

---

07-3332

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

T-MOBILE CENTRAL, LLC,  
as Successor in interest to VOICESTREAM  
KANSAS CITY, INC., d/b/a T-MOBILE,  
Plaintiff-Appellee

v.

UNIFIED GOVERNMENT OF WYANDOTTE  
COUNTY/KANSAS CITY, KANSAS,  
Defendant-Appellant

---

Appeal from the United States District Court  
For the District of Kansas, Hon. David J. Waxse, Magistrate Judge  
Case No. 06-2313-DJW

---

BRIEF OF *AMICUS CURIAE* PCIA

---

Karl J. Nelson  
Jennifer A. DeRose  
Saul Ewing LLP  
500 East Pratt Street  
Baltimore, Maryland 21202  
Phone: (410) 332-8600  
Fax No. (410) 332-8862  
E-mail: knelson@saul.com

Attorneys for PCIA

Oral argument is requested.

## Table of Contents

Table of Authorities .....	ii
I. Interest of Amicus and Authority to File .....	1
II. Federal Wireless Policy -- Growth Through Competition .....	3
III. The Fruits of Growth Through Competition .....	6
A. Who uses a wireless device? .....	6
B. What do consumers do with these devices? .....	7
C. Where do consumers use these devices? .....	8
IV. Argument .....	9
A. Significant gaps in coverage should be determined on a provider-by-provider basis. ....	10
B. The use of fixed standards for determining whether a significant gap in service exists, such as “in-vehicle” coverage, inhibits the ability of the telecommunications industry to meet the ever- increasing demands of customers for more comprehensive and more reliable service. ....	16
C. The requirement that providers demonstrate a proposed siting of wireless infrastructure is the “only feasible” means to fill a significant gap in coverage, is an unreasonably burdensome review standard not supported by the TCA and interpretative case law. ....	18
V. Conclusion .....	21

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

360 Degrees Commc’ns Co. of Charlottesville v. Bd. of Supervisors of Albermarle County, 211 F.3d 79 (4th Cir. 2000) .....14, 24

APT Pittsburgh Ltd. P’ship v. Penn Twp., 196 F.3d 469 (3d Cir. 1999) .....22

City of Auburn v. Qwest Corp., 260 F.3d 1160 (9th Cir. 2001) .....8

City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005) .....8

MetroPCS Inc. v. City and County of San Francisco, 400 F.3d 715 (9th Cir. 2005) .....passim

Nat’l Tower, LLC v. Plainville Zoning Bd. of Appeals, 297 F.3d 14 (1st Cir. 2002) ..... 14

Omnipoint Commc’ns Enter., L.P. v. Easttown Twp., 331 F.3d 386 (3d Cir. 2003) ..... 15, 16

Reno v. American Civil Liberties Union, 521 U.S. 844 (1997) ..... 18

Second Generation Props. v. Town of Pelham, 313 F.3d 620 (1st Cir. 2002)14, 16, 17

Sprint Spectrum v. Town of Easton, 982 F. Supp. 47 (D. Mass. 1997) ..... 17

Sprint Spectrum v. Willoth, 176 F.3d 630 (2d Cir. 1999) .....22

T-Mobile Central, LLC v. Unified Gov’t of Wyandotte County/Kansas City, Kansas, 528 F.Supp.2d 1128 (D. Kan. 2007) .....passim

U.S.C.O.G. of Greater Iowa, Inc, v. Zoning Bd. of Adjustment, 465 F.3d 817 (8th Cir. 2006).....23

**FEDERAL STATUTES**

42 U.S.C. § 332(c)(7)(B)(i)(II) .....14, 23

47 U.S.C. § 151 .....7

47 U.S.C. §§ 157 .....8

47 U.S.C. § 332(c)(1)(C) .....9

**OTHER AUTHORITIES**

Chani Katzen, Supreme Court Won't Hear Case of Disputed Phone Tower in Newtown Township, Pa., Phila. Inquirer, Nov. 7, 2000.....16

FEDERAL COMMUNICATIONS COMMISSION, TWELFTH ANNUAL REPORT.....passim

<http://www.fcc.gov/cgb/consumerfacts/wireless911srv.html>.....11

H.R. Rep. No. 103-111 (1993).....8

Petition of N.Y. State Pub. Serv. Comm'n to Extend Rate Regulation Order,  
10 F.C.C.R. 8187 (1995).....8

S. Rep. No. 104-230 (1996) .....8

## **I. Interest of Amicus and Authority to File**

PCIA, the Wireless Infrastructure Association, is a nation-wide non-profit trade association representing providers of wireless infrastructure. The group has more than 120 members from every sector of the wireless infrastructure industry, including federally licensed carriers, tower companies, equipment providers, and professional services firms. PCIA pursues public policies that enable the development of robust nation-wide wireless infrastructure, and works with policy makers to balance the need for such infrastructure with the variety of concerns raised by the siting of wireless facilities. What PCIA's members have in common is a desire to deploy wireless services in a fair and balanced regulatory environment.

PCIA has obtained the consent of T-Mobile and the Unified Government of Wyandotte County/Kansas City, Kansas (hereinafter referred to as the "Unified Government") for the filing of this brief.

PCIA appears here as amicus because the infrastructure community believes that the positions advanced by the Unified Government reflect an attempt to limit wireless deployment by effectively turning back the clock to a time when wireless technology was considered a luxury. Stated alternatively, PCIA believes it is important for the court to view the issues before it in light of the important federal policies embodied in the Federal Telecommunications Act of 1996 (hereinafter

referred to as the “TCA”) and the related increase in wireless use and services. Simply put, the positions advocated by the Unified Government reflect a misunderstanding both of federal wireless policy and the reality of wireless ubiquity. The Unified Government’s policies prevent competition, hinder the advance of technology, and increase regulation of wireless deployment. As explained below, competition -- not regulation -- is to be encouraged if consumers are to continue to reap the rewards of wireless expansion.

Below, PCIA examines the roots of federal wireless policy, and then describes the fruits of that policy -- an unparalleled increase of safety, commercial and personal communications uses. Next, PCIA discusses several of the issues before the Court in these contexts. Specifically, PCIA explains how the Unified Government’s positions supporting the “one provider rule,” a narrow definition of “significant gap,” and imposition of a “no viable option” proof requirement undermine federal policy and could all too easily undo the wireless revolution that has occurred and will continue into the foreseeable future. PCIA asks the Court to adopt deployment positions that support federal policy and allow for the type of flexibility necessary for the increased benefits associated with expanding wireless service.

## **II. Federal Wireless Policy -- Growth Through Competition**

Although it possesses the authority to dictate many aspects of wireless deployment, Congress has consciously decided not to do so. Rather, both Congress and the Federal Communications Commission (hereinafter referred to as the “FCC”) have made clear that competition, as opposed to regulation, will shape the growth of wireless commerce. As the FCC has stated, “Congress established the promotion of competition as a fundamental goal for CMRS<sup>1</sup> policy formulation and regulation.” FEDERAL COMMUNICATIONS COMMISSION, TWELFTH ANNUAL REPORT AND ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO COMMERCIAL MOBILE SERVICES ¶ 3 (2008) [hereinafter TWELFTH ANNUAL REPORT].

The Communications Act of 1934, 47 U.S.C. § 151 et seq., was enacted with the overarching policy goals of making available “to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide . . . radio communication service” and “promoting safety of life and property through the use of . . . radio communication.” 47 U.S.C. § 151. The Act also provides that the FCC should encourage “new technologies and services to the public,” the “efficiency of

---

<sup>1</sup> “CMRS” stands for “commercial mobile radio service,” a term used in the Telecommunications Act to encompass portable wireless services such as “cell phone” voice and telephony services.

spectrum use,” and the “efficient and intensive use of the electromagnetic spectrum.” 47 U.S.C. §§ 157; 309(j)(3)(D); 332(a)(2).

In 1996, the federal government took a bold step to promote its already-established goals of access, innovation, and efficiency with the passage of the TCA. The purpose of the TCA was to ensure “competition among and reduce regulation of telecommunications providers” and to provide a “national policy framework,” City of Auburn v. Qwest Corp., 260 F.3d 1160, 1170 (9th Cir. 2001), to encourage the “rapid deployment of new telecommunications technologies,” City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 115 (2005), including wireless telephone service.

This seismic shift in wireless regulation also reflected Congress’s “general preference in favor of reliance on market forces rather than regulation.” Petition of N.Y. State Pub. Serv. Comm’n to Extend Rate Regulation, Report and Order, 10 F.C.C.R. 8187, 8190 (1995); see also S. Rep. No. 104–230, at 1–2 (1996) (explaining that Congress sought to foster a “pro-competitive, deregulatory national policy framework”); H.R. Rep. No. 103-111, at 260 (1993) (explaining that the 1993 amendments to the Act were intended to “foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure”).

Because competition is so important to Congress' vision of wireless growth, the FCC is statutorily obligated to prepare and publish a detailed report each year identifying the state of competition in the wireless industry and the benefits reaped therefrom. 47 U.S.C. § 332(c)(1)(C). These annual reports re-emphasize Congress' reliance on competition, as opposed to regulation, and trace the growth of wireless usage and services. In its most recent annual report, the FCC described its pro-competitive model as follows: "The Commission has adopted flexible licensing policies instead of mandating any particular technology or network standard. Mobile service providers have the flexibility to deploy the network technologies and standards they choose as long as they abide by certain technical parameters designed to avoid radiofrequency interference with adjacent licensees." TWELFTH ANNUAL REPORT at ¶ 125.

Consumers are the intended beneficiaries of de-regulation. The most recent annual report states that "[t]he structural and behavioral characteristics of a competitive market are desirable not as ends in themselves, but rather as a means of bringing tangible benefits to consumers such as lower prices, higher quality and greater choices of services." *Id.* at ¶ 194.

### **III. The Fruits of Growth Through Competition**

#### **A. Who uses a wireless device?**

Wireless devices are ubiquitous—fully integrated into our daily lives. In a few short years, the technology has evolved from rarified luxury item to “the most pervasive media device, beating out computers and televisions, as consumers keep their mobile phones at their side nearly every moment of the day.” *Id.* at ¶ 245. As one commentator put it, “[c]ellphones rank just behind keys when it comes to items that Americans don’t leave home without.” *Id.* at ¶ 244.

An overwhelming majority of the American populace uses mobile wireless devices. By the end of 2006, 241.8 million of the nation’s approximately 300 million citizens were wireless subscribers. Thus, the “nationwide mobile penetration rate at year end 2006 rose to approximately 80 percent” of the population. *Id.* at ¶ 2. Since 2005, the total mobile subscriber base has increased by 31 percent. *Id.* at ¶ 206. Because these gross numbers include infants and other obvious non-users, the FCC concluded that “virtually everyone in the United States between the ages of 15 and 69 has a wireless phone.” *Id.* at ¶ 244. Even “among the very young, an estimated 51 percent of children aged 10 to 14 years and 25 percent of children aged 5 to 9 years old, have cell phones.” *Id.*

## **B. What do consumers do with these devices?**

The impact of wireless devices in America is amplified by the fact that these devices have numerous communications capabilities. Clearly, the concept of a wireless device as a “car phone” -- a mobile substitute for a traditional landline telephone -- is hopelessly outdated. Now, nearly every conceivable form of communication is carried on with wireless devices. These communications range from critical safety concerns to pure leisure uses.

Wireless devices are essential for public safety. One carrier (T-Mobile USA, Inc.) reported that it handles more than 60,000 emergency 911 (“E911”) calls on its wireless network each day. See Exh. A, T-MOBILE USA, Growing the nation’s wireless networks helps us all stay connected to our families, our jobs, our world. (2008). It has been estimated that the wireless carriers as a group handle more than 291,000 E911 calls per day. Id. Nearly thirty percent of all calls to 911 nationwide originate from wireless phones. <http://www.fcc.gov/cgb/consumerfacts/wireless911srv.html>. These calls, and the emergency responses they originate, depend on the backbone of a near-ubiquitous wireless network that can provide not only voice communication, but information about location.

Voice transmissions, or “telephony,” are but one aspect of an increasingly multifaceted wireless communications web. For example, Americans sent 18.7 billion text messages per month during 2006, for a yearly total of 158 billion.

TWELFTH REPORT at ¶ 290. This number nearly doubled from 2005. *Id.* at ¶ 7.

Aside from texting, Americans sent approximately 2.7 billion other forms of mobile messages (photographs, etc) in 2006, more than twice the number sent in 2005. *Id.* at ¶ 218.

In addition, consumers increasingly use wireless devices as internet access points and leisure devices providing music and video content. It has been estimated that 650,000 people watch television or similar video content by mobile device every day. *Id.* at ¶ 212. At least 13 percent of all wireless users send or receive emails using wireless devices, while approximately 10 percent make use of various applications, “including games, instant messaging, downloading music or videos, checking the weather, reading news, and looking up directions.” *Id.* at ¶ 212.

In sum, people depend on wireless networks. They make emergency calls from their mobile devices. They work with their mobile devices. They watch video programming and listen to music on their mobile devices. A wireless device links the typical American to the world around him/her.

### **C. Where do consumers use these devices?**

Clearly, the mobile device has moved far beyond a mere substitute for a landline phone. Indeed, because mobile devices are portable and have so many uses, they are in many cases replacing landline phones altogether. Thus, outside

the dated conception of a “car phone,” consumers increasingly use their mobile devices at home, at work, at play, and on the road. Since 2003, the number of households with only wireless phones has tripled. In 2006, nearly 12 percent of all adults lived in a household with only wireless phones. *Id.* at ¶ 292. The trend is even more prevalent among younger adults, with 25 percent of all adults aged 19-24 years living in wireless-only households, and nearly 30 percent of adults aged 25-29 living in wireless-only households. *Id.* at ¶ 246.

Because wireless consumers use their devices at home, on the road, at work and at play, wireless coverage must be robust in all areas to respond to customers’ developing needs and expectations. The idea that wireless is a roadway technology is an anachronism. Consumers demand, and are entitled to, effective wireless service in all areas that they frequent.

#### **IV. Argument**

By deciding several issues of first impression in this Circuit, this Court can influence the speed and depth of wireless deployment across a wide geographic area for years to come. Because crucial issues of interstate commerce are at stake, this Court should view the issues before it with an eye toward both Congress’ decidedly de-regulatory intentions and the critical importance of wireless commerce. Philosophically, the overarching issue before this Court is whether local regulation should be used as a tool to restrain wireless proliferation, or

whether “preservation of local zoning authority” should be viewed consistently with Congressional intent and wireless reality. Below, PCIA explains how several of the Unified Government’s positions fly in the face of both federal policy and public needs.

**A. Significant gaps in coverage should be determined on a provider-by-provider basis.**

Under the TCA, state and municipal governments may not render decisions that would “prohibit or have the effect of prohibiting the provision of personal wireless services.” 42 U.S.C. § 332(c)(7)(B)(i)(II). There is a broad consensus in the federal Circuits that a zoning decision has the effect of prohibiting service where it allows a “significant gap” in service to go uncorrected. See, e.g. Nat’l Tower, LLC v. Plainville Zoning Bd. of Appeals, 297 F.3d 14, 20 (1st Cir. 2002); 360 Degrees Commc’ns Co. of Charlottesville v. Bd. of Supervisors of Albermarle County, 211 F.3d 79, 87 (4th Cir. 2000); MetroPCS Inc. v. City and County of San Francisco, 400 F.3d 715, 731 (9th Cir. 2005). However, the Circuits are not in agreement on how to determine whether a significant gap in service exists. In the First and Ninth Circuits, a service provider may demonstrate that a significant gap in service exists by showing that it is unable to provide coverage in a given geographical area. See Second Generation Props. v. Town of Pelham, 313 F.3d 620, 632-334 (1st Cir. 2002); MetroPCS Inc., 400 F.3d at 731-34. By contrast, in the Third Circuit, a provider must demonstrate that *no provider at all* is able to

provide coverage in a given area. Omnipoint Commc'ns Enter., L.P. v. Easttown Twp., 331 F.3d 386 (3d Cir. 2003).

While the Unified Government's brief does not explicitly adopt either approach, it does not rule out the "one provider rule." This Court should join the First and Ninth Circuits by affirming the District Court's holding that a significant gap in coverage exists in an area where an individual provider demonstrates it is unable to provide coverage. See T-Mobile Central, LLC v. Unified Gov't of Wyandotte County/Kansas City, Kansas, 528 F.Supp.2d 1128, 1153-55 (D. Kan. 2007).

The Third Circuit's "one provider rule" demonstrates a profound disconnect, not only with the aims of the TCA, but with the reality of how people use wireless communications. First, the notion that consumers are best served by limiting the number of service providers to a single one is contrary to the "antiregulatory and antibureaucratic... philosophy" of the TCA. Cong. Rec. H1161 (Feb. 1, 1996) (statement of Rep. Oxley). Second, limiting service in a given area to a single provider fails to take into account the essential nature of wireless devices: that they are *mobile*.

Consumers use wireless devices on a mobile basis. A wireless device that works in some areas, but not in others, is therefore substantially less functional than a wireless device that works most places. When service providers build

infrastructure to cover service gaps, they do so because customers demand consistent coverage as they move from place to place. As the United States Court of Appeals for the First Circuit has observed, “it is of little comfort to the customer who uses AT&T Wireless ... who cannot get service [in a given area] that a Cingular Wireless customer does get some service in that gap.” Second Generation Props., 313 F.3d at 633. Another commentator has made this point even more acutely: “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. [You] will be unable to call for help....” Chani Katzen, Supreme Court Won’t Hear Case of Disputed Phone Tower in Newtown Township, Pa., Phila. Inquirer, Nov. 7, 2000. Given that more than 290,000 E911 calls are made each day from wireless devices, this is a very real possibility.

The Third Circuit has articulated a rationale for the “one provider” rule that fails to account for the competitive, multi-carrier economy envisioned by Congress:

There is no dispute that the gap must be from the users’ perspective, rather than from a particular provider’s perspective. Omnipoint cannot simply point to the gap in the services it provides to establish a prohibition of service claim.... It must show that the telecommunications needs of users in the community as a whole are not being adequately served.

Easttown Twp., 331 F.3d at 401. This rationale is built on the mistaken and anti-competitive concept that the entire community of wireless users derives some

benefit when only a fraction of that community has coverage. In its Twelfth Report, the FCC noted that the national carrier with the largest market share is AT&T Mobility, with a total national market share of just under 27 percent. TWELFTH REPORT at ¶ 18 (Chart 1). Extrapolating the one provider rule across the country and assuming that the largest carrier “got there first,” less than 27 percent of the wireless consuming public would have access to service.

Despite its premise as favoring the “user’s perspective,” the “one provider” rule paradoxically restricts the functionality of individual consumers’ devices and has the capacity to severely stunt and distort the industry as a whole, in ways that ultimately would harm the public as a whole. In the Second Generation opinion, the First Circuit described a number of scenarios by which this harm could occur. See id. at 643, n. 14. For example, if a new and improved technology emerges, a service provider seeking to deploy this new technology in a given area may be refused the ability to do so, because another provider in the area already provides service using the older, less functional technology. Id. Wireless customers obliged to live or travel frequently in the area in which the older technology was established would be effectively blocked from reaping the benefits of the new technology. See Sprint Spectrum v. Town of Easton, 982 F. Supp. 47, 51-52 (D. Mass. 1997) (“By deciding [based on the adequacy of existing services], the Board favors existing providers, sheltering them from the very competition Congress

sought to create when it enacted the TCA. Accordingly, new entrants offering potentially superior technology are burdened.”). Such a result is contrary to the TCA’s intent to “encourage the rapid deployment of new telecommunications technologies.” Reno v. American Civil Liberties Union, 521 U.S. 844, 858 (1997).

Under another scenario described by the First Circuit, where a service provider serves a given area but does not provide nationwide service, other, national carriers could be blocked from offering services in that area. Id. This would have two negative effects for the public. First, users of wireless devices who lived in, or traveled frequently to, the area would have to choose between functionality within that area, and functionality everywhere else. Second, a series of decisions of this nature would create a “crazy patchwork of intermittent coverage. That quilt might have the effect of driving the industry toward a single carrier.” MetroPCS, 400 F.3d at 732 (quoting Second Generation Props., 313 F.3d at 633). In short, the supposedly public-interest-oriented “one provider” test shields wireless service providers from competition, creates instability in the wireless networks, promotes the development of a single-carrier industry, and reduces the functionality and benefits of wireless devices for all consumers that Congress set out to preserve.

By contrast, the First and Ninth Circuits’ approach to the determination of a “significant gap” serves the needs of wireless customers and promotes the aims of

the TCA. See id. (“This approach formally takes the perspective of the individual service provider in assessing coverage gaps, but... better serves both individual consumers and the policy goals of the TCA.”). It does so by promoting robust competition between providers, because it encourages each provider to build the best and most dependable network than it can, rather than to merely occupy a given area first.

Specifically, the First and Ninth Circuits follow the rule that “zoning decisions explicitly based on redundancy are not per se invalid, but they are subject to the crucial limitations that (1) they cannot discriminate between similarly situated facilities and (2) they cannot result in a significant gap in service for the *provider in question.*” Id. at 733. This rule allows zoning authorities to consider whether a given proposal is redundant; it protects providers from discrimination that would be contrary to the TCA; and it allows the public to benefit from a telecommunications marketplace in which providers may compete to provide service that is free from significant gaps. PCIA asks this court to adopt this analysis, as did the District Court below.

**B. The use of fixed standards for determining whether a significant gap in service exists, such as “in-vehicle” coverage, inhibits the ability of the wireless telecommunications industry to meet the ever-increasing demands of customers for more comprehensive and more reliable service.**

Clearly, the days of the “car phone” are gone. Today, Americans use wireless technology in every environment, and for an ever-increasing number of purposes. Users send and receive voice, text, images, video, and other kinds of data, and, increasingly, take advantage of services such as internet access and global positioning technology. There is every reason to anticipate that growth in the variety and sophistication of the services available on wireless devices will continue. As it does, public perception of what constitutes an acceptable level of coverage, or an acceptable set of functions being supported by a network, will also continue to grow and change. At one time, after all, in-building coverage was considered less important than roadway coverage, since telephone calls could be made from land lines inside buildings. Today, most especially for the nearly 30 percent of adults aged 25-29 living in wireless-only households, but also for many others, in-building coverage is simply an expected, baseline functionality of a wireless network: a functionality that is critical to keep consumers connected to friends, family, business and emergency services.

In the present case, T-Mobile presented affidavits demonstrating that it faces a significant gap in service coverage, including an area in which approximately

600 households have no in-building coverage. *Aplt. App.* at 530-33. Nonetheless, the Board of Commissioners found that the proposed tower was not necessary for the convenience of the public. There is no controlling authority or Circuit Court doctrine on whether in-building coverage should be taken into account by local authorities in determining the presence of a significant gap in coverage.

In its opinion, the District Court wisely accepted that poor in-building coverage could form the basis for demonstrating a significant gap for TCA purposes. *T-Mobile Central*, 528 F.Supp.2d at 1168-69. Following the reasoning of the only case that has addressed this issue, *MetroPCS*, the District Court held that “where coverage holes are large or frequent in number and size, and extend to the interior of buildings in urban areas or to a significant number of residences in well-populated areas, such coverage holes are actionable under the TCA.” *Id.* at 1169. In other words, the court accepted that T-Mobile’s customers have a reasonable expectation that their wireless devices will operate effectively in buildings as well as outside them. This approach reflects Congressional intent and wireless reality.

The federal government has not limited wireless devices to roadway uses and has not defined competition as roadway competition. Indeed, as noted above, the FCC has explained that it “adopt[s] flexible licensing policies instead of mandating any particular technology or network standard.” TWELFTH REPORT at

¶ 125. The consequence of this flexible approach is that wireless carriers now compete for consumers in their homes, their offices, their places of recreation, their cars, and virtually anywhere else the public can go. As explained in detail above, the public has overwhelmingly and unambiguously embraced the proliferation of wireless technologies into their daily lives, and has now come to depend on that ubiquity.

Narrowly tailoring significant gap review to roadway coverage does not reflect current and future wireless usage patterns. As wireless usage, products and services expand, the factors considered in a significant gap analysis must expand as well. In this case, T-Mobile was able to show a true need for better in-home coverage to approximately 600 residences. In other circumstances, other forms of need will be manifested. PCIA urges this court to endorse and adopt the District Court's flexible approach to the evaluation of wireless need.

**C. The requirement that providers demonstrate a proposed siting of wireless infrastructure is the “only feasible” means to fill a significant gap in coverage, is an unreasonably burdensome review standard not supported by the TCA and interpretative case law.**

Having established that a significant gap in coverage exists, a service provider must then make a further showing with regard to its proposed solution to the gap in coverage. In the Second, Third and Ninth Circuits, the service provider must demonstrate that its proposal is the “least intrusive means” to fill the gap in coverage. See Sprint Spectrum v. Willoth, 176 F.3d 630, 643 (2d Cir. 1999); APT

Pittsburgh Ltd. P'ship v. Penn Twp., 196 F.3d 469, 480 (3d Cir. 1999); MetroPCS, 400 F.3d at 734. However, in the First, Fourth, Seventh, and Eighth Circuits, the service provider must demonstrate that its proposal is the “only feasible alternative” to fill the gap. See, e.g. U.S.C.O.G. of Greater Iowa, Inc. v. Zoning Bd. of Adjustment, 465 F.3d 817, 825 (8th Cir. 2006). The District Court below considered both tests at length, and correctly identified the “least intrusive means” test as the better approach. T-Mobile Central, 528 F.Supp.2d at 1157-59.

While at first glance the two standards appear rather similar, the difference between them in practice is substantial. In the present case, the Unified Government encourages a “plain language reading” of 47 U.S.C. § 332(c)(7)(B)(i)(II) that ostensibly sweeps aside both these tests. Appellant’s Br. 49-50. However, on a closer reading of the Unified Government’s brief, it is apparent that this “plain language reading” is the “only feasible alternative” test by another name. Id. at 50 (“The Board of Commissioners’ denial of T-Mobile’s application did not have the effect of prohibiting wireless service. The denial did not leave T-Mobile *without any options* to improve their service beyond the current level.”) (emphasis added). This Court should reject the “plan language” / “only feasible alternative” test, and affirm the District Court’s adoption of the “least intrusive means” test.

The “only feasible alternative” is excessively onerous and contrary to the aims of the TCA in that it requires proof that a solution to a coverage gap is literally the sole possible way to fill the gap. This standard essentially gives state and municipal authorities *carte blanche* to reject virtually any application, as is evident from the reasoning of the Fourth Circuit: “conceptually, if wireless service could feasibly be provided from only one site, a denial of a permit for a facility at that site could amount to a prohibition of wireless services, in violation of (B)(i)(II).” 360 Degrees Commc’ns Co., 211 F.3d at 86-87. However, the court went on, such a situation is “unlikely in the real world.” Id. at 87. What the Fourth Circuit has acknowledged is that the “only feasible alternative” test gives zoning authorities the ability to deny any siting request, because the authorities will nearly always be able to suggest another feasible way in which service for the gap in question could be provided. The Ninth Circuit observed that, in a given case,

... there may be several viable means to of closing a major service gap, and in such a situation, the only viable option 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. This seems a poor use of time and resources for both providers and local governments alike.

MetroPCS, 400 F.3d at 734. Thus, this standard holds service providers—and their customers—hostage to a standard that even its proponents admit can rarely be met “in the real world,” regardless of the size and nature of the gap in coverage being

suffered, and regardless of the practical merits of the proposed means to fill that gap.

By contrast, the “least intrusive means” test is more practical in that it “allows for a meaningful comparison of alternative sites before the siting process in needlessly repeated... and it promises to ultimately identify the best solution for the community, not merely the last one remaining after a series of application denials.” *Id.* at 734-35. This standard sets the bar high for providers to demonstrate to local authorities that their proposed solution is the best and least intrusive one, yet does not block needed growth under “real world” conditions. Thus, PCIA asks that this court adopt the “least intrusive means” test.

## **V. Conclusion**

The wireless industry’s investment in technological innovation and its service to consumers, enabled by the pro-competitive approach taken by Congress in the TCA, have made wireless technology truly ubiquitous in our society. Wireless devices are used by nearly the entire population, young and old, rich and poor; in every environment and circumstance; and for a constantly increasing number of commercial, leisure, and safety-related purposes. The public’s embrace of—and demands upon—wireless technology has obliged the wireless industry to work continuously to meet and exceed consumer expectations. Local government policies toward wireless infrastructure deployment must evolve so as not to impede



**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,846 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 14 point Times New Roman.

**CERTIFICATE OF SERVICE AND ELECTRONIC COMPLIANCE**

I hereby certify that the original and twenty-five copies of the above and foregoing Brief of *Amicus Curiae* PCIA was sent via Federal Express, this 6<sup>th</sup> day of May, 2008, addressed to:

Clerk of the Court  
United States Court of Appeals for the Tenth Circuit  
Bryon White United States Courthouse  
1823 Stout Street  
Denver, CO 80257

with copies of this Brief sent via electronic mail, this 6<sup>th</sup> day of May, 2008,  
to:

Cathy J. Dean  
Polsinelli Shalton Flanigan Suelthaus PC  
700 West 47<sup>th</sup> Street, Suite 1000  
Kansas City, MO 64112  
[CDean@Polsinelli.com](mailto:CDean@Polsinelli.com)

Attorney for Plaintiff T-Mobile Central LLC, as successor in  
Interest to Voicestream Kansas City, Inc., d/b/a T-Mobile

and to:

