

Summer 6-1-2013

Untangling the Circuit Splits Regarding Cell Tower Siting Policy and 47 U.S.C. § 332(c)(7): When Is a Denial of One Effectively a Prohibition on All?

Lucas R. White

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Recommended Citation

Lucas R. White, *Untangling the Circuit Splits Regarding Cell Tower Siting Policy and 47 U.S.C. § 332(c)(7): When Is a Denial of One Effectively a Prohibition on All?*, 70 Wash. & Lee L. Rev. 1981 (2013), <https://scholarlycommons.law.wlu.edu/wlulr/vol70/iss3/11>

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Untangling the Circuit Splits Regarding Cell Tower Siting Policy and 47 U.S.C. § 332(c)(7): When Is a Denial of One Effectively a Prohibition on All?

Lucas R. White*

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* Candidate for J.D., Washington and Lee University School of Law, May 2014; B.A., Yale University, Branford College, May 2011. I would like to thank Professor Timothy Jost for his helpful edits throughout the Note-writing process. I am even more grateful to my family and friends for their love and support. Finally and most of all, I would like to thank my parents, Robert and Bonnie, who will undoubtedly buy several copies of this Volume just for this Note—despite my many warnings about how boring it truly is.

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I. Introduction

Everyone wants to have cell phone reception wherever they go. Whether it is to make a call, send a text, receive an email, or browse the Internet, our appetite for constant connectivity seems insatiable. Of course, cell phone reception is not a natural phenomenon that just springs up by itself, but instead requires a vast array of antennae and towers, sometimes as dense as one for every ten square miles.¹ While these towers make this ubiquitous and pervasive technology possible, the placement of these towers is often a controversial matter, particularly in residential communities with regulatory zoning authority over such matters.² Thus, it seems that everyone wants to have cell phone reception but no one wants cell phone towers. With the passage of

1. See, e.g., Deborah F. Buckman, Annotation, *Construction and Application of “Personal Wireless Service Facility” Provision of Federal Communications Act*, 47 U.S.C.A. § 332(c)(7)(C)(ii), 38 A.L.R. Fed. 2d 379 § 2 (2009) (describing generally how cell phones work and stating that “[c]ities and regions are divided into cells, typically 10 square miles, each containing a base station,” which is usually a tower or antenna of some sort); *Pinney v. Nokia, Inc.*, 402 F.3d 430, 439–40 (4th Cir. 2005) (describing generally how cell phones work); Marshall Brain, Jeff Tyson & Julia Layton, *How Cell Phones Work*, <http://electronics.howstuffworks.com/cell-phone10.htm/printable> (last visited June 1, 2013) (describing how cell phones work) (cited in Buckman Annotation and *Pinney*) (on file with the Washington and Lee Law Review).

2. See, e.g., *T-Mobile v. W. Bloomfield*, 691 F.3d 794, 799–800 (6th Cir. 2012) (describing a contentious township board meeting where several residents expressed concern regarding an “ugly tower” that would be placed in their “back yard[s]” with “emissions harming children”).

the Telecommunications Act of 1996³ (TCA or the Act), Congress attempted to resolve this inherent tension with 47 U.S.C. § 332(c)(7),⁴ which, in part, provides that local zoning authorities “shall not prohibit or have the effect of prohibiting” personal wireless facilities, including towers.⁵ This statutory provision prohibits localities from instituting blanket bans on all cell phone towers—obviously—but also prohibits effective, *de facto* bans. The trouble, however, is that the courts do not agree on just what that actually means.

The circuits have split on three different issues surrounding the interpretation of this clause, subsection (B)(i)(II). The first circuit split is the threshold issue: whether a single denial of a cell tower permit can indicate an underlying policy that is an effective prohibition. Taking the narrowest reading of subsection (B)(i)(II), the Fourth Circuit has said that this provision only applies to blanket bans and can never be applied to an individual zoning denial.⁶ However, every other circuit that has addressed this question has ruled that, under the right conditions, a single denial can be indicative of an effective ban on all cell phone towers.⁷ The question, then, shifts to identifying those right conditions. A general two-pronged analysis has emerged among the circuits outside of the Fourth. First, the cell phone company needs to show a significant gap in coverage that the proposed tower can remedy. Second, the court will look into the feasibility of other alternative tower sites. If there is a need for the tower, and the most feasible location is rejected by the locality, most circuits (outside of the Fourth, of course) would consider this an effective prohibition.⁸

The next two circuit splits revolve around this two-pronged analysis. The second circuit split involves the interpretation of

3. Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

4. 47 U.S.C. § 332(c)(7) (2012). For the duration of this Note, all in-text statutory cites are to 47 U.S.C. unless otherwise provided. Also, all in-text cites to subsections (such as (B)(i)(II) or (B)(v)) relate to subsections of § 332(c)(7) unless otherwise provided.

5. § 332(c)(7)(B)(i)(II).

6. See *infra* Part III.A.1.

7. See *infra* Part III.A.2.

8. See *infra* Part III.A.2.

“significant gap.” The Second and Third Circuits have ruled that there is no significant gap in coverage if at least one provider can serve the area with existing facilities (one-provider rule).⁹ The First, Sixth, and Ninth Circuits, as well as the Federal Communications Commission (FCC or the Commission), have all rejected this interpretation and instead judge a significant gap with respect to an individual service provider’s own coverage area, not to cellular reception for just any company (own-coverage rule).¹⁰ The third and final circuit split relates to the appropriate standards for considering other feasible tower locations. The First and Seventh Circuits consider all factors in judging alternative sites (no-alternative rule).¹¹ On the other hand, the Second, Third, Sixth, and Ninth Circuits only consider the factors on which the zoning authority based its initial denial (least-intrusive rule).¹²

This Note seeks to untangle this triple knot of interrelated circuit splits, analyzing and critiquing the various circuits’ positions with particular emphasis on the underlying policies of subsection (B)(i)(II) as well as the fundamental tension that necessitated this statutory provision—everyone wants reception, but no one wants towers. Following this introductory Part, Part II provides a brief overview of the TCA and describes the underlying collective action problem regarding cell phone towers. That Part also includes an in-depth analysis of § 332(c)(7) and the policies and structure it establishes regarding tower siting. Part III lays out each of the three circuit splits in greater detail, explaining each possible answer to the three questions. Finally, Part IV critiques each of the six positions on the circuit splits, seeking to find a resolution that is most faithful to the text, policies, structure, pragmatic concerns, and legislative intent behind § 332(c)(7).

Ultimately, this Note reaches the conclusion that the two-pronged analysis is preferable to the Fourth Circuit’s approach.¹³ Also, within that framework, a significant gap should be

9. See *infra* Part III.B.1.

10. See *infra* Part III.B.2.

11. See *infra* Part III.C.1.

12. See *infra* Part III.C.2.

13. See *infra* Part IV.A.

determined with respect to an individual carrier's coverage, not just the first carrier's coverage (in other words, the own-coverage rule over the one-provider rule)¹⁴ and the quality of the site should be judged by the factors upon which the zoning board based its denial (in other words, least-intrusive rule over the no-alternative rule).¹⁵

II. Background Law

This Part will provide general information regarding the collective action problems that plague the issue of cell phone tower siting. Specifically, the not-in-my-back-yard phenomenon is particularly pervasive in this field. Then, after a brief look at the major provisions of the TCA, this Part will conclude with an examination of the text of § 332(c)(7) as well as an analysis of the siting regime that it establishes. This, in particular, will focus on the local-national balance that is struck as well as draw some helpful analogies to administrative and agency law.

A. Collective Action Problems, Not-in-My-Back-Yard, and Cell Phone Towers

A collective action problem is one in which the group as a whole would benefit from a solution, but no one person has the individual self-interest motivations to pursue that solution without assurances that every other person will be on board as well.¹⁶ Such problems occur in the provision of public goods, which are goods that are both nonrivalrous (meaning that one's enjoyment does not necessarily preclude another's enjoyment) and nonexcludable (meaning that there is no practical way to prevent another's enjoyment).¹⁷ To overcome such collective

14. See *infra* Part IV.B.

15. See *infra* Part IV.C.

16. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 2 (1965) ("Indeed, unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, *rational, self-interested individuals will not act to achieve their common or group interests.*").

17. See *id.* at 14–15 (defining public goods).

action problems, there usually needs to be a form of coercion or some “other special device” to make individuals follow their greater, common interests rather than their immediate, more individualized interests.¹⁸

The issue of siting a cell phone tower in an area without any reception is an example of a collective action problem. The public good is cell phone reception, even though, at first glance, it may not seem like a public good. Certainly one cannot use a cell phone without first paying fees to a private carrier, thus excluding noncustomers. But this only makes cell phone *service* an excludable, nonpublic good. What we are concerned with here, however, is not so much the cellular service itself but *the ability to have that service* should you chose to pay the fees. Siting a tower in a “dead zone” allows for cell phone reception to reach everyone within range, which is the necessary precursor for the purchase and use of the nonpublic good, cell phone service.¹⁹ With this distinction made, it is clear that reception is a public good. The fact that one person has reception in a given area does not diminish another’s reception nearby, thus making it nonrivalrous. Also, if *A* were to have reception, there is nothing that can be done practically to take away *A*’s reception without also taking away *B*’s as well; thus, reception is also nonexcludable.

One can generally assume that people in a “dead zone” would probably prefer to have cellular reception. This, of course, would require towers, which usually are unpopular in residential areas, specifically because of a particular variant of the general collective action problem: the not-in-my-back-yard phenomenon, or NIMBY.²⁰ This refers to instances in which “local citizens who

18. *Id.* at 2. Olson also theorized that groups that are sufficiently small can overcome collective action problems without such devices. *See id.* at 53–60 (describing collective action problems and small-group dynamics).

19. *See supra* note 1 and accompanying text (describing generally how cell phone towers work).

20. *See, e.g.,* David W. Hughes, *When NIMBYs Attack: The Heights to Which Communities Will Climb to Prevent the Siting of Wireless Towers*, 23 J. CORP. L. 469, 482–83 (1998) (describing NIMBY as “the phenomenon of local citizens who desire the benefit of essential infrastructure (*e.g.*, nursing homes and wireless telecommunications facilities), but want them placed in locations other than their own neighborhoods or communities” (citations omitted)); *see also* Robert Long, Note, *Allocating the Aesthetic Costs of Cellular Tower*

desire the benefit of essential infrastructure . . . , but want it placed in locations other than their own neighborhoods.”²¹

In the case of cell phone towers, the reported cases demonstrate that phrase “not in my back yard” is particularly fitting. For example, in *T-Mobile Central, LLC v. West Bloomfield*,²² the Sixth Circuit reviewed facts from a contentious township meeting where “several of the concerned citizens and members of the Board specifically mentioned their backyards,” including statements such as:

I need to know if a resident says, you put an ugly tower in my *backyard* and you potentially decrease my property value; my *backyard* is kind of where they’re going to put this thing; but the final word is, would you want one of these cell towers in what would be, if I build a house there or build houses there, in my *backyard*?; would you want that in your *backyard*; there will be towers and towers and pretty soon I’ll have Disneyland in my *backyard*.²³

These statements vividly demonstrate the high tensions that usually accompany a zoning board decision regarding a new cell phone tower as well as the aptness of the name, not-in-my-backyard. These also show the fundamental tension that underlies this whole issue: most everyone wants cell reception wherever they go, but no one wants to pay the costs associated with it.²⁴ One should not lose sight of the fact that the NIMBY sentiment is nothing if not sympathetic. Not only does a tower nearby have potential pecuniary effects on home values,²⁵ but it also has aesthetic and sentimental effects as well. People simply tend to

Expansion: A Workable Regulatory Regime, 19 STAN. ENVTL. L.J. 373, 389 (describing NIMBY as “the desire of citizens to benefit from essential infrastructure, such as hazardous waste disposal facilities, without bearing the cost of such facilities in their own neighborhoods” (citations omitted)).

21. Hughes, *supra* note 20, at 482 (citations omitted).

22. 691 F.3d 794 (6th Cir. 2012).

23. *Id.* at 800 n.4 (collecting comments from the minutes of the Board meeting (brackets omitted)).

24. Specifically, the cost can be conceptualized as “visual pollution” or the fact that the “tower kills the view.” John Copeland Nagle, *Cell Phone Towers as Visual Pollution*, 23 NOTRE DAME J.L. ETHICS & PUB. POLY 537, 537 (2009) (describing one resident’s objection to a tower being placed near his home).

25. See, e.g., *T-Mobile*, 691 F.3d at 800 n.4 (referencing property value).

be attached to the view from their window.²⁶ The problem is, however, people are also attached to their cell phones. This is also where the collective action logic can provide a solution. Mancur Olson argued that such splits between common and individual interests regarding public goods could be resolved through “coercion or some other special device to make individuals act in their common interest.”²⁷ While local zoning boards have not been coerced into allowing cell phone towers, Congress did pass the TCA, which included provisions that operate as a “special device” in the siting of cellular facilities.

B. Telecommunications Act of 1996 and 47 U.S.C. § 332(c)(7)

The TCA was “an omnibus overhaul of the federal regulation of communications companies”²⁸ and extensively revised the Telecommunications Act of 1934.²⁹ It sought to “provide 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.”³⁰ The major provisions include (1) prohibiting state and local regulations that hinder the provision of telecommunications services,³¹ (2) giving the FCC specific authority to preempt such state and local regulations,³² (3) providing for what would later lead to the Universal Service

26. See *supra* note 24 (describing one resident’s objection to a tower being placed near his home).

27. OLSON, *supra* note 16, at 2.

28. Sprint Spectrum, L.P. v. Willoth, 176 F.3d 630, 637 (2d Cir. 1999).

29. Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended in scattered sections of 47 U.S.C.).

30. H. REP. No. 104-458 at 1 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 124.

31. See Telecommunications Act of 1996, Pub. L. No. 104-104 § 253(a), 110 Stat. 56, 70 (1996) (“No State or local statute or regulation . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”).

32. See *id.* § 253(d), 110 Stat. at 70–71 (giving the FCC authority to preempt such regulations “to the extent necessary to correct such violation or inconsistency”).

Fund,³³ (4) mandating “interconnection” between telecommunications carriers,³⁴ (5) eliminating some ownership restrictions on radio and television stations,³⁵ and (6) various provisions regarding pornography, indecency, and depiction of violence on various telecommunications platforms, including the Internet.³⁶

Most importantly for the purposes of this Note, the Act also provided for a new federal–local cell phone tower siting regime, now codified at 47 U.S.C. § 332(c)(7).³⁷ This section does not explicitly preempt local zoning authority with respect to cell phone towers. Indeed, the section preserves it, but with five exceptions,³⁸ three substantive and two procedural. These are federally imposed limitations on local zoning authority and operate as Olson’s “special device” to address the collective action issues.³⁹ The first, of course, is the subject of this Note: local zoning boards cannot institute policies that “prohibit or have the effect of prohibiting the provision of personal wireless services.”⁴⁰

33. See *id.* § 254, 110 Stat. at 71–75 (establishing principles and policies for universal service activities to expand telecommunications services to underserved sectors such as rural areas, low-income consumers, schools, etc.); see also 47 C.F.R. Part 54 (containing various regulations regarding universal service).

34. See Telecommunications Act §§ 251–52, 110 Stat. at 61–70 (requiring various forms of interconnection between the systems of market competitors and providing negotiation and arbitration procedures to force such interconnection).

35. See *e.g.*, *id.* § 202(a), 110 Stat. at 110 (requiring the FCC to “eliminate[e] any provisions limiting the number of AM or FM broadcast stations which may be owned or controlled by one entity nationally”); *id.* § 202(c), 110 Stat. at 111 (requiring the FCC to “eliminate[e] the restrictions on the number of television stations that a person or entity may directly or indirectly own . . . nationwide”).

36. See *id.* §§ 501–61, 110 Stat. at 133–43 (providing for various prohibitions and restrictions on indecent, obscene, and violent content on cable television and the Internet). *But see* *Reno v. ACLU*, 521 U.S. 844, 849 (1997) (striking down several portions of the Act relating to Internet pornography as violative of the First Amendment).

37. See § 704, 110 Stat. at 151.

38. See 47 U.S.C. § 332(c)(7)(A) (2012) (“Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.”); see also § 332(c)(7)(B) (providing the five exceptions).

39. OLSON, *supra* note 16, at 2.

40. § 332(c)(7)(B)(i)(II).

Second, localities cannot “unreasonably discriminate among providers of functionally equivalent services.”⁴¹ Third, localities cannot regulate tower sites based on health or environmental concerns regarding radio waves if the sites comply with FCC regulations.⁴² As for the two procedural limitations, zoning boards must handle cell phone tower site applications “within a reasonable period of time”⁴³ and any denials of tower sites must be “in writing and supported by substantial evidence contained in a written record.”⁴⁴ Finally, as a means to enforce these limitations through civil litigation, a service provider may file an “expedited” action in “any court of competent jurisdiction” if any of these provisions have been violated.⁴⁵

What is particularly interesting about the § 332(c)(7) regime is that it allows the substantive decision-making regarding tower siting to remain largely in local hands, but still provides a federal procedural check on the system so as to ensure growth of the nation’s cellular infrastructure.⁴⁶ While one could easily view this as Congress’s way of “splitting the baby” between local and federal control of the issue,⁴⁷ this accurate yet glib characterization is much too simple and hides the most innovative portions of the Act. To fully understand § 332(c)(7), one must not only keep in mind the local–federal distinction, but

41. § 332(c)(7)(B)(i)(I).

42. See § 332(c)(7)(B)(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.”).

43. § 332(c)(7)(B)(ii).

44. § 332(c)(7)(B)(iii).

45. § 332(c)(7)(B)(v).

46. See, e.g., *Town of Amherst v. Omnipoint Commc’ns Enters., Inc.* 173 F.3d 9, 13 (1st Cir. 1999) (“[Section] 332(c)(7) is a deliberate compromise between two competing aims—to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers.”).

47. See, e.g., Jeffrey A. Berger, *Efficient Wireless Tower Siting: An Alternative to Section 332(c)(7) of the Telecommunications Act of 1996*, 23 TEMP. ENVTL. L. & TECH. J. 83, 84 (2004) (“Section 332(c)(7) is an earnest, but ultimately problematic congressional attempt to ‘split the baby’ between wireless providers that need towers to expand their networks and some local zoning boards and residents that view the proliferation of towers as an invasion of aesthetically displeasing technology upon their homes and lives.”).

also the substantive–procedural distinction. The Act only intervenes in the actual substance of the decisions with the three limitations listed above. The rest, though, is left in the hands of the zoning authorities in each locality, who must also comply with the two procedural requirements of reasonable time and substantial evidence. Thus, for the most part, § 332(c)(7) governs not *what* decisions are made, but rather *how* they are made.⁴⁸ In other words, § 332(c)(7) does not answer the collective action problem, but provides a way—or “special device”⁴⁹—to address the collective action problem.

This hybrid system has been described by at least one scholar as a form of “process preemption” because it federally imposes “substantive and procedural constraints on the local land use process.”⁵⁰ Section 332(c)(7) does not directly mandate any particular decision on the merits of a tower siting, but rather only constrains the process by which that decision is reached.⁵¹ Such a structure has distinct advantages over substantive federal regulation by an agency. First, it allows a jurisdictional balance on a traditionally local issue—land-use zoning—that also happens to have substantial national import—the need for fully functioning cellular infrastructure.⁵² Second, this process also

48. See, e.g., Steven J. Eagle, *Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem*, 54 CATH. U. L. REV. 445, 464 (2005) (describing how the § 332(c)(7) regime “operates not through affirmative federal rules, but rather through oversight of the operation of state and local land use decisions”); Robert B. Foster & Mitchell A. Carrel, *Tell Me What You Really Think: Judicial Review of Land Use Decisions on Cellular Telecommunications Facilities Under the Telecommunications Act of 1996*, 37 URB. LAW. 551, 552 (2005) (“The TCA does not completely preempt local zoning authority, but instead places certain restrictions on the authority of local bodies to regulate the zoning of telecommunications service facilities.”); Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. ON LEGIS. 289, 290 (2011) (“This framework empowers local governments to make primary siting decisions, subject to federal constraints on the decisionmaking process.”).

49. OLSON, *supra* note 16, at 2.

50. Ostrow, *supra* note 48, at 290.

51. See *id.* (“This framework empowers local governments to make primary siting decisions, subject to federal constraints on the decisionmaking process.”).

52. See *id.* at 293 (describing how the “hybrid federal–local framework accounts for the interjurisdictional nature of a federal siting policy, effectively balancing national and local land use priorities”); *id.* at 317 (“[T]he TCA’s Telecommunications Siting Policy utilizes a mix of regulatory actors to balance national communication goals with legitimate local siting concerns.” (footnote

allows for substantive changes in the outcomes of decisions (that is, more zoning approvals for cell phone towers), but in an open and public way that is consistent and legitimate.⁵³ Instead of federally promulgated administrative rules regulating tower siting in all localities across the country,⁵⁴ the decisions would still be made at the local level, perhaps leading to more public acceptance. For example, under this regime, it could not be said that “Washington bureaucrats” were forcing the small town to suffer the unsightly tower (or at least not directly forcing). However, the § 332(c)(7) limitations could still tip the odds more in favor of the placement of the tower. Moreover, with the procedural requirements (such as reasonable time⁵⁵ and substantial evidence on a written record⁵⁶), cell phone providers applying for tower approval will not be subject to long delays and unexplained denials. These unfortunate possibilities, if allowed to occur, could call into question the motives of the zoning authorities and give the impression that the providers are only getting the runaround and not a fair decision on the merits.⁵⁷

omitted)).

53. *See id.* at 293 (“[B]y placing procedural constraints on the local decision-making process . . . Process Preemption increases the legitimacy, consistency, and public acceptance of controversial siting decisions.”).

54. This, in fact, was an alternative considered by Congress. The original House version of the Act would have established a negotiated rulemaking committee within the FCC to promulgate a set of regulations with which local zoning boards would have to comply. *See* H. REP. NO. 104-204, at 25 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 10 (“Pursuant to subchapter III of title 5, United States Code, the Commission shall establish a negotiated rulemaking committee to negotiate and develop a proposed policy to comply with the requirements of this paragraph.”).

55. *See* 47 U.S.C. § 332(c)(7)(B)(ii) (2012) (“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 . . .”).

56. *See* § 332(c)(7)(B)(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.”).

57. *See, e.g.,* Eagle, *supra* note 48, at 493 (“Long delays in making determinations not only earn skepticism as to underlying motives with respect to the individual applications, but also lend doubt as to whether delays that ostensibly are for review of applications in fact are for discrimination among providers or for prohibitions on wireless service . . .”).

The procedural preemption characterization is a helpful way of understanding the § 332(c)(7) regime, but another metaphor may be illustrative as well. Specifically, § 332(c)(7) is highly evocative of judicial review of administrative decisions. For example, the Act requires that all denials of tower permits be supported by “substantial evidence contained in a written record.”⁵⁸ This appears to facilitate, at least in part, the judicial review portion of the Act whereby aggrieved service providers can petition the federal courts for relief from violations of § 332(c)(7)(B).⁵⁹ While the Act does not provide an exact definition of “substantial evidence,” this phrase does have a well-established definition in administrative law.⁶⁰ In fact, the legislative history of the Act demonstrates that Congress intended this phrase to mean the same as it does in the agency context.⁶¹ The cases have generally applied the same administrative standard.⁶² Thus, one could view a subsection

58. § 332(c)(7)(B)(iii).

59. See § 332(c)(7)(B)(v); see also PATRICIA E. SALKIN, 4 AM. LAW. ZONING § 40:27 (5th ed.) (“If judicial review is to be an efficient bulwark against arbitrary conduct, such records must be accurate, and reasonably complete.”). Local zoning meetings are often informal, and records and transcripts are not always rigorously taken as they would be in a court or agency hearing. See *id.* § 40:1 (generally describing the informal nature of zoning hearings, including lack of legally trained members, sporadic legal advice, and inconsistent recordkeeping).

60. See, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (“[S]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Accordingly, it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict.” (citations and quotations omitted)).

61. See H. REP. NO. 104-458, at 208 (1996) (Conf. Rep.), reprinted in 1996 U.S.C.A.N. 124, 223 (“The phrase ‘substantial evidence contained in a written record’ is the traditional standard used for judicial review of agency actions.”).

62. See, e.g., *Preferred Sites, LLC v. Troup Cnty.*, 296 F.3d 1210, 1218 (11th Cir. 2002) (applying the same “substantial evidence” standard from the administrative context); *Sw. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 58 (1st Cir. 2001) (same); *Telespectrum, Inc. v. Pub. Serv. Comm’n*, 227 F.3d 414, 423 (6th Cir. 2000) (same); *Omnipoint Corp. v. Zoning Hearing Bd.*, 181 F.3d 403, 407–08 (3d Cir. 1999) (same); *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 493–94 (2d Cir. 1999) (same). Interestingly, the Fourth Circuit is again an outlier in its interpretation of the Act. See *infra* Part III.A.1. for another anomalous interpretation by the Fourth Circuit. Noting that “[t]he ‘reasonable mind’ of a legislator is not necessarily the same as the ‘reasonable mind’ of a bureaucrat,” the Fourth Circuit applies a reasonable-legislator standard to the definition of substantial evidence for § 332(c)(7) purposes, including

(B)(v) petition like a court's review of an agency action under the Administrative Procedure Act.⁶³ Again, this underscores the fact that the substantive decision-making is still done, within certain limitations, by the local zoning board because the reviewing court "may neither engage in [its] own fact-finding nor supplant the [zoning board's] reasonable determinations."⁶⁴ Rather, the court's role is simply to ensure that the local authorities have complied with the handful of procedural and substantive limitations found within § 332(c)(7)(B), including subsection (B)(i)(II)'s prohibition on bans and effective bans. Thus, with the substantial evidence requirements and the opportunity for judicial review, § 332(c)(7) can be seen as Congress treating local zoning boards as mini-agencies.⁶⁵ The metaphor to federal administrative law is particularly helpful when considering one of the circuit splits discussed later.⁶⁶

considerations of popular opinion. *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 430 (4th Cir. 1998). While the court has a point about the differences between legislators and bureaucrats, this does not seem to be enough to trump the legislative history that clearly and unequivocally states that "substantial evidence" is to be given the same definition that it has in the administrative context. *See supra* note 61 and accompanying text.

63. *See* 5 U.S.C. § 706(2)(E) (2012) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence . . .").

64. *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999) (citing *PrimeCo Pers. Commc'ns, L.P. v. Vill. of Fox Lake*, 26 F. Supp. 2d 1052, 1063 (N.D. Ill. 1998)); *see also* *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte Cnty.*, 546 F.3d 1299, 1307 (10th Cir. 2008) ("[A] reviewing court has no power to substitute its own conclusions for those of the fact-finder . . .") (citations and quotations omitted); Ostrow, *supra* note 48, at 333 ("Though the substantial evidence standard is less deferential than the arbitrary and capricious standard of review, it does not substitute local judgments with those of the judiciary.").

65. *Compare* 5 U.S.C. § 706(2)(E) (reviewing factual findings with a substantial evidence on the record as a whole standard), *and id.* § 702 (offering right of review to persons suffering legal wrongs), *with* 47 U.S.C. § 332(c)(7)(B)(iii) (requiring that denials be supported by substantial evidence in a written record), *and id.* § 332(c)(7)(B)(v) (providing judicial review for alleged violations to any person adversely affected).

66. *See infra* Part IV.C.

III. Decisions and Circuit Splits

Speaking generally about the TCA, the Supreme Court has remarked that the Act is “in many important respects a model of ambiguity or indeed even self-contradiction.”⁶⁷ Section 332(c)(7) is no exception to this characterization. Subsection (B)(i)(II) is indeed ambiguous in that it does not spell out what it means by “the effect of prohibiting.” While there may not be any self-contradictions within § 332(c)(7) itself, the federal appellate courts have conflicting interpretations of just what this crucial substantive limitation actually means. The courts first differ as to what extent an individual denial of a siting application can constitute an effective ban by the local zoning board. From there, the circuits split again on two issues regarding how to define such an effective ban. The following subparts explain the three splits in more detail. For clarification, the table at the end of Part III summarizes these three splits and how the various courts have answered the questions.

A. First Split: Can a Single Denial Effectively Prohibit Cell Phone Towers?

The circuits are split on whether a single zoning decision can “have the effect of prohibiting” cell phone towers and thus trigger subsection (B)(i)(II). The Fourth Circuit has determined that a single denial rarely suffices as an effective prohibition, while every other circuit that has considered the issue has found that even one denial, under the right circumstances, can violate subsection (B)(i)(II).

1. The Fourth Circuit’s Approach: A Blanket Ban on (Only) Blanket Bans

In *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*,⁶⁸ the Fourth Circuit ruled that subsection

67. *AT&T Corp. v. Iowa Utils. Bd.* 525 U.S. 366, 397 (1999).

68. *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423 (4th Cir. 1998).

(B)(i)(II) operates to prohibit only across-the-board bans on cell phone towers and has no effect on individual zoning decisions.⁶⁹ Thus, a single denied application from a zoning authority cannot violate the Act. Examining the issue in a way that other courts have called “strict plain meaning analysis”⁷⁰ and even a “cramped reading,”⁷¹ the Fourth Circuit reasoned that

any reading of subsection (B)(i)(II) that allows the subsection to apply to individual decisions would effectively nullify local authority by mandating approval of all (or nearly all) applications, a result contrary to the explicit language of section (B)(iii), which manifestly contemplates the ability of local authorities to “deny a request.”⁷²

The court reasoned that its narrow interpretation of subsection (B)(i)(II) is “necessary to avoid destroying local authority and to reconcile subsection (B)(i)(II) with section (B)(iii),”⁷³ which, as the court mentioned, implicitly presumes that local authorities can deny requests.⁷⁴ Thus, because the Act contemplates permissible denials, the *AT&T* court determined that a single denial could never be considered a prohibition on personal wireless services.⁷⁵

69. *See id.* at 428 (“The district court . . . held that subsection (B)(i)(II) . . . only applies to ‘blanket prohibitions’ and ‘general bans or policies,’ not individual zoning decisions. . . . [W]e reach the same conclusion” (citations and quotations omitted)).

70. *MetroPCS, Inc. v. City & Cnty. of S.F.*, 400 F.3d 715, 730 (9th Cir. 2005).

71. *T-Mobile Cent., LLC v. W. Bloomfield*, 691 F.3d 794, 806 (6th Cir. 2012).

72. *AT&T*, 155 F.3d at 428.

73. *Id.* at 429.

74. *See id.* at 428 (stating that “the explicit language of section (B)(iii) . . . manifestly contemplates the ability of local authorities to ‘deny a request’”; *see also* 47 U.S.C. § 332(c)(7)(B)(iii) (2012) (“Any decision by a State or local government or instrumentality thereof to *deny a request* to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.” (emphasis added))).

75. *See AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 428 (4th Cir. 1998)

[A]ny reading of subsection (B)(i)(II) that allows the subsection to apply to individual decisions would effectively nullify local authority by mandating approval of all (or nearly all) applications, a result contrary to the explicit language of section (B)(iii), which manifestly contemplates the ability of local authorities to “deny a request.”

The obvious fallacy here is that while a single denial can be permissible as

In the Fourth Circuit, only “blanket prohibitions” and “general bans or policies” can violate subsection (B)(i)(II), but never “individual zoning decisions.”⁷⁶

While the *AT&T* decision was fairly rigid in its finding that only blanket bans could violate subsection (B)(i)(II), the Fourth Circuit has “since recognized . . . the theoretical possibility” that a single denial could violate subsection (B)(i)(II) if the only possible tower site was denied, but the court cautioned that “such a scenario ‘seems unlikely in the real world.’”⁷⁷ Despite the court’s skepticism that such a situation could present itself, the court has stated that a provider complaining of a single denial has the “heavy burden” of proving that this is “tantamount to a prohibition of service.”⁷⁸ On a few occasions,⁷⁹ the court has favorably cited to a First Circuit case⁸⁰: “[T]he burden for the carrier invoking [subsection (B)(i)(II)] 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.”⁸¹ The Fourth Circuit uses this to demonstrate the high hurdle that carriers must clear, even though the First Circuit uses another, more lenient analysis that the Fourth Circuit explicitly rejects.⁸² Thus,

contemplated by the statute, this does not mean that all single denials are always permissible. This is the critique to be offered in Part IV.A, *infra*.

76. *AT&T*, 155 F.3d at 428.

77. *USCOC of Va. RSA # 3 v. Montgomery Cnty. Bd. of Supervisors*, 343 F.3d 262, 268 (4th Cir. 2003) (quoting *360 Degrees Commc’ns Co. of Charlottesville v. Bd. of Supervisors*, 211 F.3d 79, 87 (4th Cir. 2000)).

78. *360 Degrees Commc’ns Co. of Charlottesville v. Bd. of Supervisors*, 211 F.3d 79, 87–88 (4th Cir. 2000) (citing *Town of Amherst v. Omnipoint Commc’ns Enters., Inc.*, 173 F.3d 9 (1st Cir. 1999)).

79. *See, e.g., id.* at 88; *New Cingular Wireless PCS, LLC v. Fairfax Cnty. Bd. of Supervisors*, 674 F.3d 270, 277 (4th Cir. 2012).

80. *See Town of Amherst v. Omnipoint Commc’ns Enters., Inc.*, 173 F.3d 9 (1st Cir. 1999).

81. *Id.* at 14.

82. *Compare Second Generation Props., L.P. v. Town of Pelham*, 313 F.3d 620, 632 (1st Cir. 2002) (“We have concluded that a town’s refusal to permit a tower that is needed to fill a significant geographic gap in service, where no service at all is offered in the gap, would violate the effective prohibition clause.” (citations, quotations, and brackets omitted)), *with T-Mobile Ne. LLC v. Fairfax Cnty. Bd. of Supervisors*, 672 F.3d 259, 266 (4th Cir. 2012) (“[W]e specifically rejected the standard adopted by other circuits permitting a plaintiff to establish merely that its proposed facility constitutes the least intrusive means

although the Fourth Circuit has acknowledged the possibility of a non-ban effective prohibition, the circuit's tests are still the most demanding and are distinct from the other circuits' tests. Whether or not the Fourth Circuit's later precedents indicate a ban only on blanket prohibitions or perhaps something a shade more lenient, other circuits certainly view the Fourth Circuit's position as the strictest.⁸³

2. Everyone Else's Approach: A Single Denial Can Constitute an Effective Prohibition

Every other circuit that has considered the question has rejected the Fourth Circuit's strict interpretation of subsection (B)(i)(II).⁸⁴ Instead, the other circuits take a more flexible approach. Although not every individual denial represents an effective prohibition, a single denial conceivably could under the right circumstances; that possibility is not foreclosed.⁸⁵ Under

to close a significant gap in service." (citations and quotations omitted)).

83. See, e.g., *T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield*, 691 F.3d 794, 806 (6th Cir. 2012) ("The cramped reading of the Fourth Circuit requires a blanket ban to trigger a violation of the statute.").

84. All but the Fifth, Eighth, Tenth, and Eleventh Circuits have directly considered this issue, and all have reached the opposite conclusion as the Fourth Circuit in *AT&T*. See, e.g., *id.* ("[T]he denial of a single application can constitute a violation of this portion of the Act."); *MetroPCS v. City & Cnty. of S.F.*, 400 F.3d 715, 731 (9th Cir. 2005) ("However, for a variety of reasons, we decline to adopt the Fourth Circuit rule on this point."); *Voicestream Minneapolis, Inc. v. St. Croix Cnty.*, 342 F.3d 818, 833 (7th Cir. 2003) ("Other circuits have determined that the clause is not restricted to blanket bans on cell towers, and that the clause may, at times, apply to individual zoning decisions." (quotations and citations omitted)); *Second Generation Props., LP v. Town of Pelham*, 313 F.3d 620, 629 (1st Cir. 2002) ("The clause may, at times, apply to individual zoning decisions."); *APT Pittsburgh Ltd. P'ship v. Penn Twp.*, 196 F.3d 469, 479 (3d Cir. 1999) ("This does not mean, however, that a provider can never establish that an individual adverse zoning decision has the 'effect' of violating § 332(c)(7)(B)(i)(II)."); *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 640 (2d Cir. 1999) ("Quoting at length from *AT&T*, the Board argues in substance that subsection B(i)(II) must be read as prohibiting only general bans. . . . We disagree with this reasoning." (citations omitted)).

85. See, e.g., *T-Mobile*, 691 F.3d at 805–06 ("The statute itself refers to actions that have the effect of prohibiting the provision of personal wireless services Not simply *prohibiting it*, but effectively prohibiting it. Thus, actions short of a complete prohibition could have the effect of improperly hindering the construction of cellular towers.").

this approach, providers instead have to demonstrate that the one denial in question arises from an underlying policy that is so against cell phone towers that it has the effect of a ban.⁸⁶ While sitting by appointment on the Ninth Circuit, Judge Cudahy aptly summarized the general approach of all other circuits:

Several circuits have held that, even in the absence of a “general ban” on wireless services, a locality can run afoul of the TCA’s “effective prohibition” clause if it prevents a wireless provider from closing a “significant gap” in service coverage. This inquiry generally involves a two-pronged analysis requiring (1) the showing of a “significant gap” in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations.⁸⁷

Although this may seem to complicate the process significantly—perhaps more so than the subsection’s plain language would indicate—the reasoning behind this two-pronged analysis is actually quite simple: if a zoning authority in a “dead zone” denies a tower at even the best possible location, then that single denial is a manifestation of a broader policy that does “have the effect of prohibiting the provision of wireless services.”⁸⁸ Essentially, if the best site is not good enough for the zoning board, then no site will ever be good enough. The next two circuit splits regard issues within this two-part test.

B. Second Split: How Significant of a Gap?

The second circuit split relates to whether a significant gap in coverage must exist for all cell phone providers, or whether an individual company’s gap in only their own service would also suffice. Consider a hypothetical town in which Verizon has a tower that provides its customers with good reception. AT&T, however, does not have a tower in the area and thus its customers have poor signal. If the local zoning authority denies

86. See, e.g., *APT Pittsburgh Ltd. P’ship v. Penn Twp.*, 196 F.3d 469, 479 (3d Cir. 1999) (“[T]he provider must bring additional proof . . . to demonstrate that the denial is representative of a broader policy or circumstance that precludes the provision of wireless service.”).

87. *MetroPCS v. City & Cnty. of S.F.*, 400 F.3d 715, 731 (9th Cir. 2005).

88. 47 U.S.C. § 332(c)(7)(B)(i)(II) (2012).

AT&T's tower application and the provider challenges the denial in federal court under subsection (B)(i)(II), can AT&T argue a "significant gap" in its *own* coverage, or does Verizon's preexisting tower prohibit this argument? Thus, the circuits split around the issue of whether a significant gap is with respect to cellular reception generally or with respect to an individual provider.

1. *The One-Provider Rule*

If the above example took place in the Second or Third Circuits, AT&T's challenge would fail due to the "one-provider rule." These circuits have concluded 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)."⁸⁹ The Second and Third Circuits were not concerned about unchecked zoning authorities with plenary power to deny all subsequent towers because "[t]he right to deny applications will still be tempered by subsection B(i)(II), which prohibits unreasonable discrimination."⁹⁰ In reviewing (and ultimately rejecting) the one-provider rule, the Ninth Circuit remarked:

This rule has been touted as proceeding from the consumer's perspective rather than the individual service provider's perspective, which the Third Circuit argues is more in keeping with the regulatory goals of the TCA—as long as *some* provider offers service in the area, consumers will be adequately served and the TCA's goal of establishing nationwide wireless service will be achieved. Under this view, the TCA protects only the individual user's ability to receive service from one provider or another; it does not protect each service provider's ability to maintain full coverage within a given market.⁹¹

89. *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999); see also *APT Pittsburgh*, 196 F.3d at 480 (quoting *Willoth*).

90. *Willoth*, 176 F.3d at 643; see also *APT Pittsburgh*, 196 F.3d at 480 (quoting *Willoth*).

91. *MetroPCS*, 400 F.3d at 731–32 (citations and quotations omitted).

Similarly, after an in-depth analysis of the Act's statutory definitions of the various kinds of cellular services,⁹² the Second Circuit stated that:

[T]he plain focus of the statute is on whether it is possible for a *user* [to have reception]. In our view, therefore, the most compelling reading . . . is that local governments may not regulate personal wireless service facilities in such a way as to prohibit remote *users* from [having reception].⁹³

Thus, with this consumer-centric view, it is only natural that the Second and Third Circuits would adopt the one-provider rule.

Although the Fourth Circuit rejects this two-pronged inquiry altogether,⁹⁴ the circuit has implicitly accepted the one-provider rule as well, determining that providers' individualized causes of action "would effectively nullify local authority by mandating approval of all (or nearly all) applications."⁹⁵ If AT&T's challenge of a single denial is likely to fail in the Fourth Circuit, then surely the challenge will be all the more likely to fail if Verizon already has a working tower in the area.

2. The Own-Coverage Rule

Three other circuits, as well as the FCC, have rejected the one-provider rule.⁹⁶ In *Second Generation Properties L.P. v. Town*

92. See *Willloth*, 176 F.3d at 641–43 (analyzing the statutory definitions); see also 47 U.S.C. §§ 332(c)(7)(C)(i), 332(d) (2012) (defining "personal wireless services").

93. *Willloth*, 176 F.3d at 643 (emphasis added).

94. Instead, the Fourth Circuit takes the position that single denials rarely, if ever, constitute violations of subsection (B)(i)(II). See *supra* Part III.A.1.

95. *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 428 (4th Cir. 1998).

96. See *Second Generation Props., L.P. v. Town of Pelham*, 313 F.3d (1st Cir. 2002) ("The fact that some carrier provides some service to some consumers does not in itself mean that the town has not effectively prohibited services to other consumers."); see also *T-Mobile Cent., LLC v. W. Bloomfield*, 691 F.3d 794, 807 (6th Cir. 2012) (citing *Second Generation*); *MetroPCS*, 400 F.3d at 732 (citing *Second Generation*); *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, 24 FCC Rcd. 13994, 14016–17 (2009) [hereinafter *FCC Ruling*] ("[W]e conclude that under the better reading of the statute, this limitation of State/local authority applies not just to the first carrier to enter into the market, but also to all subsequent entrants.").

of *Pelham*,⁹⁷ the First Circuit rejected the one-provider rule on both statutory–textual and practical–policy grounds. As for the statutory grounds, subsection (B)(i)(II) speaks of “prohibiting the provision of personal wireless *services*,” the plural being crucial to the court.⁹⁸ As for the pragmatic implications, the First Circuit worried that a one-provider rule would carve out separate enclaves for different cell phone providers based on wherever their towers were. *Town A* may have great reception for Verizon customers but little to offer to AT&T customers. Just a few miles down the highway in *Town B*, the situation could be reversed, with AT&T providing better service than Verizon.⁹⁹ In *Second Generation*, the First Circuit stated that “[t]he result would be a crazy patchwork quilt of intermittent coverage [that] might have the effect of driving the industry toward a single carrier.”¹⁰⁰ This would be quite the opposite of the legislation’s stated goal to “open[] all telecommunications markets to competition.”¹⁰¹ Because of the potential for the “crazy patchwork quilt,” the court worried that “[t]he fact that some carrier provides some service to some consumers does not in itself mean that the town has not effectively prohibited services to other consumers.”¹⁰² Even if the market does not tend toward monopoly, the patchwork is still problematic. “From the perspective of a customer who has poor coverage with T-Mobile in a certain area, it is little consolation that another provider, Verizon for example, may have good service in the same area.”¹⁰³ The Sixth¹⁰⁴ and Ninth Circuits¹⁰⁵ have also accepted the First Circuit’s reasoning on this issue.

97. 313 F.3d 620 (1st Cir. 2002).

98. *See id.* at 633 (“A straightforward reading is that ‘services’ refers to more than one carrier. Congress contemplated that there be multiple carriers competing to provide services to consumers.”).

99. All of this is to say nothing about the out-of-town traveler driving through with a third carrier like T-Mobile.

100. *Second Generation*, 313 F.3d at 633.

101. S. REP. NO. 104-23, at 1 (1995).

102. *Second Generation*, 313 F.3d at 634.

103. *T-Mobile Cent., LLC v. W. Bloomfield*, 691 F.3d 794, 807 (6th Cir. 2012).

104. *See id.* (“In light of the FCC’s endorsement of the standards used by the First and Ninth Circuits, we now adopt this approach.”).

105. *See MetroPCS, Inc. v. City & Cnty. of S.F.*, 400 F.3d 715, 733 (9th Cir. 2005) (“[W]e elect to . . . formally adopt the First Circuit’s rule that a significant

The FCC was also swayed by this logic. In a 2009 declaratory ruling, the Commission largely adopted both the plural “services” argument¹⁰⁶ and the patchwork quilt worries.¹⁰⁷ Additionally, the FCC recognized “the possibility that the first carrier may not provide service to the entire locality.”¹⁰⁸ In such a scenario, “a zoning approach that subsequently prohibits or effectively prohibits additional carriers therefore may leave segments of the population unserved or underserved.”¹⁰⁹ Finally, in that same ruling, the FCC also criticized the Fourth Circuit’s blanket-ban-only approach.¹¹⁰ Thus, the FCC has come down in favor of the own-coverage rule as well.

C. Third Split: How to Identify Feasible Alternatives?

The two-pronged test’s logic is that if the zoning authority denies a petition for even the best possible tower location in a “dead zone,” then that is effectively a ban on all cell phone towers. Aside from the issue of whether a significant gap is with respect to one or any carrier, the circuits also vary on how to determine the quality of other alternative locations. Specifically,

gap in service (and thus an effective prohibition of service) exists whenever a provider is prevented from filling a significant gap in *its own* service coverage.”).

106. See FCC Ruling, *supra* note 96, at 14017 (“First, our interpretation is consistent with the statutory language referring to the prohibition of ‘the provision of personal wireless *services*’ rather than the singular term ‘service.’”).

107. See *id.* at 14017–18 (“Our interpretation in this Declaratory Ruling promotes these statutory objectives more effectively than the alternative, which could perpetuate significant coverage gaps within any individual wireless provider’s service area.”).

108. *Id.* at 14017.

109. *Id.*

110. See *id.* at 14017 (“[W]e find unavailing the reasons cited by the Fourth Circuit (and some other courts) to support the interpretation that the statute only limits localities from prohibiting all personal wireless services (*i.e.*, a blanket ban or ‘one-provider’ approach).”). Here, the FCC interestingly—and somewhat confusingly—conflated both the one-provider rule and the blanket-ban rule. While these two are somewhat related, see *supra* notes 82–83 and accompanying text, they are separate positions. A one-provider-rule jurisdiction would not entertain an effective-prohibition challenge from a locality’s second cellular provider whereas the Fourth Circuit would not entertain such a suit for the second or even the *first* cellular provider because they interpret § 332(c)(7) in a way that never applies to an individual denial in nearly any case. See *supra* Part III.A.1.

they are split as to whether to apply a no-alternative rule or the least-intrusive rule.

1. *The No-Alternative Rule*

In the First and Seventh Circuits, a denied service provider must demonstrate that its rejected site was the “only feasible plan”¹¹¹ and that “there are no alternative sites which would solve”¹¹² the coverage gap. The underlying reasoning of this rule apparently is that the zoning board could not have instituted an effective prohibition because there are other feasible sites that the board would approve.¹¹³ If, however, the only viable location still did not satisfy the board’s standards, then it has instituted a policy with the effect of prohibiting towers generally. If the only option is not good enough for the board, then there are no real options.

2. *The Least-Intrusive Rule*

In the Second, Third, Sixth, and Ninth Circuits, the courts use a slightly different metric to compare the rejected site with other potential sites in the area. Instead of considering the simple question of whether other viable sites exist, these courts determine whether the denied location is “the least intrusive on

111. *Second Generation Props., L.P. v. Town of Pelham*, 313 F.3d 620, 630 (1st Cir. 2002) (stating that an effective prohibition would exist “where the plaintiff’s existing application is the only feasible plan; in that case, denial of the plaintiff’s application might amount to prohibiting personal wireless service” (citations and quotations omitted)); *see also VoiceStream Minneapolis, Inc. v. St. Croix Cnty.*, 342 F.3d 818, 834–35 (7th Cir. 2003) (citing *Second Generation*).

112. *See Second Generation*, 313 F.3d at 635 (“An applicant for a zoning permit arguing that there is an effective prohibition must still show that there are no alternative sites which would solve the problem.”); *see also VoiceStream*, 342 F.3d at 834–35 (citing *Second Generation*).

113. Readers are ultimately left only to guess at the rationale because the First and Seventh Circuits did not elaborate much about why they chose the no-alternative rule. Rather, the two key decisions provide only a few sentences regarding this issue and do not mention the fact that other circuits have used another rule. *See Second Generation*, 313 F.3d at 635; *VoiceStream*, 342 F.3d at 834–35.

the values that the denial sought to serve.”¹¹⁴ This leads to a somewhat lighter burden for rejected cellular providers¹¹⁵—or at least a much more cabined analysis. Instead of the court considering the broad, general question of whether any other feasible options exist, the considerations are limited to the grounds on which the denial purported to rest.¹¹⁶ For example, if the zoning board’s denial decision stated that the proposed site would ruin the view of a scenic mountain range, the zoning board could not later argue that the proposed site did not provide cellular reception to the other side of the county. The board denied the application on aesthetic grounds, not on coverage grounds. Instead, the court’s analysis would be focused on whether there are any other sites in the county that would be less disruptive of the scenic view; other concerns not raised by the board in the initial denial would not be considered. The least-intrusive rule has the effect of holding a zoning board to its initial reasoning, not allowing it to change arguments later.

D. The Effect of the FCC Ruling on the Circuit Splits

The FCC has taken a position on two of the three circuit splits. It has interpreted subsection (B)(i)(II) to apply to even single denials of zoning permits, thus siding against the Fourth Circuit on the first split.¹¹⁷ The FCC has also found the own-

114. *APT Pittsburgh Ltd. P’ship v. Penn Twp.*, 196 F.3d 469, 480 (3d Cir. 1999); *see also* *T-Mobile Cent., LLC v. W. Bloomfield*, 691 F.3d 794, 808 (6th Cir. 2012) (“We agree with . . . and adopt the ‘least intrusive’ standard from the Second, Third, and Ninth Circuits.”); *MetroPCS, Inc. v. City & Cnty. of S.F.*, 400 F.3d 715, 735 (9th Cir. 2005) (“[W]e now adopt the ‘least intrusive means’ standard”); *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999) (“A local government may reject an application for construction of a wireless service facility in an under-served area without [violating subsection (B)(i)(II)] if the service gap can be closed by less intrusive means.”).

115. *See, e.g., MetroPCS*, 400 F.3d at 734–35 (accepting the least-intrusive standard over the no-alternative rule and stating that the First and Seventh Circuits’ interpretations were “too exacting”).

116. *See, e.g., APT Pittsburgh*, 196 F.3d at 480 (“[T]he 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.”).

117. *See* FCC Ruling, *supra* note 96, at 14017 (“[W]e find unavailing the reasons cited by the Fourth Circuit (and some other courts) to support the interpretation that the statute only limits localities from prohibiting all

coverage rule to be better than the one-provider rule.¹¹⁸ Until now, this Note has considered the FCC positions alongside the circuits' decisions as if they were of equal weight. However, because of the Supreme Court's decision in *City of Arlington v. FCC*,¹¹⁹ it is possible that the FCC Ruling regarding these first two issues has effectively overruled the circuits' varying positions.

City of Arlington was an appeal from a Fifth Circuit ruling¹²⁰ that accepted the FCC's interpretation of (B)(ii)'s "reasonable period of time" requirement.¹²¹ The FCC Ruling at issue in this case is the very same Ruling that took a position on the first two circuit splits. The Court determined that (B)(ii) was ambiguous and the FCC's interpretation of it was reasonable, thus entitling the Ruling to *Chevron*¹²² deference.¹²³ However, it was not

personal wireless services (*i.e.*, a blanket ban or 'one-provider' approach)."). See also *supra* note 110 and accompanying text (describing the FCC's criticism and rejection of the one-provider rule).

118. See FCC Ruling, *supra* note 96, at 14016

We conclude that a State or local government that denies an application for personal wireless service facilities siting solely because one or more carriers serve a given geographic market has engaged in unlawful regulation that prohibits or has the effect of prohibiting the provision of personal wireless services within the meaning of Section 332(c)(7)(B)(i)(II).

119. 133 S. Ct. 1863 (2013).

120. *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd* 133 S. Ct. 1863 (2013).

121. Subsection (B)(ii) requires that zoning authorities respond applications regarding cell towers to be addressed in a "reasonable period of time." The FCC Ruling had interpreted this to mean "presumptively, 90 days to process personal wireless facility siting applications requesting collocations, and, also presumptively, 150 days to process all other applications." FCC Ruling, *supra* note 96, at 14005.

122. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984) ("If, however, the court determines Congress has not directly addressed the precise question at issue . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute."); see also *id.* at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").

123. See *City of Arlington*, 668 F.3d at 247-54 (concluding that the FCC Ruling, *supra* note 96, is entitled to *Chevron* deference, at least with respect to the FCC's interpretation of subsection (B)(ii) and "reasonable period of time").

entirely clear whether the FCC actually had the authority under this statute to interpret the statute in the first place.¹²⁴ Of course the FCC thought that it had interpretive authority.¹²⁵ Controversially, the Fifth Circuit gave the FCC *Chevron* deference on this initial jurisdictional question, as well.¹²⁶ Thus, the Fifth Circuit ruled that the FCC's determination of its own interpretive authority was entitled to *Chevron* deference. This, in turn, meant that the FCC's interpretation of (B)(iii) could get *Chevron* deference, as well.

On appeal, the Supreme Court considered the issue of whether agencies are entitled to *Chevron* deference on interpretations of their own jurisdiction, and the Court ruled that they in fact are.¹²⁷ While *City of Arlington* will no doubt have a great impact on administrative law generally, it also establishes that the FCC Ruling at issue there—which is also the very same Ruling in which the FCC considered the first two circuit splits—is in fact entitled to *Chevron* deference despite the FCC's questionable interpretive authority. For the courts that disagree with the FCC,¹²⁸ *City of Arlington* puts them in the awkward position of either applying their own circuit precedents or applying *Chevron*. While this is an interesting question of administrative law, it is beyond the scope of this Note. Part IV attempts to demonstrate how the circuit splits should be solved

124. See, e.g., *id.* at 247–48 (considering the issue of whether the FCC has authority to interpret § 332(c)(7) and ruling that, because the Fifth Circuit gives agencies *Chevron* deference for determinations of their own authority, the FCC does have authority to do so).

125. FCC Ruling, *supra* note 96, at 14000–03 (“We agree . . . that the Commission has the authority to interpret Section 332(c)(7).”).

126. See *City of Arlington*, 668 F.3d at 248 (“Some circuits apply *Chevron* deference to disputes over the scope of an agency’s jurisdiction, some do not, and some circuits have thus far avoided taking a position. In this circuit, we apply *Chevron* to an agency’s interpretation of its own statutory jurisdiction” (citations omitted)). Up until now, this jurisdictional question had sometimes been thought of as a “pre-*Chevron*” question. *Id.*

127. See *City of Arlington*, 113 S. Ct. at 1870–71 (describing the line between jurisdictional and non-jurisdictional agency interpretations as illusory, and reaffirming that “the question in every case is, simply, whether the statutory text forecloses the agency’s assertion of authority, or not”).

128. For the first split, the Fourth Circuit, which takes the “blanket ban” approach. For the second split, the Second and Third Circuits, which take the “one-provider” approach. See *supra* Parts III.A.1 and III.B.1, respectively.

based on statutory interpretation, not how the splits might be solved by agency law.

Table: Summary of Circuit Splits

<p>First Circuit Split: Can a single denial qualify as an effective prohibition?</p>	
<p>No; blanket-ban-only rule: 4th Circuit</p>	<p>Yes; apply two-pronged analysis: 1st, 2d, 3d, 6th, 7th, and 9th Circuits; FCC; 5th indirectly via <i>Chevron</i> deference</p>
<p>Second Circuit Split: Can there be a significant gap if another cell provider is already servicing the area?</p>	
<p>No; one-provider rule: 2d and 3d Circuits; 4th Circuit implicitly</p>	<p>Yes; own-coverage rule: 1st, 6th, and 9th Circuits; FCC; 5th Circuit indirectly via <i>Chevron</i> deference</p>
<p>Third Circuit Split: What is the standard for considering alternative sites?</p>	
<p>No-alternative rule: 1st and 7th Circuits</p>	<p>Least-intrusive rule: 2d, 3d, 6th, and 9th Circuits</p>

IV. Analysis, Critique, and Recommendations

Now that the three circuit splits have been laid out and the six potential answers have all been described, this Part moves on to consider and analyze each of the splits in turn. This Part will pay particular attention to the text of the Act itself as well as the underlying policy motivations. Also, the analysis will use various rational actor assumptions to attempt to predict the practical outcomes should each of the various rules be adopted nationwide.

A. First Split: Fourth Circuit vs. the Rest

The first circuit split is the threshold issue for the other two; if one shares the Fourth Circuit's view that a single denial can never violate subsection (B)(i)(II) and that only blanket bans are prohibited, then the next two circuit splits drop out of the question entirely. If a single denial can never violate subsection (B)(i)(II), then there is no need to even consider the two-pronged analysis around which the other two splits revolve. Thus, it makes sense to start untangling the splits by first considering the Fourth Circuit's decision in *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*.¹²⁹

The court's approach is laudable in that it was guided by a desire to preserve local zoning authority to the fullest extent possible;¹³⁰ indeed, this is in the text of the statute itself.¹³¹ The Act, however, does put limitations on local zoning authority. That, too, is in the text of the Act.¹³² Subsection (B)(i)(II) is undeniably one of those limitations.¹³³ Local zoning authority is preserved except to the extent that it "prohibit[s] or ha[s] the effect of prohibiting the provision of personal wireless services."¹³⁴ This is where the Fourth Circuit errs, however. The court's blanket-ban-only rule and its refusal to apply subsection (B)(i)(II) to individual denials effectively interprets away the phrase "or have the effect of prohibiting." This goes against the well-settled canon of statutory construction that statutes are to be interpreted

129. 155 F.3d 423 (4th Cir. 1998).

130. *See id.* at 428–29 (“[O]ur reading simultaneously furthers the Act’s explicit goals of . . . preserving a large portion of local authority by maintaining that authority in particular cases.”); *id.* at 429 (“[B]ut this is necessary to avoid destroying local authority.”).

131. 47 U.S.C. § 332(c)(7)(A) (2012) (“Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.”).

132. § 332(c)(7)(B) (providing, under the title “Limitations,” that “[t]he regulation of the placement . . . of personal wireless service facilities by any State or local government . . . (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”).

133. *Id.*

134. § 332(c)(7)(B)(i)(II).

so as to make every word carry some meaning and to avoid rendering words superfluous.¹³⁵

The Fourth Circuit was not unmindful of this critique and defended against it in the *AT&T* decision. The court argued that even if individual denials were not affected by subsection (B)(i)(II), the provision could still be used to prohibit moratoria on cell phone towers.¹³⁶ The court went on to cite several examples of subsection (B)(i)(II) being used for just such a purpose, striking down blanket bans on any new towers in a given locality.¹³⁷ This argument entirely misses the point, however. The cell tower moratoria to which the Fourth Circuit pointed would not need to be struck down under the second, “or have the effect of” part of subsection (B)(i)(II). Moratoria are not *effective* prohibitions, but simply *straight-up* prohibitions. Such blatant violations of the Act are already prohibited under the first portion of subsection (B)(i)(II)—“shall not prohibit”—and the second clause would still be unnecessary. The Fourth Circuit’s defense to this criticism is completely inapposite, and in fact further demonstrates the validity of the critique: the blanket-ban rule renders a crucial part of the statute meaningless.

The flaws in the court’s reasoning do not end there, however. The court also relied on false presumptions. The court stated that “any reading of subsection (B)(i)(II) that allows the subsection to apply to individual decisions would effectively nullify local authority by mandating approval of all (or nearly all)

135. See, e.g., *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute . . .’” (citing *Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883))); *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991) (“But of course we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.”).

136. *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 428 (4th Cir. 1998) (“[T]he numerous cases involving local zoning authorities’ moratoria on new zoning permits demonstrate that the reading of the statute we adopt today would hardly render the section of no use.”).

137. *Id.* (citing *Lucas v. Planning Bd. of LaGrange*, 7 F. Supp. 2d 310 (S.D.N.Y. 1998); *Sprint Spectrum L.P. v. Jefferson Cnty.*, 968 F. Supp. 1457 (N.D. Ala. 1997); *Sprint Spectrum L.P. v. Town of W. Seneca*, 659 N.Y.S.2d 687 (Sup. Ct. 1997); *Sprint Spectrum L.P. v. Town of Farmington*, No. 3:97 CV 863(GLG), 1997 WL 631104 (D. Conn. Oct. 6, 1997); *Sprint Spectrum L.P. v. City of Medina*, 924 F. Supp. 1036 (W.D. Wash. 1996)).

applications.”¹³⁸ That is simply not true. Courts can review individual zoning decisions without requiring approval by the boards in every circumstance. Indeed, nearly every other circuit in the nation has found a way to do just that. This is, incidentally, the very purpose and effect of § 332(c)(7): to allow aggrieved service providers to challenge adverse zoning decisions in a federal court.¹³⁹ In fact, why would the Act provide for such a remedy to individual cellular service providers if it did not apply to individual zoning decisions? For fear of adopting a rule that would always require the cell phone companies to win at the zoning board, the Fourth Circuit went on to adopt a rule in which the cell phone companies would always lose in district court challenges. There is certainly room for a middle path on this issue, but the Fourth Circuit unfortunately was not able to find it while every other circuit court has.

The court was undeniably correct in stating that the Act “manifestly contemplates the ability of local authorities to ‘deny a request.’”¹⁴⁰ But, just because something *can be* permissible does not mean that it *always must be* permissible. Again, this nuance was also lost on the court.¹⁴¹ Moreover, it is not immediately apparent just how many times a cell phone provider has to be denied by a zoning board before subsection (B)(i)(II) is violated. If a single denial will never suffice, would five denials be enough? Maybe ten? In addition to faulty statutory interpretation, the Fourth Circuit’s position is also inferior from a judicial economy perspective. By never allowing a single denial to trigger

138. *AT&T*, 155 F.3d at 428.

139. *See* § 332(c)(7)(B)(v) (“Any person adversely affected by any final action or failure to act by a State or local government . . . may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction.”).

140. *AT&T*, 155 F.3d at 428; *see also* § 332(c)(7)(B)(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.”).

141. *AT&T*, 155 F.3d at 428

[A]ny reading of subsection (B)(i)(II) that allows the subsection to apply to individual decisions would effectively nullify local authority by mandating approval of all (or nearly all) applications, a result contrary to the explicit language of section (B)(iii), which manifestly contemplates the ability of local authorities to “deny a request.”

subsection (B)(i)(II), the Fourth Circuit's rule encourages frequent and successive petitions both to the zoning board—testing new sites—and to the court—testing whether there is yet enough evidence to convince the court of an effective ban.

The alternative to the Fourth Circuit's position—the two-pronged approach generally adopted by every other circuit that has considered the issue¹⁴²—is based on simple logic. It only stands to reason that if there is a gap in cellular reception and even the most ideal site for a cell phone tower is rejected (say, in a secluded area, able to be disguised into the landscape, yet still solving a significant dead zone), then any other and lesser sites would also be rejected. If even the best is not good enough, then nothing is good enough. If nothing is good enough, then the zoning board's impossibly high standards are effectively a ban on cell phone towers. A denial of a single application, if based on such a stringent policy, can evince an effective prohibition.

One could argue that the two-pronged approach—and the two circuit splits that have formed around it—is somewhat more complicated than the six simple words, “or have the effect of prohibiting.” Indeed, the interpretation does seem to read a lot into that short phrase, perhaps stretching it into something more unwieldy. To some extent, however, we should expect interpretations to do this—to explain, explicate, and unpack a statute. Rarely does an interpretation result in a shorter rule or fewer words, but rather an elaboration with a finer, more particularized meaning. That is precisely what interpretation is, and this is what the two-pronged approach entails. Moreover, it is derived from the plain meaning of the statutory language and, unlike the Fourth Circuit's rule, it does not render parts of the Act meaningless. For these reasons, the Fourth Circuit's overly constrained rule ought to be rejected in favor of the general two-pronged approach. This does not end the inquiry, however, as there are two more circuit splits to consider.

142. See *supra* Part III.A.2.

B. The Second Split: One-Provider Rule vs. Own-Coverage Rule

To analyze this second split between the one-provider and own-coverage rules, recall the hypothetical scenario provided in Part III.B.: AT&T is looking to build a new tower in a town that is not yet served by AT&T, but is served by an already-existing Verizon tower. If AT&T's zoning application was rejected by the local board, the one-provider rule would preclude the company's subsection (B)(v) effective-prohibition suit because the area is already served by Verizon. If the board is nonetheless willing to allow this second tower, then it of course is free to allow AT&T to build it. One-provider jurisdictions just will not require the board to approve AT&T's application. In this sense, the one-provider rule leaves more room for local authority over tower siting, and thus could be seen as more in line with the text of § 332(c)(7): "Except as otherwise provided . . . , nothing in this chapter shall limit or affect the authority of a State or local government . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities."¹⁴³ However, the operative phrase there is "[e]xcept as otherwise provided," and we are indeed considering and analyzing one of the exceptions explicitly laid out in the statute; namely, subsection (B)(i)(II). Just as preservation of local authority is one of the underlying policies of the Act,¹⁴⁴ so is fostering a national telecommunications infrastructure.¹⁴⁵ Section 332(c)(7) takes local authority and tempers it with limitations designed to serve national interests, and one of these limits is the issue at hand. Thus, the increased deference to local zoning authority is a strong argument in favor of the one-provider rule, but this does not necessarily trump. The analysis must also include other factors.

In adopting the one-provider rule, the Second and Third Circuits stressed the fact that the "focus [of § 332(c)(7)] is on the

143. § 332(c)(7)(A).

144. *See id.* ("Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities."); *see also* § 332(c)(7) (section entitled "Preservation of local zoning authority").

145. *See supra* Part II.B. for a discussion of the local–national balance struck by § 332(c)(7).

remote users' access to the national telephone network."¹⁴⁶ As long as residents of the locality can receive telecommunications from *even just one provider*, subsection (B)(i)(II)'s goal is fulfilled.¹⁴⁷ Thus, the one-provider rule purports to be more consumer-centric view, at least in terms of initial perspective. However, the rule may not be consumer-friendly in terms of its effects on the market. The rule implicitly—if not explicitly—allows for a monopoly. As long as one provider already serves the market (Verizon in the above hypothetical), the next cell phone company is not guaranteed the opportunity to also serve the area (AT&T). While zoning boards in one-provider jurisdictions can presumably allow in second entrants if they want, there is no reason to think that localities would be eager to do so, especially given the strong not-in-my-back-yard pressures.¹⁴⁸ Thus, if one assumes that zoning authorities will usually deny towers that they are not required to accept, initial providers like Verizon will be able to maintain a monopoly. This one-participant market would be upheld, ironically, pursuant to the antimonopolistic TCA, an act with the express purpose of “opening all telecommunications markets to competition.”¹⁴⁹ Therefore, the one-provider rule would lead to practical outcomes that are the exact opposite of the clearly stated legislative intent of the Act.

These monopoly problems would only be exacerbated by the “crazy patchwork quilt” that the First Circuit was rightly concerned with in *Second Generation Properties, L.P. v. Town of Pelham*.¹⁵⁰ There, the court worried that various one-provider pockets “might have the effect of driving the industry toward a

146. *APT Pittsburgh, Ltd. P'ship v. Penn. Twp.*, 196 F.3d 469, 479 (3d Cir. 1999); *see also* *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999) (using the remote users' perspective in adopting the one-provider rule (cited in *APT Pittsburgh*)).

147. *See, e.g., MetroPCS, Inc. v. City & Cnty. of S.F.*, 400 F.3d 715, 731–32 (9th Cir. 2005) (describing the Second and Third Circuits' position: “as long as *some* provider offers service in the area, consumers will be adequately served Under this view, the [Act] protects only the individual user's ability to receive service from one provider or another . . .”).

148. *See supra* Part II.A.

149. H. REP. No. 104-458 at 1 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.A.N. 124, 124.

150. 313 F.3d 620, 633 (1st Cir. 2002).

single carrier.”¹⁵¹ Whether this would actually lead to a single-participant market nationally is unclear, but that is certainly a possibility. What is clear, however, is that the one-provider rule would allow for many single-participant markets locally, perhaps changing from town to town. This is because the provider in a given locality would be determined by which cell phone company won the race to get the first—and only—zoning board approval. While residents of each town will most likely know which cell phone company is the only one with coverage in the area, this does not really address why people want cell phones. “If your car breaks down somewhere where there is a gap in your wireless service, it won’t matter that there is another service provider in that area. That person will be unable to call for help”¹⁵² Allowing such balkanized enclaves of cell reception for just one provider each totally undercuts the very purpose for a nationwide cellular infrastructure in the first place. People want cell phones to give them the ability to make a call from anywhere, not just their hometown. Thus, the one-provider rule would establish not just monopoly markets, but an entire series of monopoly markets, each dominated by a different provider. The own-coverage rule, however, would counteract these monopolistic tendencies by allowing any competitor to get a foothold in any new market, assuming, of course, that the new entrant can find a tower site that meets the other qualifications. In this respect, the own-coverage rule is preferable and more in-line with the legislative intent of the Act.

The fundamental trade-off here is the desire for a competitive market with multiple service providers (carrier-friendly own-coverage rule) versus having as few towers in a locality as possible, perhaps even just one tower (zoning-board-friendly one-provider rule). Before one can conclude that one of these is better than the other, it is worth attempting to devise solutions that

151. *Id.* at 633.

152. Chani Katzen, *High Court Declines Phone-Tower Case Newtown Township Wants the Structure Removed Now. Omnipoint Was Challenging an Appeals Court Ruling*, PHILA. INQUIRER, Nov. 7, 2000, http://articles.philly.com/2000-11-07/news/25613548_1_phone-tower-phone-tower-cellular-telecommunications-industry-association (quoting an attorney for Omnipoint Communications after a failed writ of certiorari petition in *Omnipoint Commc’s Enters. v. Newtown Twp.*, 219 F.3d 240 (3d Cir. 2000), *cert. denied* 531 U.S. 985 (2000)) (on file with the Washington and Lee Law Review).

sidestep this dilemma. Essentially, we should try to have the cake and eat it too. One possibility for this is co-location, which is putting multiple carriers' signal-receiving equipment on the same tower,¹⁵³ to the extent that this is technologically feasible.¹⁵⁴ Typically, the tower owner will allow other cellular providers to place their equipment there on the same tower in exchange for rental payments or some sort of licensing agreement.¹⁵⁵

At first glance, this seems to offer the perfect solution to the intractable monopoly problems with the one-provider rule. Such a jurisdiction could still have multiple carriers offering cellular service if they all simply co-located on the same tower. While this seems to neutralize the monopoly issue, it actually just shifts it behind the scenes. Instead of a monopoly on the provision of cellular service to consumers, there is now a monopoly on the provision of tower facilities to other competing carriers. With the one-provider rule allowing localities to prohibit second towers, the new entrant to the market has absolutely no bargaining power when negotiating for the rights to co-locate on the one existing tower.¹⁵⁶ Relatedly, there is little if any, downward pressure on

153. See Long, *supra* note 20, at 386 (defining co-location as the "placement of more than one company's antennas on a single tower"); see also *Omnipoint Commc's, Inc. v. Town of LaGrange*, 658 F. Supp. 2d 539, 542 (S.D.N.Y. 2009) (considering a case in which a local zoning board denied an application to co-locate another carrier's receiving equipment on a preexisting tower and ruling that the denial was in violation of § 332(c)(7)(B)(i)(I) because it unreasonably discriminated against equivalent services); Timothy L. Gustin, *The Perpetual Growth and Controversy of the Cellular Superhighway: Cellular Tower Siting and the Telecommunications Act of 1996*, 23 WM. MITCHELL L. REV. 1001, 1029 (1997) (advocating for a co-location amendment to the TCA to "require competing cellular providers to share the same cellular tower when technologically feasible").

154. Depending on the circumstances, certain frequencies between carriers could cause interference with each other. See, e.g., Gustin, *supra* note 153, at 1029 n.173 ("Collocation [*sic*] would not be feasible when it creates frequency interference, known as intermodulation." (citations omitted)); Long, *supra* note 20, at 386–87 ("Co-location is limited by one technical constraint, however: Antennas placed too close together cause interference. Thus, only a limited number of antennas can coexist on one tower without reducing service quality.").

155. See, e.g., Gustin, *supra* note 153, at 1029 n.176 and accompanying text (describing the differences between a lease, sublease, and license in such co-location agreements).

156. At this point, one might suggest the possibility of the zoning board requiring consent to co-location as a prerequisite to approval. However, a few problems arise regarding the price. If none is set and the consent must be to free

the incumbent tower-owner's asking price. If the second (attempted) market entrant is not willing to pay the exorbitantly high rental, maybe the third or fourth entrants will.¹⁵⁷ These new carriers will surely pass the increased costs on to their new customers in the locality, thereby providing even more market advantages to the initial carrier. Or, if no other cell phone company is willing to pay the high rent, it may not be any loss to the incumbent carrier as they can make up any lost rental revenue through higher rates on their captive customers. The initial carrier would have a monopoly, after all; where else would the customers go? Thus, we see that, even with co-location as a possibility, the one-provider rule will still tend towards monopolies against the obvious intent of the statute.

On the other hand, the own-coverage rule would actually encourage co-location. A second entrant to the market would have the choice between building their own new tower or co-locating and paying rent to the incumbent carrier. This choice provided to

co-location, then the initial builder of the tower would necessarily bear all up-front costs associated with building the tower (which surely would get passed along to their paying customers), while the new, co-locating entrants would get to ride free. If a price is set in the board-imposed co-location consent, then there is still no guarantee that it is an efficient price. If the price is too low, there still will be a first-mover/free-rider problem, and if it is too high, then the initial carrier will still dominate the provision of cell phone service in that locality. The co-location price would most likely be better set by a market in which a second entrant has the choice of co-locating or building a new tower; this could be done by adoption of the own-coverage rule (see *infra* pp. 2017–18 for further explanation).

157. One might suggest that cell phone companies do have an incentive to offer fair, reasonable prices to one another, even if the later entrants are forced to co-locate rather than build a new tower. In a market with a few large participants, there indeed could be some downward pressure on rentals. For example, if AT&T charges a high price for Verizon's co-location in *Town A*, Verizon would easily turn around and overcharge AT&T for its proposed co-location in *Town B*. Thus, with a few repeat players who are each dominant in their own localities determined essentially at random (i.e., whoever built the first tower), there could be an incentive to "play nice." One could even foresee national agreements between large carriers like Verizon, AT&T, T-Mobile, and the like to set reasonable rental prices for co-location. However, encouraging such agreements could easily have oligopolistic tendencies, allowing the larger firms to squeeze out smaller competitors who do not have many (or any) preexisting towers on which to offer low co-location rentals. Instead of relying on such post hoc fixes to the problems inherent with the one-provider rule, it is better to adopt the own-coverage rule that directly encourages a fair, market-based co-location price-setting at the outset (see below for further explanation).

the second entrant would serve as an upper limit to what the first tower-owner could charge in a lease or license. If the asking price is more than the costs associated with zoning and building a second tower, no rational actor would sign on to such an agreement. Therefore, the first carriers would be incentivized to not monopolistically overcharge their competitors, but to offer a price that second entrants might actually take. In this sense, the own-coverage rule should lead to more co-location and fewer towers total by setting a fair, market-based price while simultaneously avoiding the monopoly problems of the one-provider rule. Thus, the own-coverage rule is preferable, not because it is better to side with the cell phone companies over local zoning boards, but rather because the rule incentivizes co-location. This leads to the most optimal outcome for both sides—better reception for more carriers with fewer towers.

C. Third Split: No-Alternative Rule vs. Least-Intrusive Rule

The third and final circuit split concerns the metric by which other potential sites are judged. The first of the two possible rules asks the court to answer the incredibly broad question of whether the rejected site was the “only feasible plan”¹⁵⁸ or if “there [were other] alternative sites which would solve”¹⁵⁹ the coverage gap.¹⁶⁰ While this phrasing of the rule keeps with the general approach of the two-pronged analysis, the main problem with this interpretation is that it is too general. The court is posed with the broad and subjective question of what other options are available and whether they are more feasible, with no guidance as to what actually constitutes feasibility. Such an open-ended question not

158. *Second Generation Props., L.P. v. Town of Pelham*, 313 F.3d 620, 630 (1st Cir. 2002) (stating that an effective prohibition would exist “where the plaintiff’s existing application is the only feasible plan; in that case, denial of the plaintiff’s application might amount to prohibiting personal wireless service” (citations and quotations omitted)); *see also VoiceStream Minneapolis, Inc. v. St. Croix Cnty.*, 342 F.3d 818, 834–35 (7th Cir. 2003) (citing *Second Generation*).

159. *Second Generation*, 313 F.3d at 635 (“An applicant for a zoning permit arguing that there is an effective prohibition must still show that there are no alternative sites which would solve the problem.”); *see also VoiceStream*, 342 F.3d at 834–35 (citing *Second Generation*).

160. *See supra* Part III.B.1.

only leaves the court with nowhere to begin the analysis, but also leaves it with nowhere to end. With this rule, the court could consider any—rather, *would* have to consider every—possible factor in tower siting. This leaves the inquiry overly broad and needlessly complicates the litigation. Moreover, the no-alternative rule, by its own terms, seeks to find the one best potential tower site out of the vast array of possible ones in the locality.¹⁶¹ Searching for some hypothetical best site—in the formal, cumbersome, and expensive litigation context, no less—is surely a fool’s errand.

Making similar observations, the Ninth Circuit has critiqued the no-alternative rule because it is “too exacting.”¹⁶² The court noted that when there are several other viable sites (assuming, of course, that the court could come up with a workable definition of viability), the no-alternative rule “would either preclude the construction of any facility (since no single site is the ‘only viable’ alternative) or require providers to endure repeated denials by local authorities until only one feasible alternative remained.”¹⁶³ Thus, this rule could run into the same pragmatic and judicial economy concerns raised regarding the Fourth Circuit’s blanket-ban rule.¹⁶⁴

The least-intrusive rule, however, avoids many of these problems. First, it narrows the range of possible factors to be considered by the court.¹⁶⁵ Instead of being able to consider anything and everything relating to the feasibility of the site, the court would only need to consider those factors mentioned in the denial itself.¹⁶⁶ This gives a reviewing court a clear place to begin

161. The rule’s own terms lead to this because if a rejected site has no alternatives, then it is, by definition, the best possible site. See *Second Generation*, 313 F.3d at 635 (“An applicant for a zoning permit arguing that there is an effective prohibition must still show that there are *no alternative sites* which would solve the problem.” (emphasis added)); see also *VoiceStream*, 342 F.3d at 834–35 (citing *Second Generation*).

162. *MetroPCS, Inc. v. City & Cnty. of S.F.*, 400 F.3d 715, 734 (9th Cir. 2005).

163. *Id.*

164. See *supra* Part IV.A.

165. See *supra* note 116 and accompanying text (describing how the least-intrusive rule narrows the court’s inquiry).

166. See, e.g., *MetroPCS*, 400 F.3d at 435 (“The Second and Third Circuits require the provider to show that ‘the manner in which it proposes to fill the

and end the analysis: read the denial letter, consider the factors used, and, using the reasoning of the zoning board, determine if the rejected site was still the least intrusive on those grounds. Presumably, the least-intrusive rule would still require the court to consider other potential sites to see if the rejected one is really the least intrusive, but at least those factors used would be limited to only those factors mentioned in the denial.

The least-intrusive rule takes the zoning decision seriously and binds the board to the rationale it purported to use in the initial denial. This holds the board accountable for what it said below and makes sure that the reasoning is logical and consistent. Such accountability is desirable in this situation because localities might otherwise be tempted to reject cell towers for purely not-in-my-back-yard reasoning¹⁶⁷ and then come up with other pretextual excuses in the formal written denials. If on review the court determines that the rejected site was actually the least intrusive on the purported values used by the board, then the site would be approved. Under a no-alternative test, in which the court can consider any factors relating to feasibility, a locality's pretextual denial may otherwise be upheld on other grounds that they did not consider and rely on in their decision.

On a similar note, the least-intrusive rule would prevent the locality from changing its argument against approval of the site midway through the application–litigation process. Operating in a way similar to estoppel,¹⁶⁸ the board could not argue one rationale in the denial letter and then another completely different (presumably stronger) rationale when challenged before the court. Under the no-alternative rule, the board would have a much broader field of possible arguments to make when the denial is challenged in court. Moreover, service providers would

significant gap in service is the least intrusive on the values that the denial sought to serve.” (quoting *APT Pittsburgh Ltd. P’ship v. Penn Twp.*, 196 F.3d 469, 480 (3d Cir. 1999)).

167. See *supra* Part II.A.

168. See, e.g., BLACK’S LAW DICTIONARY 495 (9th ed. 2009) (defining “estoppel” as “[a] bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true”); *id.* at 496 (defining “judicial estoppel” as “[e]stoppel that prevents a party from contradicting previous declarations made during the same or an earlier proceeding if the change in position would adversely affect the proceeding or constitute a fraud on the court”).

not know what arguments they should expect to face. This all gives the locality an unfair tactical advantage. That is, unless the zoning board is required to continue to rely on the same rationale they purported to use, as the least-intrusive rule does.

Finally, the least-intrusive rule is preferable to the no-alternative rule because it fits better with the overall structure of the Act, particularly how it leaves most of the substantive decisionmaking in the hands of the local zoning boards. Under § 332(c)(7), the court's role is not necessarily to delve into the substance of the underlying zoning decision. Instead, the court is simply to make sure that the local zoning authority has complied with the limitations stated in § 332(c)(7)(B),¹⁶⁹ namely that the local authority has not unreasonably discriminated between providers¹⁷⁰ and that the zoning board has not instituted a ban or effective ban on cellular services.¹⁷¹ If local zoning authority, by and large, is to be preserved,¹⁷² then the weighing of competing options and subjective considerations of feasibility should be done at zoning board meetings, not in courtrooms. Instead, the no-alternative rule invites courts to go beyond the stated reasoning of the denial and to consider any and every factor that could help the court identify other feasible tower sites.¹⁷³ At least with the

169. See 47 U.S.C. § 332(c)(7)(B)(v) (2012) (“Any person adversely affected by any final action or failure to act by a State or local government . . . that is inconsistent with this subparagraph may . . . commence an action in any court of competent jurisdiction.”).

170. See § 332(c)(7)(B)(i)(I) (“The regulation of . . . personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not unreasonably discriminate among providers of functionally equivalent services.”).

171. See § 332(c)(7)(B)(i)(II) (“The regulation of . . . personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”).

172. See § 332(c)(7)(A) (“Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.”).

173. See, e.g., *MetroPCS, Inc. v. City & Cnty. of S.F.*, 400 F.3d 715, 734 (9th Cir. 2005) (rejecting a proposed “most acceptable option” rule which operated similar to the no-alternative rule, stating that it “seems a hopelessly subjective standard, and one wonders how a proposed site could ever be proven ‘the most acceptable’ . . .”). The argument that the Ninth Circuit used to reject the “most acceptable option” rule applies just the same to the no-alternative rule. It is an

least-intrusive test, the court would be limited in its substantive considerations to those on which the zoning board based its decision.

To continue the administrative law analogy from earlier,¹⁷⁴ the substantial evidence standard largely prohibits courts from engaging in their own fact-finding, both in the administrative context¹⁷⁵ and in subsection (B)(v) actions.¹⁷⁶ The no-alternative rule, which is not limited to the rationale of the denial but open to boundless considerations, allows the court to consider evidence beyond the record from the zoning board below (that is, the denial) and to actively weigh the substantive considerations. This would all but require the court to make its own subjective judgment calls as to whether there are any other feasible alternatives. Under the least-intrusive rule, however, the court is limited in its considerations. Just as federal courts in administrative review actions are limited to the record that was in front of the agency at the time,¹⁷⁷ the court in these subsection

open-ended, subjective question that seeks to find one possible site out of vast array of options.

174. See *supra* Part II.C.

175. See 5 U.S.C. § 706(2)(E) (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence in a case . . . reviewed on the record.”); 5 U.S.C. § 556(e) (“The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the *exclusive* record for decision.” (emphasis added)); see also *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985) (“The task of the reviewing court is to apply the appropriate [standard of review] to the agency decision based on the record the agency presents to the reviewing court.”); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”).

176. See, e.g., *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999) (“[W]e may neither engage in our own fact-finding nor supplant the Town Board’s reasonable determinations.” (citing *PrimeCo Pers. Commc’ns, L.P. v. Vill. of Fox Lake*, F. Supp. 2d 1052, 1063 (N.D. Ill. 1998))); *T-Mobile Cent., LLC v. Unified Gov’t of Wyandotte Cnty.*, 546 F.3d 1299, 1307 (10th Cir. 2008) (“[A] reviewing court has no power to substitute its own conclusions for those of the fact-finder.” (citations and quotations omitted)); *Ostrow*, *supra* note 48, at 333 (“Though the substantial evidence standard is less deferential than the arbitrary and capricious standard of review, it does not substitute local judgments with those of the judiciary.”).

177. See, e.g., *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997) (“It is a widely accepted principle of administrative law that the courts base their review of an agency’s actions on the materials that were before the agency at the

(B)(v) actions would be limited to what the board based its decision on.

V. Conclusion

The siting of cell phone towers—and thus the provision of cellular reception generally¹⁷⁸—is a collective action problem and, in particular, is often fraught with the not-in-my-back-yard phenomenon.¹⁷⁹ While opposition to a tower in view of one's bedroom window is certainly understandable, so is the desire to have cellular reception wherever one goes. In an attempt to resolve the underlying tension, Congress adopted the § 332(c)(7) tower siting regime which balances the local and national interests involved by not directly making siting decisions but rather by regulating the overall process.¹⁸⁰ One key provision of this statutory scheme—subsection (B)(i)(II)—has been plagued with three interrelated circuit splits which this Note has examined in detail.¹⁸¹ After analysis and critique, this Note has concluded that the Fourth Circuit's blanket-ban rule should be rejected because it interprets away half of the clause and renders its provisions meaningless. Instead, the general two-pronged approach employed by nearly every other circuit should be adopted because it provides clear, logical meaning to all of the words of the subsection.¹⁸² Within this general framework, the own-coverage rule, while restricting the local zoning boards' authority with respect to second market entrants, nevertheless encourages efficient co-location of multiple carriers on one tower—the solution that ultimately achieves both fewer tower sites as well as increased reception and market competition.¹⁸³ Finally, the least-intrusive rule is preferable to the no-alternative rule because it focuses the litigation specifically on why the zoning board made their decision rather than opening the judicial

time its decision was made.” (citations omitted)).

178. See *supra* note 1.

179. See *supra* Part II.A.

180. See *supra* Part II.B.

181. See *supra* Part III.

182. See *supra* Part IV.A.

183. See *supra* Part IV.B.

proceedings so wide as to allow the court to substitute their own substantive decision; also, concerns regarding judicial economy and tactical equity also favor the least-intrusive rule, as well.¹⁸⁴ Thus, when one considers the text, intent, and underlying policies of § 332(c)(7), as well as the practical effects of each of the alternatives, the final interpretation of effective prohibition under subsection (B)(i)(II) is reached: When a cellular provider can show a significant gap in its own coverage and the denied site is the least intrusive on the grounds which the denial sought to serve, there has been an effective prohibition of cellular services.

184. See *supra* Part IV.C.