Creating Local Policy Consistent with the Telecommunications Act

If you are unsure of what rights are retained by local authorities under the Telecommunications Act of 1996, you are by no means alone. The United States Supreme Court has commented that "It would be [a] gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity." *AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366 (1999). Not only is the statutory language unclear, but at first brush the Act seems to preempt much local authority regarding the placement, construction, and modification of personal wireless service facilities by disallowing regulations that "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i). One may wonder if local governments retain any authority at all - after all, even minor regulations have effect of prohibiting service to some degree.

This badly-worded provision creates much confusion regarding what local authorities can and cannot do. This confusion makes the process of formulating a city policy regarding wireless facility placement an especially difficult one. Thankfully, the federal circuit courts that have interpreted § 332(c)(7)(B)(i) have uniformly come to the conclusion that the provision barely limits local discretion, prohibiting only the most hostile of local policies. All circuit court opinions on this issue agree that the Act preserves much local discretion, and local authority to formulate local zoning policy regarding wireless facility placement remains almost entirely intact.

In an attempt to clarify exactly how much discretion is retained by local authorities, this step-by-step outline explains the relevant circuit court case law in an easy-to-follow fashion. This outline will greatly assist you, the policymaker, in creating a local policy that satisfies the current interpretation of the Telecommunications Act.

Before considering the proceeding outline, however, you should be familiar with 47 U.S.C. § 332(c)(7), the section which enumerates the complete list of restraints on local regulation of wireless facility placement. § 332(c)(7) contains five limitations on state and local authority when regulating the construction of wireless telecommunication towers. The relevant part of § 332(c)(7) reads:

(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.

Thus, the denial of a wireless facility application 1) must not unreasonably discriminate among providers, 2) must not prohibit or have the effect of prohibiting wireless service, 3) must be in writing and supported by substantial evidence in a written record, and 4) must not be based on the environmental effects of RF emissions so long as the emissions comply with FCC standards. Additionally, the decision to either approve or deny an application 5) must occur within a reasonable time after the filing of the application.

Of these five requirements imposed on local authorities, the first two - the provisions concerning the prohibition of wireless service and unreasonable discrimination between providers - pose the biggest challenge when drafting local policy. They pose a challenge, however, not because they restrain local discretion to a large degree, but because they restrain local discretion to a small degree, yet are so vaguely worded as to appear otherwise. Understanding the nature of these two provisions is the key to understanding the extent of discretion retained by local authorities. Therefore, a thorough explanation of these provisions is in order.

The meaning of "prohibiting wireless service"

The most important aspect of the “prohibiting service” provision is that it has no effect unless the geographic area that an applicant provider intends to cover is devoid of any service through any provider. The 2nd, 3rd, and 4th Circuits have held that the "prohibiting wireless service" provision is *consumer*-oriented, not provider-oriented; wireless service exists in a geographic area when it is possible for a consumer to connect to the land-based telephone network through cellular technology. *360 [Degrees] Communications v. Albemarle County*, 211 F.3d 79 (4th Cir. 2000); *Sprint*

Spectrum, L.P. v. Willoth, 176 F.3d 630 (2nd Cir. 1999); *APT Pittsburg LP v. Penn Township*, 196 F.3d 469 (1999); *Cellular Telephone Company v. Ho-Ho-Kus*, 197 F.3d 64 (3rd Cir. 1999). The significance of this holding is best explained by looking at the cases themselves.

The 3rd Circuit, in *Ho-Ho-Kus*, 197 F.3d 64 (1999) held that a town may completely ban wireless facilities in a borough or neighborhood, so long as wireless facilities outside the neighborhood provide "adequate coverage" within the neighborhood. *Id.* at 71. Furthermore, "adequate coverage" means there are no "significant gaps" in the availability of wireless service, or the ability either to connect with the land-based national telephone network, or to maintain a connection capable of supporting a reasonably uninterrupted communication. *Id.* at 70. Notice that this definition of "adequate coverage" refers to wireless communication in general, not to gaps in the particular applicant's network – in other words, there is "adequate coverage" in an area if one could maintain wireless communication through *any* provider, not just the applicant. Even if a Sprint user cannot maintain a communication, there is adequate coverage if an AT&T user could. This bears repeating: the term "significant gap" does not refer to gaps in a particular provider's coverage, but to the *coverage provided by the sum of all providers.*

The 3rd Circuit based much of its *Ho-Ho-Kus* decision on the 2nd Circuit's decision in *Willoth*, 176 F.3d 630 (1999), that held that "once an area is sufficiently serviced by a wireless service provider, the right to deny applications becomes broader: State and local governments may deny subsequent applications without thereby violating subsection B(i)(II). The right to deny applications will still be tempered by subsection B(i)(I), which prohibits unreasonable discrimination. However, it is not unreasonably discriminatory to deny a subsequent application for a cell site that is substantially more intrusive than existing cell sites". The ultimate holding of the *Willoth* Court was that the "Act's ban on prohibiting personal wireless services precludes denying an application for a facility that is the least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides access to land-lines." *Id.* at *643.* In other words, to show a violation of the "prohibiting wireless service" provision under *Willoth*, an unsuccessful provider applicant must show two things: *first*, the provider must show that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network. In this context, the relevant gap, if any, is a gap in the service available to remote users. Not all gaps in a particular provider's service will involve a gap in the service available to remote users. The provider's showing on this issue will thus have to include evidence that the area the new facility will serve is not already served by another provider; *second*, the provider applicant must also show that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve. This 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. *APT Pittsburg LP v. Penn Township*, 196 F.3d 469 (3rd Cir.

1999) (citing *Willoth*, 176 F.3d 630). Therefore, if some other provider is already providing coverage to the area in question, the applicant may only challenge a denial of its application on grounds of unreasonable discrimination, not on grounds that the local government is prohibiting service.

The 4th Circuit agreed with the *Willoth* court, and held that the Act does not require 100% coverage. *360 [Degrees] Communications v. Albemarle County*, 211 F.3d 79 (2000). However, 4th Circuit in *360 degrees* rejected the *Willoth* court's interpretation of (B)(i)(II), under which the denial of a permit for a site that is "the least intrusive means to close a significant gap in service" would amount to a denial of wireless services. Instead, the court held that this rule reads too much into the Act, unduly limiting what is essentially a fact-bound inquiry, and that community could rationally reject the least intrusive proposal in favor of a more intrusive proposal that provides better service or that better promotes commercial goals of the community. *Id.* at 87.

These cases all stand for the important conclusion that the gaps in a particular provider's coverage is irrelevant to determining whether an application denial constitutes a "prohibition of wireless service." Instead, the correct inquiry is whether there is a significant gap in a consumer's access to wireless service THROUGH ANY PROVIDER. Thus, if the geographic area that an applicant provider intends to cover is already covered by another provider, the applicant cannot claim that a denial of its application would constitute a "prohibition of wireless service." Instead, an applicant provider in this situation could only claim that a denial of its application would constitute unreasonable discrimination between it and other wireless service providers.

Therefore, determining whether the “prohibiting service” provision applies to a particular case turns on the answer to the question: "Is there a significant gap in a remote user's ability to access telephone land-lines?" In other words, "Is there a significant gap in wireless service after adding together the services provided by every provider, not just the applicant?" If the answer is "yes, there is a significant gap in all wireless service," then the "prohibiting wireless service" provision applies. On the other hand, if the answer, "no, there is no significant gap after adding together the coverage by all wireless providers," then the “prohibiting service” provision has no effect, and local discretion is only restrained by the “unreasonable discrimination” provision.

If the "prohibiting wireless service" provision applies, what constitutes a "prohibition" on wireless service?

If it is the case that there exists a significant gap in *all* wireless service from within the geographic area that the applicant seeks to cover, then the Telecommunications Act forbids a local authority from "prohibiting wireless service." However, this does not mean that the local authority must approve the first project that comes along.

What it does mean, however, is not settled because there is a split in the cases on this point. As mentioned earlier, the 2nd Circuit, in *Willoth*, 176 F.3d 630 (1999), and the 3rd Circuit, in *Penn Township*, 196 F.3d 469 (1999), held that if there is a significant gap in all wireless service, then the Act precludes denying an application for a facility that is the least intrusive means for closing a significant gap. On the other hand, the 4th Circuit, in *360 [Degrees] Communications*, 211 F.3d 79 (2000), held that the "least intrusive means" rule reads too much into the Act, unduly limiting what is essentially a fact-bound inquiry, and that community could rationally reject the least intrusive proposal in favor of a more intrusive proposal that provides better service or that better promotes commercial goals of the community. *Id.* at 87. Finally, the 1st Circuit, in *Town of Amherst v. Omnipoint Communications*, 173 F.3d 9 (1999), held that the question is whether the local criteria or its administration effectively preclude towers no matter what the carrier does. However, the burden for the carrier invoking this provision is a heavy one: to show from language or circumstances not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try. *Id.* at 15.

The 9th Circuit (in which San Diego sits) has not weighed in on this question (or on any other question presented here - however, because this is the only significant split among the circuits that have considered these issues, it is safe to assume that the 9th Circuit will not vary significantly on other issues). Therefore, it is unclear which test the 9th Circuit will adopt, or whether it will create its own test. Accordingly, the safest bet is to adopt the test most restrictive of local discretion - the "least intrusive means" test of the 2nd and 3rd Circuits. The remainder of this discussion will assume this is the correct test.

If only the "unreasonable discrimination" provision applies, what constitutes "unreasonable discrimination" between providers?

If it is the case that there does not exist a significant gap in wireless service because there already exists a provider that offers coverage in the same geographic area that the applicant seeks to cover, then only the “unreasonable discrimination” provision restrains local discretion. However, this does not mean that local authorities cannot discriminate - it only means they may not do so "unreasonably." Before proceeding any further, one should realize the importance of this statement - if another provider is already providing coverage to the geographic area in question, then local authorities may deny a subsequent application from another provider, EVEN IF IT LEAVES THAT PROVIDER WITH NO ALTERNATIVE SITES FROM WHICH THEY CAN PROVIDE COVERAGE. The question is no longer whether there are alternative sites. The only question that a federal court will ask is whether it was "reasonable" to discriminate between the applicant and other providers. If there already exists coverage in the geographic area, and the applicant provider claims you must approve their project because there are no alternative suitable sites for them, you should become indignant, stand up proudly and bravely, and proclaim, "It doesn't matter! A denial of your application must only be reasonable!"

Now that it is perfectly clear that the "no suitable alternatives" argument holds no water when there exists coverage by other providers, we can move on to the next question: "what are reasonable grounds for discrimination between providers?" The District Court for the Southern District of California (in which San Diego sits) has issued an opinion that illustrates the breadth of local discretion on this point. In *Airtouch Cellular v. City of El Cajon*, 83 F. Supp. 2d 1158 (2000), the city had already allowed one provider to place antennas on a water tower, but refused to allow another to do the same because of concern regarding the increase in antennas, adding another equipment structure, and an increase in visual blight and problems such as noise. Airtouch claimed this was unreasonable discrimination - after all, all they wanted was to place their wireless facility in the same location as a preexisting one. Clearly, Airtouch maintained, it is unreasonable to deny their application for a facility on the very same water tower where another application was approved. However, the court disagreed, holding that the increased visual blight resulting from an additional facility on top of the water tower is a reasonable basis to treat the two applications differently. *Id.* at 1166. In other words, it is reasonable to deny an application based on the cumulative effects of the proposed facility and preexisting facilities. Along the same lines, the 2nd Circuit has held that a city may reasonably take the location of a proposed facility into account when determining whether to approve the project, even though this may result in discrimination between providers of functionally equivalent services. *Willoth*, 176 F.3d 630. In other words, there is a reasonable basis to discriminate between providers if the applicant wishes to place a wireless facility in a residential zone, if preexisting sites are not in residential areas. In such a case, the city is entirely within its rights to deny the application on the basis that the city wishes not to approve sites in residential areas.

Bottom line: if the proposed wireless facility will cause a negative effect that preexisting sites do not cause, then there is a reasonable basis to discriminate between the applicant and preexisting providers. This negative effect can even be the cumulative effects of the proposed facility and preexisting ones. And always remember: if it reasonable to discriminate against the applicant by denying its application, it simply does not matter whether there is an alternative site available to the applicant. The existence of alternative sites is only important when there is no coverage in the area by any provider, thereby implicating the “prohibiting service” provision.

Maybe this will help.

If the above discussion was confusing, then the Supreme Court was correct in calling the Telecommunications Act "not a model of clarity." *AT&T Corp.,* 525 U.S. 366 (1999). Perhaps an outline of the right questions will help….

I. 1st question you should ask: **is there a significant gap in the provision of wireless service within the geographic area the applicant proposes to cover** (remembering that "provision of wireless service" means service from any provider, not just the applicant)?

A. If there IS a significant gap in all wireless service from all providers...

1. Is the application the least intrusive means of filling that gap?

   i. If "yes, it is the least intrusive means of filling the gap," then the application must be approved.

   ii. If "no, there exists another, less intrusive method of filling the gap," then the city is free to deny the application!

B. If there is NOT a significant gap in all wireless service from all providers (i.e. - another provider is already providing coverage in the area)**...**

1. Is it reasonable to discriminate between the applicant and the preexisting providers?

   I. Does the proposed facility have a negative effect that the preexisting facilities do not have? This negative effect can be the cumulative effect of adding the proposed facility's environmental impacts to the environmental impacts of preexisting facilities.

2. If there is a reasonable basis to discriminate against the applicant, the application may be denied, EVEN IF IT LEAVES THE APPLICANT WITH NO ALTERNATIVE WAY TO FILL THE GAP IN THEIR COVERAGE.

One more way to open yourself up to a lawsuit: The "substantial evidence" provision

The "prohibiting service" and "unreasonable discrimination" requirements are federal mandates with which local authorities must comply. If a local authority does not comply with either of them, then the aggrieved wireless service provider may seek assistance from the federal courts. The good news: these two provisions, along with the prohibition of regulations based on the environmental effects of RF emissions, are the ONLY substantive requirements that federal law imposes on local authorities regarding wireless facility placement. As long as a local authority complies with these three requirements, it is possible for the local authority to escape further federal scrutiny; i.e. - a lawsuit.

Now for the bad news: if a local authority elects to impose on itself additional requirements by means of a zoning ordinance, it again opens itself to a federal lawsuit, even if the local authority complied with the three substantive federal mandates! This occurs by means of the "substantial evidence" provision in the Telecommunications Act. Simply put, when local zoning ordinances require that certain findings be made before ruling on an application, and a local authority purports to make those findings, the "substantial evidence" provision gives federal courts the authority to review the evidence that supports the local authority's findings. After reviewing said evidence, the federal court must order the local authority to approve the application if the local authority's findings are not supported by "substantial evidence." In other words, when a local government enacts a zoning ordinance that requires approving more facilities than is

required under the Telecommunications Act, the local government only succeeds in creating more grounds for a lawsuit.

Perhaps an illustration will best explain this principle. Imagine this scenario: a provider seeks to place a wireless facility in an area that is already covered by another provider, and in a way that would make it reasonable for the local government to deny the application on grounds other than RF emissions. If the local zoning ordinance simply stated, "deny all applications unless approval is required by the Telecommunications Act," then there is no basis for a lawsuit (assuming the application was processed within a reasonable period of time)! In this scenario, the substantive provisions of the Telecommunications Act are met, and the local government has not imposed additional requirements on itself by its zoning ordinance. However, if the zoning ordinance instead read, "In addition to the substantive requirements of the Telecommunications Act, an application must be approved if approval would not cause a devaluation of property value," then the provider would have a basis to seek federal intervention. Specifically, the provider could sue on grounds that there exists no "substantial evidence" supporting a finding that property value would be devalued by its facility. A zoning ordinance drafted more favorably toward providers only succeeds in creating another basis for losing a lawsuit!

Two Federal district court cases illustrate the consequence of adopting a local ordinance that is more favorable toward providers than is required by the Telecommunications Act. In *Delaware Valley PCS v. Fairview Township*, 168 F. Supp. 2d 361 (2001) and *Omnipoint Comm. v. White Plains*, 2001 U.S. LEXIS 20037 (2001), the provider in each case claimed that the city must approve their application because the provider's FCC license required seamless coverage from the provider, and the proposed facility was necessary to accomplish seamless coverage. As we have already discussed, the "prohibiting service" provision of the Act does not mandate approval of a facility merely because it would fill a gap in the applicant's service; instead, the "prohibiting service" provision refers to a remote user's ability to connect to a land line by *any* provider, thus having no effect if there is another provider already offering wireless services in the area. Thus, these providers were mistaken in their belief that a gap in their own coverage automatically calls for approval of their application, and they cannot be afforded relief under the "prohibiting service" provision unless there is a showing that the area in question is totally devoid of all wireless service. In *Fairview Township*, the court stated as much, holding that the provider is not entitled to relief because "Plaintiffs have not provided any evidence that this area is not covered by another wireless communications provider." *Fairview Township*, 168 F. Supp. 2d 361 at 367. Accordingly, the provider in this case was not afforded any relief.

Thus, it may be surprising to find out that the provider in *White Plains*, after making the same argument as the provider in *Fairview Township*, won their suit against the city! How could the provider in *White Plains* possibly have won? The answer is simple – White Plain's zoning ordinance required approval of applications that fill gaps in *each* provider's coverage! Instead of simply relying on the Act's "prohibiting services" provision, which only applies to gaps in all coverage, White Plains afforded the wireless

service industry more protection by requiring approval of facilities that fill an individual provider's gaps. Accordingly, the court applied the "substantial evidence" provision of the Act, and inquired whether there was substantial evidence that the proposed facility would not fill the applicant's gaps in coverage. There was no such evidence in the record; therefore, the city lost the case, even though the "prohibiting services" provision did not call for such a result. In fact, the court states as much, holding that the "prohibiting services" provision, standing alone, is not a basis for relief. *White Plains*, 2001 U.S. LEXIS 20037 at 62.

Putting it all together: how to avoid a lawsuit

We have now delved into the federal restraints on local discretion regarding wireless facilities. To recap, a denial of a wireless facility application 1) must not unreasonably discriminate among providers, 2) must not prohibit or have the effect of prohibiting wireless service, 3) must be in writing and supported by substantial evidence in a written record, and 4) must not be based on the environmental effects of RF emissions so long as the emissions comply with FCC standards. Additionally, the decision to either approve or deny an application 5) must occur within a reasonable time after the filing of the application.

How can local policy best comply with these requirements, thereby reducing the risk of costly litigation whenever an application is denied? The answer is not as elusive as may appear – the policy that most reduces the risk of litigation is the one that requires no more and no less than the substantive requirements of the Telecommunications Act!

Of course, such a hard-line defense against litigation is not necessary for all applications, because not all applications create a significant risk of litigation. A significant risk of litigation only exists when a facility application is denied, as the Gray residence episode clearly demonstrates. As mentioned above, the risk of litigation is drastically reduced by avoiding the approval of more applications than is required by the Telecommunications Act, thereby escaping the "substantial evidence" trap. In fact, a perusal of federal cases shows that the single most important cause of federal intervention is the "substantial evidence" provision. Relatively few cities have lost a lawsuit based on the "prohibiting service" or "unreasonable discrimination" provisions, primarily because it is so difficult to violate these provisions.

Therefore, the risk of litigation would be drastically reduced if we could single out those applications that stand a greater chance of being denied, and apply an ordinance that requires no more than compliance with the substantive requirements of the Telecommunications Act. In fact, we *can* single out those applications that stand a greater chance of being denied – they are applications for facility placement in city parks, city open space, multi-family residential zones, single-family residential zones, premises containing designated historical resources, the Coastal Overlay zone, and premises within the MHPA.

Applications for facility placement within these zones stand a greater chance of being denied because public opposition to these facilities will be fierce. As the Gray residence episode demonstrates, applications for facility placement within these zones puts the city in an undesirable position – on the one hand, city officials want to uphold the values and wishes of the people they represent, but on the other hand, city officials fully understand that a federal lawsuit will quickly follow a denial of an application. The city has shown its strength of character by denying the Gray residence application even though a lawsuit was the guaranteed result. Should the city ever again wish to deny an application for facility placement in residential zones and parks, it should protect itself from liability by drafting an ordinance that avoids the number one cause of liability – the "substantial evidence" provision of the Telecommunications Act. This provision is avoided simply by approving no more projects than is required by the substantive provisions of the Telecommunications Act; i.e. – the "prohibiting service," "unreasonable discrimination," and "RF emissions" provisions.

On the other hand, applications for placement in industrial zones, commercial zones, and Caltrans right-of-ways do not pose a significant risk of litigation because it is unlikely these applications will be denied. Public opposition to these facilities is likely to be non-existent. Therefore, a strong defense against liability may not be necessary for these zones, and a more lax policy may be appropriate.

By applying different criteria to industrial/commercial areas and residential/park areas, the city succeeds in appeasing both the telecommunications industry and the citizens of San Diego. The draft policy issued by the TIC does, in fact, appear to separate the two areas, but it does not do so in any meaningful way. The underlying assumption of the draft policy is that "all applications must be approved." Therefore, it encourages facility placement in less controversial areas, but if these areas are not available or feasible, approval for residential areas and parks is guaranteed upon compliance with "conditional use permit" requirements. The fatal flaw of this policy is that approval for residential areas and parks *must* be granted if other areas are not available and CUP requirements are met. If the city adopts this ordinance, we can expect the following scenario to occur in the very near future: A provider files an application for placement in a residential zone, claiming that more preferred areas are not feasible. The provider will follow the example of AT&T in the Gray residence application, and refuse to offer any meaningful evidence of this claim. Residents will oppose the application, and offer numerous alternatives to residential placement. However, the provider will claim those sites are not feasible, again refusing to offer any real evidence, opting instead to have one of their own engineers testify as to the non-feasibility of alternative sites. The residents, of course, cannot afford an expert, but are nonetheless convinced that there exist alternative sites.

If the city denies this application pursuant to a finding that there exist alternative sites, the provider will sue on grounds that there is no "substantial evidence" to support the city's findings. Who will win this case? Who knows. Probably the provider, because the federal court is unlikely to consider the testimony of non-expert residents to be "substantial evidence."

Why not avoid this scenario? Let us consider a much safer ordinance:

A.) No application for placement of a wireless communication facility shall be approved in the following areas:

1.) City parks

2.) City open space

3.) Multi-family residential zones

4.) Single-family residential zones

5.) Premises containing designated historical resources

6.) Coastal Overlay zone

7.) Premises within the MHPA.

B.) An application shall be approved notwithstanding section (A) if the applicant makes a showing that there exists a "significant gap" in the availability of "personal wireless services" within the geographic area where the proposed wireless communication facility would provide coverage, and that the proposed wireless communication facility constitutes the "least intrusive method" of filling that gap.

1.) "Significant gap" defined – "Significant Gap" shall mean a gap of "personal wireless services" that is so large or affects such a large number of remote users that it can fairly be said that the gap is significant. For example, a "gap" in service that merely covers a small residential cul-de-sac may not be significant, while a gap that straddles a significant commuter highway or commuter railway may be significant.

2.) "Personal Wireless Services" defined – "Personal Wireless Services" shall mean the ability of remote users to access the national telephone network. In this context, the relevant gap, if any, is a gap in the service available to remote users. Not all gaps in a particular provider's service will involve a gap in the service available to remote users. The provider's showing on this issue will have to include evidence that the area the new facility will serve is not already served by another provider [language taken verbatim from *APT Pittsburg LP v. Penn Township*, 196 F.3d 469 (3rd Cir. 1999) (citing *L.P. v. Willoth*, 176 F.3d 630 (2nd Cir. 1999))].

3.) "Least Intrusive Method" defined – "Least Intrusive Method" shall mean the method that least undermines the legitimate concerns and values of the community in which the applicant seeks to place the proposed wireless communication facility, including, but not limited to: visual, aesthetic, and safety concerns; protection of real property value; compliance with applicable permit, setback, zoning and land use plan requirements; compliance with all other state and local requirements and regulations; and environmental protection. The provider's showing on this issue will have to show 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.

C.) An application shall be approved notwithstanding section (A) if a denial of the application would constitute "unreasonable discrimination" between the applicant and other providers of personal wireless services.

1.) "Unreasonable Discrimination" defined – "Unreasonable Discrimination" shall mean a denial of an application even though the proposed facility would not undermine the legitimate concerns and values of the community to a significantly greater extent than other providers of personal wireless services. The legitimate concerns and values of the community include, but are not limited to: visual, aesthetic, and safety concerns; protection of real property value; compliance with applicable permit, setback, zoning and land use plan requirements; compliance with all other state and local requirements and regulations; and environmental protection. The cumulative effects of all wireless communication facilities in the area shall be considered when making this determination, and it shall not be unreasonable to deny an application if the proposed facility significantly increases these cumulative effects.

This ordinance offers the city of San Diego what the existing proposed policy does not – guaranteed compliance with the Telecommunications Act! This guarantee comes from the simple fact that the ordinance requires precisely what the Act requires, and does not require anything else, thereby drastically reducing the risk of liability via the "substantial evidence" requirement. If this ordinance were adopted, it is extremely unlikely that a "Gray residence" situation would ever arise again, where the city is forced to choose between alienating the community or losing a federal lawsuit. If this ordinance were adopted, the denial of an application for placement in a residential area would be based on the requirements of the Telecommunications Act, thereby assuring compliance with federal law.