

Third Circuit Backs Wiley Rein Client in Wireless Tower Siting Case in New Jersey

April 22, 2015

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Wiley Rein secured an important victory this week on behalf of client T-Mobile, persuading the U.S. Court of Appeals for the Third Circuit to affirm, in all respects, a lower court's favorable judgment in a wireless tower siting dispute. In an April 20 opinion, a Third Circuit panel agreed with the federal district court in the District of New Jersey, which had ruled in May 2014 that a zoning board in Paramus violated federal law in denying a wireless tower siting application jointly submitted by T-Mobile and Sprint.

Wiley Rein partners Joshua S. Turner and Claire J. Evans, and associate Caroline Rose Van Wie, represented T-Mobile in the case, *Sprint Spectrum L.P. and T-Mobile Northeast LLC v. The Zoning Board of Adjustment of the Borough of Paramus, New Jersey*.

The Third Circuit held that the Board's decision was an "effective prohibition" of wireless service in violation of the federal Communications Act, because "a significant gap in wireless coverage existed within the area presented, the monopole proposed would adequately fill that gap, and [the carriers] had adequately considered alternative sites before arriving at the ones proposed." The Third Circuit upheld the lower court's finding that a "Distributed Antenna System" (DAS) is "infeasible" to cover the gap, because it would be more susceptible to outages, less flexible, and designed to cover a gap smaller than the one in Paramus. The Third Circuit emphasized that the carriers "do not bear the burden of proving that

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every potential alternative, no matter how speculative, is unavailable. The proper inquiry for an effective prohibition claim is whether a good faith effort has been made to identify and evaluate less intrusive alternatives.”

The Third Circuit also ruled that the Board’s decision was “not supported by substantial evidence,” which is a separate violation of the Communications Act and also a violation of New Jersey state law. While the district court based its decision in large part on evidence produced at trial, the Third Circuit went further, noting that the record in the zoning hearings alone “demonstrated that a DAS was not a feasible alternative to the monopole.”

Notably, the Third Circuit summarily rejected the Board’s claim that the Communications Act amounted to unconstitutional “commandeering” of state government agencies. After finding that the Board had waived this argument by failing to raise it before the district court, the Third Circuit held in a footnote that “[e]ven if we were to consider the argument, however, it is unavailing.” The Act is “a valid congressional exercise of power,” and “[t]herefore there is no commandeering issue here.”

Mr. Turner, Ms. Evans, and Ms. Van Wie are members of the firm’s Communications Practice, and Mr. Turner is co-chair of the Communications Enforcement & Compliance Group.