



## TELECOMMUNICATIONS

**September 2008**

**Ninth Circuit Decision Allows for Local Zoning Control  
Over Wireless Telecommunication Facilities**

The Ninth Circuit Court of Appeals recently issued an opinion in the case of *Sprint Telephony PCS v. County of San Diego* that overrules the court's previous interpretation of the Federal Telecommunications Act of 1996 ("TCA") and allows for a large measure of local control over the zoning of wireless telecommunications facilities, such as cell phone towers.

At issue in *Sprint* was the County's Wireless Telecommunications Facilities Ordinance, which established comprehensive regulations for the placement, design, and operation of wireless communication facilities. Sprint claimed that the County's ordinance was facially preempted by Section 253(a) of the TCA, which states: "No 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."

Previously, in *City of Auburn v. Qwest Corporation*, the Ninth Circuit broadly construed Section 253(a) to prohibit any state or local regulation that may have the effect of prohibiting telecommunication services. Subsequent decisions from the Ninth Circuit and lower courts applied *Auburn* to invalidate local regulations from several jurisdictions that included basic zoning regulations and procedures such as setbacks, camouflaging requirements, public hearings, and civil and criminal penalties for non-compliance.

The District Court in *Sprint* had also followed *Auburn* and held that the County's ordinance was preempted because its multi-layered permitting process and the open-ended discretion granted to County decisionmakers created an impermissible barrier to Sprint's provision of telecommunication services. A three-judge panel of the Ninth Circuit initially affirmed the District Court's decision, but a larger panel of the Ninth Circuit (called an en banc panel) decided to rehear the matter.

The en banc panel overruled *Auburn*, holding that "a plaintiff suing a municipality under Section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition." Accordingly, the court upheld the County's ordinance because none of its procedural or substantive elements effectively prohibited Sprint from providing wireless services.

The Ninth Circuit's decision is welcome news for municipalities, which are now free as a matter of federal law to apply traditional local zoning rules and procedures to wireless communication facilities so long as they do not effectively prohibit wireless services. It should be noted, however, that there is still a split between the Circuit Courts of Appeal over the proper interpretation of the TCA. Thus, there remains a possibility that the United States Supreme Court could eventually overrule the Ninth Circuit.

FOR ADVICE FROM RW&G CONCERNING THE SPRINT DECISION OR OTHER TELECOMMUNICATIONS ISSUES, PLEASE CONTACT WILLIAM B. RUDELL AT [WRUDELL@RWGLAW.COM](mailto:WRUDELL@RWGLAW.COM), STEVEN L. FLOWER AT [SFLOWER@RWGLAW.COM](mailto:SFLOWER@RWGLAW.COM), OR ANY OF THE LAWYERS IN THE FIRM'S **TELECOMMUNICATIONS** PRACTICE GROUP.

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