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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

C.A. No. 05-56076; 05-56435

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SPRINT TELEPHONY PCS, L.P., a Delaware limited partnership,

Plaintiff – Appellant/Cross-Appellee,

v.

COUNTY OF SAN DIEGO, et al.,

Defendants – Appellees/Cross-Appellants.

On Appeal from the United States District Court
for the Southern District of California
No. CV-03-1398-BTM
Honorable Barry Ted Moskowitz, District Judge

**COUNTY OF SAN DIEGO'S PETITION FOR PANEL
REHEARING AND REHEARING *EN BANC***

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I.

INTRODUCTION

The panel struck down the County's Ordinance, which regulates the construction of individual wireless facilities, finding that it is preempted as a matter of law by 47 U.S.C. §253(a), which is part of the Telecommunications Act of 1996 (the "TCA"). The panel recognizes that this is the first time a local zoning ordinance regulating the construction of individual wireless facilities has been invalidated under §253(a) in the 11 years since this provision was enacted. This unprecedented decision resulted from the panel's failure to (1) identify the proper legal standards and (2) apply those standards to the uncontested facts. Because of these failures, the panel's decision is at odds with the plain language of the TCA, its legislative history, existing precedent from this Court and the United States Supreme Court and a recent decision from the Eighth Circuit.

The Eighth Circuit's decision has created a circuit split and its opinion aptly demonstrates that this Court has been relying on a lax preemption standard that is contrary to section 253(a)'s plain language. Section 253(a) preempts regulations that "prohibit or have the effect of prohibiting" an entity from providing telecommunications service. Contrary to section 253(a)'s plain language, this

Court has held that regulations that “may” or “might” prohibit an entity from providing service are preempted. Rehearing is necessary to correct this error.¹

The panel recognized that under binding precedent Sprint’s facial challenge must be rejected unless no set of circumstances exist under which the County’s Ordinance would be valid. Thus, Sprint must show that the Ordinance will prohibit or have the effect of prohibiting Sprint from providing service under all circumstances. While the panel noted the appropriate standard, it failed to follow that standard and therefore binding Supreme Court and Ninth Circuit precedent.

The panel concluded that the Ordinance provisions, which give the County discretion to deny an application to build an individual wireless facility, are preempted on their face. This was error. Since the Ordinance does not ban wireless facilities, it is beyond doubt that the County *could* apply the Ordinance and grant Sprint’s applications to install its facilities. This would not prohibit Sprint from providing service. Indeed, the undisputed evidence, which the panel ignored, establishes that the County *has* granted 6 of the 10 permit applications Sprint has submitted since the Ordinance was enacted. None of Sprint’s

¹ The Ordinance regulates the construction of wireless facilities on both County-owned rights-of-way and private property. Virtually no court has held that §253(a) applies to regulations that govern the construction of wireless facilities on private property. Section 253(c), which refers to rights-of-way only, makes it plain that §253(a) does not apply to ordinances that regulate the construction of wireless facilities on private property. Thus, at a minimum, rehearing should be ordered to clarify that the County’s Ordinance regulating the construction of wireless facilities on private property is not preempted.

applications have been denied. Thus, it is clear that the Ordinance does not in all circumstances prohibit Sprint from providing service.

Further, the Eighth Circuit has joined the district courts of this circuit in recognizing that this Court's lax standard for showing preemption under §253(a) is contrary to that section's plain language. In this Court's first §253(a) case, a panel relied upon a misquotation of §253(a) contained in a district court case from Maryland to hold that a plaintiff will prevail on a preemption claim under this section if a regulation "may" or "might" have the effect of prohibiting an entity from providing telecommunications service. Other panels have followed that decision because they are bound to do so. The Eighth Circuit has shown that this lax standard is contradicted by §253(a)'s plain language and must be overruled. The panel in this case relied on this inappropriate standard in finding that the Ordinance provisions were preempted on their face, even though there is no evidence that Sprint has actually been prohibited from providing service and the undisputed evidence is to the contrary.

Finally, in rejecting the County's contention that this Court has applied a more lenient standard to facial challenges brought under §253(a) than to such challenges brought under §332(c)(7)(B)(i)(II),² the panel recognized that Congress

² All sections referenced are contained in 47 U.S.C.

intended that for a facial challenge to succeed under either of these two sections, a plaintiff would have to prove that the regulations banned wireless facilities on their face or contain policies that have the effect of banning those facilities.

However, the panel failed to apply this standard to the County's Ordinance provisions. The panel apparently concluded the Ordinance's reservation of broad discretion to grant or deny an application for a use permit to build a wireless facility rises to the level of a ban. This conclusion conflicts with this Court's decision in *MetroPCS, Inc. v. San Francisco*, 400 F.3d 715, 724 (9th Cir. 2005), where the Court recognized that San Francisco's use permit ordinance did not ban wireless facilities even though the city had extremely broad discretion to deny a permit application if believed the wireless facility was not necessary.

II.

BY FAILING TO APPLY THE APPROPRIATE STANDARD TO FACIAL CHALLENGES, THE PANEL'S DECISION CONFLICTS WITH SUPREME COURT AND NINTH CIRCUIT PRECEDENT

The panel correctly recognized that Sprint's facial challenge to the Ordinance "is, of course, the most difficult challenge to mount successfully." (Opinion at 3010) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). The panel also recognized that Sprint "must establish that no set of circumstances exists under which the [Ordinance] would be valid." *Id. Accord Chamber of Commerce of the United States v. Lockyer*, 463 F.3d 1076, 1082 (9th Cir. 2006).

Thus, Sprint must show that there are no set of circumstances in which the County's Ordinance will not "prohibit or have the effect of prohibiting" Sprint from providing telecommunications service. Section 253(a).³

The undisputed evidence, which the panel ignored, prevented Sprint from making the required showing. This evidence showed that the County *granted* 6 of the 10 permit applications for wireless facilities that Sprint submitted since the Ordinance was enacted. (County's Supplemental Excerpts of the Record ("CER"), at 50, ¶ 4). None of Sprint's permit applications have been denied. (*Id.*)⁴ Thus, it is clear that the Ordinance does not in all circumstances prohibit Sprint from providing telecommunications service.

³ The panel apparently believed that the proper test was derived from the title to §253, which is "Removal of Barriers to Entry." The panel repeatedly refers to the County's Ordinance provisions as being "barriers." The proper test, however, is whether the Ordinance provisions "prohibit or have the effect of prohibiting" Sprint from providing telecommunications services. Moreover, §253(a) refers to "barriers to entry," not simply barriers. The Ordinance provisions do not involve barriers to entry or participation in the market. Sprint is already an active participant in the local telecommunications market. Moreover, the Ordinance simply regulates the construction of individual wireless facilities, not entry or participation into the market. *City of Dallas v. Metropolitan Fiber Systems of Dallas, Inc.*, 2000 U.S. Dist. LEXIS 2138, *15 (N.D. Tex. 2000) ("Indeed, § 253 is entitled 'Removal of barriers to entry.' Therefore, the ordinances in question could not have acted as a barrier to entry in violation of § 253 because MFS and Brooks were already in the market providing services.").

⁴ At oral argument, Sprint asserted that the County had prohibited Sprint from providing service by delaying the processing of its remaining 4 permit applications. No record evidence supports Sprint's assertion that the County is responsible for any processing delays. Moreover, such delays cannot be the basis of a facial challenge to the County's Ordinance. However, Sprint may bring an as applied "delay" claim under another provision of the TCA, 47 U.S.C. §332(c)(7)(B)(ii).

Moreover, even if the Ordinance requires the submission of a “burdensome” application and supporting materials, reserves broad discretion in the County to grant or deny applications to install wireless facilities, requires public hearings⁵ on permit applications and imposes penalties for violating the terms of a permit, this does not mean that Sprint will be prohibited from providing telecommunications service under all circumstances. It is obvious that the County *could* apply these Ordinance provisions in a manner that would still result in the granting of Sprint’s applications to install wireless facilities and thus in a manner that did not prohibit Sprint from providing service. Indeed, the undisputed evidence is that the County *has* granted Sprint’s permit applications applying these Ordinance provisions.⁶

⁵ The County pointed out to the panel that Congress clearly contemplated that public hearings would be held on applications to install wireless permit applications. H.R. Conf. Rep. No. 104-458 at 208 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 223. (emphasis added.) (“If a request for placement of a personal wireless service facility involves a zoning variance or *a public hearing* or comment process, the time period for rendering a decision will be the usual period under such circumstances.”) (emphasis added). The district court held that public hearings were allowed if the County restricted what the public could say at such hearings. *Sprint Telephony PCS, L.P. v. County of San Diego*, 377 F.Supp.2d 886, 896 (S.D. Cal. 2005). The County argued to the panel that this would be an unconstitutional content based restriction on speech. *Boos v. Barry*, 485 U.S. 312, 321 (1988); *Giebel v. Sylvester*, 244 F.3d 1182, 1189 n.13 (9th Cir. 2001). The panel did not consider the authorities cited by the County and apparently affirmed the district court’s conclusion that content based restrictions on speech should be imposed by the County.

⁶ How could broad discretion to grant or deny a permit application be a “prohibition” within the meaning of §253(a) when this Court has held that the *denial* of a permit application alone is not a prohibition within the meaning of the nearly identical language of §332(c)(7)(B)(i)(II)? *MetroPCS*, 400 F.3d at 730-35. Since the County’s discretion could be exercised in a way to grant a permit application, the County’s Ordinance is much less likely to be a prohibition than the actual denial of an application.

As discussed in detail below, there is no evidence that the Ordinance actually prohibits or has the effect of prohibiting Sprint from providing service, which is the proper standard under §253(a). However, even if prohibition were possible under some circumstances, Sprint's facial challenge must still fail because the Ordinance does not *in all circumstances* prohibit Sprint from providing service.

III.

THE PANEL APPLIED A LAX PREEMPTION STANDARD, WHICH THE EIGHTH CIRCUIT HAS SHOWN IS CONTRARY TO §253(a)'S PLAIN LANGUAGE

The panel's erroneous determination was also based on prior panel decisions of this Court holding that an ordinance is preempted if it "may" or "might" have the effect of prohibiting an entity from providing telecommunications services. Thus, the panel did not require Sprint to present any evidence that the County's Ordinance provisions have prohibited it from providing service, and ignored the evidence to the contrary. As the Eighth Circuit explained in a recent decision, this Court's prior decisions are premised on an incorrect reading of §253(a)'s plain language. The Court should take this case *en banc* to reverse these prior erroneous rulings.

The misreading of §253(a)'s plain language arose in *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175 (9th Cir. 2001), where the Court quoted *Bell Atl. v.*

Prince George's County, 49 F.Supp.2d 805, 814 (D. Md. 1999), *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2000), for the proposition that “[s]ection 253(a) preempts regulations that not only ‘prohibit’ outright the ability of any entity to provide telecommunications services, but also those that ‘*may have the effect* of prohibiting the provision’ of such services.” (internal ellipses omitted) (emphasis added). In *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004), this Court stated that “[w]e do not agree that Qwest was required to make an actual showing of ‘a single telecommunications service that it . . . is effectively prohibited from providing.’ We have previously ruled that regulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted. *Like it or not*, both we and the district court are bound by our prior ruling.” *Id.* (citation omitted) (emphasis added). *Accord Qwest Communications v. City of Berkeley*, 433 F.3d 1253, 1256-57 (9th Cir. 2006) (“[T]he City contends that Qwest must show the actual impact of Ordinance 6630 on Qwest’s ability to provide telecommunications services. . . . [R]ather than considering the actual impact of Ordinance 6630, we must determine whether the specific regulations of Ordinance 6630 ‘may have the effect of prohibiting the provision of telecommunications services’ in the City.”) (citation omitted). The panel applied the same standard in this case. (Opinion, at 3019) (relying on *City of Auburn* to strike down the County’s Ordinance provisions even though Sprint

presented no evidence that these provisions have actually prohibited Sprint from providing telecommunications service and the undisputed evidence is to the contrary).

The Eighth Circuit recently demonstrated in a published opinion that the *City of Auburn* standard (regulations that *may have* the effect of prohibiting the provision of telecommunications services are preempted) is directly at odds with the plain language of §253(a) and therefore refused to follow that standard. *Level 3 Communications, L.L.C. v. City of Saint Louis*, 477 F.3d 528, 533 (8th Cir. 2007).

Section 253(a) provides that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” The word “may” used in conjunction with the word “no” clearly states Congress’s intent to outlaw regulations that do a certain thing (prohibit or have the effect of prohibiting), not to outlaw regulations that “may” or “might possibly” have that effect.

Thus, the Eighth Circuit correctly recognized that “[e]xamination of the entirety of section 253(a) reveals the subject of the sentence, ‘[n]o State or local statute or regulation, or other State or local legal requirement’ is followed by two discrete phrases, one barring any regulation which prohibits telecommunications

services, and another barring regulations achieving effective prohibition.

However, no reading results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services, as our sister circuits seem to suggest.” *Id.* at 533 (citations omitted).⁷

Accordingly, the Eighth Circuit held that “a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition. The plaintiff need not show a complete or insurmountable prohibition, but it must show an existing material interference with the ability to compete in a fair and balanced market.” *Id.* (citations omitted).

Applying this standard, the Eighth Circuit rejected the plaintiff’s argument that prohibition or effective prohibition is shown by “the scope of the regulatory authority that a city purports to wield--not whether the city has used that authority to *actually* exclude a provider or service.” *Id.* Sprint made the same argument in this case. (Opinion at 3003) (“Sprint suggested that the ‘onerous’ permitting structure of the WTO, and the discretion retained by the County, prevented it from providing wireless service.”). Adherence to §253(a)’s plain language would have resulted in the rejection of Sprint’s contention.

⁷ The Eighth Circuit properly concluded that in *City of Portland* the Court “distorted” the meaning of §253(a) by “creative quotation.” *City of St. Louis*, 477 F.3d at 533. Indeed, the Maryland district court opinion upon which this Court relied in *City of Auburn* engaged in the exact same “creative quotation.” *Prince George’s County*, 49 F.Supp.2d 805, 814.

The district courts in the circuit have similarly recognized that §253(a)'s plain language has been distorted. *Qwest Corp. v. City of Portland*, 200 F.Supp.2d 1250, 1255 (D. Or. 2002) (“In its briefs and at oral argument, Qwest has relied on an incorrect, overly broad version of § 253(a)'s preemption test, which was unfortunately quoted in the *City of Auburn* opinion. . . . The quoted phrase simply misreads the plain wording of the statute, and implies that the statute bars not only those local requirements that actually prohibit or have the effect of prohibiting the ability to provide telecommunication service, but also those requirements that *may* have that effect. That is not what the statute says. . . . Congress used the word ‘may’ as a synonym for ‘is permitted to.’”), *rev'd* 385 F.3d 1236 (9th Cir. 2004); *City of Portland v. Elec. Lightwave, Inc.*, 452 F.Supp.2d 1049, 1059 (D. Or. 2005) (“The Ninth Circuit's interpretation of the scope of section 253(a) appears to depart from the plain meaning of the statute and extend the barrier for local regulation of telecommunications services beyond what Congress intended.”).

Here, the panel concluded that the County's Ordinance may prohibit Sprint from providing service based on the scope of the County's authority contained in its Ordinance; i.e., its broad discretion to deny permit applications, its ability to require public hearings, its ability to require the submission of certain materials. There is no evidence, however, that the County has used its discretion or the other Ordinance provisions to prohibit Sprint from providing service. As discussed

above, the evidence is to the contrary. The County has granted 6 of the 10 applications Sprint has submitted to build wireless facilities and has not denied a single Sprint application to build a wireless facility. Moreover, since Sprint has successfully complied with the County's Ordinance provisions they clearly do not constitute a "material interference with [Sprint's] ability to compete in a fair and balanced market." *City of St. Louis*, 477 F.3d at 533. *Accord City of Portland*, 200 F.Supp.2d at 1256 ("Qwest has managed to provide telecommunications services in the Cities for many years while laboring under the allegedly prohibitive right-of-way fees and other requirements. . . Qwest has not pointed to a single telecommunications service that it, or any other entity, is effectively prohibited from providing because of the Cities' revenue-based fees or any of the other challenged requirements."); *AT&T Communs. of the Pac. Northwest v. City of Eugene*, 35 P.3d 1029, 1048 (Or. Ct. App. 2001) ("That argument, however, amounts to little more than speculation about the possible effect of the city's telecommunications ordinance on the industry generally. It is buttressed by no evidence about the actual or likely effect of the city's ordinance on them or any other particular telecommunications providers. . . . [Moreover,] it is not easy to understand how being required to satisfy a requirement that the companies contend they already have satisfied constitutes an effective prohibition of their ability to provide services.").

Under the plain language of §253(a) and the Eighth Circuit’s recent decision based on that language, Sprint’s facial challenge to the County’s Ordinance would have to be rejected. Accordingly, this Court should take this case *en banc* in order to reverse its prior panel decisions holding that a local regulation is preempted if it “may” prohibit an entity from providing telecommunications services.

IV.

THE PANEL MISAPPLIED THE STANDARD FOR INVALIDATING ORDINANCES UNDER THE TCA AND THEREBY CREATED A CONFLICT WITH A PRIOR DECISION OF THIS COURT

In rejecting the County’s argument that this Court has applied a more lenient standard to facial challenges brought under §253(a) than to facial challenges brought under §332(c)(7)(B)(i)(II), which uses the same “prohibit or have the effect of prohibiting” language, the panel stated as follows:

The Conference Report explains, in the context of § 332(c)(7)[(B)(i)(II)], that “it is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-case basis.” The similar language of the sections and the Conference Report demonstrate that § 253(a) is consistent with the substantive provision of § 332(c)(7)(B)(i)(II).

(Opinion at 3017) (quoting H.R. Conf. Rep No. 104-458, at 208).

In order to avoid a conflict between the interpretation of sections 253(a) and 332(c)(7)(B)(i)(II), the panel indicated that a plaintiff bringing a facial challenge to an ordinance under either provision would have to show that the ordinance

amounted to a ban on wireless facilities or contained policies that have the effect of banning wireless facilities. However, the panel then failed to apply this test to the Ordinance. None of the Ordinance provisions on their face ban wireless facilities or have the effect of banning those facilities. The fact that the County has discretion to decide on a case-by-case basis whether to allow a company to build a wireless facility in no way establishes that the County's Ordinance bans wireless facilities. Indeed, this is precisely the type of regulation that Congress desired.

No court anywhere has held that an ordinance that allows a local government broad discretion to deny an application to build a wireless facility amounts to a ban on such facilities. Indeed, this Court reached the opposite conclusion in *MetroPCS*. In that case, this Court stated: “[a] city-wide general ban on wireless services would certainly constitute an impermissible prohibition of wireless services under [§332(c)(7)(B)(i)(II) of] the TCA.” *Id.* at 730. However, this Court recognized that San Francisco's conditional use permit ordinance, which gave the city extremely broad discretion to deny a permit application for a wireless facility if the city concluded that it was not “necessary,” did not violate §332(c)(7)(B)(i)(II) on its face:

[L]ocal regulations *standing alone* may offer little insight into whether they violate the substantive requirements of the TCA. ***Zoning rules—such as those that allow local authorities to reject an application based on “necessity”⁸—may not suggest on their face that they will lead to discrimination between providers or have the effect of prohibiting wireless services. Thus, in most cases, only when a locality applies the regulation to a particular permit application and reaches a decision—which it supports with substantial evidence—can a court determine whether the TCA has been violated.***

Id. at 724 (emphasis added). Indeed, the Court indicated that absent a ban on wireless facilities, §332(c)(7) does not affect the content of local zoning ordinances. 400 F.3d at 725 n.3.

Every court in the country agrees that if an ordinance does not ban wireless facilities on its face, it is not a ban absent evidence that the ordinance has resulted in the denial of all permit applications. *Laurence Wolf Capital Mgmt. Trust v. City of Ferndale*, 61 Fed. Appx. 204, 221 (6th Cir. 2003) (“***Wolf has not shown that the Ordinance necessarily results in the denial of any application.*** To the contrary, ***AT&T currently provides wireless services in Ferndale and has two existing wireless facilities in Ferndale. This shows that the Board does approve applications under the Ordinance.*** Moreover, the Ordinance does not prohibit placement of wireless service facilities on all private properties. Instead, it limits

⁸ In *MetroPCS*, San Francisco’s conditional use permit standards allowed the city to deny an application to construct a wireless facility if the city concluded that the facility was unnecessary. 400 F.3d at 719. The “necessity standard” offers the city as much or more discretion than that retained by the County under its Ordinance. Nonetheless, the Court indicated that this discretion was not a ban that rose to the level of a prohibition on service.

such facilities to certain zoning districts and *requires administrative approval*. *No evidence exists in the record to suggest that Ferndale has consistently denied such administrative approvals*. Therefore, the record contains no evidence that the Ordinance effectively prevents wireless communication services. Accordingly, we hold that *the Ordinance does not effectively prohibit the provision of personal wireless services.*”); *Voicestream Minneapolis, Inc. v. St. Croix County*, 212 F.Supp.2d 914, 927 (W.D. Wis. 2002) (“[L]ocal zoning laws govern the siting of wireless facilities. . . . The clearest violation of this subsection [332(c)(7)(B)(i)(II)] occurs when a local government imposes a blanket prohibition or an outright ban on personal wireless services. An *effective* ban may be found if a local government indicates that repeated individual applications will be denied because of a generalized hostility to wireless services.”), *aff’d* 342 F.3d 818 (7th Cir. 2003); *Virginia Metronet v. Board of Supervisors*, 984 F. Supp. 966, 971 (E.D. Va. 1998); *Primeco Personal Communs. Ltd. Pshp. v. Lake County*, 1998 U.S. Dist. LEXIS 22603, *40 (M.D. Fla. 1998); *Second Generation Props., L.P. v. Town of Pelham*, 2002 U.S. Dist. LEXIS 9205, *6-7 (D. N.H. 2002), *aff’d* 313 F.3d 620, 630 (1st Cir. 2002); *U S WEST Communs., Inc. v. City of Vadnais Heights*, 1998 U.S. Dist. LEXIS 22962, *12 (D. Minn. 1998).

Because the County’s Ordinance provisions do not amount to a ban on wireless facilities and Sprint submitted no evidence that the County has used the

Ordinance to repeatedly turn down its permit applications, the Ordinance is not a prohibition and the panel's decision conflicts with this Court's decision in *MetroPCS* and the decisions of numerous other courts and should be reversed.

V.

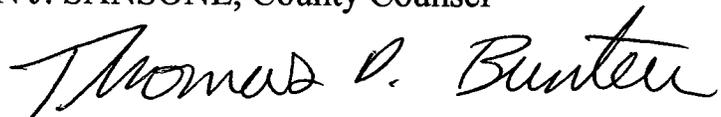
CONCLUSION

For these reasons, the panel should grant rehearing or the Court should rehear this case, *en banc*.

DATED: 3/29/07

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STATEMENT OF RELATED CASES

There are no known related cases pending in this Court

DATED: 3/29/07

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CATHY A. CATTERSON, CLERK
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SPRINT TELEPHONY PCS L.P.,
Plaintiff-Appellant/Cross-Appellee,

vs.

COUNTY OF SAN DIEGO, et al.,
Defendants-Appellees/Cross-Appellants

**BRIEF OF AMICI CURIAE NATIONAL LEAGUE OF
CITIES, ET AL. IN SUPPORT OF THE PETITION FOR
PANEL REHEARING AND REHEARING *EN BANC*
SUBMITTED BY THE COUNTY OF SAN DIEGO**

On Appeal from the United States District Court
for the Southern District of California

Panel Members: The Honorable Myron H. Bright, A. Wallace
Tashima and Carlos T. Bea

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National League of Cities, et al.

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I. INTRODUCTION

Amici curiae urge the Court to grant the petition for panel rehearing and rehearing *en banc* filed by the County of San Diego, et al. (“County”).¹ The decision is clearly erroneous and, if allowed to stand would: (i) further contribute to the burgeoning conflict with decisions from other circuits and exacerbate concerns expressed by district courts in this Circuit with this Court’s prior decisions; and (ii) unlawfully limit local government authority to regulate both wireline and wireless telecommunications carriers using the public rights-of-way and wireless carriers using private property to construct facilities.

In an admittedly “novel application” of the law, the panel concluded that 47 U.S.C. § 253(a) preempted the County’s Wireless Telecommunications Facilities zoning ordinance (“WTO”). In so doing, the panel erred in two respects. First, the panel failed to consider the difference between local regulation of use of the public rights-of-way and the exercise of local zoning authority. Congress separated the two in the Telecommunications Act of 1996 (the “TCA”) by enacting § 253 and 47 U.S.C. § 332(c)(7). Second, the panel failed to consider the importance of 47 U.S.C. § 332(c)(3), a provision of the Communications Act that pre-dated the TCA. Although that provision—which preempts barriers to entry of wireless carriers—remains in effect, the Court’s construction of §253(a) renders that provision meaningless.

Furthermore, *en banc* review is warranted for two reasons. First, *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), and its progeny (on which the panel relied) conflict with Supreme Court precedents, other circuit court

¹ The identity of amici and their interest in this proceeding are set forth in the accompanying motion for leave to file this brief.

holdings, and the intent of Congress. Second, those precedents effectively bar local regulation of telecommunication carriers, regardless of the burden placed on the carrier, and even when there is no evidence that the local ordinance has prohibited the provision of telecommunications services. Rather than create an inter-circuit conflict and improperly limit local regulatory powers, this Court should grant *en banc* review.

II. ARGUMENT

A. **THERE IS NO BASIS FOR THE PANEL'S "NOVEL APPLICATION" OF § 253(A) TO A ZONING ORDINANCE.**

The panel found that "the general provisions of §253" preempted the WTO despite the "substantive" and "procedural limitations" found in §332(c)(7). (Opinion 3013-14.) Other courts have not adopted this "new and different application" of the TCA because to do so requires a court to ignore well-settled principles of statutory construction.

First, whenever possible the "provisions of a statute should be read so as not to create a conflict." *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 370 (1986). Second, a court should avoid interpreting a statute in such a way that would render other sections redundant, inconsistent, superfluous or meaningless. See *Padash v. INS*, 358 F.3d 1161, 1170-71 (9th Cir. 2004). Third, if a statute does not define a term the court should construe it in accordance with its "ordinary, contemporary, common meaning." *A-Z International v. Phillips*, 323 F.3d 1141, 1146 (9th Cir. 2003).

The three sections of the Communications Act that are relevant here serve separate purposes:

- Section 253(a) - preempts local regulations that are "barriers to entry."

- Section 332(c)(3) - preempts state and local authority to regulate the “entry of or the rates charged by any commercial mobile service” provider.² The authority of state and local governments to regulate wireless carriers under this section includes the “facilities siting issues (e.g., zoning).” H.R.Rep.No.103-111, at 261 (1993).
- Section 332(c)(7) - preserves state and local zoning authority over the “placement, construction, and modification” of wireless facilities, subject only to the limitations contained in § 332(c)(7). *See* H.R.Conf.Rep.No. 104-458, at 208 (1995) (this section preserves state and local authority “over zoning and land use matters except in the limited circumstances” set forth therein).

Read together in harmony, these provisions establish that §253(a) does not apply to wireless carriers challenging barriers to entry. *See* 47 U.S.C. § 253(e).³ Instead, §332(c)(3) governs in that situation. By preempting a barrier to entry under §253(a), the panel therefore rendered §332(c)(3) meaningless. Applying the statutory construction principles noted above, the panel should have found that a wireless carrier cannot seek to preempt a local ordinance under §253(a) as a barrier to entry, but instead must prove that §332(c)(3) preempts that ordinance.

The WTO regulates both a wireless carrier’s use of private property and the public rights-of-way. The panel overlooked this important fact, thereby ignoring the difference between zoning and right-of-way use regulation and improperly relying on §253(a) to preempt local zoning authority.

² Section 332(c)(3) was added to the Communications Act in 1993.

³ The panel suggested that Congress could have carved out a similar exemption for §332(c)(7). (Opinion 3016.) Nonetheless, §253(a) and §332(c)(7) are not contradictory. Section 253 concerns barriers to entry and §332(c)(7) concerns the use of private property for wireless facilities.

Congress did not define the word “zoning” in §332(c)(7). Zoning is the “legislative division of a region, most commonly a city, into separate districts with different regulations within the districts for land use, building size, etc.” Eugene McQuillin, *Law of Municipal Corporations*, § 25.01 (“McQuillin”) (3d ed.). As the Supreme Court explained:

Building zone laws . . . began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities.

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386-87 (1926). Regulating a telecommunications carrier’s use of the public rights-of-way is not *zoning*. It is instead “a delegation of police power of the state government” to make “necessary and desirable regulations . . . in the interest of public safety and convenience.” McQuillin § 24.565.

The panel erred in finding that §253(a) preempted the WTO to the extent the WTO regulated a wireless carrier’s use of private property to construct a wireless facility.⁴ A wireless carrier challenging a local *zoning* ordinance can only claim preemption under §332(c)(7). See *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 735 (9th Cir. 2005) (supremacy is “fully vindicated in the TCA’s anti-discrimination and anti-prohibition provisions”). Any other holding would limit local zoning authority in ways not intended by Congress. For example, in contrast with right-of-way use permits, zoning permits are generally

⁴ The panel should have considered whether this aspect of the WTO could have been severed and thus saved from preemption. See *Qwest Communications, Inc. v. City of Berkeley*, 433 F.3d 1253, 1259 (9th Cir. 2006).

discretionary and local governments routinely require voluminous information, public notice and a hearing. See, e.g., *id.* at 718-19. Congress understood this when it enacted the TCA. See H.R.Conf.Rep.No.104-458, 208 (recognizing that a local decision could require a “zoning variance” or a “public hearing”).

B. THIS COURT SHOULD GRANT REHEARING *EN BANC* TO CONSIDER THE IMPACT THE PRESUMPTION AGAINST PREEMPTION WOULD HAVE ON ITS ANALYSIS.

Sprint’s preemption challenge concerns a potential bar to state and local laws in areas that are traditionally subject to state regulation. See *Communications Telesystems International v. California Public Utilities Commission*, 196 F.3d 1011, 1017 (9th Cir. 1999) (“*CTP*”) (telecommunications); *Cox v. State of Louisiana*, 379 U.S. 536, 554 (1965) (management of public streets); *Village of Euclid*, 272 U.S. at 365 (zoning). In such instances, there is a presumption against preemption and Congressional intent to preempt state and local laws “must be clear and manifest.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

In its decision, the panel ignored this presumption. Moreover, other than in *CTI*, this Court has failed to even mention, let alone apply, this presumption to its §253(a) preemption analysis. Accordingly, this Court should reexamine its §253(a) preemption rulings in light of this presumption.

C. THIS COURT SHOULD GRANT REHEARING *EN BANC* TO ADDRESS THE CONFLICT WITH A DECISION BY ANOTHER CIRCUIT AND BECAUSE OF CONCERNS EXPRESSED BY COURTS IN THIS CIRCUIT.

In *City of Auburn*, this Court held that §253(a) preempts local ordinances that “‘may . . . have the effect of prohibiting’ the provision” of telecommunications services, 260 F.3d at 1175, and that this preemption is “virtually absolute.” *Id.* Other panels and district courts in this Circuit have repeatedly questioned this broad construction of §253(a).

For example, other panels of this Court have expressed concern over the breadth of this Court's §253(a) decisions.⁵ See *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004), *cert. denied*, 544 U.S. 1049 (2005) (“We have previously ruled that regulations that may have the effect of prohibiting the provision of telecommunications services are preempted. Like it or not, both we and the district court are bound by our prior ruling.”) District courts in this Circuit have also struggled to try to reconcile *City of Auburn* with the plain language of §253(a). See, e.g., *Qwest Corp. v. City of Portland*, 2006 WL 2679543, at *2 (D.Or., Sept. 15, 2006) (plaintiff “must rely on more than speculation to show a potential prohibitory effect”); *Pacific Bell Telephone Co. v. California Department of Transportation*, 365 F.Supp.2d 1085, 1088 (N.D.Cal. 2005) (plaintiff must “come forward with sufficient evidence” that a local requirement is a “barrier to entry”); *Time Warner Telecom of Oregon, LLC v. City of Portland*, 452 F.Supp.2d 1084, 1093 (D.Or. 2006) (“analysis of a challenged regulation should not be completely divorced from economic reality”); *City of Portland v. Electric Lightwave, Inc.*, 452 F.Supp.2d 1049, 1059 (D.Or. 2005) (this Court's interpretation of §253(a) “appears to depart from the plain meaning of the statute and extend the barrier for local regulation of telecommunications services beyond what Congress intended”).

The sweeping scope of *City of Auburn* is apparent from a recent decision in a case in which plaintiff Verizon Wireless challenged a local ordinance requiring it

⁵ At least three pending appeals in this Court concern §253 claims. *NextG Networks of California, Inc. v. City and County of San Francisco* (No.06-16435); *City of Portland v. Qwest Corp.* (No.06-36022); *Time Warner Telecom v. City of Portland* (No.06-36024).

to obtain major encroachment permits to construct wireless facilities in the public rights-of-way. See *GTE Mobilnet of California Ltd. Partnership v. City and County of San Francisco*, 2007 WL 420089 (N.D.Cal., Feb. 6, 2007). Despite evidence that Verizon Wireless had built an extensive network of facilities on private property in San Francisco, which it used to serve tens of thousands of customers and earn tens of millions of dollars annually, the district court preempted the city ordinance under §253(a). *Id.* at *1, 4. The court found that “a showing that an ordinance ‘may have’ the effect of prohibiting a protected interest is sufficient to sustain a facial challenge.” *Id.* at *4.

In light of these decisions, it is not surprising that the Eighth Circuit recently rejected this Court’s analysis of §253(a). *Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007). In so doing, the court held that “no reading [of §253(a)] results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services.” *Id.* at 533.

Given the misgivings and concerns expressed by other courts and judges in this and other circuits over the breadth of *City of Auburn*, this Court should reexamine its decision in that case through *en banc* review. In so doing, this Court could resolve a potential inter-circuit conflict and provide further guidance to other panels and districts courts in this Circuit that must apply this Court’s precedents to the matters before them.

D. THE PANEL’S DECISION HAS IMPORTANT PUBLIC POLICY IMPLICATIONS.

This Court’s construction of §253(a) in both *City of Auburn* and this case, if allowed to stand, would have profound public policy implications. Taking this Court’s interpretation to its logical conclusion, no local ordinance regulating telecommunications carriers escapes preemption as a barrier to entry, even when

challenged by a carrier that has been serving the local community for years. Even local zoning laws, which generally require public hearings, could be preempted.

Congress did not intend this result. Congress recognized that local governments had an important role in regulating telecommunications carriers. In the TCA, Congress therefore saved local right-of-way use regulations from preemption by §253(a) (*see* 47 U.S.C. § 253(c)) and preserved local zoning authority in §332(c)(7). The panel's decision cries out for *en banc* review.

III. CONCLUSION

Amici suggest that the panel grant rehearing or, in the alternative, that this Court grant rehearing *en banc*.

Dated: April 12, 2007

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 2,092 words up to the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on April 12, 2007.

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MAY 01 2007

In the
UNITED STATES COURT OF APPEALS
For the
NINTH CIRCUIT

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

SPRINT TELEPHONY PCS, L.P., a Delaware Limited Partnership,
Plaintiff-Appellant/Cross-Appellee,

v.

COUNTY OF SAN DIEGO, et al.,
Defendants-Appellees/Cross-Appellants.

Appeal From a Decision of the United States District Court for the
Southern District of California (San Diego), No. 03-CV-1398
The Honorable Barry T. Moskowitz, District Judge

**APPELLANT/CROSS-APPELLEE SPRINT TELEPHONY PCS, L.P.'S
— RESPONSE TO PETITION FOR REHEARING OR FOR REHEARING *EN*
*BANC***

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I. INTRODUCTION.

The County's petition for rehearing by the panel or rehearing en banc falls short of the high burden for rehearing and should be denied.

In its March 13 decision, applying the Court's well-established precedent interpreting 47 U.S.C. § 253(a) ("section 253"), the panel properly held that the County's wireless telecommunications ordinance ("the WTO") ran afoul of section 253's "virtually absolute" preemption. The panel recognized that the WTO, through its open-ended discretion and imposition of onerous processes based on that discretion, violates the TCA for the identical reason as the ordinances in *City of Auburn v. Qwest Corp.*, 260 F.2d 1160 (9th Cir. 2001). The panel also invalidated the WTO based on factors substantially similar to those the Court found offensive in *Qwest Communications Inc. v. City of Berkeley*, 433 F.3d 1253, 1257-58 (9th Cir. 2006).

Nonetheless, the County asks for rehearing, arguing that the panel's decision *conflicts with* Ninth Circuit case law and creates a split of authority among circuit courts. These arguments are misplaced and do not create grounds for rehearing.

"The purpose of petitions for rehearing, by and large, is to ensure that the panel properly considered all relevant information in rendering its decision." *Armster v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 806 F.2d 1347, 1356 (9th Cir. 1986). A petition for rehearing by the panel is properly limited to only "point[s] of

law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition.” FRAP 40.

A petition for rehearing en banc faces an even stricter standard. “The criteria for taking a case en banc are clear and well-established-either necessity ‘to secure or maintain uniformity of the court’s decisions,’ or to decide ‘question of exceptional importance.’ . . . Its function is not to maintain uniformity of language or thought by three judge panels, but to maintain uniformity of decisions. [T]he only purpose of [an] en banc call is to curb ‘meddling’ by a three judge panel.” *U.S. v. Burdeau*, 180 F.3d 1091, 1092 (9th Cir. 1991); *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1073 n.14 (9th Cir. 2002). *See also* FRAP 35.

Applying these rehearing standards here, the panel’s decision should be left undisturbed for at least three reasons.

First, the panel’s decision does not conflict with, but follows, the Court’s precedent. The panel properly applied section 253(a)’s virtually absolute preemption to invalidate the WTO. The panel did not, as the County contends, apply an incorrect preemption standard. The panel’s decision likewise is consistent with the Court’s interpretation of TCA section 332 in *MetroPCS v. City & County of San Francisco*, 400 F.3d 715 (2005), which did not address section 253 but addressed only the scope of a carrier’s ability to bring various types of section 332 challenges based on denials of individual permitting decisions.

Second, the County’s argument that the panel’s decision creates a conflict among circuits is oversold and, ultimately, inconsequential. The panel’s determination that section 253(a) preempts ordinances that either actually or *may* prohibit or have the effect of prohibiting telecommunications service is a sound interpretation, which is well-supported by at three prior Ninth Circuit decisions and adopted by the majority of circuits. But even if the Court reversed its past decisions and adopted the Eighth Circuit’s “existing material interference” standard, the WTO is still invalid. The evidence shows that the County not only can, but *has* used its reservation of discretionary, subjective authority to bottleneck proposed sites in a morass of regulation. The County’s argument to the contrary is a blatant, highly misleading mischaracterization of the evidence in the record.

Third, the TCA was enacted to promote “competition among and reduce regulation of telecommunications providers” and to provide a “national policy framework.” *City of Auburn*, 260 F.3d at 1170. The panel’s decision effectuates these policies. The County’s argument—that section 253(a) preempts only blanket bans of telecommunications services—would turn those policies on their head.

The County’s petition for rehearing should therefore be denied.

II. THE PANEL FOLLOWED ESTABLISHED PRECEDENT.

A. The Panel Properly Applied Section 253(a)'s Virtually Absolute Preemption to Invalidate the WTO.

The County's first argument for rehearing—that the panel applied the wrong preemption standard to Sprint's facial challenge of the WTO—is misplaced. In fact, the panel applied the correct standard.

In *City of Auburn*, 260 F.3d at 1160, the Court set forth the appropriate framework to evaluate whether an ordinance conflicts with section 253:

The Supremacy Clause, U.S. Const. art. VI, cl.2, invalidates state laws that “interfere with, or are contrary to,” federal law.... Within constitutional limits, Congress is empowered to preempt state law in several ways, including by expressly stating its intention to do so.... In this case, there can be no doubt that the Act preempts expressly; it states that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. 47 U.S.C. § 253(a). The question for the court, then, is whether the ordinances “interfere with, or are contrary to” the act.

City of Auburn, 260 F.3d at 1175 (citations omitted).

As the Court has also recognized, section 253(a)'s preemption is “virtually absolute and its purpose is clear—certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has narrowly circumscribed the role of state and local governments in the arena. Municipalities therefore have a very limited and proscribed role in the regulation of

telecommunications.” *City of Auburn*, 260 F.3d at 1175. *See also Qwest Communications Inc. v. City of Berkeley*, 433 F.3d 1253, 1256 (9th Cir. 2006) (reaffirming section 253’s “virtually absolute” preemption).

Moreover, “section 253(a) preempts regulations that not only prohibit outright the ability of any entity to provide telecommunication services but also those that may have the effect of prohibiting the provision of such services.” *City of Auburn*, 260 F.3d at 1175. *See also City of Berkeley*, 433 F.3d at 1526 (“[R]ather than considering the actual impact of Ordinance 6630, we must determine whether the specific regulations of Ordinance 6630 ‘may have the effect of prohibiting the provision of telecommunications services’”); *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1239 (9th Cir. 2004) (“[R]egulations that *may* have the effect of prohibiting the provisions of telecommunications services are preempted.”).

Applying section 253’s virtual absolute preemption here, the panel reached the right conclusion: the WTO, through its multiple levels of discretionary, subjective review, exceeds the narrow regulatory role that section 253 allows localities to retain.

The County points to the panel’s quotation of and argues that the panel misapplied the direction in *U.S. v. Salerno*, 481 U.S. 739, 745 (1987), that a facial challenge to a law “must establish that no set of circumstances exists under which

the Act would be valid.” *See also* County’s Petition, at 4. Then, the County argues, because the WTO does not result in the denial of *all* permit applications in *all* circumstances, there are some circumstances under which the WTO is valid. This argument distorts the preemption principles in play here, as it is unfaithful to the Court’s past section 253 interpretations.

Initially, *Salerno* did not involve the question of whether federal law preempted a conflicting local law. It involved a facial challenge to a federal statute on due process and Eighth Amendment grounds. *Salerno*, 481 U.S. at 746. *Salerno*’s usefulness here—to the question of whether a local law conflicts with an expressly preempting federal statute—is therefore limited. Instead, as *City of Auburn* recognizes, the proper question is whether the WTO “interferes with, or is contrary to,” section 253’s virtually absolute preemption. *City of Auburn*, 260 F.3d at 1175; *City of Portland*, 385 F.3d at 1239-40; *City of Berkeley*, 433 F.3d at 1256.¹

Even applying *Salerno*, however, the County’s conclusion does not follow. The appropriate question applying *Salerno* would be—given section 253(a)’s express, virtually absolute preemption of conflicting local laws, and section 253’s

¹ The County also points out the Court’s quotation of *Salerno* in *Chamber of Commerce of the United States v. Lockyer*, 463 F.3d 1076, 1082 (9th Cir. 2006). But that case also did not present the preemption question that is asked here: whether a federal statute’s express preemption clause trumps a potentially conflicting local law.

application to ordinances that either outright prohibit or *may* prohibit or *may* have the effect of prohibiting telecommunications services—whether there are any circumstances under which the WTO is valid. The answer is no. Just like the ordinances in *City of Auburn* and *City of Berkeley*, the WTO is preempted and cannot be valid under any circumstances because, on its face, it preserves the exact type of unfettered, subjective discretion and imposes the precise type of requirements that the Court has previously held prohibit or may have the effect of prohibiting telecommunications service. *City of Auburn*, 260 F.3d at 1177 (lengthy process, with “ultimate cudgel” being the reservation of broad discretion, violates section 253); *City of Berkeley*, 433 F.3d at 1257-58 (regulatory scheme violated section 253 because requirements were “patently onerous” and discretion reserved to locality was “significant”).

— The County’s application of *Salerno*—that it means the WTO is valid as long as the County can point to the absence of a blanket prohibition against any and all permits—ignores this court’s precedent and the appropriate preemption analysis set forth in *City of Auburn*. While the panel correctly applied past precedent, it is the County who seeks to reinterpret section 253’s virtually absolute preemption as instead being virtually (if not completely) meaningless.²

² In a footnote, similar to its past arguments, the County suggests that section 253 is limited to ordinances that are express barriers to “entry.” (County petition, at 5 n.3). Similarly, in its amicus brief in support of the County’s petition for

B. The Panel’s Decision Does Not Conflict with *MetroPCS*.

Although the County also argues that the panel’s decision conflicts with the Court’s *MetroPCS* decision, the panel’s decision is in fact entirely consistent with *MetroPCS*.

MetroPCS reviewed whether the city’s denial of two wireless applications violated 47 U.S.C. §332. From the outset, this Court identified the statutory framework to which its opinion applied: sections 332(c)(7)(A)(i), (iii) and (iv), not the entire TCA. *MetroPCS*, 400 F.3d at 720, n.1. Within this context, the Court stated, “the TCA”— *i.e.*, *the provisions of Section 332 at issue*—“is apparently agnostic as to the substantive content of local zoning ordinances.” *MetroPCS*, 400 F.3d at 725 n.3. Similarly, the Court stated, “the TCA”—*i.e.*, *Section 332*—“does

rehearing, the National League of Cities argues that section 253 preempts only “franchise” ordinances. Both arguments are misplaced for reasons well-articulated in the panel’s decision.

Effectively, the County and its supporters try to import limitations into section 253(a)—that no “franchise requirement” or “entry requirement” may prohibit telecommunications. But section 253(a) is not so limited. It broadly preempts any “statute,” “regulation” or “legal requirement,” not just any “franchise” or “entry” requirement. Attempts to read limitations into statutes where none exists are improper. *See U.S. v. Rutherford*, 442 U.S. 544, 552 (1979) (“Exceptions to clearly delineated statutes will be implied only where essential to prevent ‘absurd results’ or consequences obviously at variance with the policy of the enactment as a whole.”); *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001) (rejecting interpretation that “require[s] this court to read exceptions into the statute’s plain language”). Therefore, the panel has already properly rejected this argument as “unconvincing.” March 13 Order, at 3019.

not intrude upon the substantive content of local zoning rules,” and “the TCA”—*i.e., Section 332*— “is agnostic as to the substantive content of local regulations.” *MetroPCS*, 400 F.3d at 730 n.6. *MetroPCS* did not mention section 253 once, let alone preclude section 253 challenges to ordinances like the WTO. The County’s attempt to read *MetroPCS* as interpreting section 253 as agnostic to the content of zoning ordinances would effectively reverse and negate *City of Auburn* and *City of Berkeley*. *MetroPCS* cannot be stretched so far.

The County urged in initial briefing, and urges again in its petition, that *MetroPCS* adopted a strict standard for invalidating an ordinance when launching a facial challenge, and that the panel’s supposedly more lenient standard for invalidating an ordinance under section 253 conflicts with *MetroPCS*. The panel properly rejected the County’s attempt to contrive a conflict where none exists:

The County also argues that we have established a “more lenient standard” for successful facial challenges under § 253(a) than under § 332(c)(7)(B)(i), relying on a supposed conflict between dicta in *MetroPCS*, 400 F.3d at 724, 725 n. 3, 727 (alluding to the difficulty under § 332(c)(7)(B) of bringing facial challenge based on a *single zoning decision*) and *Auburn*, 260 F.3d at 1175 (discussing under § 253(a) a facial challenge to a franchise *regulation*). Though we conclude here that Sprint’s challenge to the WTO meets the criterion described in *Auburn* for challenging an ordinance, we reject the argument that we have lowered the threshold suggested by *MetroPCS* for a successful facial challenge predicated on a zoning decision.

March 13 Order, at 3015 n.5.³ Thus, the panel directly addressed *MetroPCS* and concluded that, at its most liberal reading, *MetroPCS* suggested a standard for a facial challenge to an ordinance based on a particular zoning decision, which is not the issue before the panel.

III. THE COUNTY’S BELATED RELIANCE ON AN EIGHTH CIRCUIT CASE DOES NOT WARRANT REHEARING.

In addition to supposed conflicts with the Court’s own precedent, the County argues that rehearing should be granted because the panel’s decision and past Ninth Circuit precedent conflict with the Eighth Circuit’s decision in *Level 3 Communications, LLC v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007). This purported inconsistency with *Level 3* does not warrant rehearing.

As a procedural matter, *Level 3* came out over a month before the panel’s March 13 decision in this case. But the County made no attempt to submit it as supplemental authority that should be considered by the panel. Only now does the County use *Level 3*, apparently under the guise of “subsequent authority,” in an attempt to be reheard.

³ In any event, to the extent that *MetroPCS* might be considered in conflict with *City of Auburn*, the panel correctly interpreted *MetroPCS* to avoid such a conflict. *MetroPCS*, to the extent it might conflict with the *earlier* decision in *Auburn*, is invalid. *McMellon v. U.S.*, 387 F.3d 329, 333 (4th Cir. 2004) (joining seven other circuits in holding that, “as to conflicts between panel opinions, application of the basic rule that one panel cannot overrule another requires a panel to follow the earlier of the conflicting opinions”).

Apart from the procedural questionability of the County's invocation of *Level 3*, rehearing based on *Level 3* is unwarranted. *Level 3* is contrary to *four* Ninth Circuit decisions (including the panel's decision) as well as the majority of circuits that have embraced the Ninth Circuit's sound interpretation of section 253(a). In any event, even applying the Eighth Circuit's "existing material interference standard," the evidence shows that the WTO is invalid.

A. The Panel's Section 253 Interpretation Follows Established Ninth Circuit Precedent, is Sound, and is Embraced by the Majority of Circuit Court.

Level 3 is inconsistent with this Court's established precedent, which the panel followed.

As the *Level 3* court acknowledges (477 F.3d at 532), *three times* before this panel's decision, the Court has reviewed section 253(a)'s language. And *three times*, it has concluded that section 253(a) preempts both ordinances that actually prohibit and that *may* prohibit or have the effect of prohibiting provision of telecommunications services. *See supra* Part II.A; *City of Berkeley*, 433 F.3d at 1526; *City of Portland*, 385 F.3d at 1239; *City of Auburn*, 260 F.3d at 1175. This issue is settled in this circuit.

Not only is this interpretation settled law; it is also a sound reading of section 253(a). As the Court's interpretation recognizes, fundamentally, there is no meaningful difference between an ordinance that, on its face, prohibits

telecommunications services and one that imposes burdensome and discretionary regulations that allow a municipality the regulatory latitude to put applications to install telecommunications facilities in an endless morass of delay and uncertainty.

Not surprisingly, as *Level 3* also acknowledges, the majority of circuits agree with this Court; *not* the Eighth Circuit. At least the First and Tenth Circuits agree that section 253(a) does not require evidence of actual prohibition. *Puerto Rico v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004). The Eighth Circuit stands alone.

The County also misleadingly argues that “the district courts in the circuit have similarly recognized that §253(a)’s plain language has been distorted.” (County Petition, at 11). The County cites only two decisions—both from the district of Oregon, one of which was reversed by this Court on this precise point in *City of Portland*, 385 F.3d at 1240-41, and both of which predate the Court’s explicit affirmation of the rule and explicit rejection of the contrary argument in *City of Berkeley*, 433 F.3d at 1256-57. In fact, the vast majority of district courts in this circuit have expressed no concern or issue with the Court’s unanimous decisions on this point. *See, e.g., Pacific Bell Tel. Co. v. City of Walnut Creek* 428 F. Supp. 2d 1037, 1044 (N.D. Cal. 2006); *NextG Networks of California, Inc. v. City of San Francisco*, 2006 WL 1529990, at *4 (N.D. Cal. June 2, 2006); *GTE Mobilenet of California Ltd. V. City & County of San Francisco*, 2007 WL 420089,

at *4 (N.D. Cal. Feb. 6, 2007); *Cox Commnc's PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1260, 1265 (S.D. Cal. 2002).

B. The WTO Is Invalid Even Under the Eighth Circuit's "Existing Material Interference" Standard.

Even if the Court were to reverse its established course and follow *Level 3*, the WTO is invalid even under *Level 3's* standard.

The County suggests that *Level 3* holds that prohibitory effect in the form of actual denials or an outright ban on telecommunications must be shown for section 253(a) to be violated. But *Level 3* adopts a far less stringent standard:

Thus, we hold that a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition. ***The plaintiff need not show a complete or insurmountable prohibition, see TCG New York, Inc. v. City of White Plains***, 305 F.3d 67, 76 (2d Cir.2002), but it must show an existing material interference with the ability to compete in a fair and balanced market (emphasis added).

Level 3, 477 F.3d at 533 (emphasis added). Thus, *Level 3* requires an "existing material interference," not outright denials or prohibitions.

Level 3's citation of *City of White Plains* is also telling. There, the court did not directly address the question of whether section 253(a) requires actual prohibition. Instead, applying rhetoric similar to *Level 3's* material interference test, the Second Circuit concluded:

Certain portions of White Plains's Ordinance clearly have the effect of prohibiting TCG from providing telecommunications service. ***In particular, the provision***

that gives the Common Council the right to reject any application based on any “public interest factors ... that are deemed pertinent by the City” amounts to a right to prohibit providing telecommunications services, albeit one that can be waived by the City. See Ordinance, § 2.7-01(vii).

White Plains, 305 F.3d at 76. (emphasis added). Thus, one of the reasons that *White Plains* decided the ordinance there had an existing material interference was for precisely the same reason relied on by the panel in invalidating the WTO: because the ordinance there (as the WTO does here) reserved unfettered discretion to reject any application based on any public interest factors deemed pertinent.

In any event, even looking at actual prohibitory effect, contrary to the County’s assertion, the “undisputed” evidence does not show that the County’s discretionary wireless scheme has had no material effect on Sprint’s ability to deploy its network. The evidence shows precisely the opposite. Defendants’ discretionary regulatory scheme has put many of Sprint’s sites in a virtual stranglehold of delay. In one example, Sprint sought to install small antennas on an existing utility pole, along with underground equipment and one small above-ground equipment and vent pipes. (ER. pp. 74-77, 82 (Declaration of Daniel T. Pascucci, ¶¶ 4-9; Ex. B)). Exercising the discretion reserved to it under its discretionary use permit process, the County required Sprint to undergo years of processing, including seven public hearings and numerous community group meetings for this proposed site, with no approval for this site. Significantly, this

application was filed as a “minor use” permit application under the County’s wireless policy in effect prior to enactment of the WTO. Under the WTO, this application would be processed as a “major use” permit—and would be subjected to the number of other application requirements imposed by the WTO.⁴ And nothing in the WTO prevents the County from similarly protracting the processing of any wireless application it chooses.⁵

In total, as detailed in the report of Sprint’s forensics expert exchanged during discovery in the proceedings below, the County’s discretionary regulatory scheme has delayed or in some cases eliminated Sprint’s ability to develop its network in San Diego and decreased Sprint’s market share due to Sprint’s inability to obtain the required wireless coverage to attract customers. The construction delays due to the County’s onerous and lengthy application process, complete with extensive written application requirements, public hearings and appeals have already cost Sprint millions of dollars. *See* Sprint’s Opening Brief, at 18-20).

⁴ Nor is this site an anomaly. The County Board of Supervisors has also recently subjected other proposed Sprint right-of-way sites to prolonged and rigorous review, with no approval. (ER. p. 77 (Declaration of Daniel T. Pascucci, ¶ 10)).

⁵ In *White Plains*, the court did not expressly state whether or not proof of actual prohibition or delay was required before finding a section 253 violation. The court did note that “extensive delays in processing TCG’s request for a franchise have prohibited TCG from providing service for the duration of the delays.” *City of White Plains*, 305 F.3d at 76. Whether or not that was required, the combination in *City of White Plains* is the exact combination that the WTO, coupled with the evidence, shows here: discretion-laden regulation and evidence that the County has used such discretion to impose delays, costing Sprint millions of dollars.

In short, the County's scheme imposes precisely the same onerous requirements invalidated in *City of Auburn*. And even if actual impact is examined, the imposition of such a discretionary regime has had precisely the material disruption the Eighth Circuit suggests that section 253 requires.

IV. THE PANEL'S DECISION REINFORCES SOUND PUBLIC POLICIES.

The TCA was enacted "to secure lower prices and higher quality services for American telecommunications consumers...." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); *City of Auburn*, 260 F.3d at 1170. As Congress further stated, the vehicle to achieve to these goals is to "encourage the rapid deployment of new telecommunications technologies." *Id.* An injunction prohibiting the County from enforcing the WTO under section 253 is necessary in this case to achieve the TCA's goals within the County of San Diego.

The County urges the position that Congress intended to allow localities to bow to the Not-In-My-Backyard syndrome and impose any regulatory process, no matter how egregious, so long as they do not outright ban wireless facilities. If that were correct, wireless carriers would be handcuffed from ever challenging wireless ordinances, and would have to wait until a final decision is rendered on each individual application before bringing a challenge. This could take—and has taken—years. Blatantly unlawful ordinances would go unchecked and, rather than

a single suit to enjoin unlawful processes, carriers would have to file multiple suits challenging every bad decision resulting from an unlawful ordinance.

In sum, not only is the panel's decision consistent with the Court's precedent; it is consistent with the TCA's policies. The County's rehearing invitation represents nothing but yet another effort by the County to advance interpretations that thwart those same policies.

V. CONCLUSION.

For these reasons, the County's petition for rehearing or rehearing should be denied in its entirety, without modification of the panel's March 13 decision.

Dated: April 30, 2007

Respectfully submitted,

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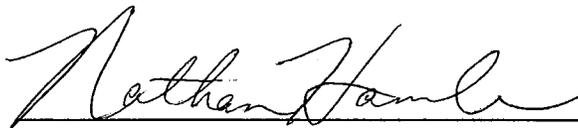
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations contained in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Exclusive of exempted provisions as set forth in Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure, this brief contains 4,115 words according to the word count function in the Microsoft Word 2003 software with which this brief was produced.

A handwritten signature in cursive script, appearing to read "Nathan Hamler", written over a horizontal line.

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PROOF OF SERVICE 05-56076(L), 05-56435

I am employed in the County of San Diego; my business address is Mintz Levin Cohn Ferris Glovsky and Popeo PC, 9255 Towne Centre Drive, Suite 600, San Diego, CA 92121. I am over the age of 18 and not a party to the foregoing action.

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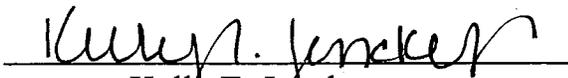
**APPELLANT/CROSS-APPELLEE SPRINT TELEPHONY PCS, L.P.'S
RESPONSE TO PETITION FOR REHEARING OR FOR REHEARING
EN BANC**

(two copies) to be served on the interested parties in this action by placing a true and correct copy thereof, enclosed in a sealed envelope, and addressed as follows:

John J. Sansone, County Counsel Thomas D. Bunton, Senior Deputy County of San Diego 1600 Pacific Highway, Room 355 San Diego, CA 92101	<u>Attorneys for Defendants– Appellees/Cross-Appellants</u> County of San Diego, Greg Cox, Dianne Jacob, Pam Slater, Ron Roberts and Bill Horn
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Kelly E. Jenckes

C.A. No. 05-56076; 05-56435

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UNITED STATES COURT OF APPEALS

MAY 03 2007

FOR THE NINTH CIRCUIT

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DATE INITIAL

SPRINT TELEPHONY PCS, L.P., a Delaware limited partnership,

Plaintiff – Appellant/Cross-Appellee,

v.

COUNTY OF SAN DIEGO, et al.,

Defendants – Appellees/Cross-Appellants.

On Appeal from the United States District Court
for the Southern District of California
No. CV-03-1398-BTM
Honorable Barry Ted Moskowitz, District Judge

**COUNTY OF SAN DIEGO'S REPLY BRIEF IN SUPPORT OF ITS
PETITION FOR PANEL REHEARING AND REHEARING *EN BANC***

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47 U.S.C.	
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The County of San Diego (the “County”) submits this short reply brief to respond to some of the arguments raised in Sprint’s Opposition to the County’s Petition for Panel Rehearing and Petition for Rehearing *En Banc*.

I. SPRINT HAS NOT MET ITS BURDEN UNDER THE STANDARD ANNOUNCED BY THE EIGHTH CIRCUIT

Sprint acknowledges that this Court’s decisions, which hold that an ordinance is preempted by 47 U.S.C. §253(a) if it “may” or “might” prohibit an entity for providing telecommunications services, conflict with the Eighth Circuit’s decision in *Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F. 3d 528 (8th Cir. 2007). However, Sprint argues that even if this Court were to apply the test adopted by the Eighth Circuit for establishing a prohibition, i.e., an “existing material interference with the ability to compete in a fair and balanced market,” it has met that burden. *Id.* at 533. Sprint is wrong.

Sprint notes that in *City of St. Louis* the Eighth Circuit cited *TCG New York, Inc. v. City of White Plains*, 305 F. 3d 67 (2d Cir. 2002) for the proposition that the “plaintiff need not show a complete or insurmountable prohibition” to establish a violation of §253(a). *City of St. Louis*, 477 F. 3d at 533. Sprint argues that in *City of White Plains* the court found a prohibition based upon the broad discretion contained in an ordinance without any evidence regarding how that discretion had been used by the city to prohibit service. (Sprint Brief, at 13-14.) It is clear that

the Eighth Circuit did not adopt this standard for invalidating an ordinance under §253(a). Indeed, the court specifically rejected it. The plaintiff in *City of St. Louis* made the same argument that Sprint is making here – a prohibition or effective prohibition is shown by “the scope of the regulatory authority that a city purports to wield--not whether the city *has used that authority to actually exclude a provider or service.*” 477 F. 3d at 533 (emphasis added; internal quotation marks omitted). The Eighth Circuit rejected that argument, concluding that the ordinance provisions themselves constitute “insufficient evidence from Level 3 of any actual or effective prohibition, let alone one that materially inhibits its operations.” *Id.* at 534.

Indeed, how could the County’s Ordinance on its face constitute a “materially interference” with Sprint’s ability to compete in the San Diego County market when the County has granted 6 of the 10 applications (and not denied a single application) that Sprint has submitted to install wireless facilities under the Ordinance? Given this undisputed evidence, it is beyond doubt that Sprint cannot meet its burden of showing a material interference with its ability to compete based on the County’s Ordinance alone. Therefore, Sprint’s §253(a) claim must fail.

A. The Delay “Evidence” Cited By Sprint Does Not Support Its Facial Challenge.

As an alternative, Sprint argues that if the Ordinance provisions themselves are not enough to establish a prohibition, there is “evidence” in the record that the County has delayed processing two of its permit applications to install wireless facilities. Sprint argues that this evidence is sufficient to show that the County’s Ordinance on its face materially inhibits its operations.¹ Once again, Sprint is mistaken.

Even if it were true that the County had delayed processing the two wireless permit applications (it has not done so), this evidence would not warrant striking down the County’s Ordinance *on its face*. Sprint does not dispute that the County has granted 6 of the 10 permit applications it has submitted since the Ordinance was enacted. Nor does Sprint contend that the County failed to process the 6 Sprint applications it has granted in a timely manner. Therefore, there is nothing in the Ordinance itself that inevitably leads to delays in granting permit applications. This fact alone establishes that any delay in processing these two permit

¹ Congress has determined that any time spent satisfying the normal requirements of a local ordinance governing the construction of wireless facilities does not result an improper delay that violates the Telecommunications Act of 1996. H.R. Conf. Rep. No. 104-458 at 208 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 223 (“If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances.”). This alone is fatal to Sprint’s claim that the Ordinance causes delays and therefore is preempted by §253(a).

applications is not a proper basis for striking down the County's Ordinance on its face.

This is true because unless an ordinance is invalid in all of its applications, it is not facially invalid. Sprint implies that a plaintiff alleging that a local ordinance is preempted by a federal statute does not have to satisfy this test. According to Sprint, this test only applies to facial challenges based upon constitutional provisions other than the Supremacy Clause. The panel rejected Sprint's argument and both the United State Supreme Court and this Court have held that the "no set of circumstances" test applies to facial preemption challenges. *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 580 (1987); *Chamber of Commerce of the United States v. Lockyer*, 463 F. 3d 1076, 1082 (9th Cir. 2006); *Committee of Dental Amalgam Manufacturers and Distributors v. Stratton*, 92 F. 3d 807, 810 (9th Cir. 1996).

At most, Sprint could allege that the Ordinance "as applied" to its two permit applications resulted in an illegal delay in violation of 47 U.S.C. §332(c)(7)(B)(ii) or a prohibition in violation of §332(c)(7)(B)(i)(II). An "as applied" challenge, however, would not invalidate the Ordinance itself. *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1111 n.3 (9th Cir. 1999) ("[A] successful 'as-applied' challenge does not invalidate the law itself, but only the particular application of that law.").

Moreover, Sprint admits that the two applications on which it relies were processed under a prior ordinance, *not the Ordinance that is at issue in this lawsuit*. (Sprint Brief at 15.) Therefore, any purported delay in processing these permit applications cannot be used to strike down the County's Ordinance on its face.

Further, the delay "evidence" upon which Sprint relies is contained in its attorney's declaration. (Sprint Excerpts of the Record, Vol. I, at 77, ¶¶ 4-10.) The attorney's statements do not attribute any purported delays to the County's Ordinance and do not cite any Ordinance provisions that were responsible for the purported delays. Further, neither the district court nor the panel found that any provision of the County's Ordinance inherently causes delays in considering permit applications and therefore prohibits an entity from providing telecommunications services. Accordingly, the attorney's statements do not show that the County's Ordinance has materially inhibited Sprint's ability to provide service or cost Sprint millions of dollars, as Sprint claims in its opposition.

Indeed, neither the district court nor the panel relied on the attorney's declaration. This was true in part because the County disputed this evidence, asserting that any delay was not caused by the County or its Ordinance, but by *Sprint's request that the County stop processing these applications* after it sued the County based on its handling of these applications. (County Supplemental

Excerpts of Record (“CER”) at 52-53, ¶ 6; County Reply Brief, at 24.) Since there is a material issue of fact in dispute regarding this evidence, it cannot be used to affirm the grant of summary judgment in favor of Sprint.²

The delay “evidence” cited by Sprint does not support its claim that the County Ordinance, on its face, materially inhibits Sprint’s ability to compete in the San Diego County market. Therefore, the County’s ordinance is not preempted by §253(a) and the panel’s decision should be overturned.

² Sprint asserts that its damages expert’s report shows that the County’s Ordinance has decreased Sprint’s market share and cost it millions of dollars. (Sprint Brief at 15). The district court did not rely on the expert’s report in granting the motion for summary judgment because Sprint did not submit it to the court prior to the ruling on the motion. Further, the expert denies that he has any opinion regarding whether the County’s Ordinance violates §253(a). (Sprint’s Excerpts of Record, Vol. II., at 221). In addition, no damages evidence was ever submitted because the district court ruled that Sprint could not recover damages against the County (the panel affirmed that ruling). Had the County needed to contest the report of Sprint’s damages expert during a damages proceeding, it would have done so. Most importantly, the expert report is unsworn and therefore hearsay, and cannot be considered in determining whether the district court properly granted summary judgment in favor of Sprint. *Pack v. Damon Corp.*, 434 F.3d 810, 815 (6th Cir. 2006) (citation omitted).

II. CONCLUSION

For these reasons, *en banc* review is necessary to overrule prior panel decisions holding that an ordinance is preempted by §253(a) if it “may” or “might” prohibit a telecommunications company from providing service. When the proper preemption test is applied, it is apparent that the County’s Ordinance does not, on its face, prohibit Sprint from providing service in the County.

DATED: 5/2/07

JOHN J. SANSONE, County Counsel

By 

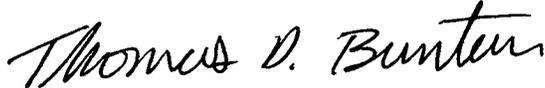
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San Diego

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure, rule 32(a)(7)(C) and Ninth Circuit Rules 32-1, 35-4, and 40-1, I certify that the attached County Of San Diego's Reply Brief In Support Of Its Petition for Panel Rehearing And Rehearing *En Banc* is double spaced, typed in Times New Roman proportionally spaced 14-point typeface, and the brief contains 1,545 words of text as counted by the Microsoft Word 2003 word-processing program used to generate the brief.

DATED: 5/2/07

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SPRINT TELEPHONY PCS, L.P. v. COUNTY OF SAN DIEGO, et al.;
C.A. No. 05-56076; 05-56435 (No. CV-03-1398-BTM)

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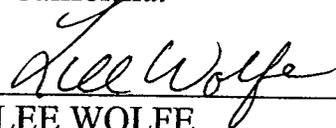
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C.A. No. 05-56076; 05-56435

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

SPRINT TELEPHONY PCS, L.P., a Delaware limited partnership,

Plaintiff – Appellant/Cross-Appellee,

v.

COUNTY OF SAN DIEGO, et al.,

Defendants – Appellees/Cross-Appellants.

On Appeal from the United States District Court
for the Southern District of California
No. CV-03-1398-BTM
Honorable Barry Ted Moskowitz, District Judge

COUNTY OF SAN DIEGO'S PETITION FOR REHEARING *EN BANC*

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I.

INTRODUCTION

The panel struck down the County’s Ordinance, which regulates the construction of individual wireless facilities, finding that it is preempted on its face by 47 U.S.C. §253(a), which is part of the Telecommunications Act of 1996 (the “TCA”). In doing so, the panel applied a lax preemption standard that, according to the Eighth Circuit, distorts the plain language of §253(a). *Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F. 3d 528, 533 (8th Cir. 2007). This Court should rehear this case, *en banc*, in order to address this recently created circuit split.

The panel also failed to apply the appropriate standard governing facial challenges to allegedly preempted ordinances. The panel recognized that under binding United States Supreme Court and Ninth Circuit precedent, Sprint’s facial challenge must be rejected unless no set of circumstances exists under which the County’s Ordinance would be valid. Thus, Sprint must show that the Ordinance will prohibit or have the effect of prohibiting Sprint from providing service under all circumstances. While the panel noted the appropriate standard, it failed to follow that standard and therefore binding Supreme Court and Ninth Circuit precedent.

The undisputed evidence, which the panel ignored, establishes that the County *granted* 6 of the 10 permit applications Sprint submitted since the Ordinance was enacted. None of Sprint's applications have been denied. Thus, it is clear that the Ordinance does not in all circumstances prohibit Sprint from providing service.

Finally, in rejecting the County's contention that this Court has applied a more lenient standard to facial challenges brought under §253(a) than to such challenges brought under §332(c)(7)(B)(i)(II),¹ the panel recognized that Congress intended that for a facial challenge to succeed under either of these two sections, a plaintiff would have to prove that the regulations banned wireless facilities on their face or contain policies that have the effect of banning those facilities.

However, the panel failed to apply this standard to the County's Ordinance provisions. The panel apparently concluded the Ordinance's reservation of broad discretion to grant or deny an application for a use permit to build a wireless facility rises to the level of a ban. This conclusion conflicts with this Court's decision in *MetroPCS, Inc. v. San Francisco*, 400 F.3d 715, 724 (9th Cir. 2005), where the Court recognized that San Francisco's use permit ordinance did not ban

¹ All sections referenced are contained in 47 U.S.C.

wireless facilities even though the city had extremely broad discretion to deny a permit application if it believed the wireless facility was not necessary.

II.

THE PANEL APPLIED A LAX PREEMPTION STANDARD, WHICH THE EIGHTH CIRCUIT HAS SHOWN IS CONTRARY TO §253(a)'s PLAIN LANGUAGE

The panel's decision striking down the County's Ordinance on its face was based on prior panel decisions of this Court holding that an ordinance is preempted if it "may" or "might" have the effect of prohibiting an entity from providing telecommunications services. Thus, the panel did not require Sprint to present any evidence that the County's Ordinance provisions have prohibited it from providing service, and ignored the evidence to the contrary. As the Eighth Circuit explained in a recent decision, this Court's prior decisions have distorted §253(a)'s plain language. The Court should take this case *en banc* to reverse these prior erroneous rulings.

The misreading of §253(a)'s plain language arose in *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175 (9th Cir. 2001), where the Court quoted *Bell Atl. v. Prince George's County*, 49 F.Supp.2d 805, 814 (D. Md. 1999), *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2000), for the proposition that "[s]ection 253(a) preempts regulations that not only 'prohibit' outright the ability of any entity to provide telecommunications services, but also those that '*may have*

the effect of prohibiting the provision’ of such services.” (internal ellipses omitted) (emphasis added). In *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004), this Court stated that “[w]e do not agree that Qwest was required to make an actual showing of ‘a single telecommunications service that it . . . is effectively prohibited from providing.’ We have previously ruled that regulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted. ***Like it or not***, both we and the district court are bound by our prior ruling.” *Id.* (citation omitted) (emphasis added). *Accord Qwest Communications v. City of Berkeley*, 433 F.3d 1253, 1256-57 (9th Cir. 2006) (“[T]he City contends that Qwest must show the actual impact of Ordinance 6630 on Qwest’s ability to provide telecommunications services. . . . [R]ather than considering the actual impact of Ordinance 6630, we must determine whether the specific regulations of Ordinance 6630 ‘may have the effect of prohibiting the provision of telecommunications services’ in the City.”) (citation omitted). The panel applied the same standard in this case. (Amended Opinion, at 7194) (relying on *City of Auburn* to strike down the County’s Ordinance provisions even though Sprint presented no evidence that these provisions have actually prohibited Sprint from providing telecommunications service, and the undisputed evidence is to the contrary).

The Eighth Circuit recently demonstrated that the *City of Auburn* standard (regulations that *may have* the effect of prohibiting the provision of telecommunications services are preempted) is directly at odds with the plain language of §253(a), and therefore refused to follow that standard. *City of Saint Louis*, 477 F. 3d at 533.

The Eighth Circuit correctly recognized that “[e]xamination of the entirety of section 253(a) reveals the subject of the sentence, ‘[n]o State or local statute or regulation, or other State or local legal requirement’ is followed by two discrete phrases, one barring any regulation which prohibits telecommunications services, and another barring regulations achieving effective prohibition. However, no reading results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services, as our sister circuits seem to suggest.” *Id.* at 533 (citations omitted). The Eighth Circuit properly concluded that in *City of Portland* this Court “distorted” the meaning of §253(a) by “creative quotation.” *Id.* Indeed, the Maryland district court opinion upon which this Court relied in *City of Auburn* engaged in exactly the same “creative quotation.” *Prince George’s County*, 49 F.Supp.2d 805, 814.

Accordingly, the Eighth Circuit held that “a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition. The plaintiff need not show a complete or

insurmountable prohibition, but it must show an existing material interference with the ability to compete in a fair and balanced market.” *Id.* (citations omitted).

Applying this standard, the Eighth Circuit rejected the plaintiff’s argument that prohibition or effective prohibition is shown by “the scope of the regulatory authority that a city purports to wield--not whether the city has used that authority to *actually* exclude a provider or service.” *Id.* Sprint made the same argument in this case. (Amended Opinion at 7178) (“Sprint suggested that the ‘onerous’ permitting structure of the WTO, and the discretion retained by the County, prevented it from providing wireless service.”). Adherence to §253(a)’s plain language would have resulted in the rejection of Sprint’s contention.

The district courts in the circuit have similarly recognized that §253(a)’s plain language has been distorted. *Qwest Corp. v. City of Portland*, 200 F.Supp.2d 1250, 1255 (D. Or. 2002) (“Qwest has relied on an incorrect, overly broad version of § 253(a)’s preemption test, which was *unfortunately quoted in the City of Auburn opinion*. . . . *The quoted phrase simply misreads the plain wording of the statute*, and implies that the statute bars not only those local requirements that actually prohibit or have the effect of prohibiting the ability to provide telecommunication service, but also those requirements that *may* have that effect. *That is not what the statute says*. . . . Congress used the word ‘may’ as a synonym for ‘is permitted to.’”) (emphasis added), *rev’d* 385 F.3d 1236 (9th Cir. 2004); *City*

of Portland v. Elec. Lightwave, Inc., 452 F.Supp.2d 1049, 1059 (D. Or. 2005)

(“The Ninth Circuit's interpretation of the scope of section 253(a) appears to ***depart from the plain meaning of the statute and extend the barrier for local regulation of telecommunications services beyond what Congress intended.***”) (emphasis added).

Here, the panel concluded that the County’s Ordinance may prohibit Sprint from providing service based on the scope of the County’s authority contained in its Ordinance; i.e., its broad discretion to deny permit applications, its ability to require public hearings, its ability to require the submission of certain materials. There is no evidence, however, that the County has used its discretion or the other Ordinance provisions to prohibit Sprint from providing service. As discussed in detail below, the evidence is to the contrary. The County has granted 6 of the 10 applications Sprint has submitted to build wireless facilities and has not denied a single Sprint application to build a wireless facility. Moreover, since Sprint has successfully complied with the County’s Ordinance provisions, the provisions clearly do not constitute a “material interference with [Sprint’s] ability to compete in a fair and balanced market.” *City of St. Louis*, 477 F.3d at 533. *Accord City of Portland*, 200 F.Supp.2d at 1256 (“Qwest has managed to provide telecommunications services in the Cities for many years while laboring under the allegedly prohibitive right-of-way fees and other requirements. . . Qwest has not

pointed to a single telecommunications service that it, or any other entity, is effectively prohibited from providing because of the Cities' revenue-based fees or any of the other challenged requirements.”); *AT&T Communs. of the Pac. Northwest v. City of Eugene*, 35 P.3d 1029, 1048 (Or. Ct. App. 2001) (“That argument, however, amounts to little more than speculation about the possible effect of the city's telecommunications ordinance on the industry generally. It is buttressed by no evidence about the actual or likely effect of the city's ordinance on them or any other particular telecommunications providers. . . . [Moreover,] it is not easy to understand how being required to satisfy a requirement that the companies contend they already have satisfied constitutes an effective prohibition of their ability to provide services.”).

Under the plain language of §253(a) and the Eighth Circuit's recent decision based on that language, Sprint's facial challenge to the County's Ordinance must be rejected. Accordingly, this Court should take this case *en banc* in order to reverse its prior panel decisions holding that a local regulation is preempted if it “may” prohibit an entity from providing telecommunications services.

III.

BY FAILING TO APPLY THE APPROPRIATE STANDARD TO FACIAL CHALLENGES, THE PANEL'S DECISION CONFLICTS WITH SUPREME COURT AND NINTH CIRCUIT PRECEDENT

The panel correctly recognized that Sprint's facial challenge to the Ordinance "is, of course, the most difficult challenge to mount successfully." (Amended Opinion at 7185) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). The panel also recognized that Sprint "must establish that no set of circumstances exists under which the [Ordinance] would be valid." *Id. Accord Chamber of Commerce of the United States v. Lockyer*, 463 F.3d 1076, 1082 (9th Cir. 2006). Thus, Sprint must show that there is no set of circumstances in which the County's Ordinance will not "prohibit or have the effect of prohibiting" Sprint from providing telecommunications service. Section 253(a).

The undisputed evidence, which the panel ignored, prevented Sprint from making the required showing. This evidence showed that the County *granted* 6 of the 10 permit applications for wireless facilities that Sprint submitted since the Ordinance was enacted. (County's Supplemental Excerpts of the Record ("CER"), at 50, ¶ 4). None of Sprint's permit applications have been denied. (*Id.*)² Thus, it

² Sprint has asserted that the County prohibited Sprint from providing service by delaying the processing of two permit applications. The delay "evidence" upon which Sprint relies is contained in its attorney's declaration. (Sprint Excerpts of the Record, Vol. I, at 77, ¶¶ 4-10.) The attorney's statements do not attribute any purported delays to the County's Ordinance and do not cite any Ordinance provisions that were responsible for the purported delays. Further,

is clear that the Ordinance does not in all circumstances prohibit Sprint from providing telecommunications service.

Moreover, even if the Ordinance requires the submission of a “burdensome” application and supporting materials, reserves broad discretion in the County to grant or deny applications to install wireless facilities, requires public hearings³ on

neither the district court nor the panel found that any provision of the County’s Ordinance inherently causes delays in considering permit applications and therefore prohibits an entity from providing telecommunications services. Accordingly, the attorney’s statements do not show that the County’s Ordinance has materially inhibited Sprint’s ability to provide service.

Moreover, such delays cannot be the basis of a facial challenge to the County’s Ordinance. Even if it were true that the County had delayed processing the two wireless permit applications (it has not done so), this evidence would not warrant striking down the County’s Ordinance *on its face*. Sprint does not dispute that the County has granted 6 of the 10 permit applications it has submitted since the Ordinance was enacted. Nor does Sprint contend that the County failed to process the 6 Sprint applications it has granted in a timely manner. Therefore, there is nothing in the Ordinance itself that inevitably leads to delays in granting permit applications. This fact alone establishes that any delay in processing these two permit applications is not a proper basis for striking down the County’s Ordinance on its face. This is true because unless an ordinance is invalid in all of its applications, it is not facially invalid. At most, Sprint could allege that the Ordinance “as applied” to its two permit applications resulted in an illegal delay in violation of 47 U.S.C. §332(c)(7)(B)(ii) or a prohibition in violation of §332(c)(7)(B)(i)(II). An “as applied” challenge, however, would not invalidate the Ordinance itself. *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1111 n.3 (9th Cir. 1999) (“[A] successful ‘as-applied’ challenge does not invalidate the law itself, but only the particular application of that law.”).

³ The County pointed out to the panel that Congress clearly contemplated that public hearings would be held on applications to install wireless permit applications. H.R. Conf. Rep. No. 104-458 at 208 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 223. (“If a request for placement of a personal wireless service facility involves a zoning variance or *a public hearing* or comment process, the time period for rendering a decision will be the usual period under such circumstances.”) (emphasis added). The district court held that public hearings were allowed if the County restricted what the public could say at such hearings. *Sprint Telephony PCS, L.P. v. County of San Diego*, 377 F.Supp.2d 886, 896 (S.D. Cal. 2005). The County argued to the panel that this would be an unconstitutional content based restriction on speech. *Boos v. Barry*, 485 U.S. 312, 321 (1988); *Giebel v. Sylvester*, 244 F.3d 1182, 1189 n.13 (9th Cir. 2001). The panel did not consider the authorities cited by the County and apparently affirmed the district

permit applications and imposes penalties for violating the terms of a permit, this does not mean that Sprint will be prohibited from providing telecommunications service under all circumstances. It is obvious that the County *could* apply these Ordinance provisions in a manner that would still result in the granting of Sprint's applications to install wireless facilities and thus in a manner that did not prohibit Sprint from providing service. Indeed, the undisputed evidence is that the County *has* granted Sprint's permit applications applying these Ordinance provisions.⁴

As discussed in detail above, there is no evidence that the Ordinance actually prohibits or has the effect of prohibiting Sprint from providing service, which is the proper standard under §253(a). However, even if prohibition were possible under some circumstances, Sprint's facial challenge must still fail because the Ordinance does not *in all circumstances* prohibit Sprint from providing service.

court's conclusion that content based restrictions on speech should be imposed by the County.

⁴ How could broad discretion to grant or deny a permit application be a "prohibition" within the meaning of §253(a) when this Court has held that the *denial* of a permit application alone is not a prohibition within the meaning of the nearly identical language of §332(c)(7)(B)(i)(II)? *MetroPCS*, 400 F.3d at 730-35. Since the County's discretion could be exercised in a way to grant a permit application, the County's Ordinance is much less likely to be a prohibition than the actual denial of an application.

IV.

THE PANEL MISAPPLIED THE STANDARD FOR INVALIDATING ORDINANCES UNDER THE TCA AND THEREBY CREATED A CONFLICT WITH A PRIOR DECISION OF THIS COURT

In rejecting the County's argument that this Court has applied a more lenient standard to facial challenges brought under §253(a) than to facial challenges brought under §332(c)(7)(B)(i)(II), which uses the same "prohibit or have the effect of prohibiting" language, the panel stated:

The Conference Report explains, in the context of § 332(c)(7)(B)(i)(II), that ***"[i]t is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-case basis."*** The similar language of the sections and the Conference Report demonstrates that § 253(a) is consistent with the substantive provision of § 332(c)(7)(B)(i)(II).

(Amended Opinion at 7192) (quoting H.R. Conf. Rep No. 104-458, at 208) (emphasis added).

In order to avoid a conflict between the interpretation of sections 253(a) and 332(c)(7)(B)(i)(II), the panel indicated that a plaintiff bringing a facial challenge to an ordinance under either provision would have to show that the ordinance amounted to a ban on wireless facilities or contained policies that have the effect of banning wireless facilities. However, the panel then failed to apply this test to the Ordinance. None of the Ordinance provisions on their face ban wireless facilities or have the effect of banning those facilities. The fact that the County has

discretion to decide on a case-by-case basis whether to allow a company to build a wireless facility in no way establishes that the County's Ordinance bans wireless facilities. Indeed, this is precisely the type of regulation that Congress desired.

No court anywhere has held that an ordinance that allows a local government broad discretion to deny an application to build a wireless facility amounts to a ban on such facilities. Indeed, this Court reached the opposite conclusion in *MetroPCS*. In that case, this Court stated: “[a] city-wide general ban on wireless services would certainly constitute an impermissible prohibition of wireless services under [§332(c)(7)(B)(i)(II) of] the TCA.” *Id.* at 730. However, this Court recognized that San Francisco's conditional use permit ordinance, which gave the city extremely broad discretion to deny a permit application for a wireless facility if the city concluded that it was not “necessary,” did not rise to a prohibition that violated §332(c)(7)(B)(i)(II) on its face:

[L]ocal regulations *standing alone* may offer little insight into whether they violate the substantive requirements of the TCA. ***Zoning rules—such as those that allow local authorities to reject an application based on “necessity” —may not suggest on their face that they will lead to discrimination between providers or have the effect of prohibiting wireless services. Thus, in most cases, only when a locality applies the regulation to a particular permit application and reaches a decision—which it supports with substantial evidence—can a court determine whether the TCA has been violated.***

⁵ San Francisco's “necessity standard” offers the city as much or more discretion than that retained by the County under its Ordinance. Nonetheless, the Court indicated that this discretion was not a ban that rose to the level of a prohibition on service. 400 F.3d at 719.

Id. at 724 (emphasis added).

Every court that has considered the issue agrees that if an ordinance does not ban wireless facilities on its face, it is not a ban absent evidence that the ordinance has resulted in the denial of all permit applications. *See, e.g., Laurence Wolf Capital Mgmt. Trust v. City of Ferndale*, 61 Fed. Appx. 204, 221 (6th Cir. 2003) (“*Wolf has not shown that the Ordinance necessarily results in the denial of any application. To the contrary, AT&T currently provides wireless services in Ferndale and has two existing wireless facilities in Ferndale. This shows that the Board does approve applications under the Ordinance.* Moreover, the Ordinance does not prohibit placement of wireless service facilities on all private properties. Instead, it limits such facilities to certain zoning districts and *requires administrative approval. No evidence exists in the record to suggest that Ferndale has consistently denied such administrative approvals.* Therefore, the record contains no evidence that the Ordinance effectively prevents wireless communication services. Accordingly, we hold that *the Ordinance does not effectively prohibit the provision of personal wireless services.*”); *Voicestream Minneapolis, Inc. v. St. Croix County*, 212 F.Supp.2d 914, 927 (W.D. Wis. 2002), *aff’d* 342 F.3d 818 (7th Cir. 2003); *Virginia Metronet v. Board of Supervisors*, 984 F. Supp. 966, 971 (E.D. Va. 1998).

Because the County's Ordinance provisions do not amount to a ban on wireless facilities and Sprint submitted no evidence that the County has used the Ordinance to repeatedly turn down its permit applications, the Ordinance is not a prohibition and the panel's decision conflicts with this Court's decision in *MetroPCS* and the decisions of numerous other courts, and should be reversed.

V.

THE PANEL'S DECISION CONFLICTS WITH THE COURT'S PREVIOUS DETERMINATION THAT CONGRESS INTENDED FOR LOCAL GOVERNMENTS TO HAVE BROAD DISCRETION OVER SUBJECTIVE FACTORS SUCH AS AESTHETICS

The panel concluded that the County's Ordinance amounts to a prohibition because the County has discretion to decide "whether a facility is appropriately 'camouflaged,' 'consistent with community character,' and designed to have minimal 'visual impact.'" (Amended Opinion, at 7194). These discretionary factors relate to aesthetics. This Court previously held that Congress intended for local governments to be able to *deny* wireless permit applications for aesthetic reasons. In *MetroPCS*, the Court concluded that a local government may deny an application to build a wireless facility based on "a purely aesthetic determination that a certain neighborhood is blighted with too many wireless antennas" because this is "specifically permitted in the prevailing case law and anticipated in the legislative history of the TCA." 400 F. 3d at 729, n.6. *Voicestream Minneapolis*,

Inc. v. St. Croix County, 342 F.3d 818, 829 (7th Cir. 2003) (“Congress recognized that there are legitimate State and local concerns involved in regulating the siting of such facilities such as aesthetic values”) (citation, internal quotation marks and ellipses omitted); *Omnipoint Communs., Inc. v. City of White Plains*, 430 F.3d 529, 533 (2d Cir. 2005) (“As Omnipoint concedes, aesthetics is a permissible ground for denial of a permit under the TCA.”) (citation omitted).

Aesthetic determinations are inherently discretionary and subjective.

Ecological Rights Found. v. Pacific Lumber Co., 230 F.3d 1141, 1150 (9th Cir. 2000) (“aesthetic perceptions are necessarily personal and subjective”). Yet this Court and Congress have stated that local governments may *deny* applications to install wireless facilities for subjective aesthetic reasons without violating the “no prohibition” provisions of the TCA. Indeed, deciding how many wireless antennas is “too many” is highly discretionary and subjective, but this Court has said that local governments have the authority to make that determination. In fact, these judicially approved aesthetic determinations are no less discretionary and subjective than determining whether a facility is appropriately camouflaged, consistent with community character, and designed to have minimal visual impact.

The conflict between the *MetroPCS* decision and the panel’s opinion is obvious. If the Ordinance provided that the County may deny a use permit if “there is substantial evidence that the proposed wireless facility will have a

negative aesthetic impact,” the panel would strike it down because determining whether a facility has a “negative aesthetic impact” involves the exercise of “open ended” and subjective discretion. However, the Court in *MetroPCS* previously recognized that Congress intended for local governments to have discretion to deny permits for aesthetic reasons.

The panel states that “[t]here is no indication . . . that Congress feared § 253(a)’s preemption language would endanger local zoning ordinances it intended to permit under § 332(c)(7).” (Amended Opinion, at 7192). If Congress had anticipated the panel’s ruling, it would have been very afraid that its intent to “preserve local zoning authority” would be ignored. The panel’s interpretation of §253(a) has eviscerated the type of zoning ordinances (discretionary decisions made on a case-by-case basis) that Congress specifically sought to preserve. Indeed, in *MetroPCS*, the Court held that absent a blanket ban on wireless facilities the TCA is “*agnostic as to the substantive content of local zoning ordinances.*” 400 F. 3d at 725, n.3 (emphasis added). Not so says this panel, striking down the substantive portions of the County’s Ordinance that allow it to regulate aesthetics. The conflict between the panel’s decision and the *MetroPCS* decision and congressional intent is apparent.

VI.

CONCLUSION

For these reasons, the Court should rehear this case, *en banc*.

DATED: 6/26/07

JOHN J. SANSONE, County Counsel

By 

THOMAS D. BUNTON, Senior Deputy
Attorneys for Appellee/Cross-Appellant County of
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STATEMENT OF RELATED CASES

There are no known related cases pending in this Court

DATED: *6/26/07*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure, rule 32(a)(7)(C) and Ninth Circuit Rules 32-1, 35-4, and 40-1, I certify that the attached County of San Diego's Petition for Panel Rehearing and Rehearing *En Banc* is double spaced, typed in Times New Roman proportionally spaced 14-point typeface, and the brief contains 4,189 words of text as counted by the Microsoft Word 2003 word-processing program used to generate the brief.

DATED: 6/26/07

JOHN J. SANSONE, County Counsel

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Appellant County of San Diego

Case Nos. 05-56076, 05-56435

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SPRINT TELEPHONY PCS L.P.,
Plaintiff-Appellant/Cross-Appellee,

vs.

COUNTY OF SAN DIEGO, et al.,
Defendants-Appellees/Cross-Appellants

**BRIEF OF AMICI CURIAE NATIONAL LEAGUE OF
CITIES, ET AL. IN SUPPORT OF THE PETITION FOR
REHEARING *EN BANC* SUBMITTED BY THE COUNTY
OF SAN DIEGO**

On Appeal from the United States District Court
for the Southern District of California

Panel Members: The Honorable Myron H. Bright, A. Wallace
Tashima and Carlos T. Bea

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I. INTRODUCTION

Amici curiae¹ urge the Court to grant the petition for rehearing *en banc* filed by the County of San Diego, et al. (“County”) because the decision is clearly erroneous and, if allowed to stand would: (i) unlawfully limit local government authority to regulate both wireline and wireless telecommunications carriers using the public rights-of-way and wireless carriers using private property to construct facilities; and (ii) further contribute to the burgeoning conflict with decisions from other circuits and exacerbate concerns expressed by district courts in this Circuit with this Court’s prior decisions. *En banc* review is warranted for three reasons.

First, in an admittedly “novel application” of the law, the panel concluded that 47 U.S.C. § 253(a) preempted the County’s Wireless Telecommunications Facilities zoning ordinance (“WTO”). In so doing, the panel failed to consider: (i) the difference between local regulation of use of the public rights-of-way and the exercise of local zoning authority; (ii) the importance of 47 U.S.C. § 332(c)(3), a provision of the Communications Act that pre-dated the Telecommunications Act of 1996 (the “TCA”); and (iii) the presumption against preemption that adheres to the type of ordinance at issue in this case.

Second, *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), and its progeny (on which the panel relied) ignore Congress’s intent. Congress did not intend to effectively bar local regulation of telecommunication carriers, regardless of the burden placed on the carrier, and even when there is no evidence that the local ordinance has prohibited the provision of telecommunications services. As a result, this Court’s erroneous construction of §253(a) conflicts with Supreme Court

¹ The identity of amici curiae and their interest in this proceeding are set forth in the accompanying motion for leave to file this brief.

precedents, other circuit court holdings, and the Federal Communications Commission's construction of §253(a). Rather than create an inter-circuit conflict and improperly limit local regulatory powers, this Court should grant *en banc* review.

Third, this Court's erroneous §253(a) analysis has important public policy implications that continue to impact local regulations. It effectively immunizes telecommunications carriers from local regulations.

II. THIS COURT SHOULD GRANT REHEARING *EN BANC*

A. THERE IS NO BASIS FOR THE PANEL'S "NOVEL APPLICATION" OF § 253(A) TO A ZONING ORDINANCE.

The panel found that "the general provisions of §253" preempted the WTO despite the "substantive" and "procedural limitations" found in §332(c)(7). (Amended Opinion 7188.) Other courts have not adopted this "new and different application" of the TCA because to do so requires a court to ignore well-settled principles of statutory construction.

First, whenever possible the "provisions of a statute should be read so as not to create a conflict." *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 370 (1986). Second, a court should avoid interpreting a statute in such a way that would render other sections redundant, inconsistent, superfluous or meaningless. *Padash v. INS*, 358 F.3d 1161, 1170-71 (9th Cir. 2004). Third, if a statute does not define a term the court should construe it in accordance with its "ordinary, contemporary, common meaning." *A-Z International v. Phillips*, 323 F.3d 1141, 1146 (9th Cir. 2003) (internal quotation marks omitted).

The panel's decision violates all of these principles. The three sections of the Communications Act that are relevant here serve separate purposes:

- Section 253(a) - preempts local regulations that are "barriers to entry."

- Section 332(c)(3) - preempts state and local authority to regulate the “entry of or the rates charged by any commercial mobile service” provider.² The authority of state and local governments to regulate wireless carriers under this section includes the “facilities siting issues (e.g., zoning).” H.R.Rep.No.103-111, at 261 (1993).
- Section 332(c)(7) - preserves state and local zoning authority over the “placement, construction, and modification” of wireless facilities, subject *only to the limitations contained in § 332(c)(7)*. See H.R.Conf.Rep.No. 104-458, at 207-08 (1996) (this section preserves state and local authority “over zoning and land use matters except in the limited circumstances” set forth therein).

Applying the statutory construction principles noted above, the panel should have found that a wireless carrier cannot seek to preempt a local ordinance under §253(a) as a barrier to entry. Instead, §332(c)(3) governs in that situation. By preempting a barrier to entry under §253(a), the panel improperly rendered §332(c)(3) meaningless.

The panel further erred by relying on §253(a) to preempt the County’s local zoning authority as exercised in the WTO, rather than requiring the plaintiff to proceed under §332(c)(7). While Congress did not define the word “zoning” in §332(c)(7), the term is commonly used to mean the “legislative division of a region, most commonly a city, into separate districts with different regulations within the districts for land use, building size, etc.” Eugene McQuillin, *Law of Municipal Corporations*, § 25.01 (“McQuillin”) (3d ed.). As the Supreme Court explained, zoning laws, which are of modern origin, place restrictions on “*the use and occupation of private lands in urban communities.*” *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926) (emphasis added).

² Section 332(c)(3) was added to the Communications Act in 1993.

Regulating a telecommunications carrier's use of the public rights-of-way is not *zoning*. It is instead "a delegation of police power of the state government" to make "necessary and desirable regulations . . . in the interest of public safety and convenience." McQuillin § 24.565.

Unlike most zoning regulations, the WTO regulates both a wireless carrier's use of private property and the public rights-of-way. The panel thus erred in finding that §253(a) preempted the WTO to the extent it regulated a wireless carrier's use of private property to construct a wireless facility.³ A wireless carrier challenging a local *zoning* ordinance can *only* claim preemption under §332(c)(7). See *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 735 (9th Cir. 2005) (supremacy is "fully vindicated in the TCA's anti-discrimination and anti-prohibition provisions").

Any other holding would limit local zoning authority in ways not intended by Congress. For example, in contrast with right-of-way use permits, zoning permits are generally discretionary and local governments routinely require voluminous information, public notice and a hearing. See, e.g., *id.* at 718-19. Congress understood this when it enacted the TCA. See H.R.Conf.Rep.No.104-458, 208 (recognizing that a local decision could require a "zoning variance" or a "public hearing").

³ This Court on rehearing should consider whether this aspect of the WTO could be severed and thus saved from preemption. See *Qwest Communications, Inc. v. City of Berkeley*, 433 F.3d 1253, 1259 (9th Cir. 2006).

B. THE PANEL IMPROPERLY FAILED TO APPLY THE PRESUMPTION AGAINST PREEMPTION.

Sprint's preemption challenge concerns a potential bar to state and local laws in areas that are traditionally subject to state regulation. See *Communications Telesystems International v. California Public Utilities Commission*, 196 F.3d 1011, 1017 (9th Cir. 1999) (telecommunications); *Cox v. State of Louisiana*, 379 U.S. 536, 554 (1965) (management of public streets); *Village of Euclid*, 272 U.S. at 365 (zoning). In such instances, there is a presumption against preemption and Congressional intent to preempt state and local laws "must be clear and manifest." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

In *City of Auburn* and its progeny, this Court has failed to apply this presumption to its §253(a) preemption analysis. Accordingly, this Court should take this opportunity to reexamine its §253(a) analysis in light of this presumption.

C. ANOTHER CIRCUIT, OTHER PANELS IN THIS CIRCUIT, AND DISTRICT COURTS IN THIS CIRCUIT HAVE QUESTIONED THIS COURT'S ANALYSIS IN CITY OF AUBURN.

In *City of Auburn*, this Court held that §253(a) preempts local ordinances that "may . . . have the effect of prohibiting' the provision" of telecommunications services and that this preemption is "virtually absolute." 260 F.3d at 1175. Other panels and district courts in this Circuit have repeatedly questioned this broad construction of §253(a).

While other Ninth Circuit panels have followed *City of Auburn*, one panel expressed concern over the breadth of this Court's construction of §253(a). *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004), *cert. denied*, 544 U.S. 1049 (2005) ("We have previously ruled that regulations that may have the effect of prohibiting the provision of telecommunications services are preempted. Like it or not, both we and the district court are bound by our prior ruling.")

District courts in this Circuit have also struggled to try to reconcile *City of Auburn* with the plain language of §253(a). See, e.g., *Qwest Corp. v. City of Portland*, 2006 WL 2679543, at *2 (D.Or., Sept. 15, 2006) (plaintiff “must rely on more than speculation to show a potential prohibitory effect”); *Pacific Bell Telephone Co. v. California Department of Transportation*, 365 F.Supp.2d 1085, 1088 (N.D.Cal. 2005) (plaintiff must “come forward with sufficient evidence” that a local requirement is a “barrier to entry”); *Time Warner Telecom of Oregon, LLC v. City of Portland*, 452 F.Supp.2d 1084, 1093 (D.Or. 2006) (“analysis of a challenged regulation should not be completely divorced from economic reality”); *City of Portland v. Electric Lightwave, Inc.*, 452 F.Supp.2d 1049, 1059 (D.Or. 2005) (this Court’s interpretation of §253(a) “appears to depart from the plain meaning of the statute and extend the barrier for local regulation of telecommunications services beyond what Congress intended”).⁴

The sweeping scope of *City of Auburn* is apparent from a recent case in which plaintiff Verizon Wireless challenged a local ordinance requiring it to obtain major encroachment permits to construct wireless facilities in the public rights-of-way. See *GTE Mobilnet of California Limited Partnership v. City and County of San Francisco*, 2007 WL 420089 (N.D.Cal., Feb. 6, 2007). Despite evidence that Verizon Wireless had built an extensive network of facilities on private property in San Francisco, which it used to serve tens of thousands of customers and earn tens

⁴ The Federal Communications Commission has also required proof of an actual prohibition. See *Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act*, 13 F.C.C.R. 22970, 22970-71 (1998) (requiring that “[f]actual assertions . . . be supported by credible evidence, including affidavits, and, where appropriate, studies or other descriptions of the economic effects” of the challenged local regulation).

of millions of dollars annually, the district court held that §253(a) preempted the city ordinance. *Id.* at *1, *4. The court found that “a showing that an ordinance ‘may have’ the effect of prohibiting a protected interest is sufficient to sustain a facial challenge.” *Id.* at *4.

In light of these decisions, it is not surprising that the Eighth Circuit recently rejected this Court’s analysis of §253(a). *Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007). In so doing, the court held that “no reading [of §253(a)] results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services.” *Id.* at 533.

Given the misgivings and concerns expressed by other courts and judges in this and other circuits over the breadth of *City of Auburn*, this Court should reexamine its decision in that case through *en banc* review. In so doing, this Court could resolve a potential inter-circuit conflict and provide further guidance to other panels and districts courts in this Circuit that must apply this Court’s precedents to the matters before them.

D. THIS COURT’S ERRONEOUS §253 ANALYSIS EFFECTIVELY IMMUNIZES TELECOMMUNICATIONS CARRIERS FROM LOCAL REGULATIONS.

This Court’s construction of §253(a) in both *City of Auburn* and its progeny (including this case), if allowed to stand, would have profound public policy implications.⁵ Taking this Court’s interpretation to its logical conclusion, no local ordinance regulating telecommunications carriers escapes preemption as a barrier

⁵ A number of appeals pending in this Court concern §253 claims. See *NextG Networks of California, Inc. v. City and County of San Francisco* (No.06-16435); *Qwest Corp./Qwest Communications Corp. v. City of Portland* (Nos.06-36022, 06-36023); *Time Warner Telecom Of Oregon, LLC v. City of Portland* (Nos.06-36024, 06-36061).

to entry, even when challenged by a carrier that has been serving the local community for years. Even local zoning laws, which generally require public hearings, could be preempted.

Congress did not intend this result. Congress recognized that local governments have an important role in regulating telecommunications carriers. In the TCA, Congress therefore saved local right-of-way use regulations from preemption by §253(a) (*see* 47 U.S.C. § 253(c)) and preserved local zoning authority in §332(c)(7). The panel's decision cries out for *en banc* review.

III. CONCLUSION

Based on the foregoing, this Court grant rehearing *en banc*.

Dated: July 9, 2007

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

In the
UNITED STATES COURT OF APPEALS
For the
NINTH CIRCUIT

SPRINT TELEPHONY PCS, L.P., a Delaware Limited Partnership,
Plaintiff-Appellant/Cross-Appellee,

v.

COUNTY OF SAN DIEGO, et al.,
Defendants-Appellees/Cross-Appellants.

Appeal From a Decision of the United States District Court for the
Southern District of California (San Diego), No. 03-CV-1398
The Honorable Barry T. Moskowitz, District Judge

**APPELLANT/CROSS-APPELLEE SPRINT TELEPHONY PCS, L.P.'S
RESPONSE TO PETITION FOR REHEARING EN BANC**

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I. INTRODUCTION.

The County's petition rehearing en banc falls short of the high burden for rehearing and should be denied.

In its March 13 decision, applying the Court's well-established precedent interpreting 47 U.S.C. § 253(a) ("section 253"), the panel properly held that the County's wireless telecommunications ordinance ("the WTO") ran afoul of section 253's "virtually absolute" preemption. The panel recognized that the WTO, through its open-ended discretion and imposition of onerous processes based on that discretion, violates the TCA for the identical reason as the ordinances in *City of Auburn v. Qwest Corp.*, 260 F.2d 1160 (9th Cir. 2001). The panel also invalidated the WTO based on factors substantially similar to those the Court found unlawful in *Qwest Communications Inc. v. City of Berkeley*, 433 F.3d 1253, 1257-58 (9th Cir. 2006).

Nonetheless, the County asked for rehearing by the panel or alternatively for rehearing en banc, arguing that the panel's decision conflicts with Ninth Circuit case law and creates a split of authority among circuit courts. In a June 13, 2007 amended opinion, the panel rejected those arguments and refused to grant rehearing. Further, the June 13, 2007 amended opinion memorialized that "[t]he full court was advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing." *Id.* at 7168. Presumably because

the June 13 amended opinion made slight amendments to the initial opinion, however, the County's first petition for rehearing en banc was denied without prejudice to seek rehearing en banc as to the amended opinion.

While the June 13 amended opinion did include slight modifications, it did not alter either the criteria that the panel applied or the reasoning the panel employed in invalidating the WTO under section 253. That part of the panel's opinion remained unchanged. What the June 13 amended opinion added was footnote 7, which is part of the panel's decision that Sprint cannot recover damages for a violation of section 253 under 42 U.S.C. § 1983. But footnote 7 has nothing to do with the question on which the issue on which the County (again) seeks rehearing en banc: whether the WTO should be enjoined as violating section 253.

Nonetheless, the County filed its second petition for rehearing en banc. Not surprisingly, because the panel's decision did not change, the County's arguments have also not changed. The Court properly denied the first petition. For the same reasons that the first petition was denied, the Court should likewise deny the second petition. The panel's opinion does not conflict with, but follows established Court precedent. Nor does the panel's decision create any significant conflict among circuit courts that justifies rehearing en banc. And the panel's decision effectuates the TCA's policies, whereas the County seeks (yet again) to enlist the Court to turn those policies upside down.

II. ARGUMENT.

A petition for rehearing en banc faces a strict standard. “The criteria for taking a case en banc are clear and well-established-either necessity ‘to secure or maintain uniformity of the court’s decisions,’ or to decide ‘question of exceptional importance.’ . . . Its function is not to maintain uniformity of language or thought by three judge panels, but to maintain uniformity of decisions. [T]he only purpose of [an] en banc call is to curb ‘meddling’ by a three judge panel.” *U.S. v. Burdeau*, 180 F.3d 1091, 1092 (9th Cir. 1991); *U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1073 n.14 (9th Cir. 2002). *See also* FRAP 35.

Applying these standards here, rehearing en banc should be denied for at least three reasons.

First, the panel’s decision follows established precedent. The panel properly applied section 253(a)’s virtually absolute preemption to invalidate the WTO. The panel did not, as the County contends, apply an incorrect preemption standard. The panel’s decision is also consistent with the Court’s interpretation of TCA section 332 in *MetroPCS v. City & County of San Francisco*, 400 F.3d 715 (2005), which did not address section 253 but addressed only the scope of a carrier’s ability to bring various types of section 332 challenges based on denials of individual permitting decisions.

Second, the County’s argument that the June 13 opinion creates a conflict among circuits is oversold and, ultimately, inconsequential. The panel’s determination that section 253(a) preempts ordinances that either actually or *may* prohibit or have the effect of prohibiting telecommunications service is a sound interpretation, which is well-supported by three prior Ninth Circuit decisions and adopted by the majority of circuits. But even if the Court reversed its past decisions and adopted the Eighth Circuit’s “existing material interference” standard, the WTO is still invalid. The evidence shows that the County not only can, but *has* used its discretionary, subjective authority under the WTO to bottleneck proposed sites in a morass of regulation. The County’s argument to the contrary mischaracterizes the evidence in the record.

Third, the TCA was enacted to promote “competition among and reduce regulation of telecommunications providers” and to provide a “national policy framework.” *City of Auburn*, 260 F.3d at 1170. The panel’s decision furthers these policies. The County’s argument—that section 253(a) preempts only blanket bans of telecommunications services—would turn those policies on their head.

The County’s petition should therefore be denied.

A. The Panel Followed Established Precedent.

1. The Panel Properly Applied Section 253(a)'s Virtually Absolute Preemption to Invalidate the WTO.

The County's first argument for rehearing—that the panel applied the wrong preemption standard to Sprint's facial challenge of the WTO—is misplaced. In fact, the panel applied the correct standard.

In *City of Auburn*, 260 F.3d at 1160, the Court set forth the appropriate framework to evaluate whether an ordinance conflicts with section 253:

The Supremacy Clause, U.S. Const. art. VI, cl.2, invalidates state laws that “interfere with, or are contrary to,” federal law.... Within constitutional limits, Congress is empowered to preempt state law in several ways, including by expressly stating its intention to do so.... In this case, there can be no doubt that the Act preempts expressly; it states that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. 47 U.S.C. § 253(a). The question for the court, then, is whether the ordinances “interfere with, or are contrary to” the act.

City of Auburn, 260 F.3d at 1175 (citations omitted).

As the Court has also recognized, section 253(a)'s preemption is “virtually absolute and its purpose is clear—certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has narrowly circumscribed the role of state and local governments in the arena. Municipalities therefore have a very limited and proscribed role in the regulation of

telecommunications.” *City of Auburn*, 260 F.3d at 1175. *See also Qwest Communications Inc. v. City of Berkeley*, 433 F.3d 1253, 1256 (9th Cir. 2006) (reaffirming section 253’s “virtually absolute” preemption).

Moreover, “section 253(a) preempts regulations that not only prohibit outright the ability of any entity to provide telecommunication services but also those that may have the effect of prohibiting the provision of such services.” *City of Auburn*, 260 F.3d at 1175. *See also City of Berkeley*, 433 F.3d at 1526 (“[R]ather than considering the actual impact of Ordinance 6630, we must determine whether the specific regulations of Ordinance 6630 ‘may have the effect of prohibiting the provision of telecommunications services’”); *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1239 (9th Cir. 2004) (“[R]egulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted.”).

Applying section 253’s virtual absolute preemption here, the panel reached the right conclusion: the WTO, through its multiple levels of discretionary, subjective review, exceeds the narrow regulatory role that section 253 allows localities to retain.

The County points to the panel’s quotation of and argues that the panel misapplied the direction in *U.S. v. Salerno*, 481 U.S. 739, 745 (1987), that a facial challenge to a law “must establish that no set of circumstances exists under which

the Act would be valid.” *See also* County’s Petition, at 4. Then, the County argues, because the WTO does not result in the denial of *all* permit applications in *all* circumstances, there are some circumstances under which the WTO is valid. This argument distorts the preemption principles in play here and is unfaithful to the Court’s past section 253 interpretations.

Initially, *Salerno* did not involve the question of whether federal law preempted a conflicting local law. It involved a facial challenge to a federal statute on due process and Eighth Amendment grounds. *Salerno*, 481 U.S. at 746. *Salerno*’s usefulness here—to the question of whether a local law conflicts with an expressly preempting federal statute—is therefore limited. Instead, as *City of Auburn* recognizes, the proper question is whether the WTO “interferes with, or is contrary to,” section 253’s virtually absolute preemption. *City of Auburn*, 260 F.3d at 1175; *City of Portland*, 385 F.3d at 1239-40; *City of Berkeley*, 433 F.3d at 1256.¹

Even applying *Salerno*, however, the County’s conclusion does not follow. The appropriate question applying *Salerno* would be—given section 253(a)’s express, virtually absolute preemption of conflicting local laws, and section 253’s

¹ The County also points out the Court’s quotation of *Salerno* in *Chamber of Commerce of the United States v. Lockyer*, 463 F.3d 1076, 1082 (9th Cir. 2006). But that case also did not present the preemption question that is asked here: whether a federal statute’s express preemption clause trumps a potentially conflicting local law.

application to ordinances that either outright prohibit or *may* prohibit or *may* have the effect of prohibiting telecommunications services—whether there are any circumstances under which the WTO is valid. The answer is no. Just like the ordinances in *City of Auburn* and *City of Berkeley*, the WTO is preempted and cannot be valid under any circumstances because, on its face, it preserves the exact type of unfettered, subjective discretion and imposes requirements that the Court has previously held prohibit or may have the effect of prohibiting telecommunications service. *City of Auburn*, 260 F.3d at 1177 (lengthy process, with “ultimate cudgel” being the reservation of broad discretion, violates section 253); *City of Berkeley*, 433 F.3d at 1257-58 (regulatory scheme violated section 253 because requirements were “patently onerous” and discretion reserved to locality was “significant”).

The County’s application of *Salerno*—that it means the WTO is valid as long as the County can point to the absence of a blanket prohibition against any and all permits—ignores the Court’s precedent and the appropriate preemption analysis set forth in *City of Auburn*. While the panel correctly applied past precedent, it is the County who seeks to reinterpret section 253’s virtually absolute preemption as instead being virtually (if not completely) meaningless.

2. The Panel's Decision Does Not Conflict with *MetroPCS*.

While the County also argues that the June 13 opinion conflicts with *MetroPCS*, the panel's decision is entirely consistent with *MetroPCS*.

MetroPCS reviewed whether the city's denial of two wireless applications violated 47 U.S.C. §332. From the outset, this Court identified the statutory framework to which its opinion applied: sections 332(c)(7)(A)(i), (iii) and (iv), not the entire TCA. *MetroPCS*, 400 F.3d at 720, n.1. Within this context, the Court stated, "the TCA"—*i.e., the provisions of Section 332 at issue*—"is apparently agnostic as to the substantive content of local zoning ordinances." *MetroPCS*, 400 F.3d at 725 n.3. Similarly, the Court stated, "the TCA"—*i.e., Section 332*—"does not intrude upon the substantive content of local zoning rules," and "the TCA"—*i.e., Section 332*—"is agnostic as to the substantive content of local regulations." *MetroPCS*, 400 F.3d at 730 n.6. *MetroPCS* did not mention section 253 once, let alone preclude section 253 challenges to ordinances like the WTO. The County's attempt to read *MetroPCS* as interpreting section 253 as agnostic to the content of zoning ordinances would effectively reverse and negate *City of Auburn* and *City of Berkeley*. *MetroPCS* cannot be stretched so far.

The County urges again in its petition that *MetroPCS* adopted a strict standard for invalidating an ordinance when launching a facial challenge, and that the panel's supposedly more lenient standard for invalidating an ordinance under

section 253 conflicts with *MetroPCS*. The panel properly rejected the County’s attempt to contrive a conflict where none exists:

The County also argues that we have established a “more lenient standard” for successful facial challenges under § 253(a) than under § 332(c)(7)(B)(i), relying on a supposed conflict between dicta in *MetroPCS*, 400 F.3d at 724, 725 n. 3, 727 (alluding to the difficulty under § 332(c)(7)(B) of bringing facial challenge based on a *single zoning decision*) and *Auburn*, 260 F.3d at 1175 (discussing under § 253(a) a facial challenge to a franchise *regulation*). Though we conclude here that Sprint’s challenge to the WTO meets the criterion described in *Auburn* for challenging an ordinance, we reject the argument that we have lowered the threshold suggested by *MetroPCS* for a successful facial challenge predicated on a zoning decision.

June 13 Order, at 7190 n.5.² Thus, the panel directly addressed *MetroPCS* and concluded that, at its most liberal reading, *MetroPCS* suggested a standard for a facial challenge to an ordinance based on a particular zoning decision, which is not the issue before the panel.³

² In any event, to the extent that *MetroPCS* might be considered in conflict with *City of Auburn*, the panel correctly interpreted *MetroPCS* to avoid such a conflict. *MetroPCS*, to the extent it might conflict with the *earlier* decision in *Auburn*, is invalid. *McMellon v. U.S.*, 387 F.3d 329, 333 (4th Cir. 2004) (joining seven other circuits in holding that, “as to conflicts between panel opinions, application of the basic rule that one panel cannot overrule another requires a panel to follow the earlier of the conflicting opinions”).

³ Amici in support of the County’s petition for rehearing en banc also argued that section 253 is limited to ordinances that are franchise ordinances or that are express barriers to “entry.” (See Brief of Amici Curiae National League of Cities, Et. Al. in Support of Petition for Rehearing *En Banc* Submitted by the County of San Diego, at 2). This argument is equally misplaced, for the reasons well-

B. The County's Reliance on an Eighth Circuit Case Does Not Warrant Rehearing.

In addition to supposed conflicts with the Court's own precedent, the County argues that rehearing should be granted because the panel's decision and past Ninth Circuit precedent conflict with the Eighth Circuit's decision in *Level 3 Communications, LLC v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007). This purported inconsistency with *Level 3* does not warrant rehearing.

Level 3 is contrary to *four* Ninth Circuit decisions (including the panel's decision) as well as the majority of circuits that have embraced the Ninth Circuit's sound interpretation of section 253(a). In any event, even applying the Eighth Circuit's "existing material interference standard," the evidence shows that the WTO is invalid.

articulated in the panel's decision. Effectively, the County's supporters try to import limitations into section 253(a)—that no franchise requirement or "entry requirement" may prohibit telecommunications. But section 253(a) is not so limited. It broadly preempts any "statute," "regulation" or "legal requirement," not just any "franchise" or "entry" requirement. Attempts to read limitations into statutes where none exists are improper. *See U.S. v. Rutherford*, 442 U.S. 544, 552 (1979) ("Exceptions to clearly delineated statutes will be implied only where essential to prevent 'absurd results' or consequences obviously at variance with the policy of the enactment as a whole."); *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001) (rejecting interpretation that "require[s] this court to read exceptions into the statute's plain language"). Thus, the panel properly rejected this argument as "unconvincing." June 13 Order, at 7194.

1. The Panel's Section 253 Interpretation Follows Established Ninth Circuit Precedent, is Sound, and is Embraced by the Majority of Circuit Courts.

Level 3 is inconsistent with this Court's established precedent, which the panel followed.

As the *Level 3* court acknowledges (477 F.3d at 532), *three times* before this panel's decision, the Court has reviewed section 253(a)'s language. And *three times*, it has concluded that section 253(a) preempts both ordinances that actually prohibit and that *may* prohibit or have the effect of prohibiting provision of telecommunications services. *See supra* Part II.A; *City of Berkeley*, 433 F.3d at 1526; *City of Portland*, 385 F.3d at 1239; *City of Auburn*, 260 F.3d at 1175. This issue is settled in this circuit.

Not only is this interpretation settled law; it is also a sound reading of section 253(a). As the Court's interpretation recognizes, fundamentally, there is no meaningful difference between an ordinance that, on its face, prohibits telecommunications services and one that imposes burdensome and discretionary regulations that allow a municipality the regulatory latitude to put applications to install telecommunications facilities in an endless morass of delay and uncertainty.

Not surprisingly, as *Level 3* also acknowledges, the majority of circuits agree with this Court; *not* the Eighth Circuit. At least the First and Tenth Circuits agree that section 253(a) does not require evidence of actual prohibition. *Puerto Rico v.*

Municipality of Guayanilla, 450 F.3d 9, 18 (1st Cir. 2006); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004). The Eighth Circuit stands alone.

The County also misleadingly argues that “the district courts in the circuit have similarly recognized that §253(a)’s plain language has been distorted.” (County Petition, at 6). The County cites only two decisions. Both are from the district of Oregon, and one of them was reversed by this Court on this precise point in *City of Portland*, 385 F.3d at 1240-41. Moreover, both district court cases cited by the County predate the Court’s explicit affirmation of the rule and explicit rejection of the contrary argument in *City of Berkeley*, 433 F.3d at 1256-57. In fact, the vast majority of district courts in this circuit have expressed no concern or issue with the Court’s unanimous decisions on this point. *See, e.g., Pacific Bell Tel. Co. v. City of Walnut Creek* 428 F. Supp. 2d 1037, 1044 (N.D. Cal. 2006); *NextG Networks of California, Inc. v. City of San Francisco*, 2006 WL 1529990, at *4 (N.D. Cal. June 2, 2006); *GTE Mobilenet of California Ltd. V. City & County of San Francisco*, 2007 WL 420089, at *4 (N.D. Cal. Feb. 6, 2007); *Cox Commnc’s PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1260, 1265 (S.D. Cal. 2002).

2. The WTO Is Invalid Even Under the Eighth Circuit’s “Existing Material Interference” Standard.

Even if the Court were to reverse its established course and follow *Level 3*, the WTO is invalid even under *Level 3’s* standard.

The County suggests that *Level 3* holds that prohibitory effect in the form of actual denials or an outright ban on telecommunications must be shown for section 253(a) to be violated. But *Level 3* adopts a far less stringent standard:

Thus, we hold that a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition. ***The plaintiff need not show a complete or insurmountable prohibition, see TCG New York, Inc. v. City of White Plains, 305 F.3d 67, 76 (2d Cir.2002), but it must show an existing material interference with the ability to compete in a fair and balanced market (emphasis added).***

Level 3, 477 F.3d at 533 (emphasis added). Thus, *Level 3* requires an “existing material interference,” not outright denials or prohibitions.

Level 3’s citation of *City of White Plains* is also telling. There, the court did not directly address the question of whether section 253(a) requires actual prohibition. Instead, applying rhetoric similar to *Level 3*’s material interference test, the Second Circuit concluded:

Certain portions of White Plains’s Ordinance clearly have the effect of prohibiting TCG from providing telecommunications service. ***In particular, the provision that gives the Common Council the right to reject any application based on any “public interest factors ... that are deemed pertinent by the City” amounts to a right to prohibit providing telecommunications services, albeit one that can be waived by the City. See Ordinance, § 2.7-01(vii).***

White Plains, 305 F.3d at 76 (emphasis added). Thus, one of the reasons that *White Plains* decided the ordinance there had an existing material interference

was for precisely the same reason relied on by the panel in invalidating the WTO: because the ordinance there (as the WTO does here) reserved unfettered discretion to reject any application based on any public interest factors deemed pertinent.

In any event, even looking at actual prohibitory effect, contrary to the County's assertion, the "undisputed" evidence does not show that the County's discretionary wireless scheme has had no material effect on Sprint's ability to deploy its network. The evidence shows precisely the opposite.

Defendants' discretionary regulatory scheme has put many of Sprint's sites in a virtual stranglehold of delay. In one example, Sprint sought to install small antennas on an existing utility pole, along with underground equipment and one small above-ground equipment and vent pipes. (ER. pp. 74-77, 82 (Declaration of Daniel T. Pascucci, ¶¶ 4-9; Ex. B)). Exercising the discretion reserved to it under its discretionary use permit process, the County required Sprint to undergo years of processing, including seven public hearings and numerous community group meetings for this proposed site, with no approval for this site. Significantly, this application was filed as a "minor use" permit application under the County's wireless policy in effect prior to enactment of the WTO. Under the WTO, this application would be processed as a "major use" permit—and would be subjected

to the number of other application requirements imposed by the WTO.⁴ And nothing in the WTO prevents the County from similarly protracting the processing of any wireless application it chooses.⁵

In total, as detailed in the report of Sprint's forensics expert exchanged during discovery in the proceedings below, the County's discretionary regulatory scheme has delayed or in some cases eliminated Sprint's ability to develop its network in San Diego and decreased Sprint's market share due to Sprint's inability to obtain the required wireless coverage to attract customers. The construction delays due to the County's onerous and lengthy application process, complete with extensive written application requirements, public hearings (during which Sprint is forced to defend its proposed sites against discretionary, subjective standards) and appeals, have already cost Sprint millions of dollars. (ER. pp. 218-227, 239-244 (Expert Report of David W. Swiney, Exhibit 3 to Declaration of Nathan R. Hamler in Support of Sprint's Opposition to the County's Motion for

⁴ Nor is this site an anomaly. The County Board of Supervisors has also recently subjected other proposed Sprint right-of-way sites to prolonged and rigorous review, with no approval. (ER. p. 77 (Declaration of Daniel T. Pascucci, ¶ 10)).

⁵ In *White Plains*, the court did not expressly state whether or not proof of actual prohibition or delay was required before finding a section 253 violation. The court did note that "extensive delays in processing TCG's request for a franchise have prohibited TCG from providing service for the duration of the delays." *City of White Plains*, 305 F.3d at 76. Whether or not that was required, the combination in *City of White Plains* is the exact combination that the WTO, coupled with the evidence, shows here: discretion-laden regulation and evidence that the County has used such discretion to impose delays, costing Sprint millions of dollars.

Reconsideration/Motion to Alter Judgment or, in the Alternative, to Stay Enforcement of the Court's Injunction Pending Appeal)). *See also* Sprint's Opening Brief, at 18-20. Tellingly, in attempting to downplay and minimize the damage that its WTO has caused to Sprint, the County ignores this evidence provided by Sprint's expert, preferring instead to mischaracterize the record as limited to one attorney declaration. This is clearly incorrect and misleading.⁶

In short, the County's scheme imposes the same onerous requirements invalidated in *City of Auburn*. And, while Sprint was not required to show evidence of actual impact, it did so. Thus, even if actual impact is examined, the imposition of the WTO's discretionary regime has had precisely the material disruption the Eighth Circuit suggests that section 253 requires.

⁶ Indeed, in addition to the detailed analysis of Sprint's forensic expert--which itself was based on numerous interviews with Sprint officials and analyses of information provided by those officials (*see, e.g.*, ER. pp. 222, 228)--and the declaration of Daniel Pascucci already discussed, the declaration of Deborah L. Collins is also part of the record. Ms. Collins was one of Sprint's land use consultants involved in Sprint's efforts to obtain sites within the County. Her declaration further shows the WTO's burdensome, restrictive nature. In particular, it supports the fact that the WTO's lower tiers of review (which in theory allow for less burdensome, more streamlined review) are illusory, that wireless sites would typically be processed as conditional use permits under the WTO and that this process is very onerous. (ER. pp. 83-87, ¶¶ 8, 9, 13, 14 (Declaration of Deborah L. Collins in Support of Plaintiff Sprint Telephony PCS L.P.'s Motion for Partial Summary Judgment)).

C. The Panel's Decision Reinforces Sound Public Policies.

The TCA was enacted “to secure lower prices and higher quality services for American telecommunications consumers....” Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); *City of Auburn*, 260 F.3d at 1170. As Congress further stated, the vehicle to achieve to these goals is to “encourage the rapid deployment of new telecommunications technologies.” *Id.* An injunction prohibiting the County from enforcing the WTO under section 253 is necessary in this case to achieve the TCA's goals within the County of San Diego.

The County urges the position that Congress intended to allow localities to bow to the Not-In-My-Backyard syndrome and impose any regulatory process, no matter how egregious, so long as they do not outright ban wireless facilities. If that were correct, wireless carriers would be handcuffed from ever challenging wireless ordinances, and would have to wait until a final decision is rendered on each individual application before bringing a challenge. This could take—and has taken—years. Blatantly unlawful ordinances would go unchecked and, rather than a single suit to enjoin unlawful processes, carriers would have to file multiple suits challenging every bad decision resulting from an unlawful ordinance.

In sum, not only is the panel's decision consistent with the Court's precedent; it is consistent with the TCA's policies. The County's rehearing

invitation represents nothing but yet another effort by the County to advance interpretations that thwart those same policies.

III. CONCLUSION.

For these reasons, the County's second petition for rehearing en banc should be denied.

Dated: August 24, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations contained in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Exclusive of exempted provisions as set forth in Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure, this brief contains 4,497 words according to the word count function in the Microsoft Word 2003 software with which this brief was produced.



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L.P.'S RESPONSE TO PETITION FOR REHEARING EN BANC**

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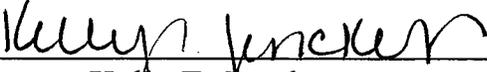
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<p>United States District Court Southern District of California The Honorable Barry Ted Moskowitz Courtroom 15 - 5th Floor San Diego, CA 92101</p>	

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I declare under penalty of perjury that the above is true and correct.

Executed on August 24, 2007, at San Diego, California.



Kelly E. Jenckes

C.A. No. 05-56076; 05-56435

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FOR THE NINTH CIRCUIT

SPRINT TELEPHONY PCS, L.P., a Delaware limited partnership,

Plaintiff – Appellant/Cross-Appellee,

v.

COUNTY OF SAN DIEGO, et al.,

Defendants – Appellees/Cross-Appellants.

On Appeal from the United States District Court
for the Southern District of California
No. CV-03-1398-BTM
Honorable Barry Ted Moskowitz, District Judge

**COUNTY OF SAN DIEGO'S REPLY BRIEF IN SUPPORT OF ITS
PETITION FOR REHEARING *EN BANC***

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The County of San Diego (the “County”) submits this short reply brief to respond to some of the arguments raised in Sprint’s Opposition to the County’s Petition for Rehearing *En Banc*.

I. SPRINT HAS NOT MET ITS BURDEN UNDER THE STANDARD ANNOUNCED BY THE EIGHTH CIRCUIT

Sprint acknowledges that this Court’s decisions, which hold that an ordinance is preempted by 47 U.S.C. section 253(a) if it “may” or “might” prohibit an entity for providing telecommunications services, conflict with the Eighth Circuit’s decision in *Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F. 3d 528 (8th Cir. 2007). However, Sprint argues that even if this Court were to apply the test adopted by the Eighth Circuit for establishing a prohibition, i.e., an “existing material interference with the ability to compete in a fair and balanced market,” it has met that burden. *Id.* at 533. Sprint is wrong.

Sprint notes that in *City of St. Louis* the Eighth Circuit cited *TCG New York, Inc. v. City of White Plains*, 305 F. 3d 67 (2d Cir. 2002) for the proposition that the “plaintiff need not show a complete or insurmountable prohibition” to establish a violation of section 253(a). *City of St. Louis*, 477 F. 3d at 533. Sprint argues that in *City of White Plains* the court found a prohibition based upon the broad discretion contained in an ordinance without any evidence regarding how that discretion had been used by the city to prohibit service. (Sprint Brief, at 14-15.) It

is clear that the Eighth Circuit did not adopt this standard for invalidating an ordinance under section 253(a). Indeed, the court specifically rejected it. The plaintiff in *City of St. Louis* made the same argument that Sprint is making here – a prohibition or effective prohibition is shown by “the scope of the regulatory authority that a city purports to wield--not whether the city *has used that authority to actually exclude a provider or service.*” 477 F. 3d at 533 (emphasis added; internal quotation marks omitted). The Eighth Circuit rejected that argument, concluding that the ordinance provisions themselves constitute “insufficient evidence from Level 3 of any actual or effective prohibition, let alone one that materially inhibits its operations.” *Id.* at 534.

Indeed, how could the County’s Ordinance on its face constitute a “materially interference” with Sprint’s ability to compete in the San Diego County market when the County has granted 6 of the 10 applications (and not denied a single application) that Sprint has submitted to install wireless facilities under the Ordinance? Given this undisputed evidence, it is beyond doubt that Sprint cannot meet its burden of showing a material interference with its ability to compete based on the County’s Ordinance alone. Therefore, Sprint’s section 253(a) claim must fail.

A. The Delay “Evidence” Cited By Sprint Does Not Support Its Facial Challenge.

As an alternative, Sprint argues that if the Ordinance provisions themselves are not enough to establish a prohibition, there is “evidence” in the record that the County has delayed processing two of its permit applications to install wireless facilities. (Sprint Brief, at 15-16.) Sprint argues that this evidence is sufficient to show that the County’s Ordinance on its face materially inhibits its operations.¹

Once again, Sprint is mistaken.

Even if it were true that the County had delayed processing the two wireless permit applications (it has not done so), this evidence would not warrant striking down the County’s Ordinance *on its face*. Sprint does not dispute that the County has granted 6 of the 10 permit applications it has submitted since the Ordinance was enacted. Nor does Sprint contend that the County failed to process the 6 Sprint applications it has granted in a timely manner. Therefore, there is nothing in the Ordinance itself that inevitably leads to delays in granting permit applications.

¹ Congress has determined that any time spent satisfying the normal requirements of a local ordinance governing the construction of wireless facilities does not result an improper delay that violates the Telecommunications Act of 1996 (the “TCA”). H.R. Conf. Rep. No. 104-458 at 208 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 223 (“If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances.”). This alone is fatal to Sprint’s claim that the Ordinance causes delays and therefore is preempted by section 253(a).

This fact alone establishes that any delay in processing these two permit applications is not a proper basis for striking down the County's Ordinance on its face.

This is true because unless an ordinance is invalid in all of its applications, it is not facially invalid. Sprint implies that a plaintiff alleging that a local ordinance is preempted by a federal statute does not have to satisfy this test. According to Sprint, this test only applies to facial challenges based upon constitutional provisions other than the Supremacy Clause. (Sprint Brief, at 7.) The panel rejected Sprint's argument and both the United State Supreme Court and this Court have held that the "no set of circumstances" test applies to facial preemption challenges. *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 580 (1987); *Chamber of Commerce of the United States v. Lockyer*, 463 F. 3d 1076, 1082 (9th Cir. 2006); *Committee of Dental Amalgam Manufacturers and Distributors v. Stratton*, 92 F. 3d 807, 810 (9th Cir. 1996).

Sprint also implies that section 253(a) -- which Sprint characterizes as an "express preemption clause" -- somehow establishes a different standard applicable to facial preemption challenges. There is nothing in section 253(a), however, that indicates that Congress altered the standard applicable to facial preemption challenges. Sprint cites no cases that support its argument because none exist.

At most, Sprint could allege that the Ordinance “as applied” to its two permit applications resulted in an illegal delay in violation of 47 U.S.C. §332(c)(7)(B)(ii) or a prohibition in violation of §332(c)(7)(B)(i)(II). An “as applied” challenge, however, would not invalidate the Ordinance itself. *4805 Convoy, Inc. v. City of San Diego*, 183 F. 3d 1108, 1111 n.3 (9th Cir. 1999) (“[A] successful ‘as-applied’ challenge does not invalidate the law itself, but only the particular application of that law.”).

Moreover, Sprint admits that the two applications on which it relies were processed under a prior ordinance, *not the Ordinance that is at issue in this lawsuit*. (Sprint Brief, at 15.) Therefore, any purported delay in processing these permit applications cannot be used to strike down the County’s Ordinance on its face.

Further, the delay “evidence” upon which Sprint relies is contained in its attorney’s declaration. (Sprint’s Excerpts of Record, Vol. I, at 77, ¶¶ 4-10.) The attorney’s statements do not attribute any purported delays to the County’s Ordinance and do not cite any Ordinance provisions that were responsible for the purported delays. Further, neither the district court nor the panel found that any provision of the County’s Ordinance inherently causes delays in considering permit applications and therefore prohibits an entity from providing telecommunications services. Accordingly, the attorney’s statements do not show

that the County's Ordinance has materially inhibited Sprint's ability to provide service or cost Sprint millions of dollars, as Sprint claims in its opposition.

Indeed, neither the district court nor the panel relied on the attorney's declaration. This was true in part because the County disputed this evidence, asserting that any delay was not caused by the County or its Ordinance, but by ***Sprint's request that the County stop processing these applications*** after it sued the County based on its handling of these applications. (County Supplemental Excerpts of Record ("CER") at 52-53, ¶ 6; County Reply Brief, at 24.) Since there is a material issue of fact in dispute regarding this evidence, it cannot be used to affirm the grant of summary judgment in favor of Sprint.²

² Sprint asserts that its damages expert's report shows that the County's Ordinance has decreased Sprint's market share and cost it millions of dollars. (Sprint Brief, at 16.) Sprint accuses the County of ignoring this "evidence." (*Id.*, at 17.) However, the expert's report is completely irrelevant. The district court did not rely on the expert's report in granting the motion for summary judgment because Sprint did not submit it to the court prior to the ruling on the motion. Further, the expert denies that he has any opinion regarding whether the County's Ordinance violates section 253(a). (Sprint's Excerpts of Record, Vol. II., at 221.) In addition, no damages evidence was ever submitted because the district court ruled that Sprint could not recover damages against the County (the panel affirmed that ruling). Had the County needed to contest the report of Sprint's damages expert during a damages proceeding, it would have done so. Moreover, the expert report is unsworn and therefore hearsay, and cannot be considered in determining whether the district court properly granted summary judgment in favor of Sprint. *Pack v. Damon Corp.*, 434 F. 3d 810, 815 (6th Cir. 2006) (citation omitted).

Sprint also cites the declaration of Deborah L. Collins, a paid consultant. (Sprint Brief, at 17 n.6.) Contrary to Sprint's assertion, Ms. Collins's declaration does not indicate that the County's Ordinance is "burdensome," "restrictive" or "onerous." She merely states that "it can sometimes take a year or even longer from the date of application to receive *full and final* approval to install the proposed facility." (Sprint's Excerpts of the Record, Vol. I, at 86, ¶14) (emphasis added). The fact that it is "sometimes" may take one year to receive approval to install a wireless facility does not establish that the County's Ordinance is facially invalid. Ms. Collins does not contend that the Ordinance inherently causes any delay. Moreover, since Ms. Collins uses the word "sometimes," it is clear that applications are processed in less than one year under the Ordinance. Indeed, one year is a relatively short period to ensure that public safety is protected. Further, Congress has determined that time spent satisfying the normal requirements of a local ordinance governing the construction of wireless facilities does not result in an improper delay that violates the TCA. H.R. Conf. Rep. No. 104-458 at 208, *reprinted in* 1996 U.S.C.C.A.N. 10, 223.³

³ Ms. Collins also refers to one of the two Sprint applications that is the subject of Sprint's attorney's declaration. She merely states that "[o]ver two years of time has passed, and Sprint has still not received the requisite approvals to construct this facility." (Sprint's Excerpts of Record, Vol. I, at 56 ¶ 14.) This statement is not relevant to Sprint's facial challenge for the same reasons as Sprint's attorney's statements are not relevant.

The delay "evidence" cited by Sprint does not support its claim that the County Ordinance, on its face, materially inhibits Sprint's ability to complete in the San Diego County market. Therefore, the County's Ordinance is not preempted by section 253(a) and the panel's decision should be overturned.

II. CONCLUSION

For these reasons, *en banc* review is necessary to overrule prior panel decisions holding that an ordinance is preempted by section 253(a) if it "may" or "might" prohibit a telecommunications company from providing service. When the proper preemption test is applied, it is apparent that the County's Ordinance does not, on its face, prohibit Sprint from providing service in the County.

DATED: 8/29/07

JOHN J. SANSONE, County Counsel

By 

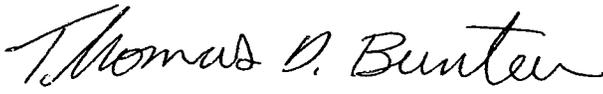
THOMAS D. BUNTON, Senior Deputy
Attorneys for Appellee/Cross-Appellant County of
San Diego

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure, rule 32(a)(7)(C) and Ninth Circuit Rules 32-1, 35-4, and 40-1, I certify that the attached County Of San Diego's Reply Brief In Support Of Its Petition For Rehearing *En Banc* is double spaced, typed in Times New Roman proportionally spaced 14-point typeface, and the brief contains 1,904 words of text as counted by the Microsoft Word 2003 word-processing program used to generate the brief.

DATED: 8/29/07

JOHN J. SANSONE, County Counsel

By 
THOMAS D. BUNTON, Senior Deputy
Attorneys for Attorneys for Appellee/Cross-
Appellant County of San Diego

SPRINT TELEPHONY PCS, L.P. v. COUNTY OF SAN DIEGO, et al.;
C.A. No. 05-56076; 05-56435 (No. CV-03-1398-BTM)

PROOF OF SERVICE BY MAIL

I, LEE WOLFE, declare:

I am over the age of eighteen years and not a party to the case; I am employed in, or am a resident of, the County of San Diego, California where the mailing occurs; and my business address is: 1600 Pacific Highway, Room 355, San Diego, California.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

I caused to be served the following document(s): **COUNTY OF SAN DIEGO'S PETITION FOR REHEARING *EN BANC* (2 copies)** by placing a true copy of each document in a separate envelope addressed to each addressee, respectively, as follows:

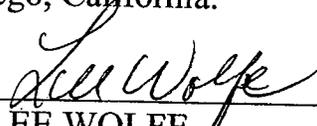
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I then sealed each envelope and, with the postage thereon fully prepaid, I placed each for deposit in the United States Postal Service, this same day, at my business address shown above, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 29, 2007, at San Diego, California.



LEE WOLFE