

Legal Reasons for Council to Stand Down on ZTA 22-01

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Council needs to stop reciting pro-wireless bias narratives that rubber-stamp and cheerlead the interests of telecom and their so-called demonstrations. What is preempted is an actual moratorium that's specific to wireless — for which Montgomery County is NOT GUILTY!

What the County's attorneys continue to advise Councilmembers cannot be squared with what the FCC told the Supreme Court! The **FCC never concluded that every limitation on any covered service is effectively prohibitory** — and told that to the Supreme Court! In addition, the FCC stated that ***“[n]othing in the Small Cell Order suggests that wireless carriers may “construct any and all towers,” or small cells, that they “deem[] necessary” in their “business judgment.”*** In addition, the Commission did not conclude that every limitation on any covered service is effectively prohibitory. I've researched and presented the DETAILS of why it is **wrong to construe that the small cell order implies that localities may never constrain a carrier's preferences.** See https://drive.google.com/file/d/1_M410pm3umwW99oG7duUecbw8BvGOJsq/view?usp=sharing

The County is recklessly and fecklessly devoted to giving maximum locations to wireless facilities AS IF doing so is law — all the while falsely alleging legal consequences when, in fact, ***“there is not a shred of evidence in the legislative history suggesting that . . . Congress intended plaintiffs to be able to recover damages and attorney's fees.”*** I've researched and presented the DETAILS of the history of City of Rancho Palos Verdes v. Abrams all the way up to the Supreme Court. Review my comprehensive look at why a **telecom company can NOT sue a local juris-diction for damages.** Enforcing violations of **§332(c)(7) would undermine the policies that the Telecommunications Act (TCA) reflects!** — See <https://drive.google.com/file/d/16ADxPEmDZAdQy6yAUUJbfZYXLuXts91Z/view?usp=sharing>

Additionally reflective of the TCA is that streaming videos, viewing online movies, sending/receiving emails, browsing the Internet, and engaging in tele-medicine are NOT part of “personal wireless service” or even a telecommunications service and the preemptive provisions in 47 U.S.C. 253 and 332(c)(7). The Telecommunications Act's **(TCA) 47 U.S.C. 253 and 332(c)(7) do not apply to these aforementioned services in isolation.**

A coverage gap analysis is all about voice service — NOT any perceived need to expand the aforementioned data services. Coverage required is for outdoor, wireless phone calls (which require up to “5 bars” of telecommunication service). As per the FCC itself, coverage is ***“outdoors and stationary. It is not meant to reflect where service is available when a user is indoors or in a moving vehicle.”*** — <https://www.fcc.gov/BroadbandData/MobileMaps/mobile-map>

WHY is it that the following has not dawned on Council — that it's **exceedingly unlikely** that the US Congress in 1996 intended for the US population to be sickened, injured, and die from profoundly deleterious RF/EMF effects 24/7/365 **to which we do not consent** — all in order to allow the wireless industry to maximize its profits???

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Council needs to be acutely aware of ExteNet v Flower Hill's inevitable influence since the very recent 7/29/2022 decision whereby a local jurisdiction in NY successfully fought off 18 "small cell" 4G wireless antennas on public rights-of-way in the Village. In sum, the alive-and-well, coverage gap analysis is all about voice service versus any perceived need to expand data services — until the Second Circuit says it isn't! The same applies in our Fourth Circuit.

ExteNet v Flower Hill is a treasure trove of case cites (below) of ALL the case law to-date that Council has ignored. This District Court's decision will undoubtedly be influential to other circuit courts.

ExteNet Sys. v. Vill. of Flower Hill, No. 19-CV-5588-FB-VMS (E.D.N.Y. Jul. 29, 2022) — <https://casetext.com/case/extenet-sys-v-vill-of-flower-hill>

The District Court affirmed the following:

>>> that **the lack of a gap in coverage is relevant here and can constitute substantial evidence justifying denial of a permit**

>>> that **the FCC's 2018 [small cell] ruling exceeds the scope of the TCA that only covers the provision of wireless telephone service access to a telephone network** because the TCA requires an application for a wireless facility be the least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides **access to land-lines**

>>> that because the TCA is not in question — that there's **no small cell entitlement to which to legally give deference** — as per one of the most-cited cases on the basic standards of review of agency statutory interpretation; by not substituting its own construction of the [plain statutory language of the TCA] and **the phrase, "personal wireless services"** — the Court affirmed that the [TCA] is not in question

>>> that even though ExteNet focused on the lack of need for improved 4G LTE coverage — and that **improved capacity and speed** are desirable (and, no doubt, profitable) goals in the age of smartphones — they **are not protected by the Act**

In asserting the above, the District Court's decision reveals a volume of former decisions and precedents with case law that is quite clear — IF IT'S READ:

>>>> "**... the FCC's [small cell] ruling is [NOT] entitled to deference** under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) [because] Chevron deference applies only when the [TCA] statute in question is silent or ambiguous [or in question]. Although the Second Circuit found the phrase "**personal wireless services**" "opaque," it ultimately relied on "[t]he plain statutory language" [of the TCA] to define it. Therefore, the **phrase was not ambiguous.**" — citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) — as per <https://casetext.com/case/chevron-inc-v-natural-resources-defense-council-inc-american-iron-and-steel-institute-v-natural-resources-defense-council-inc-ruckelshaus-v-natural-resources-defense-council-inc>

>>>> ***“A gap in 4G coverage does not establish that the target area is underserved by voice cellular telephone service.”*** — as per Crown Castle NG East LLC v. Town of Hempstead, 2018 WL 6605857, at *9 (E.D.N.Y. Dec. 17, 2018) — <https://casetext.com/case/crown-castle-ng-e-llc-v-town-of-hempstead-1>

>>>> ***“We hold only that the Act’s ban on prohibiting personal wireless services precludes denying an application for a facility that is the least intrusive means for closing a significant gap in a remote user’s ability to reach a cell site that provides access to land-lines.”*** — as per Willoth, 176 F.3d at 643 — <https://casetext.com/case/sprint-spectrum-v-willoth#p643>

which means

>>>> ***“... local governments must allow service providers to fill gaps in the ability of wireless telephones to have access to land-lines”*** — as per Sprint Spectrum L.P. v. Willoth, 176 F.3d 630 (2d Cir. 1999) — <https://casetext.com/case/sprint-spectrum-v-willoth>

>>>> ***“It is not up to the FCC to construe the [Act] to say something it does not say, nor up to the Court to find broadband communication encompassed by the law.”*** — as per Clear Wireless LLC v. Bldg. Dep’t of Vill. of Lynbrook, 2012 WL 826749, at *9 (E.D.N.Y. Mar. 8, 2012) — <https://casetext.com/case/clear-wireless-llc-v-bldg-dept-of-the-village-of-lynbrook#p9>

>>>> ***“If the Court finds that even one reason given for the denial is supported by substantial evidence, the decision of the local zoning body cannot be disturbed.”*** — as per T-Mobile Ne. LLC v. Town of Islip, 893 F.Supp.2d 338, 355 (E.D.N.Y. 2012 — <https://casetext.com/case/tmobile-ne-llc-v-town-of-islip#p355>

>>>> ***[The TCA] “strikes a balance between two competing aims — to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers.”*** — as per Omnipoint Communications v. White Plains, 430 F.3d 529 (2d Cir. 2005) — <https://casetext.com/case/omnipoint-communications-v-white-plains#p531>

>>>> ***“The [1996 Telecommunications] Act provides ... that “[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way . . . , on a competitively neutral and nondiscriminatory basis[.]”*** — as per the preemptive effect of the TCA's 47 U.S.C. § 253(a) — <https://casetext.com/statute/united-states-code/title-47-telecommunications/chapter-5-wire-or-radio-communication/subchapter-ii-common-carriers/part-ii-development-of-competitive-markets/section-253-removal-of-barriers-to-entry>

Of note are the other reasons provided by the local jurisdiction for denying the application that if supported by substantial evidence would also support denial of the applications under the case law:

- aesthetics
- property devaluation
- applicant’s refusal to provide actual fixed plans and photo simulations for each of the proposed nodes
- applicant’s refusal to comply with the local jurisdiction's provisions

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Council needs to be practical in the fact that wireless requires wireline backhaul facilities -- not more wireless. Montgomery County is not “out of bandwidth.” Rather, it is short on paid-and-promised fiber not completed or installed in Maryland since 2010. **Even former FCC Chairman, Ajit Pai, knows the importance of the physical networks** — and said so in a Mobile World Congress!

NTCA — The Rural Broadband Association states the following:

*"to a significant degree, 5G wireless services will rest upon a foundation of **wireline backhaul facilities**. Even where licensed spectrum may be available to function as backhaul in some instances, the densification of small cells that will power this **new technology will certainly require a densification of fiber not seen before in this nation's history.**[In addition, Pai stated that "all the spectrum we devote to 5G won't be put to good use if the physical networks to carry 5G traffic are never built."]* This is particularly true in rural areas where densities are low. In rural areas where potential service locations and users are often much further apart, **fiber is [] the linchpin to effective connectivity — and barriers to the deployment of fiber will undermine, if not defeat, access by rural Americans to next-generation broadband services and speeds of the kind contemplated by the FCC.**"*

— *as per remarks from FCC Commissioner, Ajit Pai, at the Mobile World Congress, Barcelona, Spain, February 28, 2017 at <https://www.fcc.gov/document/chairman-pai-remarks-mobile-world-congress> quoted in <https://www.ntca.org/sites/default/files/federal-filing/2018-09/9.10%20and%2011%202018%20Carowitz%20Adams%20ex%20partes.pdf>

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Council needs to be practical in the fact that advertising isn't reality. In fact, as per a Vantage Point report on 5G, **"5G ... "will be a mediocre if not very poor solution for tomorrow's fixed broadband, with very poor median-to-advertised speed performance."**

Here are further details from p21:

*"If 1 Gbps is a reasonable household broadband service expectation within the 5G equipment's service life, then tomorrow's maximum **5G small cell throughput cell capacity expectation** on the order of 1.5 Gbps for that timeframe — to be shared among all users, and which may seem plentiful today — **will be a mediocre if not very poor solution for tomorrow's fixed broadband, with very poor median-to-advertised speed performance.** . . . the small cell is in danger of **serious congestion**, and/or will require throughput limiting — either of which will render it indeed a mediocre if not **very poor solution.**"*

— as per https://www.vantagepnt.com/wp-content/uploads/dlm_uploads/2017/07/vps-5g-white-paper-march-2017.pdf

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Council needs to initiate Investigations into the BILLIONS of cross-subsidies carried out by Verizon and other carriers to avoid paying Maryland State taxes so that their corporate profits could be boosted. We had a bait 'n' switch; we **paid** for fiber; we got wireless instead. For decades, telecom has transferred billions from its REGULATED, wired state public telecommunications utility companies to its UNREGULATED, wireless subsidiary companies. See <https://drive.google.com/file/d/1ujaFKj7sWPYBKRJGDaO3scyv8uqnWzyQ/view>

These financial sleights-of-hand have been — and continue to be — in **direct violation of the 1996 Telecommunications Act: Title 47, §254(k), which states that “[a] telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition.”**

What Montgomery County needs is more **fiber to the home on an open, interoperable, Net Neutrality network -- preferably one that's community owned.** Recovery of the billions due/owing would allow Maryland to pay for this safe, secure, reliable, and high speed, fiber network that was promised to be installed by 2010 so that fiber to the premises (FTTP) would ***finally*** **bridge the digital divide.**

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