

Wiley Rein Attorneys Obtain Second Circuit Affirmance of Major Victory for Wireless Carriers Preempting Local Government Preference for Particular Technologies

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In a major victory for the wireless industry, the U.S. Court of Appeals for the Second Circuit held that local attempts to regulate wireless technologies by establishing a "preference" for certain "alternate technologies," such as Distributed Antenna Systems (DAS) or microcell antennas, are preempted by federal law because they trench upon a field occupied by the federal government.

A team of Wiley Rein communications attorneys, led by Andrew G. McBride and Joshua S. Turner, on behalf of Verizon Wireless and other major telecommunications carriers, had successfully mounted a facial challenge to a local town's wireless siting ordinance in federal district court. In *New York SMSA L.P. d/b/a Verizon Wireless v. Town of Clarkstown*, the Southern District of New York found that a local ordinance that legislated a preference for alternate technologies, including DAS, and which also regulated radio frequency interference, was preempted by federal law under a field preemption theory.

On appeal to the Second Circuit, the town had argued that its regulatory preference was permissible as an exercise of local zoning interests preserved by federal law. The Second Circuit disagreed, concluding that "the provisions setting forth a preference for 'alternate technologies'" are preempted "because they interfere with the federal government's regulation of technical and operational aspects of wireless telecommunications technology, a field that is occupied by federal law. The federal government has long regulated telecommunications, and in passing the Telecommunications Act,

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Congress took further steps 'to facilitate nationally the growth of wireless telephone service.' The Federal Communications Commission (FCC) has issued regulations setting technical standards for wireless technology, including, in particular, antennas." Because of the local ordinance's substantial preference for alternative technologies, the Second Circuit readily found that it "interferes with the federal regulatory scheme that occupies the field" and is preempted.

This decision is significant because of the district and appellate courts' unequivocal rulings on field preemption. Several jurisdictions across the country have been considering similar preferences for alternate technologies, including DAS. This opinion sends a clear message that such attempts improperly intrude into matters properly regulated at the federal level.

Wiley Rein served as lead counsel on behalf of a group of wireless carriers in this matter, including Verizon Wireless.