The Materially Inhibit Standard

The new standard for the review of a wireless facility siting application.

Cellco Partnership v. The White Deer Township Zoning Hearing Board, 74 F.4th 96 (3rd Cir. 2023)

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Standard of Review for the Denial of a Siting Application Under the TCA

Section 332(c)(7) of the TCA:

"[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services."

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The Materially Inhibit Standard Replaces the Least Intrusive Standard: A Historical Review of the Evolution of the New Standard

The Former Standard: APT Pittsburgh Ltd. v. Penn Township, 196 F.3d 469 (3rd Cir. 1999):

- First Prong: Significant Gap In Coverage.

An individual adverse zoning decision violates subsection 332(c)(7)(B)(i)(II) of the TCA if the applicant demonstrates that its proposed facility "will fill an existing significant gap in the ability of remote users to access the national telephone network," and

- Second Prong: Gap filled in least intrusive manner.

The manner which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve.

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Significant Gap and the One Provider Rule

APT Pittsburgh Ltd. v. Penn Township, 196 F.3d 469 (3rd Cir. 1999):

A "significant gap" in coverage could only be shown if there is a significant gap in coverage for all wireless carriers, not just for the applicant carrier, in the area of the proposed facility.

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FCC Rejected the One Provider Rule as Contrary to TCA's Goal of Promoting Competition

2009 Declaratory Ruling, In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B), 24 F.C.C.R. 13994, 14017 (2009).

FCC explicitly rejected the Third Circuit approach, concluding 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).

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Federal Court follows FCC's Rejection of the One Provider Rule

T-Mobile v. Township of Leonia, 942 F. Supp. 2d 474 (D.N.J. 2013)

Sprint Spectrum v. Borough of Paramus, No. Civ. A. 09-4940 JLL, 2010, U.S. Dist. LEXIS 124749, 2010 WL 4868218, at *9 (D.N.J. Nov. 22, 2010), aff'd, 606 Fed. Appx. 669 (3d Cir. (2015)

"if a court of appeals interprets an ambiguous statute one way, and the agency charged with administering that statute subsequently interprets it another way, even that same court of appeals may not then ignore the agency's more recent interpretation." citing Levy v. Sterling Holding Co., LLC, 544 F.3d 493, 502 (3d Cir. 2008), Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005).

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Significant Gap Prong Modified

“ Thus, the Court concludes that, in light of the FCC's ruling, a "significant gap" in wireless coverage under the first prong of the Penn Township test may be established upon a showing of a significant gap in the coverage of the applicant carrier alone.”

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Second Prong: Least Intrusive Means

The second prong of the Penn Township test analyzes whether "the manner in which applicant proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve." 196 F.3d at 480.

This required the applicant to show that "a good faith effort has been made to identify and evaluate less intrusive alternatives, e.g., that the provider has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, etc."

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FCC Rejected the Least Intrusive Standard in 2018 Declaratory Ruling and Third Report and Order

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment

WT Docket No. 17-79; WC Docket No. 17-84

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The 2018 Order

A state or local legal requirement constitutes an effective prohibition if it "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."

33 F.C.C. Rcd. 9,088, 9,102 (2018), quoting In re California Payphone Ass'n, 12 F.C.C. Rcd. 14,191, 14,206 (1997).

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What the Order Does

- Adopts a broad regulatory interpretation of the scope and meaning of the effective prohibition standard set forth in Sections 253 and 332(c)(7) of the Communications Act as applied to state and local regulation of wireless infrastructure deployment by adopting the "materially inhibit" standard to determine a prohibition of service.
- Concludes that an effective prohibition under Sections 253 and 332(c)(7) may result from more than just a denial of permits and approvals to construct a facility and may result from exorbitant fees and other requirements, such as aesthetic, spacing and undergrounding requirements that materially inhibit the improvement in existing service or the provision of new service.
- It requires that fees that state and local governments may charge must be nondiscriminatory and no greater than a reasonable approximation of the costs for processing applications and for managing deployments in the rights-of-way and that actual costs from municipal consultants must themselves be reasonable.

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What the Order Does (continued)

- Establishes time limits (shot clocks) for the review of siting applications involving Small Wireless Facilities (60 days for collocation on preexisting structures and 90 days for new builds) and codify the existing 90 and 150 day shot clocks for non- Small Wireless Facility deployments that were established in the FCC's *2009 Declaratory Ruling*.
- Clarifies that all state and local government authorizations necessary for the deployment of personal wireless service infrastructure, such as building permits, are subject to those shot clocks.
- Concludes that a failure to act within the new Small Wireless Facility shot clocks constitutes a presumptive prohibition on the provision of services.
- Preempts inconsistent state and local rule.

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The 2018 Order Rejected the Significant Gap Test

FCC expressly rejected decisions of Courts of Appeals—including the Third Circuit—that had required a plaintiff to show a "coverage gap" before a state or local requirement could amount to an effective prohibition.

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The New Materially Inhibit Test

A state or local requirement is an effective prohibition if it "materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service."

The prohibition does not have to be complete or "insurmountable" to constitute an effective prohibition.

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The New Test Applies to Both §253 and §332(c)(7) of the TCA

- 47 U.S.C. §253 Removal of barriers to entry: No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
- Sec. 332(c)(7): The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof:
- (i) Shall not unreasonably discriminate among providers of functionally equivalent services; and
- (ii) Shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

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“Service” Broadly Defined

The term “service” applies to “any covered service a provider wishes to provide, incorporating the abilities and performance characteristics it wishes to employ, including to provide existing services more robustly, or at a higher level of quality – such as through filling a coverage gap, densification, or otherwise improving service capabilities.”

An effective prohibition also applies to the introduction of new services.

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How May Services be Inhibited?

- Excessive fees and costs
- Unreasonable terms of access to ROW & attachment to facilities in the ROW
- Exclusive or discriminatory treatment
- Small cell spacing
- Unreasonable undergrounding requirements
- Quid pro quo

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Fees and Costs

- Application fees
- Permit fees
- Review fees
- Costs to use structure in ROW (e.g., light poles, traffic lights, utility poles)
- Maintenance fees

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Fees and Costs

Fees violate Sections 253 or 332(c)(7) unless these conditions are met:

(1) the fees are a reasonable approximation of the state or local government's costs,

(2) only objectively reasonable costs are factored into those fees, and

(3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations.

Even fees that might seem small in isolation have material and prohibitive effects on deployment when viewed in context of a carrier's entire network capital needs.

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Presumptive Reasonable Fees

Reasonable recurring fee for a SWF in the ROW is $270.

Application fees:

- $500 for non-recurring fees, including a single up-front application that includes up to five (5) SWFs, with an additional $100 for each SWF beyond five, or
- $1,000 for non-recurring fees for a new pole (i.e., not a collocation) intended to support one or more SWFs.

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Unlawful to Specify Means or Facilities to be Used

It would be unlawful prohibition for a state or locality to specify “the means or facilities through which a service provider must offer service.”

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Exclusive or Discriminatory Treatment

Minnesota Order:

- Exclusive ROW Agreements Violate the TCA
- Must not discriminate among providers of functionally equivalent services

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Spacing and Undergrounding

Some spacing may be an acceptable aesthetic requirement but some spacing may violate the TCA.

Crown Castle Fiber LLC v. City of Pasadena, Docket No. H-20-3369 (S.D. Tex. 2022) (TCA applies not only to new networks, but to densification of networks and three hundred (300) foot spacing requirements are discriminatory, unreasonable and invalid)

A requirement that all wireless facilities be deployed underground would amount to an effective prohibition given the propagation characteristics of wireless signals.

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Quid Pro Quo

An explicit or implicit quid pro quo in which a municipality makes clear that it will approve a proposed deployment only on condition that the provider supply an “in-kind” service or benefit to the municipality is invalid.

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The Materially Inhibit Standard Adopted by the Court in Cellco Partnership v. The White Deer Township Zoning Hearing Board

74 F.4th 96 (3rd Cir. 2023)

"Because we did not hold that § 332(c)(7)(B) was unambiguous in APT Pittsburgh and we believe that the FCC's interpretation is a reasonable interpretation of the statute, we adopt the "materially inhibit" standard today."

"Coverage gap-based-tests, like [APT Pittsburgh, reflect] an 'unduly narrow reading of the statute and an outdated view of the marketplace.'"

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The standard applies not only when a provider is attempting to fill a coverage gap in its wireless service, but also when a provider is pursuing 'the introduction of new services or the improvement of existing services.' Under the new standard, a local government can materially inhibit personal wireless service even if a provider has filled all coverage gaps.

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Cellco Partnership v. The White Deer Township Zoning Hearing Board
74 F.4th 96 (3rd Cir. 2023)

"Applying the FCC's standard here, the zoning board has materially inhibited the ability of Verizon to compete in a fair and balanced legal and regulatory market because, considering the totality of the circumstances, its application denial prevented Verizon from providing wireless services without incurring unreasonable costs."

It is significant that the case involved a proposed 195' tall monopole, not a SWF.

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It is a totality of the circumstances test.

An insurmountable barrier is not required.

At bottom: test is really one with respect to reasonableness. Is the state or local government regulating in a reasonable manner or is the purpose or effect to impose costs and delay deployment?

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Impact on New Jersey Courts

Smart SMR of NY v. Borough of Fair Lawn, 152 N.J. 309 (1998): “municipal boards may regulate the location of mobile communications facilities, they may not altogether prohibit them from being constructed within the municipality.”

“Relevant to the determination of the suitability of a telecommunications site is the Telecommunications Act’s mandate that ‘the regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof … shall not prohibit or have the effect of prohibiting the provision of personal wireless services.’”

Might the Court now deem wireless facilities to be inherently beneficial?

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New York SMSA Limited Partnership v. Bd. Of Adjust., Twp. of Weehawken,

370 N.J. Super. 319 (App. Div. 2004)

"No case interpreting and applying New Jersey's MLUL has required a wireless communications carrier to prove the existence of a significant gap in coverage in order to satisfy the positive criteria of N.J.S.A. 40:55D-70(d).

Although the existence of a coverage gap, i.e. a need for additional service, has been deemed relevant to an analysis of the positive criteria, New Jersey courts have not applied the rigorous standard developed by federal courts addressing alleged significant gaps in coverage under the TCA.

Thus, the question of a significant coverage gap only arises when the carrier claims that the denial of its application constitutes an effective prohibition of wireless communications services in violation of the TCA, 47 U.S.C.A. § 332(c)(7)(B)(i)(II)."

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