"YOU WANT TO PUT THAT WHERE?" A DISCUSSION OF THE INTERPLAY BETWEEN LOCAL ZONING CONTROL AND EFFECTIVE PROHIBITION UNDER THE TELECOM ACT OF 1996

Mattaniah S. Jahn, Aya M. Abunada & David Blum*

I. INTRODUCTION

How does your cell phone work and what does that have to do with land use? Well, as it turns out, a lot. Those handy communication, business, gaming, and procrastination devices work off invisible wireless signals broadcast from not-so-invisible communication or "cell" towers.[1] The technology underpinning the whole system is not that new; cellphones are FM radio transceivers, so they are essentially high-class walkie-talkies that use radio waves. Radio waves have been used since at least the Cold War era, if not the days of Marconi.[2] The innovation of microchip computing technology provided the true impetus to allow cell phones and cell towers to create private two-way channels of communication, which seamlessly hands those channels off as the cell phones move geographically, allowing large amounts of information to be moved back and forth over those private channels.[3]

Establishing "strong" cell phone connections requires additional cell towers, roughly spaced within a one-to-five-mile radius, to facilitate

 Mattaniah Jahn is a zoning and land use attorney based in Safety Harbor, Florida. Ms. Jahn leads a small firm that practices zoning and land use law, and related appellate work, in Florida and Georgia. The firm primarily focuses on the wireless telecommunication industry. Ms. Jahn was admitted to the Florida Bar in 2013 and has since focused her practice on telecommunications projects. Ms. Jahn maintains a pro bono practice that serves the LGBTQ+ community. She also serves on the board of the Clearwater Bar Young Lawyer's Division and the Pinellas County Local Planning Agency Board. Aya M. Abunada is a recent graduate from Stetson University College of Law and works as a planner at the Law Office of Mattaniah S. Jahn, P.A. where she supports the team's zoning and appellate work. Ms. Abunada serves on the board of the Clearwater Bar Young Lawyer's Division. David Blum is Of Counsel to the Law Office, supporting the firm's appellate practice. Mr. Blum received Florida licensure in 2003 and brings nearly two decades of civil trial practice to the Law Office.

1. *See* Christine Jorgensen, *Fundamentals of Wireless Signals and Cellular Networks*, QUALCOMM (Oct. 10, 2019, 9:16 AM), https://developer.qualcomm.com/blog/fundamentals-wireless-signals-and-cellular-networks.

2. *See id.*

3. *Id.*

two-way communication.[4] But cellular devices are not just communication tools anymore;[5] for example, they can be used for navigating, emergency locating, internet access, and business communications.[6] The typical American has several cellular-enabled devices or "cell phones" that require cellular-network connection, ranging from the watches on many individuals' wrists to the computer used to write this Article.[7] The fifth generation of wireless technology ("5G") will be even more data-rich, requiring cable speed data connections and performing increasingly critical functions, such as remote health monitoring and drone navigation—all while people expect their calls to go through clearly.[8] Two things happen as more data moves through the networks: (1) wireless providers must switch to higher frequency radio waves that travel shorter distances, and (2) the antennas must increase in size so they have the physical hardware necessary to connect to an ever-increasing number of devices in their ever-shrinking service areas.[9]

These service areas are regulated by state and local governments that consider land use necessary to construct cell towers.[10] Local governments usually make these decisions for either the stated or genuine purpose of protecting their citizens.[11] Furthermore, wireless

4. *Id.*

5. *A Computer in Your Pocket: The Rise of Smartphones*, SCI. MUSEUM (Nov. 13, 2018), https://www.sciencemuseum.org.uk/objects-and-stories/computer-your-pocket-rise-smartphones#:~:text=Mobile%20phones%2C%20once%20simply%20tools,and%20the%20world%20around%20us [hereinafter *A Computer in Your Pocket*]; *9-1-1 Statistics*, NENA, https://www.nena.org/page/911Statistics (last visited Apr. 1, 2022).

6. *A Computer in Your Pocket*, *supra* note 5.

7. *4G LTE Tablets*, BEST BUY, https://www.bestbuy.com/site/ipad-tablets-ereaders/4g-lte-tablets/pcmcat258800050018.c?id=pcmcat258800050018 (last visited Apr. 1, 2022); Michael Sawh, *Best 4G/LTE Smartwatch 2022: Cellular Picks from Apple, Samsung and More*, WAREABLE (Mar. 16, 2022), https://www.wareable.com/smartwatches/best-4g-lte-cellular-smartwatch; Paolo Collela, *5G and IoT: Ushering in a New Era*, ERICSSON, https://www.ericsson.com/en/about-us/company-facts/ericsson-worldwide/india/authored-articles/5g-and-iot-ushering-in-a-new-era (last visited Apr. 1, 2022).

8. 5G *FAQs*, FCC, https://www.fcc.gov/5g-faqs (last visited Apr. 1, 2022); Collela, *supra* note 7; Dev Singh, *Qualcomm Flight RB5 5G Platform — The World's First 5G- and AI-Enabled Drone Platform*, QUALCOMM (Aug. 17, 2021), https://www.qualcomm.com/news/onq/2021/08/17/qualcomm-flight-rb5-5g-platform-worlds-first-5g-and-ai-enabled-drone-platform; Dong Li, *5G and Intelligence Medicine—How the Next Generation of Wireless Technology Will Reconstruct Healthcare?*, 2 PRECISION CLINICAL MED., 205, 205–06 (2019), https://academic.oup.com/pcm/article/2/4/205/5591013.

9. Phillip Tracy, *What Is the MM Wave and How Does It Fit into 5G?*, RCR WIRELESS NEWS (Aug. 15, 2016), https://www.rcrwireless.com/20160815/fundamentals/mmwave-5g-tag31-tag99; David Talbott, *Article 7 of Our 5G Series: 5G Antenna Design Is Critical to Its Broader Success*, WEVOLVER (Dec. 7, 2020), https://www.wevolver.com/article/5g-antenna-design.

10. *See* Hess v. Port Auth. Trans–Hudson Corp., 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments.").

11. *See* Fed. Energy Regul. Comm'n v. Mississippi, 456 U.S. 742, 768 (1982) ("[R]egulation of land use is perhaps the quintessential state activity.").

providers and local governments face backlash from citizens who oppose cell towers for being intrusive, radioactive, detrimental to property values, or ugly.[12] After consuming large amounts of local government resources, wireless providers are often denied permits as a result of citizen and government opposition.[13]

This was just as much the case in the mid-nineties as it is today.[14] In the mid-nineties, there were only 33,800,000 cellular subscriptions in the United States. In other words, just thirteen percent of the population possessed a cell phone.[15] Some political lobbyists, prescient members of Congress,[16] or a combination of the two, anticipated that this luxury technology would eventually grow into national infrastructure.[17] This led to Congress passing the Telecom Act of 1996 (TCA), which was "the first major overhaul of telecommunications law [in the United States] in almost sixty-two years."[18] The TCA was enacted "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."[19] In addition, the TCA was intended "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[20] This overhaul included wireless communications, with Section 332 mainly focusing on what we now know as cell phones.[21] This included five specific preemptions of state and local government law under section (c)(7), titled "Preservation of Local Zoning Authority."[22]

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12. *See* Tom Leddo & Lynn Whitcher, *Small Cells – Not in My Front Yard*, MD7 (June 23, 2016), https://www.md7.com/perspectives/not-in-my-front-yard/.

13. Jessica Bakeman, *Florida Lawmakers Shift Local Authority to State, One Bill at a Time*, WLRN 91.3 FM (Mar. 15, 2021, 6:00 AM), https://www.wlrn.org/news/2021-03-15/florida-lawmakers-shift-local-authority-to-state-one-bill-at-a-time.

14. Leddo & Whitcher, *supra* note 12.

15. *Wireless History Timeline*, WIRELESS HIST. FOUND., https://wirelesshistoryfoundation.org/wireless-history-project/wireless-history-timeline/ (last visited Apr. 1, 2022).

16. *See* Mike Mills, *Telecom's Lavish Spending on Lobbying*, WASH. POST (Dec. 6, 1998), https://www.washingtonpost.com/archive/business/1998/12/06/telecoms-lavish-spending-on-lobbying/b3f35aec-aab0-4a9d-8f48-3212572df8ec/.

17. H.R. REP. NO. 104-458, at 113 (1996) (Conf. Rep.), *as reprinted in* 1996 U.S.C.C.A.N. 10, 124.

18. *Telecommunications Act of 1996,* FCC, https://www.fcc.gov/general/telecommunications-act-1996 (June 20, 2013).

19. H.R. REP. NO. 104-458, at 113.

20. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 56 (1996); Am. Tower LP v. City of Huntsville, 295 F.3d 1203, 1206–07 (11th Cir. 2002).

21. *See* Preferred Sites, LLC v. Troup County, 296 F.3d 1210, 1214 (11th Cir. 2002); 47 U.S.C. § 332(c)(7).

22. 47 U.S.C. § 332(c)(7)(B)(iv).

Since 1996, the world has changed in several ways. As of 2020, there were 417,215 cell sites in the United States; a third of United States households had three or more smartphones; and ninety-seven percent of the population owned at least one cell phone.[23] These changes may lead many people, especially those in local government, to ask whether the TCA is still necessary.

In contrast, wireless service providers (i.e., carriers) and other proponents of cellular technology would counter this by pointing to the decreasing number of landline connections in the United States, increasing congestion rates within cell towers, and the fact that eighty percent of all 9-1-1 calls come from wireless phones.[24] Further, the 5G rollout, which is part of a national program to expand high-speed internet connectivity across the United States, is anticipated to require sizeable increases in both small cells and cell towers in order to obtain the signal strength and capacity necessary to create cable internet speeds over the air.[25] Regardless of whether it is powered by lobbyists, the American consumer, or some modern take on the space race, the TCA is likely going nowhere soon.[26] Therefore, as a means of finding pragmatic and efficient project solutions, a thorough understanding of the TCA and its interplay with local zoning laws is key for those who work with cell towers.

II. LEGISLATIVE PROHIBITIONS (253) VS. QUASI-JUDICIAL PROHIBITION (332)

The TCA includes two sections that ban the prohibition or effective prohibition of personal wireless service.[27] The provision codified at 47

23. Bevin Fletcher, *U.S. Counts More than 417K Cell Sites as of 2020*, FIERCE WIRELESS (July 28, 2021, 1:03 PM), https://www.fiercewireless.com/wireless/u-s-counts-more-than-417k-cell-sites-as-2020; *Mobile Fact Sheet: Mobile Phone Ownership Over Time*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/mobile/; Kenneth Olmstead, *A Third of Americans Live in Households with Three or More Smartphones*, PEW RSCH. CTR. (May 25, 2017), https://www.pewresearch.org/fact-tank/2017/05/25/a-third-of-americans-live-in-a-household-with-three-or-more-smartphones/.

24. Niall McCarthy, *The Great Decline of the Landline*, FORBES (Feb. 27, 2015, 8:51 AM), https://www.forbes.com/sites/niallmccarthy/2015/02/27/the-great-decline-of-the-landline-infographic/?sh=111503bc12f3; *The Wireless Industry: Industry Data*, CTIA, https://www.ctia.org/the-wireless-industry/infographics-library (last visited Apr. 1, 2022); *9-1-1 Statistics*, *supra* note 5.

25. *Accelerating 5G in the United States*, CTR. FOR STRATEGIC INT'L STUD. 5 (Mar. 1, 2021), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/210301_Lewis_Accelerating_5G_0.pdf?klP.hknBLh2uJBCPMkxs5_wRNzFiMbdO.

26. *See* Richard Adler, *Will the Telecommunications Act Get a Much-Needed Update as It Turns 21?*, VOX (Feb. 8, 2017, 9:05 AM), https://www.vox.com/2017/2/8/14500978/telecommunications-act-1996-regulation-update-telecom-policy.

27. 47 U.S.C. §§ 253, 332.

U.S.C. § 253 (Section 253) disallows a state or local government from legislatively enacting an ordinance that prohibits or has the effect of prohibiting the provision of wireless service in all or part of a state or local government.[28] Conversely, the provision codified as 47 U.S.C. § 332 (Section 332) prevents a local government from making a quasi-judicial decision that prohibits or has the effect of prohibiting the provision of wireless service.[29] It may be useful to think of Section 253 as "Legislative Prohibition" and Section 332 as "Quasi-Judicial Prohibition."

The two inquiries are effectually very different since they are triggered by different actions of state and local governments.[30] However, the Federal Communications Commission (FCC) stated that the actual mechanics of prohibition and the facts that constitute a significant gap are functionally the same for both inquiries.[31] Given this insight from the FCC, the authors will discuss the two prongs of the Effective Prohibition analysis in the context of Quasi-Judicial Prohibition.

III. OVERVIEW OF SECTION 332 OF THE TELECOM ACT

In 1996, Congress enacted the TCA with the intent of promoting both the competition and the rapid deployment of wireless services within the telecommunications industry which allows for improved cell phone coverage in areas with significant coverage gaps.[32] Incorporating this into an analysis of Section 332, the TCA outlines five claims that may be brought to federal court for redress.[33] These claims are: (1) failure to provide a written decision supported by substantial evidence (Substantial Evidence); (2) failure to provide a decision within a 150-day time from the date of a new communication tower application (Shot Clock); (3) unreasonable discrimination among providers of functionally equivalent services (Unreasonable Discrimination); (4) consideration of radio frequency emissions when deciding whether to approve or deny a communication tower application (RF); and (5) rendering a decision on a communication tower application that

28. MetroPCS Inc. v. City & County of San Francisco, No. C02-3442 PJH, 2005 WL 1692631, at *2 (N.D. Cal. July 15, 2005).

29. MetroPCS Inc. v. City & County of San Francisco, No. C02-3442 PJH, 2006 WL 1699580, at *6 (N.D. Cal. June 16, 2006).

30. *MetroPCS Inc.*, 2005 WL 1692631, at *2; s*ee also MetroPCS Inc.*, 2006 WL 1699580, at *6.

31. Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv., 33 FCC Rcd. 9088, ¶ 34, at 9101, ¶ 37, at 9105 (2018).

32. *See* MetroPCS N.Y., LLC v. Village of East Hills, 764 F. Supp. 2d 441, 448 (E.D.N.Y. 2011).

33. 47 U.S.C. § 332(c)(7)(B).

prohibits or has the effect of prohibiting wireless service to a geographic area (Effective Prohibition).[34]

The TCA requires that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record."[35] Federal courts have limited authority over TCA-related zoning decisions.[36] In reviewing an agency's decision, a court is bound by "the traditional substantial evidence standard used by courts to review agency decisions."[37] The Substantial Evidence standard is said to be between a mere scintilla and a preponderance of the evidence.[38] A local government should include in its written record the requirements of the local zoning ordinance and the basis for its denial.[39] Therefore, "[w]hen evaluating the evidence [supporting the denial], local and state zoning laws govern the weight to be given the evidence," and the TCA does not "affect or encroach upon the substantive standards to be applied under established principles of state and local law."[40]

When a local zoning board fails to provide a written decision that is supported by substantial evidence, the applicant's next chance for redressability is analogous to a Florida writ of certiorari for a local government's decision to federal court. Extrinsic evidence may not be introduced and the adjudicator is not allowed to re-weigh the evidence that was before the local government; rather, the adjudicator examines whether the basis of a local government's decision was supported by substantial evidence.[41] Although the standard "is not as stringent as the preponderance of the evidence standard, it requires courts to take a harder look than when reviewing under the arbitrary and capricious standard."[42] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[43] Furthermore, the party seeking to overturn the local government's

34. *Id.*
35. *Id.*
36. Am. Tower LP v. City of Huntsville, 295 F.3d 1203, 1207 (11th Cir. 2002).
37. *Id.* at 1208; *see also* T-Mobile S., LLC v. City of Roswell, 135 S. Ct. 808, 815 (2015).
38. Michael Linet, Inc. v. Village of Wellington, 408 F.3d 757, 762 (11th Cir. 2005).
39. Wireless Towers, LLC v. City of Jacksonville, 712 F. Supp. 2d 1294, 1303 (M.D. Fla. 2010) (citing Wireless Towers, LLC v. St. Johns County, 690 F. Supp. 2d 1282, 1294–95 (M.D. Fla. 2010); T–Mobile S., LLC v. Coweta County, No. 1:08–CV–0449–JOF, 2009 WL 596012, at *7 (N.D. Ga. Mar. 5, 2009)).
40. *Id.* (quoting Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 494 (2d Cir.1999)).
41. Preferred Sites, LLC v. Troup County, 296 F.3d 1210, 1220 (11th Cir. 2002).
42. *Id.* at 1218.
43. VoiceStream Minneapolis, Inc. v. St. Croix County, 342 F.3d 818, 830 (7th Cir. 2003) (quoting Aegerter v. City of Delafield, 174 F.3d 886, 889 (7th Cir. 1999)).

decision bears the burden of demonstrating a lack of substantial evidence supporting the decision.[44]

A Shot Clock claim arises when a local government fails to provide a decision within 150 days from the date an application was filed.[45] The 150-day period begins when the zoning application is filed.[46] The time period continues to run while the local government reviews the request and it is paused when the local government comments on the request.[47] The time period restarts when the applicant submits a response to the local government's comments.[48] This cycle continues until either the time period runs out or the local government issues a final decision on the application.[49]

Moreover, the TCA prohibits "unreasonabl[e] discriminat[ion] among providers of functionally equivalent services."[50] This provision aims to "ensure that, once the municipality allows the first wireless provider to enter, the municipality [will] not unreasonably exclude subsequent providers who similarly wish to enter and create a competitive market in telecommunications services."[51] Furthermore, it is important to note that the TCA only provides protection from *unreasonable* discrimination.[52] To determine whether discrimination is unreasonable, the Third Circuit employs a two-prong test: (1) the plaintiff must show that the relevant providers are functionally equivalent; and (2) that the government body unreasonably discriminated against subsequent providers.[53]

The TCA also prohibits a local zoning board from considering RF emissions when deciding whether to approve or deny a communication tower application, specifically when testimony is present that the RF emissions are within the standards set by the FCC.[54] The TCA states, "No [s]tate or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service

44. *Id.*

45. Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv., 33 FCC Rcd. 9088, ¶ 138, at 9159 (2018).

46. *Id.* ¶ 141, at 9161.

47. *Id.* ¶ 141–142, at 9161.

48. *Id.* (describing "tolling" which occurs under the shot clock when a local government issues a formal comment).

49. *Id.*

50. 47 U.S.C. § 332(c)(7)(B)(i)(I).

51. Omnipoint Commc'ns Enters., L.P. v. Zoning Hearing Bd. of Easttown Twp., 331 F.3d 386, 400 (3d Cir. 2003).

52. *Id.* at 395; *see also* AT&T Wireless PCS, Inc. v. City Council of Virginia Beach, 155 F.3d 423, 427 (4th Cir.1998).

53. *Omnipoint Commc'ns Enters.*, *L.P.*, 331 F.3d at 395.

54. 47 U.S.C. § 332(c)(7)(B)(i)(I).

facilities on the basis of the environmental effects of radiofrequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions."[55] Thus, denial based on RF emissions still violates the TCA, even if other legitimate reasons play a role in the government's decision.[56]

An Effective Prohibition claim arises when a local zoning board delivers a decision that prohibits or has the effect of prohibiting wireless service to a geographic area.[57] Unlike Substantial Evidence, the standard of review is de novo, which gives no deference to local governments.[58] An Effective Prohibition analysis consists of two main prongs.[59] The applicant must show (1) a significant gap in service and (2) that "some inquiry into the feasibility of alternative facilities or site locations" has occurred.[60]

When reviewing an Effective Prohibition claim, a federal court analyzes not only whether a local government's decision has prohibited the provision of wireless coverage in an area, but also whether the decision *had the effect* of prohibiting wireless coverage.[61] Furthermore, it is important to note that a local government can take part in Effective Prohibition even if its decision is supported by substantial evidence.[62] Extrinsic evidence is allowable under the Effective Prohibition review.[63] This begs the question as to what a "significant gap" is, when a "significant gap" exists, and what legal standard should be applied?

55. *Id.*

56. T-Mobile Ne. LLC v. Loudoun Cnty. Bd. of Supervisors, 903 F. Supp. 2d 385, 409 (E.D. Va. 2012), *aff'd*, 748 F.3d 185 (4th Cir. 2014) (quoting T-Mobile Ne. LLC v. Ramapo, 701 F. Supp. 2d 446, 460 (S.D.N.Y. 2009)).

57. PI Telecom Infrastructure, LLC v. City of Jacksonville, 104 F. Supp. 3d 1321, 1346 (M.D. Fla. 2015); *see* Second Generation Props., L.P. v. Town of Pelham, 313 F.3d 620, 629 (1st Cir. 2002); Voice Stream PCS I, LLC v. City of Hillsboro, 301 F. Supp. 2d 1251, 1260 (D. Or. 2004).

58. *PI Telecom Infrastructure, LLC*, 104 F. Supp. 3d at 1346.

59. T-Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987, 995 (9th Cir. 2009); *see PI Telecom Infrastructure, LLC*, 104 F. Supp. 3d at 1350; Wireless Towers, LLC v. St. Johns County, 690 F. Supp. 2d 1282, 1293 n.11 (M.D. Fla. 2010).

60. *T-Mobile USA, Inc.*, 572 F.3d at 995.

61. *PI Telecom Infrastructure, LLC*, 104 F. Supp. 3d at 1346.

62. Cellco P'ship v. Town of Grafton, 336 F. Supp. 2d 71, 82 (D. Mass. 2004); *see Town of Pelham*, 313 F.3d at 629.

63. Airtouch Cellular v. City of El Cajon, 83 F. Supp. 2d 1158, 1167 (S.D. Cal. 2000); *see* VoiceStream Minneapolis, Inc. v. St. Croix County, 342 F.3d 818, 833 (7th Cir. 2003); T-Mobile Ne., LLC v. Bedford, No. 17-CV-339-LM, 2018 WL 6201717, at *6 (D.N.H. Nov. 28, 2018).

IV. RULES ON THE "SIGNIFICANT GAP"

Currently, there is a split amongst the circuits regarding what constitutes a "significant gap" in service.[64] Depending on the test applied, a telecommunications provider could build a robust telecommunications system that meets the growing needs of a developing network; find itself relying on competitors' towers; or, in the worst-case scenario, be forced to give up on constructing any new towers in an area.

The rules vary in the amount of deference provided to local governments and their decisions.[65] The rules are "Tantamount Prohibition," "One Service Provider" (sometimes referred to as the "Any Service Provider"), "Provider's Service," and "Material Inhibition."[66] There is an inverse relationship between the amount of local control allowed versus the ability of telecommunication providers and servicers to build towers as needed.[67] The Fourth Circuit's approach (Tantamount Prohibition) is the most stringent, while the rule followed by the First, Sixth, and Ninth Circuits is more lenient.[68] The middle ground relies on the One Service Provider and the Provider's Service rules, which differ primarily in their focus on encouraging competition.[69] The newest and most lenient rule, from the telecommunication provider/servicer perspective, is the FCC's Material Inhibition standard, which gives the telecommunications provider/servicer nearly free rein and almost completely deprives local governments of control over their land use regulations regarding telecommunication towers.[70]

64. *See PI Telecom Infrastructure, LLC*, 104 F. Supp. 3d at 1346; *see also* Cellular S. Real Estate, Inc. v. City of Mobile, No. 15-0038 7-CG-B, 2016 U.S. Dist. LEXIS 88444, at *31–32 (S.D. Ala. July 8, 2016).

65. *See* T-Mobile Ne. LLC v. Fairfax Cnty. Bd. of Supervisors, 672 F.3d 259, 273 (4th Cir. 2012); *see also* MetroPCS, Inc. v. City and County of San Francisco, 400 F.3d 715, 725 (9th Cir. 2005); Sprint Spectrum L.P. v. Willoth, 176 F.3d 630, 643 (2d Cir. 1999).

66. *MetroPCS, Inc.*, 400 F.3d at 731.

67. *See T-Mobile Ne. LLC*, 672 F.3d at 266; *see also* AT&T Wireless PCS, Inc. v. City Council of Virginia Beach, 155 F.3d 423, 428 (4th Cir. 1998); *PI Telecom Infrastructure, LLC*, 104 F. Supp. 3d at 1346; *Cellular S. Real Estate, Inc.*, 2016 U.S. Dist. LEXIS, at *31–32; Omnipoint Holdings, Inc. v. City of Cranston, 586 F.3d 38, 52–53 (1st Cir. 2009); T-Mobile W. Corp. v. City of Agoura Hills, No. CV 09-9077 DSF PJWX, 2010 WL 5313398, at *9 (C.D. Cal. Dec. 20, 2010).

68. *Cellular S. Real Estate, Inc.*, 2016 U.S. Dist. LEXIS 88444, at *32.

69. *Omnipoint Holdings, Inc.*, 586 F.3d at 51.

70. Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv., 33 FCC Rcd. 9088, ¶ 141–142, at 9161, ¶ 145, at 9162 (2018).

A. Tantamount Prohibition Rule

The Fourth Circuit represents five mid-Atlantic states with a total population of approximately thirty-two million. This circuit interpreted Effective Prohibition to only prohibit "a 'blanket ban' on wireless service," resulting in "a general policy that essentially guarantees [the] rejection of all wireless facility applications."[71]

Since the Fourth Circuit will uphold any ordinance, law, or decision that does not result in "a 'blanket ban' on wireless service," this Tantamount Prohibition rule is considered the most restrictive test by telecommunication providers.[72] Under this rule, all wireless facility applications can be rejected by a local government without running afoul of the TCA as it is almost impossible to argue that one particular tower would result in the general prohibition of service across an entire area.[73]

In applying the Tantamount Prohibition rule, the Fourth Circuit has adopted a hands-off approach to federal regulation of local government land use decisions regarding telecommunications. If this rule is adopted nationwide, the result would be a return to the NIMBY ("not in my backyard")[74] days that existed prior to the TCA. Such adoption would be contrary to congressional intent since this restrictive policy will impede the growth of existing networks and will prevent the creation of new networks at a time where both are needed to support 5G coverage expansion.[75] Congress enacted the TCA to "deregulate[] various aspects of the wireless phone industry,"[76] foster competition between telecommunication providers, rapidly spur innovation, and create higher quality telecommunication services for consumers.[77] "The Act generally preserves 'the traditional authority of state and local governments to regulate the location, construction, and modification' of wireless communications facilities like cell phone towers, but imposes

71. *T-Mobile Ne. LLC*, 672 F.3d at 266; *see also AT&T Wireless PCS, Inc.*, 155 F.3d at 428; *Cellular S. Real Estate, Inc.*, 2016 U.S. Dist. LEXIS 88444, at *32.

72. *Cellular S. Real Estate, Inc.*, 2016 U.S. Dist. LEXIS 88444, at *32.

73. *See T-Mobile Ne. LLC*, 672 F.3d at 266; *see also AT&T Wireless PCS, Inc.*, 155 F.3d at 428; 360 Degrees Commc'ns Co. of Charlottesville v. Bd. of Supervisors of Ablemarle Cnty., 211 F.3d 79, 88 (4th Cir. 2000) (holding that provider has the burden of demonstrating that "denial of its application for the one particular site is tantamount to a prohibition of service" and that "further reasonable efforts are so likely to be fruitless that it is a waste of time even to try").

74. *Good Cell Service Is Vital These Days*, CHRONICLE (Nov. 10, 2017), https://thechronicle.com/stories/20171110Editorial.php (last visited Apr. 1, 2022).

75. H.R. REP. NO. 104-458, at 113 (1996) (Conf. Rep.), *as reprinted in* 1996 U.S.C.C.A.N. 10, 124.

76. Michael Linet, Inc. v. Village of Wellington, 408 F.3d 757, 761 (11th Cir. 2005).

77. *Id.* (quoting City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 115 (2005)).

'specific limitations' on that authority."[78] One such limitation prevents local governments from regulating "the placement, construction, and modification of personal wireless service facilities" in a way that "prohibit[s] or [has] the effect of prohibiting the provision of personal wireless services."[79] A party who is "adversely affected by a locality's decision may seek judicial review."[80]

B. One Service Provider Rule

The Second and Third Circuits, representing a population of over forty-seven million, employ an Effective Prohibition analysis that specifically requires the applicant to determine whether another telecommunications provider has already established a service that would resolve the gap in the applicant's network.[81] The idea seems to be that consumers are no longer burdened with paying "roaming" charges and the carriers have learned to get along by sharing locations and networks in what is envisioned as a seamlessly integrated system.[82] The rule presumes that providers will cooperate with one another to provide reliable coverage to consumers.[83] However, the rule ignores the benefit of redundancy and competition in the marketplace, a stated goal of the TCA.[84]

The One Service Provider rule allows towers to be limited on a first-come-first-serve basis, leading to a race to be the first in an area in order to exclude potential competitors.[85] As a result, the rule discourages new entrants into the market.[86] Functionally, there are only four nationwide cellular providers: T-Mobile, Verizon, AT&T, and Dish Wireless. In many cases, lack of space prevents these providers from co-locating their towers.[87] For example, Dish, which was established as a fourth carrier

78. T-Mobile South, LLC v. City of Roswell, 574 U.S. 293, 299 (2015) (quoting *Abrams*, 544 U.S. at 115).

79. *Id.* at 816; Omnipoint Commc'ns Enters., L.P. v. Newton Township, 219 F.3d 240, 243 (3d Cir. 2000).

80. *See T-Mobile South, LLC*, 574 U.S. at 299.

81. *See* Sprint Spectrum L.P. v. Willoth, 176 F.3d 630, 643 (2d Cir. 1999); Cellular Tel. Co. v. Zoning Bd. of Adjustment of Ho-Ho-Kus, 197 F.3d 64, 70 (3d Cir. 1999); *Omnipoint Commc'ns Enters., L.P.*, 219 F.3d at 244; Cellular S. Real Estate, Inc. v. City of Mobile, No. 15-00387-CG-B, 2016 U.S. Dist. LEXIS 88444, at *32 (S.D. Ala. July 8, 2016).

82. Second Generation Props., L.P. v. Town of Pelham, 313 F.3d. 620, 627 (1st Cir. 2002).

83. *Id.*

84. *Id.* at 631.

85. *Id.* at 633.

86. *Id.*

87. Linda Hardesty, *Dish Gets Its Day in the Sun, Becomes No. 4 US Wireless Carrier*, FIERCE WIRELESS (Feb. 11, 2020, 11:10 AM), https://www.fiercewireless.com/operators/dish-gets-its-day-sun-becomes-no-4-us-wireless-carrier.

after Sprint and T-Mobile merged, will be at a distinct disadvantage and at the mercy of its competitors in establishing an effective business with limited towers.[88] Complicating the situation further, the rule ignores the reality that all carriers struggle with: increased consumer usage.[89] The problem with the nationwide adoption of this rule is that a carrier would have to cooperate with its competitors and cobble together a "crazy patchwork quilt" in order to provide one reliable network.[90] Such a result is contrary to the intent of the TCA, discourages competition, and would result in limited—if any—overlapping tower coverage between carriers.[91]

C. Provider's Service Rule

The First, Sixth, and Ninth Circuits, which collectively contain a population of approximately 111 million, apply a test to "determine whether the area has a significant gap in the *applicant's own* wireless coverage."[92] The analysis is fact-driven, as it tries to reconcile the sometimes competing interests of preserving local authority with the need for the rapid growth of cellular service, along with the goal of providing universal coverage.[93] These competing interests pit consumers of cellular services against local residents.[94]

The analysis starts with the identification of a "significant gap" and a proposed site to resolve said gap.[95] The local government then decides whether the telecommunications tower can be built on the proposed site.[96] In cases where the decision results in a denial, an appeal may be taken to federal court.[97] The question then becomes what standard or rule is applied to resolve the gap.[98]

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88. *Id.*

89. Bashar Romanous et al., *Network Densification: Challenges and Opportunities in Enabling 5G*, IEEE (Oct. 2015), https://ieeexplore.ieee.org/abstract/document/7390494.

90. *Town of Pelham*, 313 F.3d at 633.

91. *Id.* at 634.

92. Cellular S. Real Estate, Inc. v. City of Mobile, No. 15-00387-CG-B, 2016 U.S. Dist. LEXIS 88444, at *32 (S.D. Ala. July 8, 2016) (emphasis added).

93. *Town of Pelham*, 313 F.3d at 631; T-Mobile Cent., LLC v. Charter Township of West Bloomfield, 691 F.3d 794, 807 (6th Cir. 2012); MetroPCS, Inc. v. City & County of San Francisco, 400 F.3d 715, 733 (9th Cir. 2005), *abrogated on other grounds by* T-Mobile South, LLC v. City of Roswell, 574 U.S. 293 (2015).

94. *MetroPCS, Inc.*, 400 F.3d at 718. *See generally County Population Totals: 2010-2019*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/time-series/demo/popest/2010s-counties-total.html (Oct. 8, 2021).

95. Omnipoint Commc'ns. Enters., L.P. v. Newtown Township, 219 F.3d 240, 244 (3d Cir. 2000).

96. *Id.* at 242.

97. *Id.*

98. *Id.*

Of the rules that have been adopted by courts, the Provider's Service rule is best suited to today's wireless networks, which require ever-increasing levels of data transfer and faster processes.[99] Looking at the rules, it seems that wireless networks have progressed with modern technology.[100] That being said, it is easy to forget the development of technology taking place alongside tower development and the TCA over the last twenty-five years.[101]

For the most part, cellular telephones in the 1990s were just phones, and wireless technology was still an underutilized option that did not require tremendous amounts of data transfer.[102] For instance, "[i]n 1987 there were fewer than 100,000 cell-phone users in the United States."[103] During this time, the public and local governments were largely still combatting NIMBY sentiments in response to tower construction and the focus in the mid-Atlantic region of the United States was to allow for the approval of some telecommunication land use development based only on gaps where no coverage existed.[104] In the TCA, Congress intended to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers."[105] Following the passage of the TCA, the number of cellphone users increased to 128 million in 2001 and the number of towers to service these users increased as well.[106]

The courts, which are historically conservative and hesitant to adopt change, started with a view of whether there was a direct conflict between the TCA, local decisions, and ordinances.[107] This approach worked well when the Fourth Circuit decided *360 Degrees* in 2000.[108] In *360 Degrees*, the cellular carrier alleged it was receiving twenty calls per week regarding inadequate service which was contradicted by the

99. Joan Engebretson, *CTIA Report: 37 Trillion MBs in Mobile Data in 2019 Highlights 96-Fold Growth in Mobile Data Usage Since 2010*, TELECOMPETITOR (Aug. 25, 2020), https://www.telecompetitor.com/ctia-report-37-trillion-mbs-in-mobile-data-in-2019-highlights-96-fold-growth-in-mobile-data-usage-since-2010/.

100. *Id.*

101. Calvin Sims, *All About/Cellular Telephones; a Gadget That May Soon Become the Latest Necessity*, N.Y. TIMES (Jan. 28, 1990), https://www.nytimes.com/1990/01/28/business/all-about-cellular-telephones-a-gadget-that-may-soon-become-the-latest-necessity.html.

102. *Id.*

103. Thomas A. Wikle, *Cellular Tower Proliferation in the United States*, 92 GEOGRAPHICAL REV. 45, 51 (2002).

104. *Good Cell Service is Vital These Days*, CHRONICLE (Nov. 10, 2017), https://thechronicle.com/stories/20171110Editorial.php.

105. Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56, 56 (1996).

106. Wikle, *supra* note 103, at 46–47, fig. 1–2.

107. 360 Degrees Commc'ns. Co. of Charlottesville v. Bd. of Supervisors of Albemarle Cnty., 211 F.3d 79, 83 (4th Cir. 2000).

108. *Id.* at 87.

testimony of ten to thirteen members of the public who expressed concerns about the tower and claimed that their cellular coverage was adequate.[109] The court ruled that the Board of Supervisors' decision to deny the installation of the tower was proper, while tacitly stating that the communication system at that time was good enough.[110]

As cellular subscribers continued to rapidly expand, the FCC required telecommunication providers to allow tower access to competitors and to enter into agreements to expand coverage and promote the creation of a seamless system from the consumers' perspective.[111] Likewise, courts relied on the One Service Provider rule, which prioritizes a cooperative approach to towers.[112] The One Service Provider rule promotes the use of shared resources to provide uninterrupted coverage.[113] This rule provides more coverage than the prior rule but requires carriers to cooperate and solve gaps by agreements with competitors.[114] While simple and straightforward, the One Service Provider rule did not address the complexities of the next step in telecommunications technology.[115] By 2014, the cellular market had reached ninety-two percent of the Unites States' population and the types of devices had again taken a giant leap forward with the proliferation of smart phones.[116] As the need for towers expanded to cover the changes from a 3G network to a 4G network, and now a 5G network, courts became more involved in local government denials of cell towers.

In *MetroPCS, Inc. v. San Francisco*, the court addressed whether a carrier who had a "significant gap" in its network was entitled to construct a tower to address said gap where there were already five other carriers that covered the gap in question.[117] Interpreting the TCA, the court adopted the position of the First Circuit, holding that an Effective Prohibition of service exists when a provider is prevented from filling its own significant gap in network coverage.[118]

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109. *Id.*
110. *Id.* at 88.
111. *See Roaming for Mobile Wireless Services*, FCC (June 6, 2019), https://www.fcc.gov/wireless/bureau-divisions/competition-infrastructure-policy-division/roaming-mobile-wireless.
112. Omnipoint Commc'ns. Enters., L.P. v. Zoning Hearing Bd. of Easttown Twp., 331 F.3d 386, 397 (3d Cir. 2003); Nextel W. Corp. v. Unity Township, 282 F.3d 257, 265 (3d Cir. 2002).
113. Sprint Spectrum L.P. v. Willoth, 176 F.3d 630, 641 (2d Cir. 1999).
114. MetroPCS, Inc. v. City and County of San Francisco, 400 F.3d 715, 732 (9th Cir. 2005), *abrogated by* TMobile South, LLC v. City of Roswell, 574 U.S. 293 (2015).
115. *See* Second Generation Props., L.P. v. Town of Pelham, 313 F.3d 620, 631–32 (1st Cir. 2002).
116. *Mobile Fact Sheet*, *supra* note 23.
117. *MetroPCS, Inc.*, 400 F.3d at 732.
118. *Town of Pelham*, 313 F.3d at 632.

The court concluded that individual carriers must have access to their own networks to increase the reliability and density of coverage for the entire network.[119] This led to the Provider's Service rule, which allows each carrier to increase the coverage of its own network to eliminate the "significant coverage" gaps in that carrier's particular network without considering the competitors that already occupy the space.[120] The Provider's Service rule allows each carrier to have its own deployment.[121] The plain language of the TCA intended to provide coverage to more than one carrier in a particular area by use of the plural, rather than the singular form of "services," meaning more than one carrier.[122] The Provider's Service rule analysis is tailored and examined as to a specific carrier and the existing gap in coverage.[123] "In short, the First Circuit's multiple providers rule better facilitates the robust competition which Congress sought to encourage with the TCA, and it better accommodates the current state of the wireless services market."[124] This rule appears to accomplish the goals set forth by Congress in the TCA while still allowing local governments to have meaningful land use planning.

D. Material Inhibition (FCC 18-113)

The Material Inhibition rule, based on *California Payphone*, was advanced by the FCC and is the extreme opposite to the Tantamount Prohibition rule.[125] The Material Inhibition rule focuses on the use of technology beyond the use of cellular towers and seeks to remove barriers to entry, placement, and construction of towers—effectively eliminating local control to deny cellular networks.[126] This rule is the least deferential to local government decisions. Under the Material Inhibition rule, local government denials are overturned if the denial materially limits or inhibits competition among telecommunication providers.[127] The rule restricts competition that goes beyond solving

119. *Id.* at 634.
120. *Id.* at 635.
121. *Id.* at 634.
122. *Id.*
123. *See id.* at 633.
124. MetroPCS, Inc. v. City & County of San Francisco, 400 F.3d 715, 732 (9th Cir. 2005), *abrogated by* T-Mobile South, LLC v. City of Roswell, 574 U.S. 293 (2015).
125. *See* Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv., 33 FCC Rcd. 9088 (2018).
126. *See id.* ¶ 49, at 9112–13.
127. *See* California Payphone Ass'n Petition for Preemption of Ordinance No. 576 NS of Hunting Park Pursuant to Section 253(d) of the Commc'ns Act of 1934, 12 FCC Rcd. 14191, ¶ 31, at 14206 (1997).

gaps in existing coverage and allows for "densifying a wireless network, introducing new services or otherwise improving service capabilities."[128]

Under the *California Payphone* standard, a state or local government requirement could materially inhibit service in numerous ways, not only by rendering a service provider unable to provide existing service in a new geographic area or by restricting the entry of a new provider, but also by materially inhibiting the introduction of new services and the improvement of existing services.[129] Thus, an Effective Prohibition includes materially inhibiting additional services or improving existing services. The FCC advances the position that narrowing the reading of the TCA to coverage gaps does not comport with congressional intent and restricts the development of wireless networks.[130]

Without adequate interpretation from the courts, tower siting decisions are largely kept out of local governments' hands due to the TCA's broad language and the FCC's continually extending regulation.[131] The FCC's regulation is contrary to congressional intent, which aims to foster a robust telecommunications system in which competition exists harmoniously with local government controls over traditional land use regulations.[132] If adopted, Material Inhibition language would likely see the *California Payphone* logic grafted onto a significant gap analysis.[133]

V. INQUIRY INTO ALTERNATIVES

As stated previously, under an Effective Prohibition analysis, the applicant has the burden of proving there has been "(1) a significant gap in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations."[134] After the applicant establishes the existence of a significant gap in service, the applicant must analyze and eliminate alternative sites in the service area. Next, Effective

128. *See FCC Takes Latest Action to Promote Deployment of Wireless Services and* Facilities, DAVIS WRIGHT TREMAINE LLP (Sept. 26, 2018), https://www.dwt.com/insights/2018/09/fcc-takes-latest-action-to-promote-deployment-of-w.

129. *California Payphone Ass'n*, 12 FCC Rcd. at 14212, n.102.

130. *See Acclerating Wireless Broadband Deployment*, 33 FCC Rcd. ¶ 37, at 9104.

131. *See id.* ¶ 67, at 9123.

132. 47 U.S.C. § 223(f)(2).

133. *See Acclerating Wireless Broadband Deployment*, 33 FCC Rcd. ¶ 37, at 9104.

134. T-Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987, 995 (9th Cir. 2009); *see* PI Telecom Infrastructure, LLC v. City of Jacksonville, 104 F. Supp. 3d 1321, 1350 (M.D. Fla. 2015); Wireless Towers, LLC v. St. Johns County, 690 F. Supp. 2d 1282, 1296 n.11 (M.D. Fla. 2010); T-Mobile W. Corp. v. City of Agoura Hills, CV 09-9077 DSF PJWX, 2010 WL 5313398, at *7–8 (C.D. Cal. Dec. 20, 2010).

Prohibition requires the approval of the proposed tower by local government.[135] The federal courts describe this exercise as a "practical inquiry into feasible, available alternatives."[136] The applicant possesses the burden to show a prima facie case that no feasible alternatives exist, then the burden shifts to the local government to prove the existence of alternatives.[137] No bright-line rule exists to determine when a wireless provider successfully eliminates alternatives to a proposed tower.[138] However, a wireless provider will fail to meet this burden in instances where carriers' alternatives are essentially undisputed or practically admitted.[139] The court in *Omnipoint Holdings v. City of Cranston* gave more guidance on this point:

> As with most such questions, the district court may consider a number of facts relevant to the conclusion it must reach. What facts are relevant may vary with the case. It is clear that the technical feasibility of the proposed solution or alternative solutions is important. *Town of Amherst* does not say that technical feasibility is the only criterion, nor would we adopt such a rule. The fact that a carrier's proposed solution to the gap is technologically optimal does not, under *Town of Amherst*, end the inquiry. Nor does the inquiry end with the solution preferred by town officials other than the zoning board.[140]

Thus, applicants should take a holistic and thorough approach when analyzing alternatives.

A. Fourth Circuit Rule

The Fourth Circuit, representing a population of approximately thirty-two million, espouses a minority view when analyzing whether an applicant has exhausted their search for alternatives.[141] The court's position is that although Congress intended to limit state and local government control over zoning decisions to promote growth in wireless telecommunications, Congress also sought to preserve state and local control over the actual placement of towers and other wireless

135. *City of Anacortes*, 572 F.3d at 995.
136. Omnipoint Holdings, Inc. v. City of Cranston, 586 F.3d 38, 52–53 (1st Cir. 2009).
137. *Id.* at 52; *City of Anacortes*, 572 F.3d at 997–98.
138. *City of Cranston*, 586 F.3d at 52.
139. *Id.*
140. *Id.* (internal citation omitted).
141. Primeco Pers. Commc'ns Ltd. P'ship v. Lake County, 97-208-CIV-OC-10B, 1998 WL 565036, at *10 (M.D. Fla. July 20, 1998).

service facilities.[142] The court seeks to balance the purpose of the TCA with local interests in zoning decisions.[143] Under the Fourth Circuit rule, the applicant has the burden of proving they have no reasonable alternative.[144] To be reasonable, the court states that an alternative must "provide a high level of wireless service, its cost must be within or close to the industry-wide norm for establishing new service under similar circumstances, it must employ commonly used technology, and it must be logistically feasible."[145] The applicant must establish either that the local government's policies on their face prohibit any wireless services or that the local government's application of its policies has resulted in the rejection of all possible sites in a particular geographic area.[146]

B. Only Feasible Plan Test

Outside the Fourth Circuit, there are two main tests for eliminating alternatives under Effective Prohibition review: the Only Feasible Plan test and the Least Intrusive Means test.[147] Under the Only Feasible Plan test utilized by the First and Seventh Circuits, which represent almost forty million individuals, the applicant must show that "further reasonable efforts are so likely to be fruitless that it is a waste of time even to try."[148] To establish Effective Prohibition under this test, the applicant must show that the proposed tower site is the only feasible site that solves the gap in service.[149]

It is important to note that only feasible alternatives can be considered by the adjudicator.[150] A feasible alternative is one that is technically feasible, available, and not speculative.[151] An alternative is technically feasible if it is physically and legally able to support the

142. 360 Degrees Commc'ns Co. of Charlottesville v. Bd. of Supervisors of Albemarle Cnty., 211 F.3d 79, 86 (4th Cir. 2000).

143. *Id.*

144. *Id.* at 88.

145. *Id.* at 85.

146. *Primeco Pers. Commc'ns Ltd. P'ship*, 1998 WL 565036, at *13.

147. PI Telecom Infrastructure, LLC v. City of Jacksonville, 104 F. Supp. 3d 1321, 1348–49 (M.D. Fla. 2015); T-Mobile S. LLC v. City of Margate, No. 10-CV-60029, 2011 WL 1303898, at *6–8 (S.D. Fla. Apr. 4, 2011); TowerCom V, LLC v. City of College Park, No. 1:13-cv-530-SCJ, 2013 WL 4714203, at *8–9 (N.D. Ga. Aug. 21, 2013); T-Mobile South, LLC v. City of Milton, No. 1:10-CV-1638-RWS, 2015 WL 13687970, at *8–9 (N.D. Ga. Nov. 2, 2015).

148. *City of Margate*, 2011 WL 1303898, at *4; *see also* Town of Amherst v. Omnipoint Commc'ns Enters., Inc., 173 F.3d 9, 14 (1st Cir. 1999); Omnipoint Holdings, Inc. v. City of Cranston, 586 F.3d 38, 50 (1st Cir. 2009); Second Generation Props., L.P. v. Town of Pelham, 313 F.3d 620, 630 (1st Cir. 2002).

149. Airtouch Cellular v. City of El Cajon, 83 F. Supp. 2d 1158, 1166 (S.D. Cal. 2000); Voice Stream PCS I, LLC v. City of Hillsboro, 301 F. Supp. 2d 1251, 1261 (D. Or. 2004).

150. T-Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987, 996 (9th Cir. 2009).

151. *City of Cranston*, 586 F.3d at 52.

site.[152] For example, wetlands and unstable soils can make a site technically unfeasible.[153] Other considerations such as zoning, topography, proximity to other towers, and proximity to residential development can make a site technically unfeasible.[154] Finally, the alternative must still be able to solve the coverage gap.[155] Therefore, movement too far away from the carrier's target area, leaving a gap, can make a site technically unfeasible.[156] Next, alternatives must be available, meaning that they must have a landlord willing to lease their land to the applicant.[157] An applicant does not need to obtain judicial confirmation of unavailability.[158] An owner's prior history of rejecting cell site leases is adequate to render a hypothetical alternative too speculative.[159] Furthermore, under the Only Feasible Plan test, a speculative site is not a viable alternative.[160] If reasonable efforts have shown that a site is not available, an adjudicator cannot speculate that further efforts would make it available.[161]

C. Least Intrusive Means Test

Under the Least Intrusive Means test, which has been adopted by the Second, Third, and Ninth Circuits, the provider has the burden of showing the lack of available and technologically feasible alternatives.[162] This standard requires the provider "show that the manner in which it proposes to fill the significant gap in services is the least intrusive on the values that the denial sought to serve."[163] This means that the provider must 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."[164] The Least Intrusive Means test analyzes the pool of feasible alternatives under the

152. *Id.*
153. Indus. Commc'ns & Elecs., Inc. v. O'Rourke, 582 F. Supp. 2d 103, 108 (D. Mass. 2008).
154. T-Mobile W. Corp. v. City of Agoura Hills, No. CV 09-9077 DSF PJWX, 2010 WL 5313398, at *10 (C.D. Cal. Dec. 20, 2010).
155. T-Mobile S. LLC v. City of Margate, No. 10-CV-60029, 2011 WL 1303898, at *8 (S.D. Fla. Apr. 4, 2011).
156. *Id.*
157. *City of Agoura Hills*, 2010 WL 5313398, at *9.
158. *City of Margate*, 2011 WL 1303898, at *6.
159. *Id.*
160. *City of Agoura Hills*, 2010 WL 5313398, at *8.
161. Omnipoint Holdings, Inc. v. City of Cranston, 586 F.3d 38, 53 (1st Cir. 2009).
162. T-Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987, 997–98 (9th Cir. 2009); *County Population Totals: 2010-2019*, *supra* note 94.
163. *City of Anacortes*, 572 F.3d at 995 (citation omitted).
164. APT Pittsburgh Ltd. P'ship v. Penn Township Butler County, 196 F.3d 469 (3d Cir. 1999).

local Land Development Code (LDC) and determines which one would be least intrusive.[165] If the least intrusive means to serve the gap in service is the proposed site, Effective Prohibition exists.[166] If the least intrusive means to serve the gap in service is another site, there is no Effective Prohibition.[167]

Moreover, the Least Intrusive Means analysis is limited to options available to the adjudicator at the time the local government renders a final decision on the application, not at the time the application is submitted.[168] The adjudicator must analyze factors such as proximity of the site, alternatives to residential development, proximity to other towers, and whether the alternatives conform more closely to the LDC standards than the proposed site.[169] If the alternative before the adjudicator is merely comprised of shorter towers, the adjudicator must determine whether the LDC discourages the proliferation of towers.[170] Finally, movement leaving a gap in coverage or requiring a second tower can make an alternative more intrusive.[171]

In *T-Mobile South LLC v. City of Margate*, the Southern District of Florida noted that both parties acknowledged that a significant gap in T-Mobile's service to the area existed.[172] It then discussed the federal circuit split regarding tests for eliminating alternatives, acknowledging the existence of the Only Feasible Plan test, the Least Intrusive Means test, and the Tantamount Prohibition minority test in the Fourth Circuit.[173] The court acknowledged that the Eleventh Circuit had not yet expressly adopted any of the tests, but observed that the Eleventh Circuit would be likely to adopt a relaxed version of the No Alternative Plan test.[174] It supported its conclusion by analyzing the Eleventh Circuit's treatment of the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[175] The court then entered an injunction requiring Margate to approve T-Mobile's tower.[176]

165. T-Mobile S. LLC v. City of Margate, No. 1-CV-60029, 2011 WL 1303898, at *1, 4 (S.D. Fla. Apr. 4, 2011) (citing *City of Anacortes*, 572 F.3d at 995).
166. *Id.*
167. PI Telecom Infrastructure, LLC v. City of Jacksonville, 104 F. Supp. 3d 1321, 1349 (M.D. Fla. 2015).
168. MetroPCS, Inc. v. City and County of San Francisco, No. C 02-3442 PJH, 2006 WL 1699580, at *13 (N.D. Cal. June 16, 2006).
169. *City of Anacortes*, 572 F.3d at 994.
170. *Id.*
171. *City of Margate*, 2011 WL 1303898, at *8.
172. *Id.* at *3.
173. *Id.* at *4.
174. *Id.* at *4–5.
175. *Id.*
176. *Id.* at *12.

The Supreme Court in *City of Rancho Palos Verdes v. Abrams* noted that Congress' intent when creating the TCA suggests that courts should interpret it while keeping in mind that Congress enacted it to promote the "*rapid deployment* of new telecommunications technologies."[177] The court in *City of Margate* stated that Congress intended for courts construing the TCA to allow local governments to maintain authority over land use matters under the condition that the result of local governmental action still supports and allows cellular phone coverage in geographic areas with significant gaps in coverage.[178] These "analytical guideposts" extracted from RLUIPA made it apparent that the Eleventh Circuit would adopt a test more favorable to service providers than the No Alternative standard contained in the Only Feasible Plan and the Least Intrusive Means tests; both of which are more in line with the purpose of the TCA.[179]

TowerCom V, LLC v. City of College Park established that an applicant must undertake a reasonable and good faith inquiry of alternatives.[180] An applicant cannot eliminate alternatives based upon conclusory statements or very little evidence as it fails reasonableness.[181] Likewise, summarily dismissing alternatives or sites proposed by a local government fails reasonableness.[182] Furthermore, repeated failures to investigate alternative sites is unreasonable.[183] Failure to look at alternative RF deployment configurations on existing sites and upgrades to handoff tower sites will also fail to meet this reasonableness standard.[184] Moreover, failure to search for alternatives altogether also fails reasonableness.[185] Overall, the inquiry only needs to be a commercially reasonable inquiry, and pursuit beyond commercial reasonableness is not necessary.[186]

177. 544 U.S. 113, 115 (2005) (emphasis added).
178. *City of Margate*, 2011 WL 1303898, at *5.
179. *Id.*
180. No. 1:13-CV-530-SCJ, 2013 WL 4714203, at *10 (N.D. Ga. Aug. 21, 2013).
181. 360 Degrees Commc'ns Co. of Charlottesville v. Bd. of Supervisors of Albemarle Cnty., 211 F.3d 79, 88 (4th Cir. 2000).
182. Cellco P'ship v. Town of Grafton, 336 F. Supp. 2d 71, 83–84 (D. Mass 2004).
183. VoiceStream Minneapolis, Inc. v. St. Croix County, 342 F.3d 818, 835 (7th Cir. 2003).
184. Cellco P'ship v. Bd. of Supervisors of Fairfax Cnty., 140 F. Supp. 3d 548, 585 (E.D. Va. 2015); *Town of Grafton*, 336 F. Supp. 2d at 83.
185. PI Telecom Infrastructure, LLC v. City of Jacksonville, 104 F. Supp. 3d 1321, 1350 (M.D. Fla. 2015).
186. Omnipoint Holdings, Inc. v. City of Cranston, 586 F.3d 38, 53 (1st Cir. 2009); *see* T-Mobile S. LLC v. City of Margate, No. 1-CV-60029, 2011 WL 1303898, at *1, 6 (S.D. Fla. Apr. 4, 2011).

VI. ELEVENTH CIRCUIT SURVEY

The Eleventh Circuit has yet to opine on Effective Prohibition under the TCA.[187] However, it has engaged with Section 332 seven times since the Act was passed.[188] Six of the seven engagements were tower cases primarily deciding Substantial Evidence claims; two dealt with rate regulations under § 332(c)(3), and one dealt with a claim for monetary damages under 42 U.S.C. § 1983.[189]

Even though the Eleventh Circuit's tower cases have sounded in Substantial Evidence, the court did provide one small glimpse into its temperament towards exhausting alternatives in *Municipal Communications, LLC v. Cobb County*.[190] While this case is a Substantial Evidence case, the court took Municipal's consistent assertions that an alternative site was unavailable for leasing as Substantial Evidence.[191] This does not change the fact that it was a Substantial Evidence analysis, but the weight of this evidence does affect the remedies that the courts are willing to grant.[192] In this case, the Eleventh Circuit left the mandatory injunction for the applicant in place, indicating perhaps some faint agreement with the district court's conclusion that Municipal adequately eliminated alternative sites within the record.[193]

Given that Eleventh Circuit guidance on Effective Prohibition is fleeting at best, applicable district court opinions are discussed below. The Northern District of Alabama, Southern District of Alabama, Northern District of Georgia, Middle District of Florida, and Southern District of Florida have all engaged in Effective Prohibition analysis.[194]

187. Cellular S. Real Estate, Inc. v. City of Mobile, No. 15-00387-CG-B, 2016 WL 3746661, at *10 (S.D. Ala. July 8, 2016).

188. Mun. Commc'ns, LLC v. Cobb County, 796 F. App'x 663, 668 (11th Cir. 2020); Athens Cellular, Inc. v. Oconee County, 886 F.3d 1094, 1095 (11th Cir. 2018); T-Mobile S., LLC v. City of Roswell, 731 F.3d 1213, 1221 (11th Cir. 2013), *rev'd and remanded*, 574 U.S. 293 (2015); T-Mobile S., LLC v. City of Milton, 728 F.3d 1274, 1283 (11th Cir. 2013); Michael Linet, Inc. v. Village of Wellington, 408 F.3d 757, 761 (11th Cir. 2005); Preferred Sites, LLC v. Troup County, 296 F.3d 1210, 1214 (11th Cir. 2002); Am. Tower LP v. City of Huntsville, 295 F.3d 1203, 1207 (11th Cir. 2002); AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d 1322, 1325 (11th Cir. 2000), *vacated*, 223 F.3d 1324 (11th Cir. 2000), *opinion reinstated*, 250 F.3d 1307 (11th Cir. 2001), *vacated on reh'g en banc,* 260 F.3d 1320 (11th Cir. 2001).

189. *See generally AT&T Wireless PCS, Inc.*, 210 F.3d at 1325.

190. 796 F. App'x at 670.

191. *Id.*

192. *Id.* at 672.

193. *Id.*

194. *See* Am. Tower, L.P. v. City of Huntsville, No. 99-B-2933-NE, 2005 WL 8157811, at *8 (N.D. Ala. Mar. 31, 2005); Cellular S. Real Estate, Inc. v. City of Mobile, No. 15-00387-CG-B, 2016 WL 3746661, at *10–11 (S.D. Ala. July 8, 2016); PI Telecom Infrastructure, LLC v. City of Jacksonville, 104 F. Supp. 3d 1321, 1346–49 (M.D. Fla. 2015); T-Mobile S. LLC v. City of Margate, No. 10-cv-60029, 2011 WL 1303898, at *3–8 (S.D. Fla. Apr. 4, 2011).

A. Northern District of Alabama

The Northern District of Alabama encompasses the cities of Birmingham, Huntsville, Decatur, Anniston, Tuscaloosa, Gadsden, and Jasper.[195] It had a population of approximately three million as of 2019.[196] The district has long engaged in Substantial Evidence analysis, providing two iterations of the case that ultimately became *American Tower L.P. v. City of Huntsville*.[197] The district has also engaged in Effective Prohibition analysis twice since the TCA's enactment.[198]

The district's first Effective Prohibition analysis came in 1997 in *Sprint Spectrum L.P. v. Jefferson County*.[199] The district found that moratoria against new communication tower development effectively prohibited "the provision of this new technology and its advantages."[200] The court did not elaborate on which test is employed; instead, it cited *Western PCS II Corp. v. Extraterritorial Zoning Authority*.[201] *Western PCS*, in turn, implemented the Provider's Service rule for "significant gap" analysis.[202] Neither case engaged in alternative analysis.[203]

The district encountered Effective Prohibition a second time in *American Tower, L.P.*[204] While a later iteration of this case provides long-standing Eleventh Circuit precedent on Substantial Evidence, it also provides the district's only analysis on Effective Prohibition.[205] The district court did not confront significant gap analysis and instead focused on an alternative analysis.[206] The court surveyed the Fourth Circuit's Least Intrusive Means and Only Feasible Plan tests.[207] The court

195. *Southern District Alabama – Area of Service*, U.S. DEP'T OF JUSTICE, https://www.usmarshals.gov/district/al-s/general/area.htm (last visited Apr. 1, 2022).

196. *County Population Totals: 2010-2019*, *supra* note 94.

197. 2005 WL 8157811, at *12; American Tower, L.P. v. City of Huntsville, CV-99-B-2933-NE, 2001 WL 34135265, at *4 (N.D. Ala. June 20, 2001); American Tower, L.P. v. City of Huntsville, CV-99-B-2933-NE, 2000 WL 34017802, at *35 (N.D. Ala. Sept. 29, 2000), *rev'd sub nom.*, 295 F.3d 1203 (11th Cir. 2002).

198. *American Tower, L.P.*, 2005 WL 8157811, at *8; Sprint Spectrum L.P. v Jefferson County, 968 F. Supp 1457, 1467 (N.D. Ala. 1997).

199. *Sprint Spectrum L.P.*, 968 F. Supp at 1467. This case is somewhat unique in that Sprint litigated moratoria and a new ordinance for communication tower standards that was affecting an application instead of a quasi-judicial decision on the application itself. *Id.*

200. *Id.* at 1468.

201. *Id.* at 1467.

202. Western PCS II Corp. v. Extraterritorial Zoning Auth., 957 F. Supp. 1230, 1238 (D.N.M. 1997).

203. *Id.*; *Sprint Spectrum L.P.*, 968 F. Supp. at 1467.

204. American Tower, L.P. v. City of Huntsville, No. CV 99-B-2933-NE, 2005 WL 8157811, at *8 (N.D. Ala. Mar. 31, 2005).

205. American Tower LP v. City of Huntsville, 295 F.3d 1203, 1207 (11th Cir. 2002).

206. *American Tower, L.P.*, 2005 WL 8157811, at *8–9.

207. *Id.* at *7.

analyzed the alternatives to the tower in question under the Only Feasible Plan test and declined to grant summary judgment on the issue.[208] As of this point, the Northern District of Alabama appeared to be inclined to the Provider's Service rule for significant gap analysis and the Only Feasible Plan test for alternatives analysis.

B. Southern District of Alabama

The Southern District of Alabama encompasses the cities of Mobile and Selma.[209] It had a population of approximately 850,000 as of 2019.[210] The district's only case on Effective Prohibition is *Cellular South Real Estate, Inc. v. City of Mobile*.[211] The Southern District acknowledged the circuit split on Effective Prohibition rules and gave an overview of the various rules of the split.[212]

The court reviewed the RF materials of the application, consisting of before and after RF coverage maps and at-hearing testimony verbalizing the maps.[213] The court acknowledged that propagation maps alone can sometimes support a finding of a significant gap.[214] However, the court found the maps offered by Cellular South Real Estate, Inc. insufficient because the maps failed to include any explanation of the current, weaker signal's effects on cellular customers in the area.[215] The court completed its Effective Prohibition analysis at that point without continuing alternative site analysis or formally adopting a position.[216] However, it is worth observing that the entirety of the court's significant gap discussion occurred within the context of the RF propagation maps for the carrier requesting the tower, which is the essence of significant gap analysis under the Provider's Service rule.[217]

208. *Id.* at *9.
209. *Southern District Alabama – Area of Service*, *supra* note 195.
210. *County Population Totals: 2010-2019*, *supra* note 94.
211. Cellular S. Real Estate, Inc. v. City of Mobile, No. 15-00387-CG-B, 2016 WL 3746661, at *10–11 (S.D. Ala. July 8, 2016).
212. *Id.* at *10 (citing PI Telecom Infrastructure, LLC v. City of Jacksonville, 104 F. Supp. 3d 1321, 1346–49 (M.D. Fla. 2015)).
213. *Id.* at *11.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*

C. Northern District of Georgia

The Northern District of Georgia encompasses the cities of Atlanta, Gainesville, Rome, and Newnan. [218] It had a population of approximately seven million as of 2019.[219] The district has a long history with the TCA, consisting of rulings on both Substantial Evidence and Effective Prohibition claims dating back to 1996 and 1998, respectively.[220]

The Northern District first engaged with Effective Prohibition in *Gearon & Co. v. Fulton County*.[221] In this case, the court acknowledged Gearon's Effective Prohibition argument.[222] However, it declined to discuss whether a gap in coverage existed because Gearon failed to eliminate alternative sites in the area, including one on the parcel where Gearon proposed locating the tower.[223]

The district's next engagement with Effective Prohibition took place nine years later in *Powertel/Atlanta, Inc. v. City of Clarkston*.[224] The court found that Effective Prohibition was not sufficiently established because Powertel failed to show the size of the gap "in its service."[225] It is important to note that the court spoke in terms of the applicant's service, not the overall service in the area, meaning that it employed the Provider's Service rule in evaluating the gap.[226] The court did not proceed past the gap analysis; as such, the case provides no guidance on the alternatives prong analysis.[227]

The Northern District Court engaged with Effective Prohibition Analysis again six years later in *TowerCom V, LLC v. City of College Park*.[228] The court observed an "emerging consensus" formed around the Provider's Service rule for significant gap analysis.[229] The court agreed with TowerCom that the appropriate tests to implement were the Provider's Service rule and the Least Intrusive Means test, citing the Southern District Court's analysis in *City of Margate*[230] and a 2009 FCC

218. *Georgia*, U.S. DEP'T OF JUSTICE, https://www.usmarshals.gov/district/navigation/ga.htm (last visited Apr. 1, 2022).
219. *County Population Totals: 2010-2019*, *supra* note 94.
220. Gearon & Co. v. Fulton County, 5 F. Supp. 2d. 1351, 1355 (N.D. Ga. 1998); BellSouth Mobility Inc. v. Gwinnett County, 944 F. Supp. 923, 928 (N.D. Ga. 1996).
221. 5 F. Supp. 2d. at 1355.
222. *Id.*
223. *Id.*
224. No. 1:05 CV-3068-RWS, 2007 WL 2258720, at *6 (N.D. Ga. Aug. 3, 2007).
225. *Id.*
226. *Id.*
227. *Id.*
228. TowerCom V, LLC v. City of College Park, No. 1:13-cv-530-SCJ, 2013 WL 4714203, at *8–9 (N.D. Ga. Aug. 21, 2013).
229. *Id.* at *8.
230. *See supra* pt. V.C.

declaratory ruling supporting the Provider's Service rule.[231] The court gave deference to the FCC's reasoning finding "the fact that some carrier provides some service to some consumers does not in itself mean that the town has not effectively prohibited service to other consumers."[232]

The court analyzed Metro PCS's coverage gap, basing its determination upon the carrier's RF analysis and coverage maps.[233] TowerCom did not provide the number of users within the area where customer complaints arose.[234] Instead, TowerCom showed that the gap was 0.75 miles in radius and that two interstates passed through the gap.[235] The court sided with TowerCom, finding no requirement to provide customer complaint information to establish a significant gap in service.[236]

The court then performed a Least Intrusive Means analysis, boiling it down to whether "the provider [] considered less intrusive alternatives, e.g., that the provider [] considered less sensitive sites, alternative tower designs, placement of antennae on existing structures, etc."[237] The court accepted TowerCom's assertions that neither existing towers nor shorter versions of a tower at the proposed site, in combination with the RF materials, would solve Metro PCS' gap in service as sufficient to meet the Least Intrusive Means test.[238]

As shown in the *TowerCom* opinion, these two tests are more favorable to tower applicants. However, they still require both the applicant and the local government to do their homework during the zoning review process.[239] If College Park had brought up a list of properties within the gap area that met more of the requirements of the city's code than the proposed site, and if TowerCom had left that list unaddressed, the outcome of the case would likely have been similar to the outcome in *PI Telecom Infrastructure, LLC*. Instead, the Northern District enjoined the city of College Park, requiring that TowerCom's tower request be approved.[240]

231. *TowerCom V, LLC*, 2013 WL 4714203, at *8–9.
232. *Id.* at *9 (quoting T-Mobile Cent., LLC v. Charter Township of West Bloomfield, 691 F.3d 794, 806 (6th Cir. 2012)).
233. *Id.* at *8
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* at *9.
238. *Id.* at *8–10.
239. *See id.*
240. *Id.* at *11.

T-Mobile South, LLC v. City of Milton includes the Northern District's most recent discussion of Effective Prohibition.[241] This opinion is the culmination of four opinions, three released by the district and one by the Eleventh Circuit.[242] The court employed the Provider's Service rule for significant gap analysis, stating that the district had been employing it since *Powertel* in 2007.[243] The court acknowledged that small "dead spots" in a carrier's coverage do not qualify for protection under the TCA and then gave examples of small dead spots.[244] Importantly, the court accepted an expert witness report submitted by T-Mobile, showing that T-Mobile's gap in service had continued to grow in the years since the denial, finding it relevant to the effect of Milton's denial.[245] The court even opined that such reports may be more relevant than the conditions of the carrier's network at the time of denial.[246]

The court then analyzed alternatives to T-Mobile's application under the Least Intrusive Means test, stating that it was the majority test for alternative analysis.[247] The court found that T-Mobile met the test by citing the fact that no existing structure was tall enough to solve the gap and that T-Mobile evaluated fourteen alternative locations, determined whether each site was available, met the requirements of the city's code, solved the gap, and was less intrusive than the proposed site.[248] The court put no weight on T-Mobile's rejection of a monopine[249] style camouflage tower at the hearing, finding the steps T-Mobile took prior to submission as being the only relevant steps to alternative site analysis under the Least Intrusive Means test.[250]

D. Middle District of Florida

The Middle District of Florida encompasses the cities of Tampa, Fernandina, Fort Myers, Jacksonville, Live Oak, Ocala, Orlando, and St.

241. No. 1:10-CV-1638-RWS, 2015 WL 13687970, at *4–9 (N.D. Ga. Nov. 2, 2015).

242. T-Mobile S. LLC v. City of Milton, No. 1:10-CV-1638-RWS, 2011 WL 2532920 (N.D. Ga. June 24, 2011), *on reconsideration*, No. 1:10-CV-1638-RWS, 2011 WL 6817820 (N.D. Ga. Dec. 28, 2011), *rev'd and remanded*, 728 F.3d 1274 (11th Cir. 2013); T-Mobile S., LLC v. City of Milton, 728 F.3d 1274, 1280–81 (11th Cir. 2013); T-Mobile S. LLC v. City of Milton, 27 F. Supp. 3d 1289 (N.D. Ga. 2014); *City of Milton*, 2015 WL 13687970, at *1.

243. *City of Milton*, 2015 WL 13687970, at *4.

244. *Id.* at *5.

245. *Id.* at *7.

246. *See id.* at *5.

247. *Id.* at *8.

248. *Id.*

249. *Id.* at *9; T-Mobile S. LLC v. Cobb County, No. 1:10-CV-0111-WSD, 2011 WL 336641, at *2 n.1 (N.D. Ga. Jan. 31, 2011) (noting a "monopine" is a type of communication tower camouflage that makes the tower look like a very tall pine tree).

250. *City of Milton*, 2015 WL 13687970, at *9.

Petersburg.[251] It had a population of approximately 12,500,000 people as of 2019.[252] The district has a long history with the TCA, dating back to 1997.[253]

The Middle District first engaged in Effective Prohibition in *AT&T Wireless Services of Florida, Inc. v. Orange County*.[254] The court applied the Fourth Circuit rule, citing *AT&T v. City Council of Virginia Beach*, which held that the TCA was only intended to limit general bans or policies that effectively prohibit communication towers.[255] The court concluded that the record showed no general hostility to *any* tower in the area where AT&T proposed its tower.[256]

The Middle District's next substantive engagement with Effective Prohibition came seventeen years later in *PI Telecom Infrastructure, LLC v. City of Jacksonville*.[257] While the court ultimately ruled for the city, it made some interesting observations in reaching its conclusion, finding that a service gap consisting of a lack of indoor service over several city blocks was large enough to be substantial.[258] This is remarkable because the court strictly applied the Fourth Circuit rule in Effective Prohibition cases up to this point.[259] However, the court took note of cases from around the country in coming to its observation of the gap.[260] It is worth noting that the court conducted its entire significant gap analysis only within the context of AT&T's coverage; in other words, it analyzed the gap under the Provider's Service rule, though this rule is less instructive than the indoor service finding because the rule was not in contest between the parties.[261] The court did not follow the City of Jacksonville down the path of requiring AT&T to provide in-depth technical data on the gap.[262] Instead, the court accepted two RF coverage maps, a one-page letter of need, and testimony from PI Telecom's agent of record, who was not a radio frequency engineer.[263] At the very least, this shows that the court recognized the changing trends in how a gap in service is defined

251. *Florida*, U.S. MARSHALS SERV., https://www.usmarshals.gov/district/navigation/fl.htm (last visited Apr. 1, 2022).
252. *County Population Totals: 2010-2019*, *supra* note 94.
253. OPM-USA-INC v. Bd. of Cnty. Comm'rs of Brevard Cnty., 7 F. Supp. 2d. 1316, 1316 (M.D. Fla. 1997).
254. 982 F. Supp. 856, 860 (M.D. Fla. 1997).
255. 979 F. Supp. 416, 427 (E.D. Va. 1997).
256. *AT&T Wireless Servs. of Fla., Inc.*, 982 F. Supp. at 860.
257. 104 F. Supp. 3d 1321, 1346–49 (M.D. Fla. 2015).
258. *Id.* at 1348.
259. *Id.* at 1347–48.
260. *Id.* at 1348.
261. *Id.*
262. *Id.* at 1342–43.
263. *Id.* at 1347 n.29.

and a willingness to move away from the Fourth Circuit ruling. This case also provides insight into an alternative analysis as PI Telecom and the City of Jacksonville each championed different tests.[264] The City of Jacksonville asked the court to follow a modified Fourth Circuit rule, finding "reasonable efforts" towards locating an alternative "so likely to be fruitless that it is a waste of time to even try."[265]

While PI Telecom asked the court to apply the Least Intrusive Means test,[266] the court's research led it toward the Only Feasible Plan test.[267] It acknowledged the First Circuit's observation in *Omnipoint Holdings v. City of Cranston*, that the tests may not truly differ.[268] However, it did not delve further into the First Circuit's insight because it found that PI Telecom failed to meet the Least Intrusive Means test requirements when PI Telecom only looked at properties it already had leasing control over.[269] Again, this shows movement away from the Fourth Circuit rule. The court could have just as easily shown that PI Telecom failed to investigate alternatives under the Only Feasible Plan test, and it certainly could have shown failure under the Fourth Circuit rule with less effort. Instead, the court took the time and the page space to analyze the case under the Least Intrusive Means test.[270]

E. Southern District of Florida

The Southern District of Florida encompasses the cities of Miami, Fort Lauderdale, Fort Pierce, Key West, and West Palm Beach.[271] It had a population of approximately seven million people as of 2019.[272] The Southern District of Florida has heard significantly more TCA cases than the Middle District of Florida, dating back to 2001.[273]

The Southern District of Florida's first engagement with Effective Prohibition came in *Benjamina Nursery Farm, Inc. v. Miami-Dade*

264. *Id.* at 1346.
265. *Id.* (quoting Voice Stream PCS I, LLC v. City of Hillsboro, 301 F. Supp. 2d 1251, 1261 (D. Ore. 2004)).
266. *Id.*
267. *Id.*
268. *Id.* at 1346–47; *see also* Omnipoint Holdings, Inc. v. City of Cranston, 586 F.3d. 38, 50–51 (1st Cir. 2009).
269. *PI Telecom Infrastructure, LLC*, 104 F. Supp. 3d at 1348–49.
270. *Id.* at 1350.
271. *Florida*, *supra* note 251.
272. *County Population Totals: 2010-2019*, *supra* note 94.
273. BellSouth Mobility, Inc. v. Miami-Dade County, 153 F. Supp. 2d 1345, 1345–46 (2001); *e.g.*, *PI Telecom Infrastructure, LLC*, 104 F. Supp. 3d at 1321, 1324; AT&T Wireless Services of Fla., Inc. v. Orange County, 982 F. Supp. 856, 856–57 (M.D. Fla. 1997).

County.[274] The case originated in Florida state court and was removed to the United States Court for the Southern District of Florida by the respondent, Miami Dade County, for clarification on federal law, and was ultimately remanded back to state court for final adjudication.[275] The court applied the Fourth Circuit rule, finding that the TCA only protects against "local laws or policies that actually prohibit or have the effect of prohibiting the provision of personal wireless services generally."[276] The court observed that the plaintiff must show the county prohibits any wireless service in the area, not just the requesting carrier's service.[277]

After *Benjamina Nursery*, the Southern District did not engage in Effective Prohibition again for another nine years until its decision in *Keys Wi-Fi, Inc. v. City of Key West*.[278] This case is interesting because the plaintiff argued "absolute prohibition," similar to the Fourth Circuit rule, but later attempted to pivot to the Providers Service rule and Only Feasible Plan tests in its motion for summary judgment.[279] From the opinion, the court declined to fully follow the plaintiff through the pivot, discussing Effective Prohibition and stating that "Keys Wi-Fi argues that the City's denial amounted to an absolute prohibition in violation of the [TCA]."[280]

The court then defined an "absolute prohibition" as a significant gap in coverage combined with "no feasible alternative[]" to the location, citing to *MetroPCS, Inc. v. City of San Francisco*, a Ninth Circuit case that champions the Provider's Service rule and Least Intrusive Means test.[281] The court then determined that even if the three carriers collocated on the proposed tower had significant gaps in service, the record contained no evidence that other carriers in the area possessed a significant gap in service.[282] Following this, the court applied the Fourth Circuit test for alternatives as it discussed the fact that the city had a history of approving tower permits.[283]

The extent to which the court genuinely espouses the One Service Provider rule for service gaps and the Fourth Circuit test for alternatives is unclear, as the court bluntly called out the plaintiff's evidence on

274. 170 F. Supp. 2d 1246, 1250 (S.D. Fla. 2001).
275. *Id.* at 1246, 1248, 1253.
276. *Id.* at 1251.
277. *Id.*
278. 752 F. Supp. 2d 1274, 1280 (S.D. Fla. 2010).
279. Plaintiff's Motion for Summary Judgment at 38–40, *Keys Wi-Fi, Inc.*, 752 F. Supp. 2d 1274 (No. 4:10-CV-10014); *Keys Wi-Fi, Inc.*, 752 F. Supp. 2d at 1280.
280. *Keys Wi-Fi*, *Inc.*, 752 F. Supp. 2d at 1280.
281. *Id.*
282. *Id.* at 1280–81.
283. *Id.* at 1280.

Effective Prohibition as "anecdotal" and conflicting with other evidence in the record.[284] The court even pointed to the fact that one of the collocating carriers actually had an application for another tower near the plaintiff's tower.[285] The court then briefly observed that efficiency is not protected under the TCA, which is true for all gap rules and alternative tests.[286]

The Southern District's most recent substantive engagement with Effective Prohibition came a year later in *T-Mobile South LLC v. City of Margate*.[287] The case itself is only minimally instructive on what constitutes a significant gap in service because the existence of a gap within the city was uncontested, though it is interesting that the court speaks only in terms of T-Mobile's coverage.[288] The case is far more instructive on the alternatives prong of the analysis.[289]

The city argued that alternatives should be evaluated via the Only Feasible Plan test while the plaintiff championed the Least Intrusive Means test, and neither party called for the Fourth Circuit rule.[290] The court acknowledged the lack of guidance from the Eleventh Circuit and looked to the Circuit's discussion of reasonableness in *Michael Linet, Inc. v. Village of Wellington* combined with the circuit's reasoning in interpreting the RLUIPA,[291] which focused heavily on the jurisprudential foundations of that Act.[292] The *City of Margate* Court then looked to the United States Supreme Court's opinion in *City of Rancho Palos Verdes v. Abrams*, finding guidance from the Court as to how to best interpret the TCA and learning Congress' intent in passing the Act.[293] The district court reviewed the intent of the TCA and concluded that the Act permits local discretion in land use permits for towers "as long as the net result of local governmental action still promotes and allows cellular phone

284. *Id.* at 1280–81.
285. *Id.* at 1281.
286. *Id.*; *see* Second Generation Props. L.P. v. Town of Pelham, 313 F.3d 620, 630 (1st Cir. 2002); T-Mobile Ne. LLC v. Fairfax Cnty. Bd. of Supervisors, 672 F.3d 259, 266 (4th Cir. 2012); Cellular Tel. Co. v. Zoning Bd. of Adjustment of Ho-Ho-Kus, 197 F.3d 64, 70 (3d Cir. 1999); MetroPCS, Inc. v. City & County of San Francisco, 400 F.3d 715, 731–32 (9th Cir. 2005), *abrogated*, T-Mobile S., LLC v. City of Roswell, 135 S. Ct. 808, 814 (2015); 360 Degrees Commc'ns Co. of Charlottesville v. Bd. of Supervisors of Albemarle Cnty., 211 F.3d 79, 87 (4th Cir. 2000); Omnipoint Holdings, Inc. v. City of Cranston, 586 F.3d 38, 52 (1st Cir. 2009); T-Mobile USA Inc. v. City of Anacortes, 572 F.3d 987, 997–98 (9th Cir. 2009).
287. No. 10–cv–60029, 2011 WL 1303898, *4–8 (S.D. Fla. Apr. 4, 2011).
288. *Compare id.* at *5, *with Keys Wi-Fi, Inc.*, 752 F. Supp. 2d at 1280.
289. *City of Margate*, 2011 WL 1303898, at *4–5.
290. *Id.* at *4.
291. *Id.* at *5.
292. *Id.*
293. *Id.*

coverage in geographic areas with significant coverage gaps."[294] The court, while talking about tests for alternative sites, concluded that "the Eleventh Circuit would adopt a test more favorable to service providers than the" Only Feasible Plan test.[295]

The Southern District then declared the issue moot, concluding that T-Mobile met the requirement for the Only Feasible Plan test.[296] The court rejected the proposition by the City that T-Mobile needed to sue or reapply to lease an alternative site after the decision-making body controlling the property rejected a ground lease, finding that case law confirmed that T-Mobile did not need to obtain judicial confirmation of an alternative's unavailability.[297] The court rejected an alternative on the basis that it was speculative, and rejected hypothetical alternatives.[298] The court found that requiring judicial confirmation of unavailability would both promote litigation and delay deployment of wireless infrastructure, which is opposite to Congress' intent for the TCA.[299]

The court guided what constitutes the most efficient solution versus what constitutes merely a viable solution.[300] Specifically, the city used T-Mobile's radio frequency engineer's testimony, stating that the proposed site was "'the best possible location' which 'would best fit all the coverage objectives,' would 'fit us exactly,' and would be 'ideally more ideal to us'" and that T-Mobile was seeking approval for the most efficient location for its network instead of one that was merely viable.[301] The court rejected this position, finding that the radio frequency engineer's words were "not talismanic [but rather] . . . imprecise jargon or poor word choice."[302] The court instead looked to the record as a whole, including the application materials and the staff report, and concluded that T-Mobile met the requirements of the Only Feasible Plan test.[303] The court concluded that satisfying the Only Feasible Plan test inherently satisfies the less rigorous Least Intrusive Means test.[304]

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294. *Id.*
295. *Id.* It should be noted the court used the term "no alternative" test but spoke about it as if it were referring to the Only Feasible Plan test. *Id.*
296. *Id.* at *6.
297. *Id.*
298. *Id.*; T-Mobile USA, Inc. v. City of Anacortes 572 F.3d 987, 997 (9th Cir. 2009) (citing Omnipoint Holdings, Inc. v. City of Cranston, 586 F.3d 38, 52–53 (1st Cir. 2009)).
299. *City of Margate*, 2011 WL 1303898, at *7.
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.* at *8.

The *City of Margate* case is important in that it shows the court's departure from the Fourth Circuit test, which seems to be the culmination of the Southern District's smaller shifts in *Michael Linet* and *Keys Wi-Fi*.[305] This also indicates movement towards the One Service Provider rule and Provider's Service rule. This conclusion is further corroborated by the court's relatively forgiving treatment of T-Mobile's radio frequency engineer as well as the decisions in *City of Cranston* and *City of Anacortes*, First and Ninth Circuit cases, respectively.[306] It is also essential to keep in mind that the Southern District of Florida accounts for the fact that witnesses are people and subject to mistakes.[307] Therefore, both the applicant and the local government should focus on meeting their burden of proof in the written record instead of hoping that some testimony or misstep will come out at the hearing to bring their side to a win.

VII. CONCLUSION

The Telecom Act of 1996 endeavors to promote competition in the telecommunications industry, as well as rapid deployment of wireless services to the American public.[308] The TCA preserves local government control over land use decisions so long as the purpose of the TCA is accomplished. The preemptions under the TCA, especially Effective Prohibition, are highly nuanced and require a concerted effort to deploy. Effective Prohibition is neither a shield for a local government to hide behind, nor a sword for an applicant to use, but rather, a tool that ensures wireless services are delivered to the American public while protecting traditional zoning interests. These objectives are best realized when the analysis is performed with the Provider's Service rule and the Least Intrusive Means test, which balance deploying robust and competitive wireless services with an analysis based on the objective values embodied in local governments' Land Development Codes. Therefore, stakeholders from all parts of the zoning equation should familiarize themselves with the TCA and approach the political soup of contentious tower projects with pragmatism and cooperation.

305. *Id.* at *12.
306. *Id.* at *4.
307. *Id.* ("T–Mobile's use of the words 'best' or 'ideal' is not talismanic and, at most, may be disregarded as imprecise jargon or poor word choice—not as evidence that actual alternative sites existed.").
308. Michael Linet, Inc. v. Village of Wellington, 408 F.3d 757, 761 (11th Cir. 2005).