparison of alternative sites before the siting application process is needlessly repeated." *Id. at 734-35*.

We agree with Judge Cudahy and adopt the "least intrusive" standard from the Second, Third, and Ninth Circuits. It is considerably more flexible than the "no viable alternatives" standard, as a carrier could endlessly have to search for different, marginally better alternatives. Indeed, in this case the Township would have had TMobile search for alternatives indefinitely.

[*21]** Under the "least intrusive" standard, the analysis is straightforward, and TMobile satisfies its burden. *See Omnipoint, 331 F.3d at 398* (noting that ***HN17***[⬆] the "least intrusive" standard "will require a showing that a good faith effort has been made to identify and evaluate less intrusive alternatives, e.g., that the provider has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, etc."). T-Mobile made numerous good-faith efforts to identify and investigate alternative **[**37]** sites that may have been less intrusive on the "values that the denial sought to serve." *Penn Twp., 196 F.3d at 480*. Specifically they considered building a monopole near the West Hills High School and on a water tower at the Knollwood Country Club. A facility at the High School would have been significantly more intrusive to the values of the community, as demonstrated by the widespread opposition to that proposal. Also, T-Mobile determined that a facility at the Knollwood Country Club location would have been too far away from the area with weak service and would not have resolved the coverage gap. The Township suggested no other alternatives beyond the two already proposed. This evidence is sufficient to make the requisite "showing as to the intrusiveness or necessity of its proposed means of closing that gap." *MetroPCS, 400 F.3d at 734*.

The Township's decisions had "the effect of prohibiting the provision of personal **[*809]** wireless services" and thus violated *47 U.S.C. § 332(c)(7)(B)(i)(II)*.

IV

Remaining is the state-law claim, *M.C.L. 125.3504*, which the district court declined to address, finding that the violation of the Telecommunications Act renders the issue moot. Because we hold that **[**38]** the Township's actions violated the Telecommunications Act, we also need not address the state-law claim.

V

The judgment of the district court is AFFIRMED.

End of Document

KRS § 100.987

Current through Act 10 of the 2021 Regular Session.

Michie's™ Kentucky Revised Statutes > TITLE IX Counties, Cities, and Other Local Units (Chs. 65 — 109) > CHAPTER 100 Planning and Zoning (§§ 100.010 — 100.991) > Regulation of Cellular Antenna Towers (§§ 100.985 — 100.987)

100.987. Local government may plan for and regulate siting of cellular antenna towers — Duties of utility or company proposing to construct antenna tower — Confidentiality of information contained in application — Duties and powers of planning commission — Co-location — Public Service Commission approval of cellular antenna towers on certain properties of the state or instrumentality of the state.

(1)A planning unit as defined in *KRS 100.111* and legislative body or fiscal court that has adopted planning and zoning regulations may plan for and regulate the siting of cellular antenna towers in accordance with locally adopted planning or zoning regulations in this chapter, except as otherwise provided in this section.

(2) Every utility or a company that is engaged in the business of providing the required infrastructure to a utility that proposes to construct an antenna tower for cellular telecommunications services or personal communications services within the jurisdiction of a planning unit that has adopted planning and zoning regulations in accordance with this chapter shall:

(a) Submit a copy of the applicant's completed uniform application to the planning commission of the affected planning unit to construct an antenna tower for cellular or personal telecommunications services. The uniform application shall include a grid map that shows the location of all existing cellular antenna towers and that indicates the general position of proposed construction sites for new cellular antenna towers within an area that includes:

1.All of the planning unit's jurisdiction; and

2.A one-half (½) mile area outside of the boundaries of the planning unit's jurisdiction, if that area contains either existing or proposed construction sites for cellular antenna towers;

(b) Include in any contract with an owner of property upon which a cellular antenna tower is to be constructed, a provision that specifies, in the case of abandonment, a method that the utility will follow in dismantling and removing a cellular antenna tower, including a timetable for removal; and

(c) Comply with any local ordinances concerning land use, subject to the limitations imposed by *47 U.S.C. sec. 332(c)*, *KRS 278.030*, *278.040*, and *278.280*.

(3) All information contained in the application and any updates, except for any map or other information that specifically identifies the proposed location of the cellular antenna tower then being reviewed, shall be deemed confidential and proprietary within the meaning of *KRS 61.878*. The local planning commission shall deny any public request for the inspection of this information, whether

submitted under Kentucky's Open Records Act or otherwise, except when ordered to release the information by a court of competent jurisdiction. Any person violating this subsection shall be guilty of official misconduct in the second degree as provided under *KRS 522.030*.

(4) After an applicant's submission of the uniform application to construct a cellular antenna tower, the planning commission shall:

(a) Review the uniform application in light of its agreement with the comprehensive plan and locally adopted zoning regulations;

(b) Make its final decision to approve or disapprove the uniform application; and

(c) Advise the applicant in writing of its final decision within sixty (60) days commencing from the date that the uniform application is submitted to the planning commission or within a date certain specified in a written agreement between the local planning commission and the applicant. If the planning commission fails to issue a final decision within sixty (60) days and if there is no written agreement between the local planning commission and the applicant to a specific date for the planning commission to issue a decision, the uniform application shall be deemed approved.

(5) If the planning commission disapproves of the proposed construction, it shall state the reasons for disapproval in its written decision and may make suggestions which, in its opinion, better accomplish the objectives of the comprehensive plan and the locally adopted zoning regulations. No permit for construction of a cellular or personal communications services antenna tower shall be issued until the planning commission approves the uniform application or the sixty (60) day time period has expired, whichever occurs first.

(6) The planning commission may require the applicant to make a reasonable attempt to co-locate additional transmitting or related equipment. A planning commission may provide the location of existing cellular antenna towers on which the commission deems the applicant can successfully co-locate its transmitting and related equipment. If the local planning commission requires the applicant to attempt co-location, the applicant shall provide the local planning unit with a statement indicating that the applicant has:

(a) Successfully attempted to co-locate on towers designed to host multiple wireless service providers' facilities or existing structures such as a telecommunications tower or another suitable structure capable of supporting the applicant's facilities, and that identifies the location of the tower or suitable structure on which the applicant will co-locate its transmission and related facilities; or

(b) Unsuccessfully attempted to co-locate on towers designed to host multiple wireless service provider's facilities or existing structures such as a telecommunications tower or another suitable structure capable of supporting the applicant's facilities and that:

1.Identifies the location of the towers or other structures on which the applicant attempted to co-locate; and

2.Lists the reasons why the co-location was unsuccessful in each instance.

(7) The local planning commission may deny a uniform application to construct a cellular antenna tower based on an applicant's unwillingness to attempt to co-locate additional transmitting or related equipment on any new or existing towers or other structures.

(8) In the event of co-location, a utility shall be considered the primary user of the tower, if the utility is the owner of the antenna tower and if no other agreement exists that prescribes an alternate arrangement between the parties for use of the tower. Any other entity that co-locates transmission or

related facilities on a cellular antenna tower shall do so in a manner that does not impose additional costs or operating restrictions on the primary user.

(9) Upon the approval of an application for the construction of a cellular antenna tower by a planning commission, the applicant shall notify the Public Service Commission within ten (10) working days of the approval. The notice to the Public Service Commission shall include a map showing the location of the construction site. If an applicant fails to file notice of an approved uniform application with the Public Service Commission, the applicant shall be prohibited from beginning construction on the cellular antenna tower until such notice has been made.

(10)A party aggrieved by a final action of a planning commission under the provisions of *KRS 100.985* to *100.987* may bring an action for review in any court of competent jurisdiction.

(11) Applications for approval of cellular antenna towers on property owned by any state agency, university electing to perform financial management of its real properties pursuant to *KRS 164A.555* to *164A.630*, department, board, commission, authority, or other instrumentality of the state that is exempt from zoning regulations under *KRS 100.361*, other than property for which the use is controlled by the secretary of the Finance and Administration Cabinet pursuant to *KRS 56.463(4)(a)*, shall be submitted to the Public Service Commission for approval under *KRS 278.650*.

History

Enact. Acts *1998, ch. 231, § 2*, effective July 15, 1998; *2002, ch. 343, § 3*, effective April 23, 2002; *2002, ch. 346, § 158*, effective July 15, 2002; *2016 ch. 74, § 1*, effective July 15, 2016.

End of Document

KRS § 278.010

Current through Act 10 of the 2021 Regular Session.

Michie's™ Kentucky Revised Statutes > TITLE XXIV Public Utilities (Chs. 276 — 281A) > CHAPTER 278 Public Service Commission (§§ 278.010 — 278.992) > Public Utilities Generally (§§ 278.010 — 278.457)

278.010. Definitions for *KRS 278.010* to *278.450*, *278.541* to *278.544*, *278.546* to *278.5462*, and *278.990*.

As used in *KRS 278.010* to *278.450*, *278.541* to *278.544*, *278.546* to *278.5462*, and *278.990*, unless the context otherwise requires:

(1)"Corporation" includes private, quasipublic, and public corporations, and all boards, agencies, and instrumentalities thereof, associations, joint-stock companies, and business trusts;

(2)"Person" includes natural persons, partnerships, corporations, and two (2) or more persons having a joint or common interest;

(3)"Utility" means any person except a regional wastewater commission established pursuant to *KRS 65.8905* and, for purposes of paragraphs (a), (b), (c), (d), and (f) of this subsection, a city, who owns, controls, operates, or manages any facility used or to be used for or in connection with:

(a) The generation, production, transmission, or distribution of electricity to or for the public, for compensation, for lights, heat, power, or other uses;

(b) The production, manufacture, storage, distribution, sale, or furnishing of natural or manufactured gas, or a mixture of same, to or for the public, for compensation, for light, heat, power, or other uses;

(c) The transporting or conveying of gas, crude oil, or other fluid substance by pipeline to or for the public, for compensation;

(d) The diverting, developing, pumping, impounding, distributing, or furnishing of water to or for the public, for compensation;

(e) The transmission or conveyance over wire, in air, or otherwise, of any message by telephone or telegraph for the public, for compensation; or

(f) The collection, transmission, or treatment of sewage for the public, for compensation, if the facility is a subdivision collection, transmission, or treatment facility plant that is affixed to real property and is located in a county containing a city of the first class or is a sewage collection, transmission, or treatment facility that is affixed to real property, that is located in any other county, and that is not subject to regulation by a metropolitan sewer district or any sanitation district created pursuant to KRS Chapter 220;

(4)"Retail electric supplier" means any person, firm, corporation, association, or cooperative corporation, excluding municipal corporations, engaged in the furnishing of retail electric service;

(5)“Certified territory” shall mean the areas as certified by and pursuant to *KRS 278.017*;

(6)“Existing distribution line” shall mean an electric line which on June 16, 1972, is being or has been substantially used to supply retail electric service and includes all lines from the distribution substation to the electric consuming facility but does not include any transmission facilities used primarily to transfer energy in bulk;

(7)“Retail electric service” means electric service furnished to a consumer for ultimate consumption, but does not include wholesale electric energy furnished by an electric supplier to another electric supplier for resale;

(8)“Electric-consuming facilities” means everything that utilizes electric energy from a central station source;

(9)“Generation and transmission cooperative” or “G&T” means a utility formed under KRS Chapter 279 that provides electric generation and transmission services;

(10)“Distribution cooperative” means a utility formed under KRS Chapter 279 that provides retail electric service;

(11)“Facility” includes all property, means, and instrumentalities owned, operated, leased, licensed, used, furnished, or supplied for, by, or in connection with the business of any utility;

(12)“Rate” means any individual or joint fare, toll, charge, rental, or other compensation for service rendered or to be rendered by any utility, and any rule, regulation, practice, act, requirement, or privilege in any way relating to such fare, toll, charge, rental, or other compensation, and any schedule or tariff or part of a schedule or tariff thereof;

(13)“Service” includes any practice or requirement in any way relating to the service of any utility, including the voltage of electricity, the heat units and pressure of gas, the purity, pressure, and quantity of water, and in general the quality, quantity, and pressure of any commodity or product used or to be used for or in connection with the business of any utility, but does not include Voice over Internet Protocol (VoIP) service;

(14)“Adequate service” means having sufficient capacity to meet the maximum estimated requirements of the customer to be served during the year following the commencement of permanent service and to meet the maximum estimated requirements of other actual customers to be supplied from the same lines or facilities during such year and to assure such customers of reasonable continuity of service;

(15)“Commission” means the Public Service Commission of Kentucky;

(16)“Commissioner” means one (1) of the members of the commission;

(17)“Demand-side management” means any conservation, load management, or other utility activity intended to influence the level or pattern of customer usage or demand, including home energy assistance programs;

(18)“Affiliate” means a person that controls or that is controlled by, or is under common control with, a utility;

(19)“Control” means the power to direct the management or policies of a person through ownership, by contract, or otherwise;

(20)“CAM” means a cost allocation manual which is an indexed compilation and documentation of a company’s cost allocation policies and related procedures;

(21)"Nonregulated activity" means the provision of competitive retail gas or electric services or other products or services over which the commission exerts no regulatory authority;

(22)"Nonregulated" means that which is not subject to regulation by the commission;

(23)"Regulated activity" means a service provided by a utility or other person, the rates and charges of which are regulated by the commission;

(24)"USoA" means uniform system of accounts which is a system of accounts for public utilities established by the FERC and adopted by the commission;

(25)"Arm's length" means the standard of conduct under which unrelated parties, each party acting in its own best interest, would negotiate and carry out a particular transaction;

(26)"Subsidize" means the recovery of costs or the transfer of value from one (1) class of customer, activity, or business unit that is attributable to another;

(27)"Solicit" means to engage in or offer for sale a good or service, either directly or indirectly and irrespective of place or audience;

(28)"USDA" means the United States Department of Agriculture;

(29)"FERC" means the Federal Energy Regulatory Commission;

(30)"SEC" means the Securities and Exchange Commission;

(31)"Commercial mobile radio services" has the same meaning as in *47 C.F.R. sec. 20.3* and includes the term "wireless" and service provided by any wireless real time two (2) way voice communication device, including radio-telephone communications used in cellular telephone service, personal communications service, and the functional or competitive equivalent of a radio-telephone communications line used in cellular telephone service, a personal communications service, or a network radio access line; and

(32)"Voice over Internet Protocol" or "VoIP" has the same meaning as in federal law.

History

3952-1: amend. Acts 1960, ch. 209; 1964, ch. 195, § 1; 1972, ch. 83, § 1; 1974, ch. 118, § 1; 1978, ch. 379, § 1, effective April 1, 1979; 1982, ch. 82, § 1, effective July 15, 1982; *1994, ch. 238, § 1*, effective July 15, 1994; *1998, ch. 188, § 1*, effective July 15, 1998; *2000, ch. 101, § 5*, effective July 14, 2000; *2000, ch. 118, § 1*, effective July 14, 2000; *2000, ch. 511, § 1*, effective July 14, 2000; *2001, ch. 11, § 1*, effective June 21, 2001; *2002, ch. 365, § 15*, effective April 24, 2002; *2005, ch. 109, § 2*, effective June 20, 2005; *2006, ch. 239, § 5*, effective July 12, 2006; *2011, ch. 98, § 20*, effective June 8, 2011.

End of Document

KRS § 278.546

Current through Act 10 of the 2021 Regular Session.

Michie's™ Kentucky Revised Statutes > TITLE XXIV Public Utilities (Chs. 276 — 281A) > CHAPTER 278 Public Service Commission (§§ 278.010 — 278.992) > Broadband and Other Telecommunication Technologies (§§ 278.546 — 278.5462)

278.546. Legislative findings and determinations relating to telecommunications.

Whereas, the General Assembly finds and determines that:

(1) State-of-the-art telecommunications is an essential element to the Commonwealth's initiatives to improve the lives of Kentucky citizens, to create investment, jobs, economic growth, and to support the Kentucky Innovation Act of 2000;

(2) Streamlined regulation in competitive markets encourages investment in the Commonwealth's telecommunications infrastructure;

(3) Consumers in the Commonwealth have many choices in telecommunications services because competition between various telecommunications technologies such as traditional telephony, cable television, Internet and other wireless technologies has become commonplace;

(4) Consumers benefit from market-based competition that offers consumers of telecommunications services the most innovative and economical services; and

(5) Consumer protections against fraud and abuse, for the provision of affordable basic service, and for access to emergency services including enhanced 911 must continue.

History

Enact. Acts *2004, ch. 167, § 1*, effective July 13, 2004.

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