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# Ninth Circuit Decision a Victory for Landline and Wireless Telecommunications Providers

On June 13, 2007, the United States Court of Appeals for the Ninth Circuit issued a decision that will have important ramifications on the ability of both wireless telecommunications providers and telecommunications providers in general to challenge local regulatory schemes that impose discretionary zoning regulations on applications to install network facilities.

In April 2003, the County of San Diego (County) passed the Wireless Telecommunications Ordinance (WTO), which imposed a new regulatory scheme on applications to install wireless telecommunications facilities within the unincorporated areas of the County. For nearly all proposed sites, the WTO imposed a laborious, discretionary zoning process, which imposed aesthetics-based regulation based on malleable concepts like community character, and which reserved complete discretion to the County to grant, deny or modify a permit subject to any conditions it deemed to be reasonable under the circumstances.

Sprint Telephony PCS L.P. (Sprint) challenged the WTO on the grounds that it violated Section 253 of the federal Telecommunications Act of 1996, 47 U.S.C. § 253. That section preempts any state or local ordinance that either prohibits or has the effect of prohibiting the provision of telecommunications services. Sprint argued that the WTO's regulatory scheme was so onerous and discretion-laden that it effectively prohibited wireless carriers' ability to build out their networks within the County. The County, on the other hand, argued that Section 253 did not protect wireless telecommunications providers, and that a different section of the federal Telecommunications Act—namely, 47 U.S.C. § 332—was the exclusive provision governing the protections that wireless carriers enjoy to build their networks under federal law. Further, the County argued, an ordinance could only be challenged under that section if it

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amounted to an outright ban of the provision of telecommunications services in the County. Finally, the County argued, to the extent Section 253 protected wireless, it only prevented state or local governments from imposing "franchise" or "entry" ordinances, not to traditional zoning ordinances that did not ostensibly regulate the entry or ability of a carrier to do business in the County market.

In July 2005, the U.S. District Court for the Southern District of California granted Sprint's motion for summary judgment and permanently enjoined the WTO, finding that it violated Section 253. The County appealed to the Ninth Circuit. In April 2007, a three-judge panel of the Ninth Circuit affirmed the district court's injunction, agreeing that the WTO's discretion-laden, subjective-based regulation violated Section 253. The County promptly moved for rehearing or rehearing *en banc*. Rehearing *en banc* would have resulted in the court rehearing the case with eleven judges. Moreover, the County's rehearing petition drew much attention and support from *amici* across the country, including the National League of Cities, National Association of Counties, International Municipal Lawyers Association, National Association of Telecommunications Officers and Advisors, League of California Cities, New Jersey State League of Municipalities, Texas Municipal League, Texas City Attorney Association and the California State Association of Counties. Despite this broad *amici* support for the County, the court's June 13 decision refused to rehear the case, denying both the County's petition for rehearing and for rehearing *en banc*.

In its June 13 opinion, the court noted that this case was the first time it had been asked to construe a local ordinance governing wireless telecommunications under Section 253. But, relying on its past precedent that had struck down ordinances that applied to landline telecommunications, the court held that the WTO offended Section 253 for the same reasons as the landline ordinances in those past cases, most notably, *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001). Further, the court rejected the County's arguments that Section 253 only prohibited "franchise" ordinances or that Section 253's application to wireless telecommunication providers was limited given Section 332. In addition to the WTO's general reservations of discretion, which the court noted were almost identical to the provisions struck down in *City of Auburn*, the court singled out the WTO's even more onerous and subjective criteria, noting that "[t]he WTO itself explicitly allows the decision maker to determine whether a facility is appropriately 'camouflaged,' 'consistent with community character,' and designed to have minimum 'visual impact.'" *Sprint Telephony PCS, L.P. v. County of San Diego*, Nos. 05-56076, 05-56435 (9th Cir. June 13, 2007).

This decision is an important victory for telecommunications

providers in general and wireless providers in particular as those providers seek to install effective, cost-efficient networks throughout the United States. For wireless providers, the decision affirms that Section 253's protections extend not only to traditional landline services but also to wireless technologies. Further, for telecommunications providers in general, the decision affirms that Section 253's proscriptions go beyond merely preventing a state or local government from imposing prohibitive franchise or entry requirements. A state or local law can equally offend Section 253 if it does not expressly regulate the entry of carriers into a state or local market but nonetheless imposes onerous processes for providers to secure the necessary permits to build their facilities. Armed with this decision, then, telecommunications providers now have significant ammunition to challenge laws that aren't limited to imposing objective regulations that are difficult to comply with.

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