

NOTES

MONUMENTAL CHANGES: STALLING TACTICS AND MORATORIA ON CELLULAR TOWER SITING

INTRODUCTION

Personal wireless communication is the latest technological craze to hit the country.¹ This trend has sharply increased the need for cellular towers and cellular antennas.² Consequently, legal and social conflicts surrounding the location of cell towers have increased.³ Specifically, telecommunications providers are at odds with community leaders who favor modernization but have a vested interest in protecting citizens' property from intrusive cellular towers.⁴ The growing phenomenon of wireless communication shows no signs of abatement.⁵ By late 1996, an estimated forty-one million cellular subscribers were using wireless communication devices,⁶ resulting in a need for more cellular facilities.⁷ Over the next decade, telecommunications companies will

1. See Gary Stern, *Cell Towers Beat Local Opposition*, GANNETT SUBURBAN NEWSPAPERS (visited Sept. 8, 1997) <<http://www.nynews.com/archives/me60921a.html>>; World of Wireless Communications, *Frequently Asked Questions by State and Local Officials of Wireless Antennas* (visited Feb. 19, 1999) <<http://www.wow-com.com/lawpol/antenna/proffaq.cfm>>.

2. See Michelle Gregory, *Cell-Mania*, PLANNING, July 1997, at 16. Cellular antennas are usually placed on cellular towers or already existing structures so that they blend in with the background. See *id.* Cellular providers prefer to place antennas on already existing structures because it costs less than building new cellular towers. See *id.*

3. See generally, Sara A. Evans, Note, *Wireless Service Providers v. Zoning Commissions: Preservation of State and Local Zoning Authority Under the Telecommunications Act of 1996*, 32 GA. L. REV. 965 (1998).

4. See *Cell-Phone Company Sues S. Jordan to Allow Tower*, SALT LAKE TRIBUNE, Sept. 30, 1998, at B7; Mike Fricano, *Town's Moratorium Prepares for Towers*, TIMES UNION, Sept. 2, 1998, at F3; Pam Kowalik, *Village Board Delays Acting on Tower Pending a Proposal*, BUFFALO NEWS, Oct. 20, 1998, at 5B; Sheila McCarthy, *Ruling Defeats Plan to Build Cellular Tower*, BUFFALO NEWS, Aug. 24, 1998, at 5B.

5. See *Customer Churn Stirs Up Paging Industry*, PR NEWSWIRE, Nov. 5, 1998; *New Wireless Business Phones Are Forecasted To Be Used By 77% of All Workers According to New Research from Alexander Resources*, PR NEWSWIRE, Oct. 27, 1998.

6. See World of Wireless Communications, *supra* note 1. Most people rely on cellular devices to enhance their personal safety, keep in close contact with friends and family, and to make more productive use of their personal and professional time. Everything Wireless, a network of wireless service providers, estimates that the demand for wireless communication will continue to rise over the next decade, with approximately 28,000 new subscribers signing up each day. See *id.*

7. See generally Simson Garfinkle, *Wireless Gets Real: Simson Garfinkle Goes on the Road*,

erect more than 100,000 new cellular towers across the United States.⁸

More towers are needed due to the manner in which cellular communication devices operate,⁹ the growing popularity of Personal Communication Services (“PCS”),¹⁰ and the deregulation of the telecommunications industry.¹¹ Further, due to the growing number of cellular device users and the expanded number of companies offering cellular services,¹² telecommunications companies ardently are applying for permits to erect cellular towers. The Telecommunications Reform Act of 1996 (“the Act”)¹³ made it easier for cellular companies to obtain cellular tower permits.¹⁴ Many communities, however, are not ready to grant cellular tower permits without first examining the Act and its

Gets Unplugged, and Finds Out How Close We Really Are to an Untethered Nirvana, WIRED, Oct. 1997, at 98.

8. See Denise Baker, *Local Officials Learn Ins and Outs of Cell Tower Siting*, NATION'S CITIES WKLY., Mar. 31, 1997, at 5.

9. It is necessary to place antennas relatively close together in order to provide high quality, continuous service to an area. This situation may be ameliorated to some extent by the increasing utilization of digital, as opposed to analog technology. See Timothy Thompson, *Meeting The Challenges of Zoning in the Information Age: Planning for Wireless Communications Facilities*, at Ch. 3 (visited Sept. 8, 1997) <<http://nova.bsuvc.bsu.edu/~02jtthompson/litrev.html>>.

10. See James L. Dam, *Lawyers Wrestle with Cellular Phone Towers*, LAWYERS WEEKLY USA, July 14, 1997, at 20. Experts have predicted that PCS will become more popular than standard cellular phones in the next few years because PCS uses smaller phones than regular cellular services and it is capable of superior faxing and computer transmissions. See *id.* PCS uses higher frequency radio waves, which provide clearer reception. See Brian Moura, *The Telecommunications Revolution Comes to City Hall*, WESTERN CITY, Apr. 1996 (visited Apr. 6, 1999), <<http://www.abag.ca.gov/bayarea/telco/other/moura.html>>. As PCS signals are weaker than regular cellular telephone signals, PCS antennas must be closer together. Thus, PCS providers need to erect more cellular towers in order to keep pace with the demand for PCS service. Compared to the regular cellular service offered today, PCS requires ten to twenty times as many antennas and repeaters. See Dam, *supra*. Additionally, as a result of telecommunications deregulation, the FCC has auctioned off PCS frequencies to a host of companies. Deregulation has increased competition in areas from an average of two companies to over seven companies competing for space. See Larry See, Jr., *The Monroe Guardian's Series on Cell Communications Towers in Monroe, County, Michigan—Part 1*, MONROE GUARDIAN, 1997 (visited Jan. 31, 1999) <<http://monroe.lib.mi.us/cwis/guardian.htm>>.

11. On March 14, 1996, the FCC “completed the biggest auction in U.S. history, dividing airwave rights into 99 geographic licenses and awarding those licenses to commercial mobile-radio-service carriers nationwide.” Michelle Gregory, *When Cells Multiply: Regulating Cellular Tower Siting for the Public Good*, PTI-PRISM, Winter 1994/1995 (visited Jan. 1, 1998) <<http://pti.nw.dc.us/PRISM/W9596/FRAMES/STORY.HTM>>. The FCC authorized the sale of additional licenses in late 1996, “allocat[ing] 120 Mhz (megahertz) of radio spectrum in the 1850—1990 Mhz frequency band for ‘broadband PCS’ which is digital wireless phone service.” See See, *supra* note 10 (quoting AT&T External Affairs Manager Rackeline Hoff). A megahertz is a unit of frequency (wavelength) expressed in cycles per second. See *id.*

12. See World of Wireless Communications, *supra* note 1 and accompanying text.

13. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.). The Act was the first major overhaul of the Telecommunications Act since 1934.

14. See Thompson, *supra* note 9, at Ch. 1.

ramifications.¹⁵ They desire time to formulate and implement ordinances that protect community interests, while conforming to the Act. Consequently, some communities have tried to solve their problems by implementing moratoria.¹⁶ This solution is only temporary because under the Act a state or local government must review requests for towers within a “reasonable period of time” after the request is filed.¹⁷ Further, the government cannot pass legislation that has the effect of prohibiting personal wireless services in a community.¹⁸ An understanding of these complex issues is pertinent for any community with cellular technology.

Part I of this Note develops the background of this problem, explains what cellular towers are and how they operate, and outlines the relevant provisions of the Act.¹⁹ Part II examines why communities need new zoning ordinances. It explains how moratoria are a useful and necessary planning tool when properly used and a formidable obstacle to telecommunication providers when abused.²⁰

15. In his remarks to WIRELESS 98 in Atlanta, Georgia on February 23, 1998, William E. Kennard, Chair of the Local and State Government Advisory Committee (“LSGAC”) of the FCC, praised the great advances that wireless communications has allowed in both business and personal pursuits, while emphasizing the tension that exists between wireless providers and state and local governments. He explained that in the United States, where many communities value the appearance of their neighborhoods, cellular providers “face the power of entrenched incumbents. Any land use board who hears testimony about how ugly towers are can delay” cellular providers until there is no longer a competitive business reason to erect a tower. William E. Kennard, Chairman, Federal Communications Commission, Remarks at WIRELESS 98 (Feb. 23, 1998) (transcript available at <<http://www.fcc.gov/commissioners/kennard/speeches.html>> (visited Apr. 1, 1999)).

16. To be sure, moratoria represent neither the best nor the only way for a community without adequate siting provisions to deal with cellular tower applications. Moratoria, however, are a relatively simple solution to the lack-of-time problem that many communities face.

17. See 47 U.S.C. § 332(c)(7)(B)(ii) (Supp. II 1996). For the text of the statute, see *infra* note 37.

18. See 47 U.S.C. § 332(c)(7)(B)(i)(II) (Supp. II 1996). For the text of the statute, see *infra* note 37.

19. See *infra* note 50 and accompanying text.

20. This Note provides examples of how communities can follow the recently formulated guidelines for cellular facility siting and why they should do so. Such guidelines have been advocated by the LSGAC, the Cellular Telecommunications Industry Association (“CTIA”), the Personal Communications Industry Association (“PCIA”), and the American Mobile Telecommunications Industry (“AMTA”). The LSGAC is a body of elected and appointed local and state officials established by the FCC in March 1997. The FCC describes the LSGAC in an unofficial announcement as providing “advice and information to the Commission on key issues that concern local and state governments and communicates state and local government policy concerns regarding proposed Commission actions pursuant to the Telecommunications Act of 1996.” Federal Communication Commission, *Chairman William E. Kennard Announces Historic Agreement by Local and State Governments and Wireless Industries on Facilities Siting Issues* (visited Apr. 1, 1999) <http://www.fcc.gov/Bureaus/Wireless/News_Releases/1998/nrw18032.html>. The CTIA, PCIA, and AMTA are trade associations representing the wireless industry. These bodies recently promulgated cellular tower siting guidelines through the use of a multilateral agreement. See *Guidelines for Facilities Siting Implementation and Informal Dispute Resolution* (visited Apr. 1, 1999) <<http://www.fcc.gov/state/local/agreement.html>> [hereinafter Agreement]; see also Kenneth S. Fellman, Chair of the LSGAC, Press Statement (Aug. 5, 1998) (transcript available at

Part III examines the meaning of the relevant provisions of the Act, the case law, and legislative restrictions on moratoria. Part IV proposes a bright-line test for establishing the propriety of a moratorium and gives an example of a model moratorium. Part V concludes by emphasizing the important roles that community planners, telecommunications providers, the FCC, and the Judiciary play in solving cellular tower siting problems.

I. BACKGROUND INFORMATION

A. *Wireless Communication Systems*

Section 704 of the Telecommunication Reform Act of 1996 addresses wireless communication facilities.²¹ These facilities allow cellular phones, pagers, and wireless faxes to work,²² and include towers, poles, antennas, or other structures used to transmit or receive radio or television signals, or any other spectrum-based transmissions/receptions.²³ *Antennas placed within a defined area*²⁴ is called a cellular system, and *the number and location of antennas within a given area* directly affect the service available to cellular customers.²⁵

<<http://www.fcc.gov/statelocal/kf080598.html>> (visited Apr. 1, 1999) [hereinafter Press Statement]. Fellman considers the Agreement of August 5, 1998, as “a beginning” to resolving the tensions that have arisen between local and state government leaders and cellular services providers. *Id.* He claims that the Agreement “resolves the issue of possible preemption of local zoning authority with respect to moratoria, and it gives [local and state governments] a mechanism to address the difficult issues in this area that will continue to arise from time to time.” *Id.* In entering into this agreement, the LSGAC recognized that some local governments have used moratoria improperly, while representatives from cellular service providers acknowledged that zoning moratoria are a valid planning tool when not used to completely prohibit cellular expansion. The LSGAC advocated resolution of the improper use of zoning moratoria by general educational efforts and “intervention on a case by case basis, rather than a broad national preemption of local authority.” *Id.* Indeed, the Agreement encourages local governments to work with cellular service providers to develop “local plans concerning tower and antenna siting.” Agreement, *supra*.

21. See Pub. L. No. 104-104, § 704, 110 Stat. 56, 151-52 (1996) (codified at 47 U.S.C. § 332(c)(7) (Supp. II 1996)). Throughout this Note, 47 U.S.C. § 332(c)(7) will be referred to in the text as section 704. Scholars in this field refer to this section as section 704 in reference to its designation in the Telecommunications Act. Throughout the footnotes, however, this Note will cite directly to the *United States Code*.

22. See Thompson, *supra* note 9, at Ch. 1.

23. See *id.* at Ch.1. There is no official consensus among local governments or the courts as to a definition of a communications facility. The definition used in this Note is a conglomerate of the most commonly used definitions by experts in the field.

24. A defined area refers to anywhere one wants to have cellular service.

25. See *See*, *supra* note 10. Cellular phones transmit the user’s voice, in the form of radio waves, to a wireless base tower. See *World of Wireless Communications*, *supra* note 1. The station is connected with the local telephone network and one’s voice is sent through this network to a wired telephone or another wireless phone. See Thompson, *supra* note 9, at Ch. 3. Cellular technology uses the same

Telecommunications companies provide wireless service to the public by initially carving service areas into “cells.”²⁶ Each cell contains at least one cellular antenna.²⁷ Where there are no existing structures high enough to accommodate an antenna, telecommunications companies must build tower structures.²⁸

B. The Telecommunication Reform Act of 1996

President Clinton signed the Act²⁹ into law on February 8, 1996.³⁰ According to the Federal Communications Commission (“FCC”),³¹ the foremost authority on telecommunications in the United States, Congress passed the Act to promote competition among communications companies, to open access to information networks, and to spur private investment.³² Congress

individual radio frequencies over and over again to serve a single county or city. *See id.* at Ch. 1 (citing Ameritech, *How a Cellular Phone Works* (1996) (visited Apr. 2, 1999) <<http://www.ameritech.com/products/wireless/new/acsn0007.html>>). Cellular technology is therefore unlike CB radio, in which all users must share several radio channels. Cellular channels can be “reused simultaneously” without forcing callers to hear each other’s conversations. This simultaneous reuse is possible because of the speed and nature of cellular communications. *Id.*

26. *See* Thompson, *supra* note 9, at Ch. 3. The geographical areas of cellular systems (“cells”) range from one to twenty miles in diameter depending on the terrain and the system’s capacity needs. *See id.* Cellular systems used for business purposes, such as computer or fax transmissions, require more antennas to accommodate users in the service area because they encode more information on higher frequencies. *See id.* Similarly, if the area contains many trees, mountains, or skyscrapers, additional antennas are needed to ensure the quality transmission of radio waves. *See id.* As there are numerous antennas within each cell and the range of radio frequencies can be shaped to fit a single cell, there is little chance of interference. *See id.* The transmitter/receiver is connected to the cellular company’s switchboard or base tower to the local network. When the phone begins to leave a cell, the signal becomes weaker and the network automatically transfers the call to the next closest tower that has a stronger signal. This is known as a “handoff.” *See id.*

27. *See id.*

28. *See id.*

29. Telecommunications Reform Act of 1996, Pub. L. 104-104, 110 Stat. 56 (Supp. II 1996) (codified in scattered sections of 47 U.S.C.).

30. *See* Thompson, *supra* note 9, at Ch. 1; Federal Communications Commission, *Telecommunications Act of 1996 Enacts 21 Proposals to “Reinvent” Agency* (visited Apr. 2, 1999) <http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1996/nrmc6008.txt> [hereinafter *Reinvent Agency*].

31. The Federal Communications Commission is the agency most involved in the regulation of telecommunications in the United States. For information highlighting FCC legislative proposals see generally Mary Beth Richards, Special Counsel to the Commission for Reinventing Government, *Report to the Commissioners: Creating a Federal Communications Commission for the Information Age* (visited Apr. 2, 1999) <<http://www.fcc.gov/Bureaus/Miscellaneous/Informal/ilmc5001.txt>>.

32. In May 1995 the five FCC Commissioners noted in their transmittal letter to Congress that nearly all of the FCC’s proposals “are deregulatory or pro-competitive in nature in that their enactment will eliminate certain Commission functions, privatize other responsibilities, reduce regulatory burdens on industry, increase telecommunications competition, save agency resources, or otherwise streamline agency

discussed local zoning authority prior to passing the Act, focusing on the FCC's role in zoning for Direct Broadcast Satellite Dishes and cellular towers.³³

Section 704 of the Act directly addresses federal governmental oversight and limited preemption of local authority in cellular siting matters.³⁴ This section generally preserves local zoning authority, prohibits discrimination against different service providers,³⁵ makes it illegal to pass legislation that has the effect of prohibiting personal wireless service to a community,³⁶ and specifies an appeal procedure for parties alleging injury based on local governmental regulation of "personal wireless service" facility placement.³⁷ To properly deny

processes." *Reinvent Agency*, *supra* note 30. According to its legislative history, Congress intended the Act to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . ." H.R. CONF. REP. NO. 104-458, at 1 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124.

33. See Thompson *supra* note 9, at Ch. 1.

34. See 47 U.S.C. § 332(c)(7) (Supp. II 1996); see also The Wireless Lawyer, *The FCC's Zoning/Land Use Policy* (visited Aug. 22, 1997) <<http://www.wireless-lawyer.com/wi03003.html>>.

35. See 47 U.S.C. § 332(c)(7)(B)(v) (Supp. II 1996). For the relevant text of the statute, see *infra* note 37.

36. See 47 U.S.C. § 332(c)(7)(B)(i)(II) (Supp. II 1996). For the relevant text of the statute, see *infra* note 37.

37. 47 U.S.C. § 332(c)(7) states:

(7) Preservation of local zoning authority

(A) General Authority—

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority 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

a permit, a state or local government must expeditiously review requests for towers³⁸ and provide a written denial supported by substantial evidence.³⁹ Additionally, local officials cannot base zoning regulations or denials of cell tower erection applications on the environmental effects of radio frequency emissions, if the facilities comply with the FCC regulations concerning such emissions.⁴⁰ Despite these seemingly clear limitations, planners are unsure how to quickly enact legal and effective provisions that protect their communities from the erection of unsightly cell towers.⁴¹ Thus, many communities are buying time with moratoria so that they can formulate long-term solutions to quickly exploding cellular tower siting problems.

II. "CELL MANIA"⁴² AND THE NEED FOR NEW ORDINANCES

The recent flood of cellular tower applications has forced local municipalities and governments throughout the United States to balance the desire to modernize against concerns about citizens' property rights.⁴³ Telecommunications companies are eager for cities to approve their tower permit applications so they can expand while local citizens complain to municipal planners about companies erecting in their backyards.⁴⁴ Most local

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) of this title).

Id.

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

39. See *id.* § 332(c)(7)(B)(ii).

40. See *id.* § 332(c)(7)(B)(iv). This Note does not address or discuss the growing body of information available regarding human exposure to radio frequency fields from cellular and PCS radio transmitters. Some individuals claim that such emissions cause certain kinds health ailments. The FCC says there might be a possible risk, but "it is probably small." Federal Communications Commission, *Information on Human Exposure to Radio Frequency Fields from Cellular and PCS Radio Transmitters* (visited Apr. 6, 1999) <<http://www.fcc.gov/oet/rfsafety/cellpcs.html>>.

41. See Dam, *supra* note 10, at 20.

42. "Cell Mania" refers to the recent mushroom of wireless communications systems and dramatic commercial expansion of wireless communication customers. See Gregory, *supra* note 2.

43. See *id.*

44. Cellular towers are becoming the latest "Not In My Backyard" ("NIMBY") complaint among

governments lack adequate procedures for dealing with this influx and are unable to respond effectively⁴⁵ because they generally do not look at the Act or create cell tower zoning policies until faced with a cellular-tower-permit-request crisis.

A community must establish an applicable zoning ordinance before any wireless communication provider erects a cellular tower. As soon as a company constructs a tower or places an antenna on already existing structures, local governments lose their power to dictate zoning restrictions without violating the nondiscrimination provision of section 704.⁴⁶ Presently, numerous communities need cell tower zoning ordinances.⁴⁷ Other communities that have such ordinances are finding that their regulations conflict with the new FCC guidelines.⁴⁸ Without additional time, communities lacking appropriate ordinances rarely can enact “valid” or “appropriate” legislation before they must make a decision on cellular tower applications.⁴⁹

Moratoria on tower applications are a short-term solution to the timing issues faced by communities without cell tower ordinances.⁵⁰ They allow

citizens facing the possibility of telecommunications companies placing cellular towers in residential neighborhoods. *See, e.g.*, Dam, *supra* note 10, at 20; John J. Keller, *With Cellular Towers Sprouting All Over, Towns Begin to Rebel*, WALL ST. J., July 2, 1996, at A1; *see also supra* note 10.

45. “Across the U.S., this wireless telecommunications revolution has encountered significant resistance at the grassroots level.” Degnan et al., *The Telecommunications Act of 1996: § 704 of the Act and Protections Afforded the Telecommunications Provider in the Facilities Siting Context*, 3 MICH. TEL. TECH. L. REV. 1, ¶ 3 (1997) <<http://www.law.umich.edu/mttlr/volthree/mclaren.html>> (citing Keller, *supra* note 44, at A1).

46. *See* 47 U.S.C. § 332(c)(7)(B)(i)(I) (Supp. II 1996). For the text of the statute, *see supra* note 37.

47. *See* Gregory, *supra* note 2, at 16.

48. In a Spring 1997 survey of subscribers to Planning Advisory Service and Zoning News sponsored by the American Planning Association, sixteen percent of respondents said they had “begun to develop telecommunications plans or to add telecommunications elements to their comprehensive plans.” Gregory, *supra* note 2, at 16. These survey results indicate a shift in thinking due to the deregulation of the telecommunications industry. Planners rarely considered telecommunications a local concern in the past, as the industry was closely regulated by the Federal Communications Commission. *See id.* at 16-17.

49. *See* Gregory, *supra* note 2. Section 704 dictates that decisions must be made within a reasonable period of time. *See* 47 U.S.C. § 332(c)(7)(B)(ii) (Supp. II 1996).

50. *See* Lori Harrison-Stone, *Moratorium Requested for Cellular Towers*, NORTHWEST ARKANSAS TIMES, July 31, 1997 (visited Feb. 19, 1999) <<http://www.nwarktimes.com/archives/index.inn?loc=detail&doc=/ar/nwarnews/archives/store/1997/July/31-481-news7.txt>>. In Washington County, Arkansas, citizens filed a lawsuit against the Planning Board alleging that approval of cell tower applications and placement of cellular towers in the county would violate restrictive covenants on their property. These citizens have called for a moratorium on the approval of cell tower applications because “time to develop regulations that will ensure such towers are placed in less populated areas A valid moratorium can give [planning boards] time to decide what is best for the community without being strong-armed. . . .” *Id.* (internal quotations omitted). A valid moratorium might also provide more time for lawsuits concerning the constitutionality of the FCC regulations to be decided by courts across the country. *Id.*; *see also infra* note 149 and accompanying text. For a brief overview on litigation under

planners to assess fully the issues surrounding cellular tower siting without having to worry about setting precedent by granting cellular tower permits. Although no clear legally enforceable standard defines when moratoria are appropriate, the FCC has indicated that moratoria are only a temporary solution for communities lacking proper cell tower ordinances.⁵¹ Recently, the FCC and representatives of the telecommunications industry reached an agreement (“the Agreement”) regarding moratoria and established guidelines for facility siting implementation.⁵² The Agreement recognizes that a moratoria may be appropriate if a local governmental body needs time to review or amend its land use regulations but emphasizes that moratoria should be lifted as soon as possible.⁵³ Additionally, the Agreement suggests that “[i]n many cases, the issues that need to be addressed during a moratorium can be resolved within 180 days.”⁵⁴ All parties involved, however, recognize that 180 days is not adequate in some cases.⁵⁵ The Local and State Government Advisory Committee (“LSGAC”)⁵⁶ advocates the flexible time limitation due to the difficulty of properly reviewing and implementing cell tower zoning ordinances.⁵⁷

section 704, see Degnan et al., *supra* note 45, at Part IV.

51. See Dam, *supra* note 10, at 20; see also Barrie Tabin, *NLC Champions Cities' Authority in Cell Tower Siting*, NATION'S CITIES WKLY., Feb. 24, 1997, at 1. At a meeting sponsored by the FCC in Washington D.C. in February of 1997, telecommunications representatives “asked the FCC to preempt the ability of local governments to institute brief moratoria on the processing of applications and granting of tower siting permits. This preemption request was first made several weeks [before the mid-February meeting] by the Cellular Telecommunications Industry Association (“CTIA”) in a petition filed before the FCC. *Id.* The National League of Cities (“NLC”) contended that the FCC had no authority under the Act to review local zoning ordinances. The NLC emphasized that “[t]he need to have the FCC comply with this provision is essential to municipal attorneys who maintain that a state or federal court will likely provide a more neutral, much less costly arena than the FCC where finances and proximity cause industry attorneys to have an advantage.” *Id.* LSGAC has recommended that the FCC deny CTIA’s petition. See *infra* note 139.

52. See Agreement, *supra* note 20 and accompanying text.

53. See *id.* at Part I.A.

54. *Id.* at Part I.B.

55. See *id.* The Agreement specifies several other guidelines for moratoria. It says that governments choosing to enact moratoria should specify a termination date. The Agreement also states, “Moratoria should not be used to stall or discourage the placement of wireless telecommunications facilities within a community, but should be used in a judicious and constructive manner.” *Id.* at Part I.B. This means that a local government should continue to accept and process applications during a moratorium, so that when the moratorium is lifted, wireless communication providers can resume operations. See *id.* at Part I.C.

56. See *supra* note 20 for an explanation of LSGAC.

57. In his thesis, Timothy Thompson, a graduate of Ball State University and Planner for the City of Rochester, New Hampshire outlines six steps governments should take to respond effectively to the cellular tower crisis facing many local governments. See Thompson, *supra* note 9, at Ch. 7. First, local governments and planners need to develop an understanding of the Act. The second step is to “buy time” while planners formulate and implement a plan to deal with the pertinent cellular and land use issues.

Before the recent Agreement, a district court posited the limited use of moratoria and held invalid a community's moratorium on the processing and issuance of building or zoning applications for cellular towers.⁵⁸ Other courts, however, have upheld moratoria that are reasonable in length and not overly restrictive.⁵⁹ Thus, examining how courts have interpreted the requirements of the Act is useful in formulating recommendations regarding cellular tower siting issues.

III. RESTRICTIONS ON MORATORIA

Courts traditionally have held that cellular tower siting falls within the scope of local zoning power.⁶⁰ Government entities have disagreed, however, about a community's limitations in enacting zoning ordinances and using moratoria to evaluate and create land use policies.⁶¹ Courts have recognized several public

Third, a municipality should review its existing ordinances to assess what statutes and language already apply to towers, support structures, antennas, or other wireless facilities. *See id.* Planners immediately should repeal any ordinance language that violates the Act. The fourth step is meeting with all local telecommunications service providers and involving them in the development of the community's wireless planning. Community planners need to know how providers are going to react to colocation requirements, whether their ideas are technologically feasible, and whether competitors truly are willing to come together to plan and implement the best solutions for the community. Face-to-face negotiations tend to be more effective in this type of planning than contract negotiations and bare ordinance enactment. *See id.* (citing feedback from Glen Markegard, Associate Planner of Bloomington, Minnesota). The fifth step for local governments is developing and amending regulations dealing with wireless communications facilities and writing an ordinance if necessary. Finally, planners must keep the lines of communication open among service providers, governmental planners, and the public. *See id.* The Federal Communications Commission also provides a fact sheet suggesting that wireless service providers "supply as much advance information about the nature of its service offerings and the 'big picture' plan for service deployment." Federal Communications Commission Wireless Telecommunications Bureau, *Fact Sheet #2: National Wireless Facilities Siting Policies* (Sept. 17, 1996) at 7 [hereinafter *Fact Sheet #2*]. The FCC goes on to support Thompson's suggestion that planners familiarize themselves with cellular siting issues and statutes by stating, "Local zoning authorities have a strong interest in becoming fully informed about exactly what they are authorizing, and what will be the long-term effects of facilities siting on land use in their communities." *Id.*

58. *See* Sprint Spectrum, L.P. v. Jefferson County, 968 F. Supp. 1457 (N.D. Ala. 1997).

59. *See* Sprint Spectrum, L.P. v. City of Medina, 924 F. Supp. 1036 (W.D. Wash. 1996); Westel-Milwaukee Co. v. Walworth County, 556 N.W.2d 107 (Wis. Ct. App. 1996).

60. *See* 4 EDWARD ZIEGLER, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 55A.02[1] (4th ed. 1998) (citing *Carino v. Pilon*, 530 N.Y.S.2d 1022 (N.Y. Sup. Ct. 1988) (upholding denial of variance and the constitutionality of ordinance prohibiting tower antennas and satellite dishes on lots of less than one acre); *Schroeder v. Municipal Court*, 73 Cal. App. 3d 841 (Cal. Ct. App. 1977) (upholding ordinance prohibiting radio or television transmitting or receiving antenna over 40 feet in height in single-family zone)); *see also* *Abbot v. City of Cape Canaveral*, 840 F. Supp. 880 (M.D. Fla. 1994) (upholding location, installation, screening, and height restrictions of satellite dish antennas); *Bell Atlantic Mobile Sys., Inc. v. Zoning Hearing Bd.*, 676 A.2d 1255 (Pa. Commw. Ct. 1996) (upholding denial of site-plan approval for cellular antennas).

61. *See generally* Press Statement, *supra* note 20; Ziegler, *supra* note 60.

purposes that support local zoning power,⁶² and local zoning ordinances traditionally are upheld as long as they reasonably relate to some zoning purpose.⁶³ Indeed, section 704 recognizes and preserves state and local authority to regulate the placement, construction, and modification of personal wireless facilities but imposes new standards that govern zoning regulations.⁶⁴ The Act is “intended to remove all barriers to entry in the provision of telecommunications services”⁶⁵ in order to encourage the rapid deployment of new telecommunications technologies. Thus, state and local governments must balance federal law against local sovereignty issues.

Merely a few pages of legislation lay out section 704’s regulations,⁶⁶ but the meaning of the statute remains unclear. Issues regarding section 704 include: what constitutes a ban on wireless service; what regulatory actions a community can take without discriminating against providers of essentially similar services; and what constitutes an illegal moratorium in relation to cellular siting applications.⁶⁷

A. General Requirements of Section 704

As stated in the Act, local regulations cannot ban service to an area.⁶⁸ This means that a community can neither expressly ban wireless communications

62. See Ziegler, *supra* note 60, § 55A.02[1]. Some of these purposes are the protection of health and safety, protection of property values, protection of aesthetics, and protection of the character of the area. *See id.*

63. “Zoning controls typically may include restrictions on local placement, and installation, as well as height, fencing minimum area, setback, and screening, painting, or landscaping requirements.” *Id.* (citing generally Thomas J. Ragonetti, *A Towering Problem? Land Use Regulation of Commercial Broadcasting Towers*, 15 ZONING & PLANNING L. REPT. 9 (1992)).

64. See Ziegler, *supra* note 60, § 55A.03[2]; see also *supra* note 34 and accompanying text.

65. H.R. CONF. REP. NO. 104-458, at 126 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 138. Specifically, section 704 of the Act provides for the “express preemption of local regulation of cellular and personal wireless facilities in a number of limited areas and imposed several federal standards on local regulation of these facilities.” Ziegler, *supra* note 60, § 55A.03[2]; see also Degnan et al., *supra* note 45.

The legislative history of the Act evidences the competitive objective: “The managers on the part of the House and the Senate [intend] to provide for a pro-competitive, de-regulatory, national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . .” H.R. CONF. REP. NO. 104-458, at 113 (1996), reprinted in 1996 U.S.C.C.A.N. 124.

66. For the text of the statute, see *supra* note 37.

67. Courts around the country are also deciding what information must be present in the written findings denying the application of a telecommunications provider. For further information on this issue, see *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732 (C.D. Ill. 1997); *Western PCS II Corp. v. Extraterritorial Zoning Authority*, 957 F. Supp. 1230 (D.N.M. 1997); *Bell S. Mobility, Inc. v. Gwinnett County, Georgia*, 944 F. Supp. 923 (N.D. Ga. 1996).

68. See 47 U.S.C. (c)(7)(B)(i)(II) (Supp. II 1996). For the text of the statute, see *supra* note 37.

services, nor enact legislation having such an effect.⁶⁹ In their ordinances, planners must provide for feasible colocation requirements⁷⁰ and general location requirements as well as other provisions. The Act does not require state and municipal governments to set aside property for cell tower siting but requires the FCC to provide states with technical support to encourage them to make property under their jurisdiction available for cell tower placement.⁷¹ Local municipalities may charge reasonable property use fees to telecommunication companies.⁷²

Local officials may seek to control the placement and maintenance of the towers by requiring telecommunications providers to place antennas on existing

69. Telecommunications companies favor the preemption of state and local governments because it allows them to put towers on property where a municipal government might otherwise want to restrict tower siting. *See* Wireless Lawyer, *supra* note 34. Additionally, until the recent Agreement between the LSGAC and representatives from the telecommunications industry, members of the CTIA sought “federal preemption of siting and zoning moratoria regulation[s].” In the Matter of Federal Preemption of Moratoria Regulation Imposed by State and Local Governments On Siting of Telecommunications Facilities, CTIA stated in its petition:

Absent preemption of these moratoria, the Commission ensures at best additional delay and added costs in continued rollout of PCS and other wireless services The uneconomic costs imposed by such unnecessary, disparate State and local regulation will ultimately be borne by the consumer in the form of higher rates and delayed services, no doubt contrary to the public interest as expressed in the Communications Act.

Petition for Declaratory Ruling of the Cellular Telecommunications Industry Association (Dec. 16, 1996) (visited Jan. 31, 1999) <<http://www.fcc.gov/wtb/siting/ctiapet.html>> [hereinafter *CTIA Petition*]. CTIA argued that state and local zoning power could not be used to impose moratoria because such delays amount to bans, which are impermissible under section 704. The CTIA petition stated that the FCC has a duty to preempt local government zoning moratoria, which operate as barriers to entry. But its explanation of the balance of power between federal and state governments failed to account for any situation in which a moratorium might be appropriate. *See CTIA Petition, supra*. While state and local governments retain some authority under the Communications Act to regulate zoning, this authority does not comprehend the erection and maintenance of telecommunications service or provider entry barriers. The Commission’s preemptive authority arises if and when state and local government action impedes entry of new telecommunications services and/or providers. *See id.* Currently, the CTIA recognizes that moratoria are sometimes necessary to allow local governments to write comprehensive zoning policies that comply with the standards of the Act. *See* Agreement, *supra* note 20 and accompanying text.

70. Colocation requirements, often called shared use requirements, specify that applicants for commercial wireless telecommunications service towers or support structures must design their towers structurally, electrically, and in all other respects, to accommodate at least two additional users if the tower is over one hundred feet high or for at least one additional user if the tower is over 60 feet high. Colocation/tower-sharing requirements are often seen by telecommunications providers as anticompetitive, however, to date, there have been no antitrust suits concerning this matter. Tower sharing results in fewer towers in a community, but companies generally must construct taller towers, because they must place antennas of competing companies a certain distance apart. Some communities choose to exclude tower sharing provisions because of concerns about tower height rather than tower quantity.

71. For the text of the statute, see *supra* note 37.

72. Obvious questions that arise out of this provision include what is reasonable and how much incentive do states really have to provide rights-of-way and easements to telecommunications companies.

public property structures when technically possible.⁷³ Placing antennas on public property may allow local government officials to ensure that telecommunication companies are maintaining cell towers properly.⁷⁴ Allowing cellular tower siting on government property also potentially reduces the number of antennas scattered randomly throughout the community, and benefits the entire community both by extending personal wireless services into the community and by generating revenue from the rental cost of government property.⁷⁵

According to section 704, local regulations cannot prohibit cell tower siting due to possible health problems caused by the tower's radio frequency emissions if the emissions meet FCC guidelines.⁷⁶ In *Westinghouse Electric Corp. v. Township of Hamptown*,⁷⁷ the Commonwealth Court of Pennsylvania upheld the reversal of the township's denial of a cell tower permit to Cellular One.⁷⁸ The court held that, under Pennsylvania state law, a showing by the zoning board that the cell tower would *possibly* rather than *probably* have an adverse impact on the community was insufficient grounds for denial of Cellular One's permit application.⁷⁹ The court stated that, although the Act was not in place when the township originally dismissed Cellular One's application, the Act indicates that governmental entities cannot deny petitions based on unsubstantiated claims about the effects of electromagnetic radiation.⁸⁰

73. See Moura, *supra* note 10. For example, the City of Palo Alto rented a right-of-way for a telecommunications utility and received an annual lease payment and free fiber optic service between some of its buildings in exchange for providing free duct space to the telecommunications company. See *id.* "In most cases, telecommunications providers decide to do their own trenching or boring to put in telecommunications lines. Nevertheless, it is in the best interests of all cities to inventory what surplus conduits and rights-of-ways they may own suitable for rental by telecommunications providers." *Id.* "Several cities in California have already retained the services of companies such as Coldwell-Banker, Kingston Cole and Associates, and TelNet Communications Group to act as leasing agents to, in effect, market city property for these antenna locations. This seems to be a key revenue opportunity that cities should consider." *Id.*

74. See *supra* notes 60-63 and accompanying text.

75. See Moura, *supra* note 10.

76. See 47 U.S.C. § 332(c)(7)(B)(iv) (Supp. II 1996). For the text of the statute, see *supra* note 37. Additionally, section 704(b) of the Act requires the FCC to establish new rules regarding the environmental effects of radio frequency emissions that are under consideration in ET Docket 93-62 within 180 days of the enactment of the Act. See *Westinghouse Electric Corp. v. Township of Hamptown*, 686 A.2d 905 (Pa. Commw. Ct. 1996).

77. 686 A.2d 905 (Pa. Commw. Ct. 1996).

78. See *id.* at 908.

79. The trial court found that the "evidence did not demonstrate 'to a high degree of probability that the use will adversely impact on the public interest; the mere possibility of adverse impact is not enough.'" *Id.* at 906 (quoting *Brentwood Borough v. Cooper*, 431 A.2d 1177, 1179 (Pa. Commw. Ct. 1981)).

80. See 47 U.S.C. § 332(c)(7)(B)(iv) (Supp. II 1996). For the text of the statute, see *supra* note 37. The court in *Westinghouse* held that "even without the direction of [the Act] the trial court properly held

Therefore, the denial was improper.

Section 704 also provides that local regulations cannot unreasonably discriminate against any wireless service provider in favor of another.⁸¹ A city is allowed, however, to make reasonable distinctions in its regulatory treatment of different cell tower applications.⁸² In *Westel-Milwaukee Co. v. Walworth County*,⁸³ the Court of Appeals of Wisconsin noted that the Act made substantive changes to the zoning process.⁸⁴ In addition to remanding the denial of a permit for a cellular tower to the district court for further consideration, the court discussed balancing the county's zoning concerns with the Act's nondiscriminatory provision.⁸⁵

B. What Constitutes a Reasonable Period of Time Under the Act

The Act provides that local officials must evaluate applications for wireless towers and support structures within a reasonable period of time, considering the nature and scope of the request.⁸⁶ Many municipalities already have found themselves in court over this matter.⁸⁷ Ideally, governments impose moratoria to give themselves time to enact proper tower siting legislation.⁸⁸ Many municipalities, however, are using moratoria to stall or prohibit wireless

that the Objectors had not met their burden of proving a high degree of probability that the use would adversely impact on the public interest." *Westinghouse*, 686 A.2d at 908 n.4.

81. See 47 U.S.C. § 332(c)(7)(B)(i)(I). For the text of the statute see *supra* note 37.

82. "For example, the [Conference Committee] do[es] not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's . . . tower in a residential district." H.R. CONF. REP. NO. 104-458, at 208 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 222. See generally *Westel-Milwaukee Co. v. Walworth County*, 556 N.W.2d 107 (Wis. Ct. App. 1996) (remanding discrimination suit for retroactive application of Act's provisions).

83. 556 N.W.2d 107 (Wis. Ct. App. 1996).

84. See *id.* at 109. *Westel-Milwaukee* was the first case in which the Court of Appeals of Wisconsin applied section 704 of the Act. The court noted that aside from the provisions of section 704, "the Act places no other limits on 'the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.'" *Id.* (quoting 47 U.S.C. § 332(c)(7)(A) (Supp. II 1996)).

85. See *id.* The court also noted that any person or corporation adversely affected by a state or local government's action or failure to comply with section 704 may seek review in the courts. See *id.* at 109. Such review is on an expedited basis. See 47 U.S.C. § 332(c)(7)(B)(v). For the text of the statute, see *supra* note 37.

86. See 47 U.S.C. § 332(c)(7)(B)(ii). For the text of the statute, see *supra* note 37.

87. See World of Wireless Communications, *Antenna Moratoria Search* (visited Apr. 6, 1999) <<http://www.wow-com.com/lawpol/antenna/seeall.cfm>>. This web page lists most of the moratoria that local governments have imposed in the past year and how telecommunications companies have responded. It classifies each moratorium by date, city or county, state, type, duration, reason, and current status.

88. See *supra* note 44 and accompanying text; see also *infra* note 149. "To avoid writing bad law, some communities have instituted siting moratoria until they have ample opportunity to research and formulate regulations that are fair to both community and industry." Gregory, *supra* note 11.

communications providers from erecting towers.⁸⁹ Thus, wireless service providers are looking to the Judiciary for relief from local moratoria.⁹⁰

In *Sprint Spectrum, L.P. v. City of Medina*,⁹¹ the United States District Court for the Western District of Washington held that a city's six-month moratorium satisfied section 704 and therefore was not an illegal ban on telecommunication services within the community.⁹² The district court based its decision on the plain language of the statute and its legislative history.⁹³ In contrast, the court in *Sprint Spectrum, L.P. v. Town of West Seneca*⁹⁴ held that a town board's lack of action on an application, after a ninety-day moratorium expired, constituted a violation of the Act.⁹⁵

In *Sprint Spectrum, L.P. v. Jefferson County*⁹⁶ the court held a moratorium null and void because it amounted to "unreasonable discrimination" between telecommunications companies,⁹⁷ a direct violation of the Act. This ruling has

89. See Brad Stone, *The Great Cell Invasion*, NEWSWEEK, Nov. 10, 1997, at 88. "Because of [the *Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. 1036 (W.D. Wash. 1996)] ruling, there are 606 moratoria currently in effect around the country on the siting of wireless facilities." *Id.*; see also CTIA Petition, *supra* note 69. "The deployment of an efficient and ubiquitous wireless telecommunications infrastructure is being threatened by State and local regulation nationwide expressly prohibiting the construction of additional tower sites. These regulations exceed the bounds of reasonableness by imposing absolute restrictions for extended periods of time." *Id.*

90. See generally, Evans, *supra* note 3, at 987 & n.92.

91. 924 F. Supp. 1036 (W.D. Wash. 1996).

92. The moratorium in question was passed just five days after the effective date of the Act.

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

Medina, 924 F. Supp. at 1040.

93. Specifically, the court quoted the Joint Explanatory Statement of the Congressional Committee of Conference as saying:

If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision.

Id. (quoting H.R. CONF. REP. NO. 104-458, at 208 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 223).

94. 659 N.Y.S.2d (N.Y. Sup. Ct. 1997). In *West Seneca* the court held that Sprint is "entitled to have its applications promptly determined and to date, the Town's actions are tantamount to a denial." *Id.* at 690.

95. See *id.* The court noted that the town had also failed to comply with section 704 of the Act by failing to support its denial of the permit in writing supported by substantiated evidence, and because the town's actions had the effect of prohibiting personal wireless service to the area. See *id.* at 689.

96. 968 F. Supp. 1457 (N.D. Ala. 1997).

97. *Id.* at 1468. The court also spoke to the anticompetitive effects of moratoria:

Providers entering the market several years ago were not subjected to the same barriers. Indeed, earlier

attracted a great deal of attention in the legal community⁹⁸ because it was the first case to hold a moratorium imposed by a county attempting to enact cellular tower siting regulations null and void. The Northern District of Alabama found this case factually distinguishable from earlier cases such as *Medina*⁹⁹ and *Westel-Milwaukee Co.*,¹⁰⁰ which supported a community's right to impose a reasonable moratorium on the processing of cell siting applications.¹⁰¹

In *Jefferson County*¹⁰² the plaintiff provided personal communications services to consumers in Jefferson County and surrounding areas. Before the passage of the Act, Jefferson County did not have an ordinance specifically regulating the construction or placement of cellular towers.¹⁰³ The county anticipated a flood of cellular tower applications with the passage of the Act.¹⁰⁴ Therefore, the Jefferson County zoning board passed a moratorium on rezoning property for cell tower use two months before President Clinton signed the 1996 Telecommunications Act into law¹⁰⁵ to give the county time to develop a proper

entrants have benefited from the moratoria, in that they have been sheltered from the competitive forces of a free market, while late entrants offering superior technology have been burdened in their attempts to fill gaps in their broadcast pattern and, thereby, to compete.

Id. at 1467. The court further noted that even though the earlier entrants into the Jefferson County market had utilized equipment based on analog technology, as compared to the plaintiff's digital technology, the competitors provided "functionally equivalent services." *Id.* at 1467 n.15 (citing *Western PCS II Corp. v. Extraterritorial Zoning Auth. of Santa Fe*, 957 F. Supp. 1230, 1237 (D.N.M. 1997)).

98. For example, the United States District Court for Massachusetts distinguished *Jefferson County* in *National Telecommunication Advisors, LLC v. Board of Selectmen*, 27 F. Supp. 2d 284 (D. Mass. 1998). In *Selectmen* the court held that the town's six-month moratorium on the issuance of special use permits for wireless communications facilities complied with the Act. The plaintiff argued that the defendant's passage of the moratorium was "merely a delaying tactic" noting that the Berkshire Regional Planning Commission had sponsored a workshop on "Preparing Towns for the Telecommunications Act of 1996" more than a year before the defendant adopted the challenged moratorium. *Id.* at 286-87. While the court looked to the *Medina* and *Jefferson County* decisions for guidance, it concluded that "each situation must be independently examined" and evaluated, and held that the challenged moratorium complied with the Act. *Id.* at 287 (quoting *Virginia Metronet, Inc. v. Board of Supervisors*, 984 F. Supp. 966, 976-77 (E.D. Va. 1998) (finding a fourteen-month delay not per se unreasonable under the Telecommunications Act)).

99. 924 F. Supp. 1036 (W.D. Wash. 1996).

100. 556 N.W.2d 107 (Wis. Ct. App. 1996).

101. See *supra* notes 84-85, 92 and accompanying text.

102. 968 F. Supp. 1457 (N.D. Ala. 1997).

103. See *id.* at 1461. The county's existing zoning ordinance allowed the placement of towers in utility ("U-1") districts and the director of land development for the county noted that "[a] rezoning of property to a district that permits towers requires at least 90 days, and often longer." *Id.*

104. The court noted that in all the years preceding passage of the Act, the county had received only sixteen applications to rezone property to U-1 for the placement of a cellular telephone tower. But after passage of the Act, applications to rezone property for construction of cell sites virtually tripled: 45 applications for new tower sites had been filed at the time the case arose. See *id.* at 1461.

105. See *supra* note 29 and accompanying text.

cell tower ordinance.¹⁰⁶ The county enacted new zoning guidelines three months after the original moratorium but imposed a second moratorium eight months later.¹⁰⁷

The zoning board passed the second moratorium to encourage telecommunications companies to voluntarily collocate their antennas and cut back on the number of new cell towers erected in Jefferson County.¹⁰⁸ When the second moratorium lapsed after ninety days, the wireless service providers continued their efforts to construct individual tower sites instead of voluntarily collocating on existing towers.¹⁰⁹ Residents complained about the numerous unsightly towers going up across the county. Thus, the county commission imposed a third moratorium to prevent the placement of additional towers immediately contiguous to residential neighborhoods.¹¹⁰ The moratorium did not preclude the collocation of antennas on existing towers.¹¹¹

The district court held the series of moratoria void due to the Commission's noncompliance with the Act.¹¹² The court further found that the moratoria had a discriminatory effect.¹¹³ Most significantly, the court held that local governments must assess personal communication service providers' pending applications using the zoning ordinance provisions in effect on the date the company files the applications, rather than using proposed zoning provisions.¹¹⁴

The court proclaimed that this holding was consistent with *Medina*¹¹⁵ and that the moratoria in the two cases were distinguishable. In *Medina* the moratorium did not stop the issuance of permits, but rather the processing of applications.¹¹⁶ Additionally, the Medina City Council acted pursuant to a Washington statute that explicitly authorized the ordinances for limited periods. Because Alabama had no similar statute, the *Jefferson County* court surmised that the county had no similar power to impose a moratorium.¹¹⁷ The court

106. See *supra* note 104 and accompanying text.

107. The second moratorium "only applied to applications to rezone property for the purpose of erecting a cellular telephone tower" as opposed to original moratorium which applied to all cellular tower issues. *Sprint Spectrum, L.P. v. Jefferson County*, 968 F. Supp. 1457, 1462.

108. See *id.*

109. See *id.*

110. See *id.* at 1463. The Resolution adopting the third moratorium stated that the county needed the time in order to develop amendments to better regulate the installation of cell towers.

111. See *id.*

112. See *id.* at 1469.

113. See *id.*; see also *supra* note 97 and accompanying text.

114. See *Jefferson County*, 968 F. Supp. at 1464.

115. *Medina*, 924 F. Supp. 1036.

116. See *supra* notes 91-93 and accompanying text.

117. See *Jefferson County*, 968 F. Supp. at 1466. This holding indicates a distinct victory for

analogized the case to *West Seneca*¹¹⁸ where the town postponed actions on all applications for cell towers for no apparent reason.¹¹⁹

The *Jefferson County* court also noted that the defendant violated the Act by failing to offer a legitimate explanation as to why the pending applications were, in essence, denied during the moratoria.¹²⁰ The court stated that there must be “substantial evidence”¹²¹ that amounts to more than just general concerns of the citizens for the Commission to legitimately deny any permits.¹²²

While *Jefferson County* is still considered the leading case on cellular tower moratoria, there is no consensus among the courts on what constitutes proper moratoria in most situations.¹²³ The leading cases on moratoria suggest, however, that the longer the moratoria, the more likely the court will find that the local government had improper motives for its enactment. Additionally, courts are more likely to declare a moratorium invalid if the local government completely ceases to consider permit requests while they revise their land use policies to comply with the Act. Finally, courts will not tolerate a moratorium

telecommunications companies as it basically says that the new ordinances local municipalities are trying to initiate during brief moratoria might not carry as much weight as municipal planners had hoped. To date, no other court has interpreted the holding in *Jefferson County*.

118. 659 N.Y.S.2d (N.Y. Sup. Ct. 1997). For a discussion of the *West Seneca* decision, see *supra* notes 94-95 and accompanying text.

119. See *Jefferson County*, 969 F. Supp. at 1466. Additionally, the *Jefferson County* court said that the acts of the commission were anticompetitive to expansion of the communications services in Jefferson County because they shielded the owners of already erected towers from outside competition. See *id.* at 1468.

120. See *Jefferson County*, 968 F. Supp. at 1468-69.

121. The legislative history of the Act indicates “[t]he phrase ‘substantial evidence contained in a written record’ is the traditional standard used for judicial review of agency actions” H.R. CONF. RPT. NO. 104-458 at 208 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 223. “Substantial evidence” as construed by the courts means “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (internal quotations omitted). Commentators have also noted that the “substantial evidence” standard set forth in section 704

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

Degnan et al., *supra* note 45, at ¶ 20 (internal citations omitted) (alterations in original).

122. *Jefferson County*, 968 F. Supp. at 1468-69. The commission’s statement that “it is in the best interest of the County that no further communication towers be authorized or permitted pending the consideration and adoption of the proposed amendments” was not substantial evidence for the decision. *Id.* Other courts had already addressed the Act’s requirement that local governments issue in writing decisions denying applications for wireless services. See *supra* note 67 and accompanying text.

123. See, e.g., *National Telecommunication Advisors, LLC v. Board of Selectmen*, 27 F. Supp. 2d 284 (D. Mass. 1998) (stating that each situation must be independently examined and evaluated); *Virginia Metronet, Inc. v. Board of Supervisors*, 984 F. Supp. 966, 976-77 (E.D. Va. 1998) (same).

that is enacted for the purpose of halting cellular expansion.¹²⁴

IV. DEFINING A PROPER MORATORIUM

The problems associated with cellular siting are not likely to abate in the near future. Communities that have not yet enacted proper legislation lack clear standards upon which to base their zoning and planning decisions regarding cellular towers.¹²⁵ To alleviate this problem, courts should establish a clear and concise test outlining permissible zoning and planning power under section 704.¹²⁶ Moratoria are the most popular solution to the “cell mania” problem,¹²⁷ and courts frequently must assess the validity of moratoria. Specifically, courts must determine whether communities may enact moratoria while they attempt to establish or modify cellular tower ordinances. During their deliberations, courts should evaluate what constitutes a reasonable period of time for a moratorium and determine when a moratorium is appropriate. Courts must also define adequate reasons for denying cell tower siting applications.¹²⁸

124. See Evans, *supra* note 3, at 1005.

125. See Baker, *supra* note 8 and accompanying text.

126. For a general discussion of the cellular tower problem see Dean J. Donatelli, *Locating Cellular Telephone Facilities: How Should Communities Answer when Cellular Telephone Companies Call?*, 27 RUTGERS L.J. 447 (1996).

127. See *supra* note 50 and accompanying text.

128. Whether cell towers are a public utility is another issue that courts around the country are presently trying to decide. Most courts are adopting the attitude that cellular services are not a public utility.

Cell towers should not be considered a public utility because they are not essential services that are provided to the public. See Ziegler, *supra* note 60, § 55A.02[10][c] & n.57. “Public utilities” generally refer to entities engaged in regularly supplying the public with “some commodity or service which is of public consequence or need, (for instance electricity, gas, water, transportation, or telephone services), regulated and controlled by a state or federal regulatory commission, and which may often have power of eminent domain.” *Id.* A public utility is alternatively defined as:

A privately owned and operated business whose services are so essential to the general public as to justify the grant of special franchises for the use of public property or of the right of eminent domain, in consideration of which the owners must serve all persons who apply, without discrimination. It is always a virtual monopoly.

BLACK’S LAW DICTIONARY 1232 (6th ed. 1990). By enacting an ordinance stating that a cell tower is not an essential service, communities can try to avoid this question. “Whether a specific land use or structure is within the scope of the term ‘public utilities’ as that term is used in a specific statutory exemption provision or local ordinance has been a contested issue in a number of court decisions.” Ziegler, *supra* note 60, § 55A.02[10][c]. For instance, the court in *Akron Cellular Telephone Co. v. City of Hudson Village*, 684 N.E.2d 734 (Ohio Ct. App. 1996), affirmed a lower court decision which supported the Hudson zoning inspector’s denial of Cellular One’s application for an exemption from zoning requirements, which had been based on Cellular One’s alleged status as a “public utility” providing an “essential service.” The court in *Bell Atlantic Mobile Systems, Inc. v. Zoning Hearing Board*, 676 A.2d 1255 (Pa. Commw. Ct. 1996), held that a provider was not “public utility” providing “essential services” so as to entitle the provider to erect cellular telephone antennas in a special residential district, according

Courts ultimately should retain the power to decide what constitutes a reasonable period of time to act on “any request for authorization to place, construct, or modify personal wireless facilities,”¹²⁹ as provided by section 704, on a case-by-case basis because all governmental entities operate in a different manner.¹³⁰ This is not to say, however, that legislative guidelines are unnecessary. On the contrary, most state and local governments can establish guidelines and procedures for dealing with cell tower applications within six months.¹³¹ Barring extenuating circumstances, once a community revises application procedures, it should be able to process applications within one to two months.¹³²

When evaluating a specific moratorium, a court should examine the duration of the moratorium, the stated purpose of the moratorium, the existence of special or extenuating circumstances within a community, and whether the moratorium is worded to restrict telecommunication services as little as

to the township zoning ordinance. The court in *Bell Atlantic Mobile Systems, Inc. v. Borough of Baldwin*, 677 A.2d 363 (Pa. Commw. Ct. 1996), held that company’s proposed construction of communications tower was not a permitted use by right as an “essential service” in the district. The court in *River Bend Farm Development Co. v. Cellular One*, No. 95-P-0076, 1996 WL 210783 (Ohio Ct. App. Mar. 8, 1996), held that Cellular One, a company applying for a cell tower building permit is a public utility and thus is exempt from local zoning regulations. *See id.* at *3. The court defined a public utility as “[a]ny persons, firm, corporation, governmental agency or board fully authorized to furnish and furnishing to the public, electricity, gas, steam, telephone, telegraphy, transportation, water or any other similar public utilities.” *Id.* (internal quotations omitted). Thus, there is no general consensus as to whether or not personal wireless service should be considered a public utility.

129. 47 U.S.C. § 332(c)(7)(ii) (Supp. II 1996). For the text of the statute, see *supra* note 37.

130. The FCC has stated:

In certain instances, state and local governments may benefit from a brief, finite period of consideration in order to set up a process for the orderly handling of facilities siting requests. These brief periods of consideration may be most effective if the state or local government communicates clearly to wireless service providers the specific duration of the moratorium, the tasks that the local governmental entity intends to accomplish during the moratorium and the ways in which the wireless service providers can help the local government to achieve the state goals of the moratorium by, for example, providing additional information about their needs and about their services.

Fact Sheet #2, supra note 57, at 10.

131. *See* Sprint Spectrum, L.P. v. City of Medina, 924 F. Supp. 1036 (W.D. Wash. 1996). For a general overview of the moratoria that have been passed in the United States in the past year, see *Everything Wireless, supra* note 87.

132. On February 20, 1997, FCC Chairman Hundt sent letters to various communities concerning moratoria the communities had allegedly adopted regarding the siting of telecommunications facilities. An excerpt from this form letter stated, “Many communities are able to process [cellular tower siting] applications in as little as two months, with some as short as one month. In other cases, the pace is slower. The underlying causes for those differences should be explained.” Federal Communications Commission, *Wireless Facilities Siting Issues—Archive* (visited Apr. 6, 1999) <<http://www.fcc.gov/wtb/siting/sitingarchive.html>>. Additionally, the recently announced Agreement between the LSGAC and representatives from the telecommunications industry endorse the 180 day guidelines for moratoria. *See* Agreement, *supra* note 20 and accompanying text.

possible. Courts generally should uphold a first time moratorium lasting less than two months, because it probably exists to allow communities to enact proper cellular tower legislation.¹³³ Accordingly, courts should analyze multiple moratoria by the same community or first time moratoria lasting longer than six months with heightened scrutiny.¹³⁴ Nothing within the text of section 704 prevents a court from upholding a moratorium lasting longer than six months, as long as it does not unduly prohibit the placement of cellular towers.¹³⁵

The question of how long it takes to enact proper zoning legislation has no definitive answer. The FCC has indicated that many governments process applications in less than two months.¹³⁶ Considering the potential effect that zoning legislation may have on future land use, however, courts may exhibit leniency as seen in *Medina*,¹³⁷ when the approved moratorium lasted for six months.¹³⁸ Generally, six months gives local government time to enact legislation without disregarding other duties or overcompensating for other emergencies that might arise. The six month time period also provides time for municipalities to consult with industry representatives and modify out-of-date regulations.¹³⁹

Thus far, case law does not provide a solid example of a situation in which a court will approve a community's moratorium and there are only a few cases that have directly discussed the validity of moratoria.¹⁴⁰ Commentators have

133. See *supra* note 132 and accompanying text.

134. In examining a moratorium with heightened scrutiny, a court should look to see if the statute serves a compelling interest and that the means are narrowly tailored to serve that interest and are as least restrictive as possible.

135. For the text of the statute, see *supra* note 37.

136. See *supra* note 132.

137. See *Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. 1036 (W.D. Wash. 1996).

138. It is presumed that these extra months gave planners the time they needed to consult with their attorneys, land use experts, and citizens of the community.

139. In its recommendation to deny CTIA's petition to preempt all local zoning moratoria affecting the siting of wireless telecommunications facilities, the LSGAC stated:

The record before the Commission does not demonstrate that federal government action is warranted. Local governments are developing new guidelines and policies and revising ordinances to govern placement of wireless facilities. Moratoria have permitted communities, *often in close consultation with industry representatives*, to modify out-of-date regulations and facilitate the placement of facilities. In many communities, the adoption of a moratorium has been followed by the adoption of clear siting policies and procedures that properly balance local safety and aesthetic concerns with the desire of many local residents to have access to reliable personal wireless service.

Federal Communications Commission, *FCC Local and State Government Advisory Committee Advisory Recommendation Number 4: CTIA Petition for Declaratory Ruling* (DA 96-2140) (June 27, 1997) (visited Apr. 6, 1999) <<http://www.fcc.gov/statelocal/recommendation4.html>>.

140. Compare *Sprint Spectrum, L.P. v. Jefferson County*, 968 F. Supp. 1457 (N.D. Ala. 1997), with *Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. 1036 (W.D. Wash. 1996), and *Westel-Milwaukee Co. v. Walworth County*, 556 N.W.2d 107 (Wis. Ct. App. 1996).

reconciled *Jefferson County*¹⁴¹ and *Medina*¹⁴² because of their distinct fact patterns. These cases, however, do not provide comprehensive guidance to lower courts regarding when moratoria are proper and consistent with section 704.

There is little case law to guide courts in their evaluation of moratoria. *Medina*, however, correctly suggests that moratoria that suspend the issuance, rather than the processing of applications, are reasonable and necessary. Such moratoria allow communities to address cell tower siting by evaluating long-term land use issues and enacting or revising relevant ordinances.¹⁴³ As the *Medina* court noted, there is nothing in the text or legislative history of the Act suggesting that Congress meant to preclude the careful consideration of land use issues.¹⁴⁴ Therefore, unless a local political body lacks the power to enact moratoria, as was the case in *Jefferson County*,¹⁴⁵ courts should not consider moratoria of reasonable duration per se invalid under section 704.

Community planners should follow certain procedures to ensure that a court's favorable assessment of a particular moratorium. The plain language of any moratorium clearly should state its duration and particular tasks that local planners intend to accomplish during the moratorium.¹⁴⁶ As a practical matter, a moratorium might list specific information that the government is seeking from telecommunications providers so they can furnish the information and expedite

141. *Jefferson County*, 968 F. Supp. 1457.

142. *Medina*, 924 F. Supp. 1036.

143. *See id.*; *supra* notes 92-93 and accompanying text.

144. *See Medina*, 924 F. Supp. 1036. As the court stated in its opinion,

There is nothing to suggest that Congress, by requiring action within a reasonable period of time, intended to force local government procedures onto a rigid timetable where the circumstances call for study, deliberation, and decision-making among competing applicants. . . . The generally applicable time frames for zoning decisions, in Washington, may include reasonable moratoria adopted in compliance with state law.

Id. at 1040 (internal quotations omitted).

145. In finding the series of moratoria which suspended the processing and issuance of cellular tower permits invalid, the court compared Jefferson County's power to issue moratoria to that of the town of Medina:

[T]he Medina city council acted pursuant to a state statute, explicitly authorizing the imposition of moratoria or interim zoning ordinances for limited periods. As previously noted, however, Alabama has no similar statute enabling the Jefferson County Commission to utilize moratoria as valid zoning tools. At best, such power arises by implication, and then only as an emergency response to substantial threats to public health and safety.

Jefferson County, 968 F. Supp. 1457 at 1466 (internal citations omitted).

146. The city of Pullman, Washington adopted a moratorium that basically conforms with suggestions by the FCC and should act as a model for other communities trying to enact a proper moratorium. *See infra* note 148

the enactment of proper legislation.¹⁴⁷

The following model ordinance is an example of a proper moratorium:¹⁴⁸

WHEREAS, it appears to this Council that recent federal legislation related to the communications industry has produced persistent current interest, and is expected to produce new interest in the future, in the provision of cellular communication coverage in the City of XYZ; and,

WHEREAS, the current Zoning Code of the City of XYZ was adopted at a time before cellular communication towers were anticipated; and, therefore, appropriate siting and development standards do not exist; and,

WHEREAS, the uncontrolled siting of such communication towers could have significant adverse effects and cause irreparable harm; and,

WHEREAS, long delays and uncertainty of the permit process due to lack of clear siting and development standards is an unreasonable limitation upon the communications companies seeking to provide cellular service; and,

WHEREAS, it is necessary for the City to act carefully in a field with rapidly evolving technology and undertake a deliberative public process to establish policy, standards, and procedures related to the siting of antenna towers; now, therefore,

THE CITY COUNCIL OF THE CITY OF XYZ DOES ORDAIN
AS FOLLOWS:

SECTION 1: That the above recitals are adopted as Findings of Fact, which clearly indicate that an emergency exists and thereby justify the imposition of a 180-day moratorium pursuant to State Code 1234 on the siting of cellular telephone or similar type communication antennas on towers in the City of XYZ.

SECTION 2: During the period of this City Council moratorium, the City will develop appropriate siting criteria and limitations to govern future cellular telephone and similar type communication antennas. These will at a minimum include potential number or density limitations for such towers in all zone districts and on public property. Also during this moratorium, the City will develop an appropriate permitting process for considering siting requests. The City Planning Commission will

147. See *Fact Sheet #2*, *supra* note 57, at 10.

148. Adopted from Pullman, Wash., Ordinance 96-11 (June 18, 1996) (visited Apr. 6, 1999) <<http://www.mrsc.org/ords/m-s/P8-96-11.htm>>.

conduct at least one public hearing on the criteria or limitations and permitting process, and make recommendations to the City Council.

SECTION 3: Wireless communications providers, who have applied for permits, will have their permits processed during the time of this moratorium and can assist local officials by furnishing studies, reports, summaries, etc. on [the information the Council is seeking].

SECTION 4: The tasks described in Section 2 will require approximately 180 days to complete. Therefore, this ordinance shall expire 180 days after passage [or specific date].

SECTION 5: Because it is found and declared that a public emergency exists, pursuant to State Code 1234 justifying the immediate effectiveness of this ordinance, this ordinance shall take effect and be in full force immediately upon its passage.

[proper signatures and notary seals]

The model moratorium complies with the proposed test for evaluating the propriety of a moratorium. The preamble clearly identifies the purpose for the moratorium and the goals of the city council in establishing the moratorium and provides a definite expiration date. The imposition of the moratorium does not halt the processing of tower permit applications, which ensures that when the municipality lifts moratorium, it will grant applications complying with new policies as soon as possible. Additionally, the moratorium clearly calls for specific information from wireless service providers, which facilitates communication between the affected parties and ensures that no party is surprised by the resulting permit decisions or requirements. Lastly, the moratorium is nondiscriminatory and ensures that the local government has time to deal with complicated land use issues.

Moratoria, while strongly disfavored by telecommunications providers, effectively allow local planners to enact forward looking legislation that addresses the growing siting issues facing communities.¹⁴⁹ Moratoria certainly are not the only solution for a community caught without a tower ordinance, but they provide a good short-term solution for communities committed to formulating comprehensive tower siting ordinances and avoiding presumably

149. See Armando Machado, *Ban Issued on Cell Towers: County Will Not Take Applications for Next Six Months*, SKAGIT VALLEY HERALD, Sept. 18, 1997 at A3. "The commissioners [of Skagit County] say the moratorium, in all unincorporated areas, will allow time for planning officials to prepare the cell-tower ordinance with stricter, more specific requirements than the general special-use regulations the county has been using." *Id.*

inadequate piecemeal legislation.¹⁵⁰

Currently, the FCC is attempting to address issues that have surfaced as a result of the Act. Several community leaders and telecommunications companies have met to try to decipher prominent issues, but these conferences have not yielded adequate resolutions to all of the problems.¹⁵¹ The proposed test provides flexibility that is needed when dealing with the quickly intensifying cell tower crisis. The test accommodates actions taken by municipal governments today and provides for changing technology in the future.

V. CONCLUSION

Section 704 of the Act adequately addressed cell tower problems but left many unanswered questions. Local communities and courts must ensure that cell tower siting is regulated properly in the future. As indicated by the legislative history of section 704,¹⁵² no single entity has complete control over cellular tower siting. States and local municipalities still possess zoning power,

150. See *Sprint Spectrum, L.P. v. Jefferson County*, 968 F. Supp. 1457 (N.D. Ala. 1997); see also *supra* notes 96-118 and accompanying text. Hastily enacted ordinances generally tend not to state guidelines for wireless telecommunications in terms of community goals. Many of these ordinances have a practical effect of banning service to a certain area because such ordinances prohibit towers or supporting structures in areas that have been zoned for residential or nonindustrial uses. Some communities have also tried to adopt provisions for which the local government does not possess the necessary authority. See Thompson, *supra* note 9, at Ch. 5. Michele Farquhar, Chief of the Federal Communications Commission Wireless Telecommunications Services Bureau, commented that “[l]ocal governments need to be cautious and aware of a few issues that affect the significance of their telecommunications policy” such as whether service providers will be able to meet the demand of their customers and discrimination claims. Baker, *supra* note 8, at 11. Although the FCC has tried to facilitate talks between community planners and telecommunications providers, companies still remain reluctant to collocate antennas on the towers of competitors or allow antennas to be placed on their towers. See *id.* Additionally, make-shift and piecemeal legislation often leads to conflicting and confining legislation that accomplishes very little. Community planners and telecommunications providers cannot count on Congress to help them cope with the demands of telecommunications companies and the need for quick and well-planned legislation. It took Congress over sixty years to overhaul the 1934 Telecommunications Act and eliminate inconsistencies that resulted from the slowly evolving legislation of the past sixty years.

151. See Baker, *supra* note 8, at 5, 11. The recently announced Agreement between the LSGAC and representatives from the telecommunications industry regarding facility siting implementation represents a “beginning” to the resolution of some tension between local leaders and telecommunications companies, according to LSGAC chair, Kenneth Fellman. See Press Statement, *supra* note 20. Fellman explained what he felt the Agreement does not do:

This agreement does not mean that [local governments and wireless communications providers] have resolved all disputes It does not mean that the LSGAC will be able to resolve all disputes with the various segments of the telecommunications industry. It certainly does not mean that the commission will never again have to rule on a case seeking preemption of state or local government authority.

Id.

152. See H.R. REP. NO. 104-458, at 1 (1996), *reprinted* in 1996 U.S.C.C.A.N. 124; see also *supra* note 65 and accompanying text.

but the Act precludes some options. Thus, the courts and all sectors of government must work together to stimulate competition among wireless communications companies in accordance with FCC guidelines while protecting the property rights of citizens. Moratoria may be the best solution to ensure that local planners enact solid legislation that deals with the long term consequences of this quickly expanding technology. Although unpopular with telecommunication providers, properly written, executed, and regulated moratoria will help to ensure that the Act accomplishes its goal of removing “all barriers to entry into the provision of telecommunications services.”¹⁵³

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153. H.R. REP. NO. 104-458, at 126 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 138.