

# *Wireless Facilities Siting*



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**Brian T. Grogan, Esq.**

612-877-5340

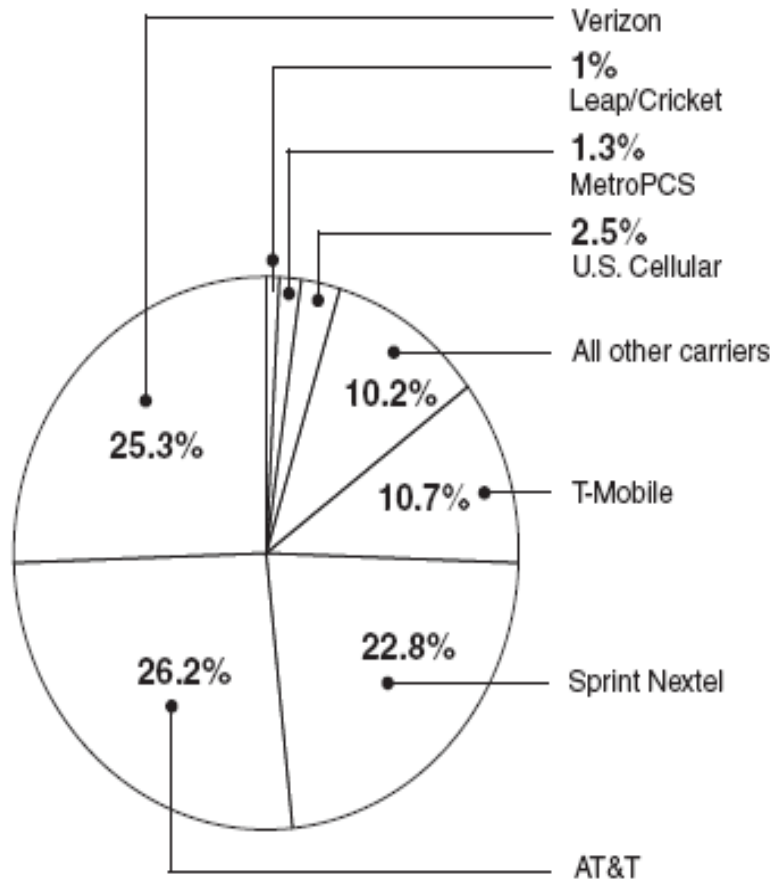
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# July 2010 GAO Report on Wireless Industry

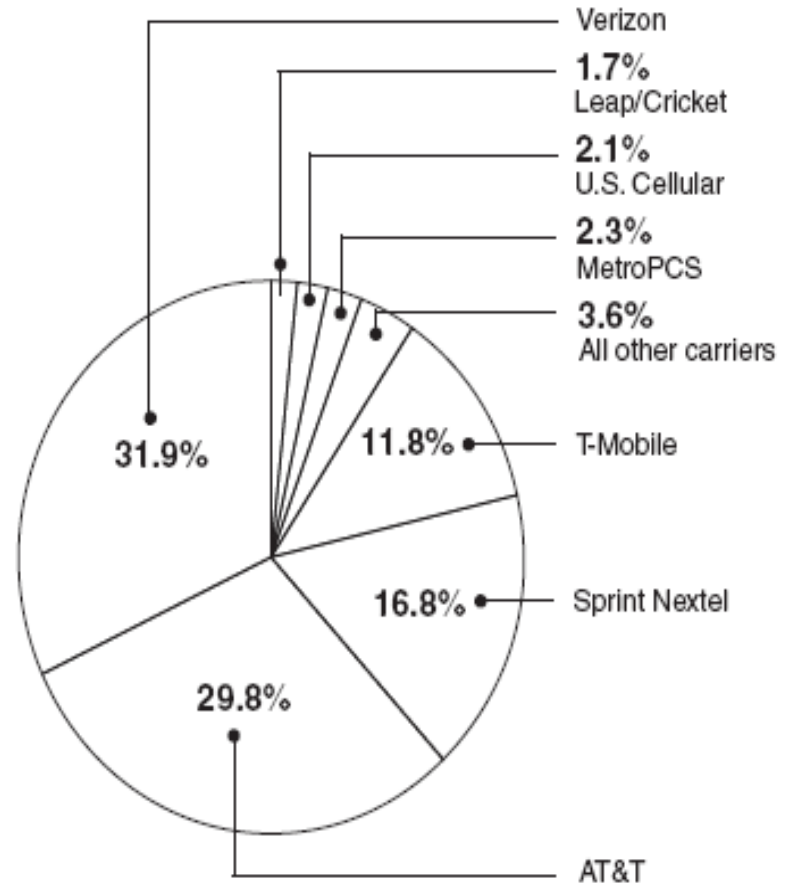
- 1989 = 3.5 million wireless subs
  - 2009 = 285 million subs
  - 40% of households now rely primarily on wireless
- \$150 billion /year industry
- 4 major providers have 90% of market
  - AT&T
  - Sprint
  - T-Mobile
  - Verizon

# Wireless Market Share

2006



2009



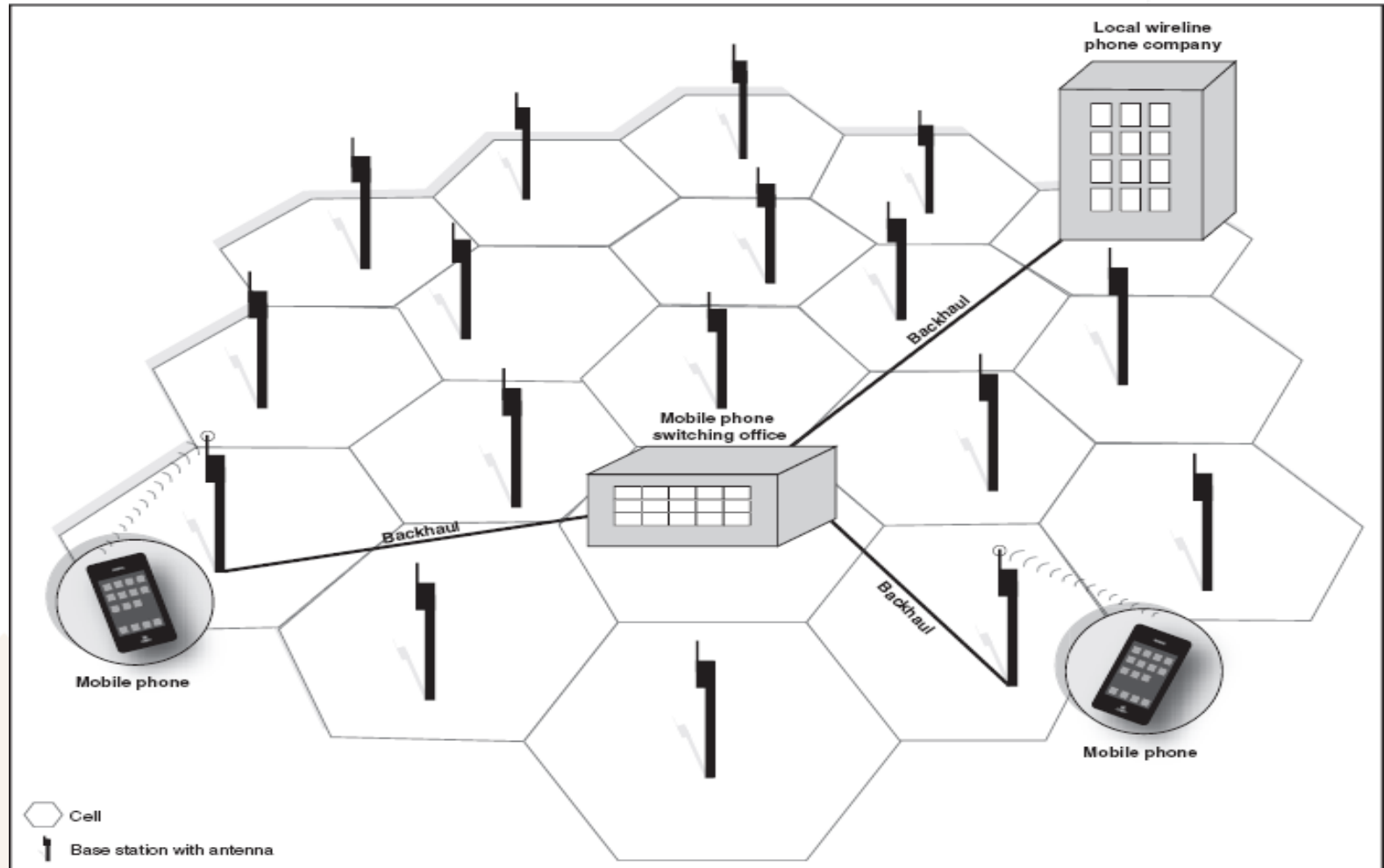
# *Components of a Mobile Phone System*

- Mobile phones are low-powered radio transceivers
  - Use radio waves (spectrum) to communicate with base stations
    - Include voice-only cellular phones and “smart” phones
- Carriers deliver service by subdividing large geographic areas into smaller overlapping sections called cells.
- Each cell has a base station
  - equipped with an antenna to receive and transmit radio signals
- Cell site can vary in size
  - from under a mile to 20 miles from the base station.

# *Components of a Mobile Phone System*

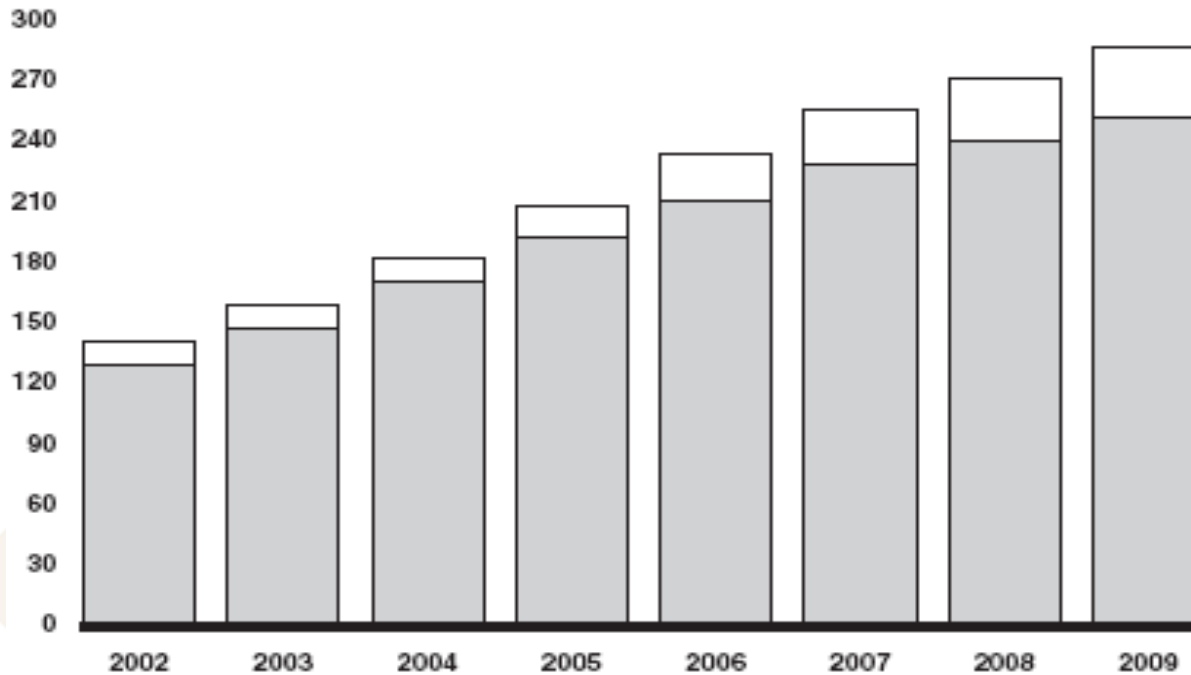
- When a call is initiated
  - The base station assigns a radio frequency to phone
    - The number of frequencies available at a base station will depend on
      - the amount of radio frequency spectrum obtained by the carrier from FCC,
      - the number of base stations in the carrier's service area, and
      - the type of technology that the carrier uses.
  - Each base station is linked to a mobile phone switching office
    - The switching office is connected to the local wireline telephone network.
- Most wireless traffic flows over the wireline telephone system
  - only wireless segment = traveling to and from mobile phones to towers
- The mobile phone switching office
  - directs calls to another mobile phone or a traditional wireline telephone.
  - switches calls from one cell to another as consumers change locations
- Special access services provide backhaul services to wireline networks.

# Components of a Wireless System

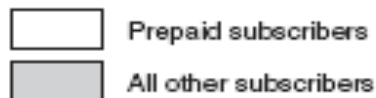


# Wireless Phone Subscribers

Number of subscribers (in millions)

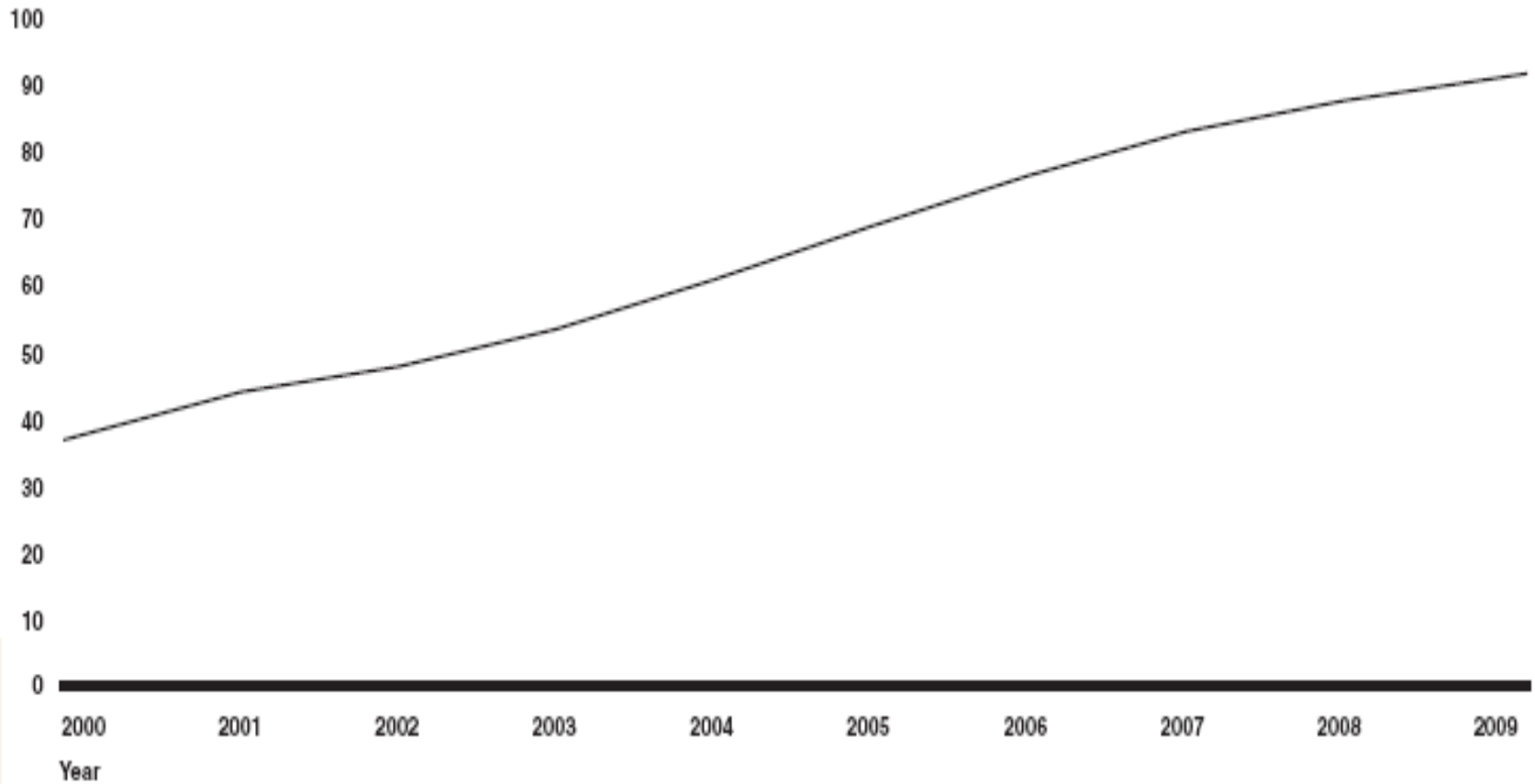


Year



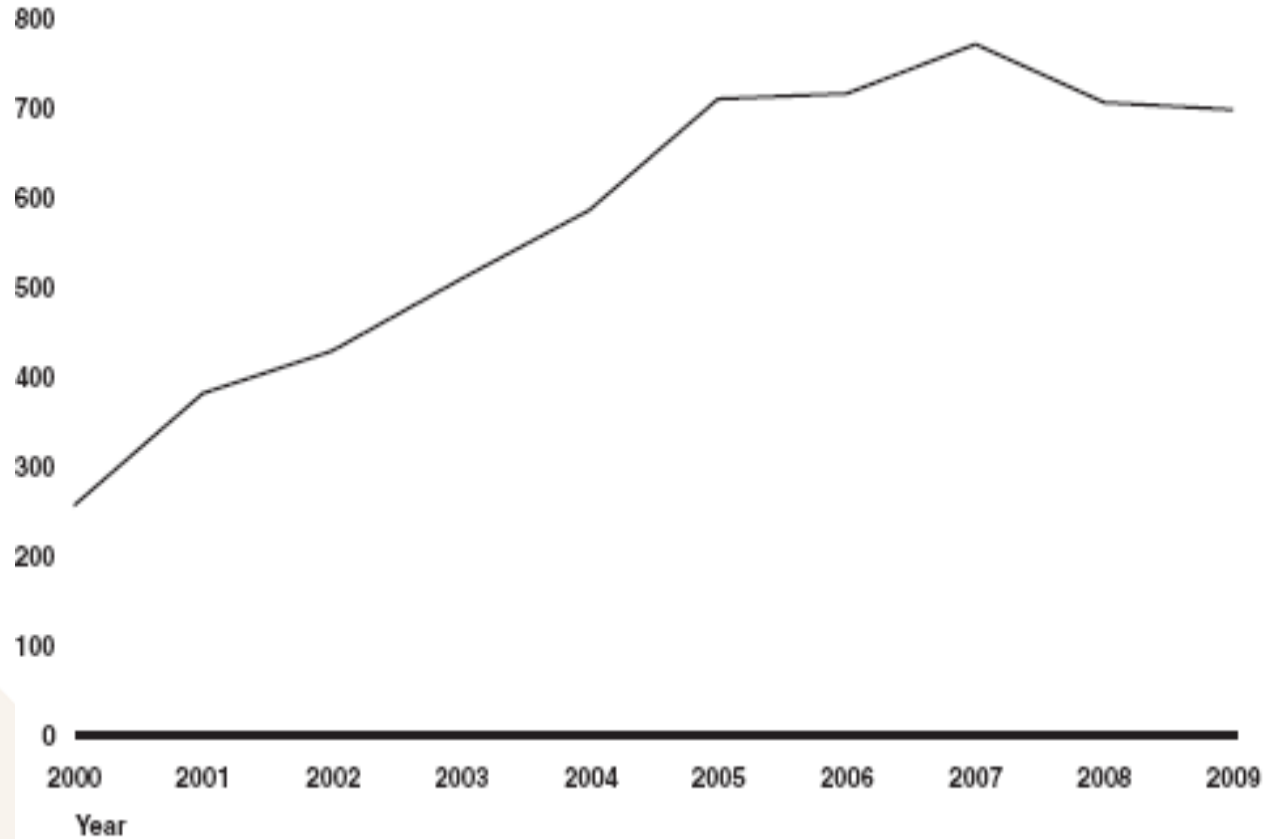
# Wireless Penetration Rate

Wireless industry penetration rate percentage



# Wireless Voice Minutes of Use

Average monthly minutes of use per subscriber



Source: CTIA-The Wireless Association, used with permission.

# FCC is Not National Zoning Bd

- Despite FCC Wireless Siting Order
  - Section 332 (c)(7)
  - Nothing shall limit or affect the authority of State or local government over decisions regarding:
    - Placement, construction and modification of personal wireless services.
    - The courts adjudicate disputes – not FCC.

# Federal Shot Clock

- Reasonable time =
  - 90 days for collocation
  - 150 days for other siting applications
  - Application must be complete
    - Timeline may not start for incomplete app.
      - City must notify within 30 days of incomplete app.
  - Operator has 30 days to bring challenge
    - City can argue additional time was needed
      - Based on nature and scope of application.
- Many states have shorter timeframes

# Unreasonable Discrimination

- Reasonable discrimination of “functionally equivalent” services is permitted.
  - Unreasonable =
    - Showing of differential treatment where providers are similarly situated in terms of:
      - Structure, placement or cumulative impact
  - Cities can discriminate to preserve aesthetics or safety.
    - City must build record to support decision
    - Provider may engage in “systematic comparison” of sites in question
      - Operator will build its own record to support position

# What does Prohibition mean?

- Under Section 332 (c)(7) - Varies by circuit
  - City wide prohibition – not permitted
  - “Effective prohibition”
    - Prevent operator from closing a “significant gap” in coverage
      - One provider in area v. provider in question
      - Dead spots alone – not a significant gap
      - Alternative sites v. least intrusive option
      - Must investigate all alternative sites
- Under Section 253(a)
  - Must show actual prohibition
    - Not mere possibility of prohibition

# Section 332 Prohibition Case

- *T-Mobile USA, Inc. v City of Anacortes*,
  - (No. 08-35493 (9th Cir July 20, 2009))
  - Court held that T-Mobile showed gap in coverage
    - T-Mobile had selected least intrusive means to close gap.
  - City’s denial failed to rebut these showings.
  - Permit denial was an “effective prohibition” of coverage in violation of section 332(c) (7).
  - City ordered to grant the permit.

# Section 253 Prohibition Case

- *Sprint PCS Assets, LLC v City of Palos Verdes Estates* (9th Circuit, October 14, 2009).
- Sprint was denied the right to construct two towers in the City's public right-of-way.
  - Was the City's denial supported by evidence?
  - Did the denial constitute a prohibition on the provision of wireless services in violation of Sec 253 (a) and 332(c)?
  - Court found City's denial supported by evidence
    - Issues of material fact exist as to whether the decision amounted to a prohibition on the provision of wireless service.
  - Summary judgment in favor of Sprint was reversed and remanded.

# Section 253 Prohibition Case

- *Sprint Telephony PCS v County of San Diego*,
  - 543 F.3d 571(9th Cir. 2008),
  - *cert denied*, 77 U.S.L.W. 3366 (US June 29, 2009).
  - The court interpreted section 253(a)
  - Concluded that it had erred in reading the text of the statute to permit challenge to actions which “may...have the effect of prohibiting” the provision of telecommunications services.

# Zoning Decisions

- Substantial evidence
  - Local government entitled to deference
  - Congress intended to allow local zoning boards to continue what they traditional do
    - make reasoned decisions about the appropriate use of private property for the public good.
  - Less than preponderance = OK
  - Personal opinions are not enough
    - Record of complaints
      - Aesthetics and property value reductions
      - may be enough
    - Safety concerns can be considered

# ZONING (Public v. Private)

- Can zoning authorities use ordinances to establish an unfair advantage in pricing within the real estate market?
- Can such zoning ordinances amount to:
  - a “barrier to entry” or
    - under 47 USC Sec. 253 (a)
  - a “prohibition of wireless services”
    - under 47 USC Sec. 332(c)(7)(B)(i)(II)?

# ***Town of Clarkstown***

– *New York SMA Limited Partnership d/b/a Verizon Wireless et al v Town of Clarkstown*, No. 07 Civ. 7637 (S.D.N.Y. Mar. 26, 2009).

- Town’s zoning ordinance was unconstitutional.
- The Court found that the TCA preempted the Town ordinance where the Town ordinance:
  - Required Radio Frequency information for use in the Town’s zoning point scoring system and
  - Favored “preferred alternative technologies.”

# *Town of Clarkstown*

- 2<sup>nd</sup> Circuit decision
  - » No. 09-1546-cv, slip op. (2nd Cir. June 30, 2010)
- Preemption:
  1. Express preemption
    - Congress legislated comprehensive legislation
    - Occupies field of regulation – no room for state reg
  - Conflict preemption
    - Local law = obstacle to achieve federal objectives
- Holding that federal law occupies the fields of:
  - the regulation of radio frequency interference and
  - the regulation of the technical and operational aspects of wireless telecommunications service

# ***Town of Clarkstown***

- FCC issues regs setting tech standards:
  - For wireless technology
  - For antennas
- City's Ord interferes with Congress's goal
  - Spread of new technologies
  - Growth of wireless
- Federal law has preempted "field" of
  - Technical and operational aspects of wireless
  - No room for conflicting City Ord
- City can not discriminate:
  - "among providers of functionally equivalent services"

# Zoning Ordinance Case

- *New York SMA LTD D/B/A Bell Atlantic Mobile v Township of Mendham Zoning Board of Adjustment*, 366 N.J. Super 141; 840 A.2d 901; 2004 N.J. Super.
- Five wireless carriers collaborated to file an application for a single site proposal but after 31 hearings, the board found that the tower had a negative impact on aesthetics and property values and would be detrimental to the public good.
- Court found the denial effectively amounted to the prohibition prohibited under section 332(3)(7)(B)(i)(II).
  - Remanded to Board to grant the variance and approve the site plan, pending successful completion of the environmental assessment process.
  - The Township adopted a zoning ordinance which permitted telecommunications towers only as conditional uses *on municipal property*.
  - In the trial court, the plaintiffs sought to have the Township's wireless ordinance declared null and void *on the ground that it violated state and federal anti-trust law* (emphasis added).
  - The Superior Court entered final judgment declaring the Township's wireless ordinance to be invalid but upholding the Board's decision.

# Zoning Ordinance Case

- *USCOC Of Greater Missouri v. Village of Marlborough*, 619 F. Supp 2d. 1055 (E.D. Mo. April 30, 2009).
- U.S. Cellular sought a court order to allow it to build a cell tower.
- Village denied the application and refused to grant a variance.
  - Village wanted US Cellular to build on property owned by the Village.
  - Village offered expedited permits for the Village site.
  - US Cellular rejected economic terms offered by the Village.
- US Cellular challenged under 332(c)(7)(B)(i)(II) and 253(a)
  - Court dismissed these challenges.
  - The court also dismissed argument on unreasonable discrimination.
    - based on the City's zoning ordinance that made it more difficult to located on privately owned land compared to Village property.
- US Cellular's prevailed on equal protection and due process.
  - 42 U.S.C. Section 1983 claim
  - Village's zoning regulations on their face and as applied violated US Cellular's constitutional rights.



# RF Interference Provisions

- FCC has promulgated extensive regulations regarding RF interference
- Courts have preempted by field preemption.
  - *Southwestern Bell Wireless Inc. v. Johnson*, 199 F.3d 1185, 1193 (10th Cir. 1999)
    - finding that Congress intended federal regulation of RF interference to be so pervasive as to occupy the field)
  - *Town of Clarkstown*

# Payment of Consultant Fees

- *MetroPCS N.Y., LLC v. City of Mount Vernon*, 09 Civ. 8348, slip op. at 27 (S.D.N.Y. July 22, 2010)
  - “there is no limitation on the amount of funds needed; in fact, the Zoning Code specifically leaves it open-ended.”
  - “The Court is also concerned that there is no limitation on the amount of consulting fees the applicant could be required to pay. The City of Mount Vernon has unlimited discretion to charge a wireless carrier prohibitive fees by simply dragging out the process and utilizing consultants for its convenience — rather than out of necessity.”
  - Court relied on state law to strike down both the application fee and consulting fee provisions
    - City was charging \$6,000 to \$12,000 for permit applications
    - in addition to consulting fees.

# Municipal Leases

- Do not explain an issue by stating
  - City will not execute w/o this language
  - Understand the issue and explain the concern
    - If a carrier understands the City's position a solution can be found
- Where possible work from City "model lease"
  - Remain flexible to add carrier language on issues
  - Negotiate lease rates first
  - Accelerators, adjustments, comparisons
- Premises – be precise in definitions
  - Broad phrases to expand lease space – only lead to debate
    - Property
    - Land space
    - Tower
    - Tower property
    - Right-of-way

# Municipal Leases

- Termination issues
  - Operator wants 5 x 5 term with right to terminate
  - City wants option for termination
  - Deal with issue upfront
- Subordination and nondiscrimination
- Amendments
  - Additional facilities
- Insurance and indemnification
  - Make sure City attorney is involved
    - These issues can hold up deal
      - Cap on general liability
      - Endorsements
      - Additional insured
      - Waiver of subrogation – release
- Access to facility
  - Water tower control
- Defaults

# Thank You!

**Brian T. Grogan** is a shareholder and director with the Minneapolis law firm of Moss & Barnett practicing in the firm's communications, business law and infrastructure practice groups. Since 1988 Brian has worked with entities throughout the country on a variety of cable, telecom, wireless and broadband communications issues. In his business law practice Brian focuses on fiber and conduit lease agreements, mergers and acquisitions and contract matters in the communications and technology industries. Brian is the current Chair of the Communications Law Section of the Minnesota State Bar Association.

Brian T. Grogan, Esq.  
Moss & Barnett  
4800 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402-4129  
Phone: 612-877-5340  
Facsimile: 612-877-5999  
Email: [groganb@moss-barnett.com](mailto:groganb@moss-barnett.com)  
Web site: [www.municipalcommunicationslaw.com](http://www.municipalcommunicationslaw.com)