Restoring the Balance: Recent Federal Cases Preempting Local Government Regulation of Telecommunications Providers: A Wireless Industry Observer's Perspective

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During 2007 and continuing into 2008 federal courts have granted relief in several instances to telecommunications companies claiming that local government regulations of telecommunications infrastructure are so onerous, pervasive and vague that the regulations constitute barriers to entry under Section 253 of the Telecommunications Act of 1996 (TCA). During this period there has been an increased willingness of wireless industry participants seeking to vindicate the express intent of the US Congress in the passage of the TCA - to promote a pro-competitive and de-regulatory telecommunications environment that serves the national need to foster advanced wireless services available to consumers at lower costs – by proactively seeking to enjoin enforcement of excessive local government regulations under Section 253 rather than waiting to appeal a site specific permit denial under Section 332(c)(7)(B) of the TCA.

In a series of carefully considered decisions the federal courts have drawn on the plain language of and manifest Congressional intent expressed in the TCA to preempt excessive local government regulations that act as barriers to entry to telecommunications providers seeking to roll out services in a particular local market. The cases discussed below are Section 253 cases decided in 2007 and the first quarter of 2008 where federal courts largely considered the overall telecommunications regulatory scheme of a local government rather than the application of these local regulations to a site specific application of a telecommunications service provider. While an attempt has been made to cover significant decisions, not every Section 253 decision is reviewed.

Statutory Backdrop

Excerpts from 47 USC § 253. Removal of barriers to entry

> (a) In general. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of

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prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 [47 USCS § 254], requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority. Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers. Nothing in this section shall affect the application of section 332(c)(3) [47 USCS § 332(c)(3)] to commercial mobile service providers. ……

Excerpts from 47 USC § 332. Mobile services

(a) Factors which Commission must consider. In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 1 of this Act [47 USCS § 151], whether such actions will—
(1) promote the safety of life and property
(2) improve the efficiency of spectrum use and *reduce the regulatory burden upon spectrum users*, based upon sound engineering principles, user operational requirements, and market-place demands;
(3) *encourage competition* and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services…….

(c) Regulatory treatment of mobile services.
(1) Common carrier treatment of commercial mobile services……

(2) Non-common carrier treatment of private mobile services….

(3) State preemption.
(A) Notwithstanding sections 2(b) and 221(b) [47 USCS §§ 152(b) and 221(b)], *no State or local government shall have any authority to regulate the entry of* or the rates charged by *any commercial mobile service* or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates……

(7) Preservation of local zoning authority.
(A) General authority. Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
(B) Limitations.
(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--
(I) shall not unreasonably discriminate among providers of functionally equivalent services; and
(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or in-

strumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions. For purposes of this paragraph--

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) [47 USCS § 303(v)])……

[Emphasis added].

Section 253 Cases

First Quarter 2007

***Level 3 Communications v. City of St. Louis,* 477 F3d 528 (8th Cir. MO 2007).** **[**February 5, 2007]. Level 3 sued the City of St. Louis claiming that its municipal licensing (franchise) regulations for use of public rights of ways by telecommunications providers violated 47 USC §253(a). The USDC agreed. On appeal, the Eighth Circuit Court of Appeals reversed and in doing so distinguished its reading of 47 USC §253(a) from that of the First and Ninth Circuit Court of Appeals. The Eighth Circuit assumed that a telecommunications carriers has the right under the Supremacy Clause of the US Constitution to challenge a municipal right of way regulations as an unlawful barrier to entry in violation of 47 USC §253(a). The Eighth Circuit held that to prove a violation of Section 253(a) a telecommunications carrier has the burden of proving "actual or effective prohibition" rather than "the mere possibility of prohibition. The plaintiff need not show a complete or insurmountable prohibition, see [citation omitted] but it must show an existing material interference with the ability to compete in a fair and balanced market. [Citation omitted]."

***GTE Mobilnet Ltd P'ship d/b/a Verizon Wireless v. City and County of San Francisco*, 2007 US Dist Lexis 8801 (ND CA 2007)** [February 17, 2007]. USDC enjoins enforcement of San Francisco Major Encroachment Permit Ordinance (MEPO) in a facial challenge brought by Verizon Wireless. Verizon wished to place small wireless telecommunications facilities within SF public rights of ways. Verizon alleged that the MEPO violates 47 USC §253(a) because it imposes substantial burdens including: revocable permits; extensive application requirements; multiple city reviews and reports; a public hearing requirement with extensive public notice requirements; and provides for unbridled discretion to the Board of Supervisors about whether to grant or deny an application.

The USDC agreed with Verizon and pointed to the wholly discretionary decision making authority of the Board which could act without any governing or limiting standard. The Court also found that the MEPO was not saved under 47 USC §253(c) because the regulations are not reasonably restricted to allowing San Francisco to manage the public rights of ways. The unfettered discretion left in the City of San Francisco looked to the Court more like an unlawful regulation of a telecommunications provider than permissible local government management of the rights of ways.

***QWEST v. Utah Telecommunications Open Infrastructure Alliance Agency (UTOPIA*), 2007 US Dist Lexis 43469 (D UT 2007).** [March 7, 2007]. Lawsuit brought by QWEST, a local exchange carrier, against an intergovernmental entity created by 14 Utah cities. UTOPIA was created to construct and operate a wholesale telecommunications network which QWEST asserts competed with it in the market place. QWEST claimed, inter alia, that the UTOPIA member cities were granting certain preferential treatment to themselves in violation of their obligations to not create barriers to entry under 47 USC §253(a) and to act in a competitively neutral and non-discriminatory manner under 47 USC §253(c). A stipulated

judgment was entered settling the dispute with the local government members of UTOPIA agreeing to certain restrictions on their governmental actions including publicly accounting for loans and loaned employees that the cities were using to support this public telecommunications project.

This case is relevant to two common instances where the wireless industry sees local governments overreaching – instances where municipal governments give siting preferences – a higher zoning priority, quicker administrative approvals or an exemption from certain zoning regulations to commercial wireless facilities located on public property than on private property – and instances where local governments adopt highly restrictive telecommunications siting regulations that apply to commercial wireless carriers but completely exempt any municipal telecommunications facility from such regulations.

***Verizon Wireless v. City of Rio Rancho*, 476 F. Supp 2d 1325 (D NM 2007)**. [March 8, 2007] USDC denied City of Rancho's Federal Rule 12(b)(6) motion to deny a complaint brought by Verizon Wireless and T-Mobile which alleged that the Wireless Telecommunications Ordinance (WTO) enacted by the City of Rio Rancho violates 27 USC §253(a) and 47 USC §332(c)(3). This case was ultimately dismissed after Rio Rancho amended each of the sections of the WTO that were challenged in the Complaint. The Rio Rancho ordinance amended in the summer of 2007 still has significant problems with it. Discussions with the City to avoid further litigation are ongoing.

In denying the City's motion to dismiss the court considered three issues: (1) is the case ripe for adjudication; (2) did the wireless carriers sue under the wrong provisions of the TCA; and (3) does the FCC have primary jurisdiction over one of the claims – unlawful local government effort to regulate RF emissions and RF interference. The court found that the carriers did state claims that were ripe for adjudication, the carriers stated claims that were cognizable under 47 USC §253(a) & 332(c)(3) and that referral to the FCC is unnecessary for the carriers' claims of unlawful local government regulations of RF.

The Rio Rancho ordinance at issue in this lawsuit was crafted over time by city staff in consultation with the Center for Municipal Solutions (CMS). During the course of City Council consideration of the ordinance the carriers provided substantial written comments in opposition to the proposed ordinance. After the ordinance was adopted the carriers sued. The carriers alleged that multiple sections of the WTO violate the TCA including but not limited to the burdensome and onerous application requirements, the application and consultant review fees, the burdensome, highly discretionary and open ended application review process, and the vague and discretionary standards for determining whether an application should be granted or denied. In denying the motion to dismiss, the court rejected the City's claim that the carriers' remedy was to appeal a site specific permit denial under Section 332(c)(7). The court found that the carriers had pleaded facially valid claims under both Sections 253 and 332(c)(3) of the TCA.

***Sprint Telephony v. County of San Diego*, 490 F.3d 700 (9th Cir. 2007)** [March 13, 2007. Amended decision dated June 13, 2007. Reconsideration Motion Pending]. Affirms District Court decision and permanently enjoins enforcement of the County of San Diego Wireless Telecommunications Ordinance (WTO) and dismissal of Sprint's claim for money damages and attorneys fees. The legal issues on appeal were: (1) whether Sprint may seek a permanent injunction against the San Diego WTO under 47 USC §253(a); (2) whether the San Diego WTO violates 57 USC §253(a) as a matter of law; and (3) whether Sprint may recover money damages and attorneys fees for a violation of 47 USC §253(a) under 42 USC §1983.

After reviewing the requirements of the San Diego WTO, the Court began *sua sponte* an analysis of Sprint's standing to bring a facial challenge to the San Diego WTO. The Court reaffirmed its earlier finding in *QWEST v. City of Auburn*, 260 F. 3d 1160 (9th Cir. 2001) that a plaintiff seeking injunctive relief against state regulations on the grounds that they are preempted by federal statutes states a cause of action under the Supremacy Clause of the US Constitution and that federal courts have jurisdiction to resolve such cases under 28 USC §1331.

The Court then noted that the District Court had twice held that Sprint could bring a facial challenge to the entirety of the San Diego WTO. The Court of Appeals then went on to consider the difference between a site specific local government decision that may be appealed under 47 USC §332 and a general challenge to the entire wireless zoning ordinance under 47 USC §253(a). The Court of Appeals noted that 47 USC §253 challenges are "a new and different application of the TCA" which the Court considered unsurprising in light of the high standard of proof necessary to successfully mount a facial challenge -- "the challenger must establish that no set of circumstances exists under which the Act would be valid." ." [This Ninth Circuit dicta has been criticized by subsequent Section 253 cases. See *Newpath Networks, LLC v. City of Riverside, infra*.] After reviewing both the plain language and legislative history of the TCA, the Court of Appeals concluded that Sprint had standing to bring a facial challenge to the San Diego WTO under 47 USC §253.

The Court then went on considering the second question whether the San Diego WTO violated 47 USC §253. The Court summarized the decision below which looked at the onerous permit submittal requirements, the vague standards for approving or denying applications, the necessity for a public hearing and the possible imposition of criminal penalties for a violation of the ordinance – all criteria which the Ninth Circuit had used to strike down telecommunications franchising ordinances in *Qwest v. City of Auburn, supra*, -- and concluded that the WTO suffered from the same defects. The Ninth Circuit considered and rejected the County of San Diego's argument that the elements of the WTO challenged by Sprint are "traditional facets of zoning" that are unobjectionable for the simple reason that the WTO is a zoning ordinance rather than a franchise or public right-

of-way ordinance--unconvincing. The Ninth Circuit concluded that the San Diego WTO imposes both permitting and design requirements that are barriers to entry to wireless telecommunications in violation of 47 USC §253(a).

The Ninth Circuit then took up Sprint's claim for damages and attorneys fees. The Court held that Section 253(a) creates neither an implied private right of action nor a right enforceable under 42 USC §1983. The Ninth Circuit agreed with the analysis of the Tenth Circuit in *QWEST v. Santa Fe*, 380 F.3d 1258 (10th Cir. 2004) that 47 USC §253(a) does not create a right of action that allows recovery under 42 USC §1983.

***Southwest Bell Telephone v. City of Houston*, 2007 US Dist Lexis 22952 (SD TX 2007).** [March 29, 2007] Court grants Houston's motion to dismiss a 47 USC §253(a) claim brought by Southwest Bell which claimed that the City ordinance requiring utilities that have facilities within the public rights of way to relocate such facilities at their own expense when required to do so to serve the public convenience and necessity. Southwest Bell argued that the high relocation costs associated with such relocations constituted a barrier to entry under §253(a). The court held that even if the regulation was a barrier to entry under §253(a), the ordinance fell squarely within the right of way management authority reserved to the City under 47 USC §253(c) of the Telecom Act. The Court rejected Southwest Bell's argument that the City ordinance was not competitively neutral and non-discriminatory because it distinguished between utilities that had facilities within the rights of ways and those that did not. Such "discrimination" – if it even amounted to such – was reasonable.

Second Quarter 2007

***Illinois Bell Telephone v. Village of Itasca, IL, et al.*, 503 F Supp 2d 928 (ND IL 2007)**. [May 25, 2007]**.** Lawsuit brought by Illinois Bell Telephone against a group of local municipal governments. Plaintiffs alleged that the moratoriums and local franchising and zoning ordinances of the local governments were barriers to entry under 47 USC §253(a) and not saved by the "safe harbor" provisions of 47 USC §253(c). Upon defendant local governments' motion to dismiss the USDC found that Plaintiff had stated a valid cause of action at least as to the moratorium ordinances of the local governments.

The court found that a moratorium ordinance that prohibited "ground mounted utility installations 'GMUIs'" - cabinets of a certain dimension within the public rights of ways – but exempted ground mounted electrical substations, power off emergency electric generators, ground mounted traffic light control cabinets or utility poles – was simply a veiled attempt to stop Illinois Bell from deploying the controller cabinets for its new fiber optic system. As such the local government moratoriums were an effective barrier to entry under 47 USC §253(a) and were not saved under 47 USC §253(c) because the moratoriums were simply a method to control the business activities of a telecommunications carrier. 47 USC §253(c)

protects competitively neutral and non-discriminatory regulations to manage public rights of ways. It does not shield unlawful local government efforts to manage the business activities of companies that happen to install facilities within public rights of ways. (See also discussion in *NextG v. County of Los Angeles*, infra).

***Next G Networks v. County of LA*, 522 F. Supp 2d 1240 (CD CA 2007)**. [June 20, 2007]. Suit to enjoin enforcement of Los Angeles County conditional use permit ordinance that applied to wireless facilities installed in public rights of ways. Ordinance was enacted in 1927. Plaintiff alleged County ordinance was a barrier to entry prohibited under 47 USC Section 253(a). County alleged that it would apply conditional use permit process uniformly on all companies working in public rights of ways.

Standing Analysis:
Court began its analysis by *sua sponte* conducting a "standing" analysis to determine if NextG alleged a sufficient injury to meet the "case or controversy" requirement that is a prerequisite to obtaining injunctive relief in a federal court. Court held that NextG's claim that enforcement of LA County's conditional use permit process would expose NextG to claims for breach of contract claims from wireless carriers that had contracted with NextG to have a network operating by a date certain was too tenuous a claim to meet the case or controversy requirement. NextG could breach the contract with the wireless carriers for many reasons independent of complying with Los Angeles County's conditional use permit ordinance.

However, Court found that NextG met the case or controversy requirements in alleging violations of 47 USC §253(a) and CPUC 7901 and 7901.1. The mere threat of enforcement of the County's conditional use permit ordinance against telecommunications companies raised an injury in fact sufficient to meet the case or controversy requirement of the Telecommunications Act. Court distinguishes *QWEST v. City of Auburn*, 260 F.3d 1160 (2001) because in *Auburn* the telecommunications provider already had existing equipment in the right of way and faced the "Hobson's choice" of complying with the ordinance or facing criminal penalties. NextG had not constructed any facilities. Nevertheless the court held that *the very enactment of the ordinance created an injury* – infringement of NextG's federal rights under 47 USC §253(a) – sufficient to get relief in a federal court.

Injunctive Relief Standard:
The Court then went on to analyze the legal standard NextG had to meet to get a preliminary injunction: (1) likelihood of success on the merits and possibility of irreparable injury or (2) that serious questions going to the merits are raised and that the balance of hardships tips sharply in its favor. These two tests represent a continuum – thus the greater the relative hardship to a plaintiff, the less probability of success must be shown. Plaintiff, however, still must establish "clear and unequivocal" need for an injunction which is "an extraordinary remedy."

Court's Analysis:

(A) Likelihood for Success on Merits.

The Court conducted a two Step §253 Federal Preemption Analysis: (1) determine whether the ordinance provision violates the preemption requirement of §253(a) and then (2) see if the ordinance provision may be saved under §253(c) which allows local governments to manage public rights of ways so long as the regulations are competitively neutral and non-discriminatory.

Within Ninth Circuit it is recognized that §253(a) broadly preempts local regulations of the telecommunications industry. "The preemption is virtually absolute and its purpose is clear – certain aspects of telecommunications regulations are uniquely the province of the federal government and Congress has narrowly circumscribed the role of state and local governments in this area. *Auburn, supra,* at 1175. *QWEST v. City of Berkeley*, 433 F.3d 1253, 1256 (9th Cir. 2006) (Municipalities have "a very limited and proscribed role in the regulation of telecommunications.")

Court's §253(a) Analysis

Court restates the broad federal preemption of local regulations of telecommunications under §253(a). Three principles:

(1) §253(a) prohibits local 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. *Auburn, supra*, at 1175. *Qwest v. City of Portland*, 385 F.3d 1236, 1240-41 (9th Cir. 2004);
(2) §253(a) prohibits local regulations that "in combination" may have the effect of prohibiting the provision of telecommunications services. *Auburn, supra*, at 1176.
(3) Plaintiff need not prove the inability to enter into a particular market. It is sufficient that the regulations "may have the effect of prohibiting the provision of telecommunications services." *Portland, supra*, at 1240; see also, *NextG Networks v. City of San Francisco*, 2006 Lexis 36101, 2006 WL 1529990 (ND CA).

Court then summarized the common features in the local government regulations that three Ninth Circuit cases – *Qwest v. City of Auburn, supra, Qwest v. City of Berkeley, supra* and *Sprint Telephony PCS, L.P. v. County of San Diego, 479 F.3d 101(*Amended opinion at 490 F.3d 700)(9th Cir. 2007*)* – have found are preempted by federal law. These features are:

(1) a complicated application process (including reporting financial in formation);
(2) a public hearing on the application;
(3) imposition of criminal or civil sanctions for violations;
(4) unfettered discretion to approve or deny the application or revoke a permit once issued.

Court then examines County of Los Angeles code 22.56.030 setting forth the requirements for a conditional use permit:

(1) name and address of applicant
(2) location of subject property
(3) legal description of the subject property involved;
(4) nature of the requested use;
(5) nature, condition and development of adjacent uses, building and structures;
(6) the dimensions and state of improvement of the adjoining streets and highways providing access to the proposed site of the requested use;
(7) other permits and approvals secured in compliance with the provisions of other applicable ordinances;
(8) a "site plan" drawn to a scale satisfactory to and in the number of copies prescribed by the Director indicating (a) the area and dimensions of proposed site for the requested use and (b) the location and dimensions of all structures, yards, walls, fences, parking and loading facilities, landscaping, and other development features;
(9) maps in the number prescribed and drawn to a scale specified by the Director, showing (a) the location of all property included in the re quest, (b) the location of all highways, streets, and alleys, and (c) the location and dimensions of all lots or parcels adjacent to the subject parcel of land;
(10) one map indicating the uses established on every lot and parcel of land shown within said 500-foot radius;
(11) a list, certified to be correct by affidavit or by a statement under penalty of perjury, of the names and addresses of all persons who are shown on the latest available assessment roll of the County of Los Angeles as owners of the subject parcel of land and as owning prop erty within a distance of 500 feet from the exterior boundaries of the parcel of land to be occupied by the use;
(12) a map indicating where such ownerships are located;
(13) and finally any other information as the Director may require.

The Court then examined the burden of proof imposed on an applicant under the conditional use permit ordinance. The proponent must prove that the requested use must not:

(1) "Adversely affect the health, peace, comfort or welfare of persons residing or working in the surrounding area";
(2) "Be materially detrimental to the use, enjoyment or valuation of property of other persons located in the vicinity of the site"; or
(3) "Jeopardize, endanger or otherwise constitute a menace to the public health, safety or general welfare."

The Court then looked at three related ordinance provisions:

(1) The applicant must also establish the site is large enough to accommodate the yards, walls, fences, parking and loading facilities, landscaping and other development features required by Title 22 or "as is otherwise required in order to integrate said use with the uses in the surrounding area" and that the site is adequately served by highways and streets and other public and private service facilities as required. *Id*.
(2) The fee to apply for a CUP is $ 5,369, see sections 56.22.050, 56.60.100.
(3) The County may deny any application outright "if such application does not contain the information" specified by sections 56.22.030 and 56.22.040, see section 22.56.060.

The court concluded:

> The Court has little trouble concluding that *this [application] process is so burdensome and Byzantine* as to erect a barrier to providing telecommunications services. (Emphasis added). Not only does the ordinance impose a lengthy, detailed, and expensive application process riddled with administrative hoops, missing a single one of which causes the outright rejection of the costly application, but it also allows the Director to request further unspecified information. See section 22.56.030. And even if Plaintiff succeeds in submitting an acceptable application and pays the $ 5,000 fee, it still has the heavy burden to prove the proposed use complies with such subjective and imprecise concepts as the "health, peace, and comfort" of the area's residents, does not impact the "use, enjoyment or valuation of property" of neighbors, and does not endanger "public health, **[*27]** safety or general welfare." See section 22.56.040.

The court then went on to consider the public hearing requirement, potential for civil and criminal penalties and unfettered discretion left in local municipal officials who would apply vague and arbitrary standards in deciding on an application.

Public hearing:

In addition to the lengthy application, the County also requires a public hearing, see section 22.56.080, and yet another uncodified hearing before the "Altadena Town Council," a fact left undisputed by the County. (Pl. Mot. at 11:25-12:13; Pl. Reply at 9:12-18.) These public hearing requirements further complicate the already burdensome application process, as courts have nearly universally held. (citations omitted).

Civil and criminal penalties:

Further, the ordinance imposes criminal and civil sanctions for violating its provisions. See section 22.60.340. Although less universally cited by Courts in determining an ordinance's burden on an applicant, this nonetheless further complicates the process. (Citations omitted).

Vague and arbitrary discretion of local government officials:

Finally, section 22.56 provides unfettered discretion to County officials at multiple points in the approval process, including discretion to ultimately deny the application, the "ultimate cudgel" in the preemption analysis. (Citations omitted). For example and as noted above, section 22.56.030 allows the County to request additional unspecified information in the application, and section 22.56.050 permits summary rejection of the application for failing to provide it. Then section 22.56.040 imposes vague burdens for an applicant to prove broadly stated, generalized discretionary concerns such as "health, peace, comfort or welfare," "use, enjoyment, and valuation of property," and "public health, safety or general welfare." Even if an applicant carries this burden, the County can still deny an application under section 22.56.090 by concluding that the proposed use is inconsistent with the "general plan" of the area, whatever that might mean.

Further, the County may impose conditions on the CUP including but not limited to requiring yards, open spaces and buffer area's, fences, walls, parking facilities, landscaping, signs, a site plan, in the mitigation of nuisance factors or other conditions "as will make possible the development of the proposed conditional use in an orderly and efficient manner and in general accord with all elements of the general plan and the intent and purpose of this Title 22." Section 22.56.100. The County may revoke a permit that does not comply with these largely discretionary provisions. Section 22.56.1780. An applicant may appeal the denial of a permit, but the Director again has discretion to request further information

> from the applicant "as may be necessary," section 22.56.1670, and may deny an application that does not "insure the protection of public health, safety and general welfare, prevent adverse effects on neighboring property and is in conformity with good zoning practice" or is not "suitable from the standpoint of functional developmental design," section 22.56.1690. These provisions give the County de facto discretion to deny an application for nearly any possible reason under the guise of any of these terms. (Emphasis added)

The court concluded that this highly discretionary ordinance must be preempted under Section 253(a).

Court's Consideration of Section 253(a) defenses raised by the County of Los Angeles:

County raised two defenses:

(1) Unlike the ordinance preempted in Auburn the Los Angeles County ordinance at issue in this case is a zoning ordinance, not a franchise ordinance;
(2) Los Angeles County Code Section 22.56.010 et seq., is a regulation of general applicability and "nothing in the TCA specifically prohibits its regulations based on substantive local land use factors." (Def. Opp. at 6-9.) (footnote omitted.)

The court responds in two ways: First, by pointing out that the Ninth Circuit has already rejected drawing a distinction in §253(a) jurisprudence between franchise ordinances and zoning ordinances. Second, by prohibiting local governments from circumventing §253(a) by attempting to regulate telecommunications carriers under generally applicable ordinances

No distinction in result between a franchise ordinance and a zoning ordinance. Said the Court:

> The County of San Diego court specifically looked at City of Auburn's franchise ordinance and concluded in the context of a zoning ordinance: We find the County's retort -- that the elements of the WTO challenged by Sprint are traditional facets of zoning that are unobjectionable for the simple reason that the [ordinance] is a zoning ordinance rather than a franchise or public right-of-way ordinance -- unconvincing. Though Auburn discussed a franchise ordinance, our concerns in this case are largely the same. We conclude that the [ordinance] imposes a permitting structure and design requirements that present barriers to wireless telecommunications within the County, and is therefore preempted by § 253(a).

> Courts will not allow local governments to dress up unlawful regulations of telecommunications companies as generally applicable regulations:
>
> Moreover, simply because section 22.56 is of general applicability does not save it from preemption as applied to Plaintiff for a very practical reason: If a city could circumvent the requirements of section 253(a) simply by enacting regulations that apply to all utilities, then federal law would fail to provide any meaningful protection to telecommunications providers. Under the City's proposed construction, it could enact a regulation allowing the City to arbitrarily deny any utility access to public rights-of-way without violating section 253(a). The City's position cannot be reconciled with the plain language of the statute or the deregulatory purpose which it serves…..
>
> Section 253(a) was passed "to promote competition among and reduce regulation of telecommunications providers." City of Auburn, 260 F.3d at 1170. As a result, *the TCA confers a special status on Plaintiff*, which includes avoiding "barriers to entry" created by state and local governments, such as application schemes that have the effect of prohibiting the provision of service. (Emphasis added) See id. Precedent dictates that the scheme embodied in section 22.56 is simply too burdensome to be imposed on Plaintiff. The County's CUP process is therefore preempted by section 253(a) as a "barrier to entry."

Court's Consideration of §253(c) "safe harbor" provision.

NextG argued that Los Angeles County could not rely on §253(c) because: (1) County Code section 22.56 was not directed to managing public rights of ways and (2) the County did not apply section 22.56 in a non-discriminatory manner. Indeed it applied in a discriminatory manner toward wireless telecommunications service providers.

Code provisions not reasonably related to management of the rights of ways:

The court then reviewed the cases relating to rights of way management and the FCC's interpretation of the proper scope of state and local control of rights of ways. In re TCI Cablevision of Oakland Cty., Inc., 12 F.C.C.R. 21396, P 103 (F.C.C. 1997). The proper scope of local government authority is limited to such matters as coordination of construction schedules, determination of insurance, bonding, and indemnification requirements, establishment and enforcement of building codes, keeping track of various systems using the rights of ways to avoid interference between them and similar regulations rationally related a company's presence in a right of way. The Court reiterated the FCC's interpretation that

"management of the right of way" in §253(c) means management of the right of way itself, not control over the companies with facilities in the right of ways.

The court honed in on the unfettered discretion given to local officials in Section 22.56 LACC. The Court stated that unfettered discretion reserved to local government officials is a definitive factor in a §253(c) analysis. Local officials had the right to deny applications based on such vague criteria as "good zoning practice" and "functional development design." Unfettered discretion denotes attempts by local governments to control the companies that install facilities within public rights of ways, rather than management of the rights of way themselves.

The court also closely examined the criteria contained in Section 22.56 of the LACC and found that numerous criteria – "nature of the requested use, the uses of adjacent buildings and structures, the location and dimensions of all structures, yards, walls, fences, parking and loading facilities, maps indicating the ownership of all surrounding parcels of land, and any other information as required by the Director. This information has little to do with managing the physical integrity of the rights-of-way, the flow of traffic, the provision of other utilities, or any construction schedules, and cannot be viewed as management of the rights-of-way preserved by section 253(c)."

Code provisions discriminatorily applied only to wireless facilities located within public rights of ways:

LA County admitted that the conditional use permit process applied to all telecommunications facilities that wished to install wireless facilities in public rights of ways. In easily finding that LACC 22.56 was discriminatory the Court said:

> Section 253(c) requires that rights-of-way must be managed in a nondiscriminatory way. See NextG Networks, 2006 U.S. Dist. LEXIS 36101, 2007 WL at *8. Section 253 contains no distinction between wireless and wireline facilities and the Ninth Circuit has found none. See Cty. of San Diego, 490 F.3d 700, 2007 WL at *16 ("[W]e determine that local zoning ordinances regulating the construction and placement of wireless communications facilities are within the preemptive scope of § 253(a) (removing barriers).").

Third Quarter 2007

***Global Network Communications v. City of New York*, 507 F. Supp 2d 365 (SD NY 2007)**. [August 30, 2007]. This is one of a series of cases pending in both federal and state courts in New York relating to efforts by a pay phone company to get a franchise to install pay phones in New York City public rights of ways. NYC Department of Information Technology and Telecommunications denied Plaintiff a franchise primarily due to the involvement of multiple known associates of the Bonnano crime family within the Global Network Communications

business entity. There was evidence that Global Networks defrauded property owners of more than $1.8 million. The court held that a municipal decision to deny a franchise where there was a reasonable likelihood that if given a franchise Global Networks still would not pay fair and reasonable compensation to the City fell squarely within the "safe harbor" provisions of 47 USC §253(c). The City acted within its rights in denying a franchise.

***Level 3 v. City of St Louis,* 2007 US Dist Lexis 71078 (D. MO 2007)** [September 25, 2007]. Upon remand from the Eighth Circuit, the USDC determined that the Eighth Circuit's interpretation of Section 253(a), to wit imposing a requirement that Plaintiff establish that local government ordinances "materially inhibit" Plaintiff's ability to provide telecommunications services, is not a new legal standard but is similar to that espoused by the FCC in *In Re California Payphone Ass'n*, 12 FCCR 14.191, 14,206 and followed by the Second Circuit in *TCG New York v. City of White Plains*, 305 F.3d 67 (2nd Cir 2002) and a USDC within the Second Circuit in *Tel Comm Techs v. City of New Haven*, 2006 US Dist. Lexis 60440 (D. CT 2006). Accordingly, since Level 3 had not undertaken discovery in the time allotted under the pretrial order the court denied Level 3's attempt to re-open discovery post Eighth Circuit remand and granted summary judgment to the City of St. Louis.

Fourth Quarter 2007

***MCI Communications v. City of Eugene*, 2007 US Dist Lexis 75602 (DC OR 2007)**. [October 9, 2007]. Judgment on the pleadings granted to City on MCI's claim Eugene Ordinance 20083 violates 47 USC §253(a) because it is an unlawful barrier to entry. In concluding that the Tax Injunction Act, 28 USC §1341 precludes the USDC from having subject matter jurisdiction, the Court focused on the registration and revenue raising purpose of the ordinance. The ordinance imposes a 2% gross revenue tax on telecommunications carriers that occupy the rights of ways. The court stated, "There can be no dispute that plaintiffs' complaint centers around the requirement that they pay the registration and license fees." Because the Oregon state courts have jurisdiction over revenue and taxation disputes between a carrier and a city, the Tax Injunction Act precluded the USDC from acting.

***Sprint PCS Assets v. City of Palos Verde Estates*, 508 F.3d 897 (9th Cir CA 2007)**. [November 16, 2007]. [*Certification by the Ninth Circuit to the California Supreme Court* to decide the question whether Cal. Pub. Util. Code §§ 7901 and 7901.1 permitted public entities to regulate the placement of telephone equipment in public rights of way on aesthetic grounds.] The Ninth Circuit was asked by the California Supreme Court to clarify its question, specifically, in light of the significance, if any, of the Ninth Circuit's decision in *Sprint Telephony PCS, L.P. v. County of San Diego, et al., supra*. The Ninth Circuit urged the California Supreme Court to please decide the original question stating:

> This appeal presents two questions distinct from those answered in *Sprint Telephony*. First, we must answer whether California Public Utilities Code §§ 7901 and 7901.1 permit public entities to regulate the placement of telephone equipment in public rights of way on aesthetic grounds. Second, we must consider whether the zoning ordinances in question are permissible under federal law. However, we need reach this second question only if the zoning ordinances are valid under California state law. Only if the California Supreme Court were to decide that California Public Utilities Code §§ 7901 and 7901.1 allow aesthetic zoning would we be required to determine whether the aesthetic zoning in question is preempted by § 253(a)
>
> For these reasons, we again certify to the Supreme Court of California the question of whether the California Public Utilities Code §§ 7901 and 7901.1 permit public entities to regulate the placement of telephone equipment in public rights of way on aesthetic grounds.

Incidentally, the California Supreme Court denied the renewed certification request. *Sprint PCS Assets, LLC v. City of Palos Verde Estates, 2008 Cal. Lexis 280.* [January 3, 2008].

First Quarter 2008

***Next G v. City of New York,* 513 F. 3d 49 (2nd Cir 2008).** [January 15, 2008] Lawsuit brought by NextG, an Outdoor DAS vendor, against the City of New York Department of Information Technology and Telecommunications ("DOITT"). NextG claimed that the NYC franchise requirements unlawfully denied NextG access to City owned utility poles located within public rights of ways. The USDC granted summary judgment to the City finding that 47 USC §253(a) created a private right of action and that NextG could sue for damages under 42 USC §1983 for any alleged violation of 47 USC §253(a) by the city. The USDC also ruled that the availability to NextG of an action for damages weighed against NextG's claim for injunctive relief. The USDC also ruled that because NextG failed to prove any actual damages its damage claim should be dismissed.

The Second Circuit reversed. The Second Circuit held that 47 USC §253(a) does not create a private right of action for telecommunications providers. Therefore telecommunications providers have no right to recover damages under 42 USC §1983 for alleged violations of 47 USC §253(a). Nevertheless, the Second Circuit affirmed the dismissal of NextG's damage claim but for very different reasons than those advanced by the USDC below.

The Second Circuit also held that the District Court erred by not adequately considering NextG's claim that the City of New York's entire regulatory scheme over

telecommunications providers violates 47 USC §253(a) because it presumes that the City has complete and unfettered discretion to determine who may provide telecommunications services. Reversed and remanded to USD for further considerations of NextG's claim that the City's regulatory scheme is in material respects preempted or prohibited by the Telecommunications Act.

NextG Networks v. City of Huntington Beach, CA **(CD CA Case SACV 07-1471 ABC).** [Revised Order 2/7/2008]. NextG constructs Outdoor DAS networks and contracts with wireless carriers to provide a managed network. When Next G tried to deploy facilities in Huntington Beach, it faced a series of discretionary permit approvals similar to those enjoined by the same USDC Judge in *NextG v. County of LA, supra.* The court ruled here as well that a preliminary injunction would issue restricting the City of Huntington Beach to enforcing its encroachment permit only and enjoining the City from enforcing its wireless permit, franchise, Design Review and Conditional Use Permit criteria against NextG. This case illustrates the broad preemption of local government regulations that effectively bar access to public rights of ways for telecommunications providers.

Newpath Networks LLC v. City of Irvine, **(CD CA Case SACV 06-550-JVS)** [Order filed 3/10/2008]. Newpath Networks is a competitive local exchange carrier which contracts with certain wireless carriers. Newpath builds and operates Outdoor Distributed Antenna Systems (DAS). After having trouble obtaining permits in Irvine, Newpath withdrew its application and filed a facial challenge to the City of Irvine Wireless Communications Ordinance (WCO). Specifically Newpath alleged that the WCO violated 47 USC §253(a) and was not saved under 47 USC§253(c).

The Court agreed with Newpath and focused in on the lengthy, time consuming and expensive permit application requirements, the lack of limitations upon either the type of supplemental information or when the information is requested by the local government, the wholly discretionary approval process including the possibility of a staff referral to the Zoning Administrator for review and the necessity of a public hearing on the application. The Court found the regulations burdensome and prohibitive and that they have the effect of prohibiting the provision of telecommunications services and create a substantial and unlawful barrier to entry into participation in Irvine's telecommunications market.

The USDC considered the City of Irvine's claim (citing the Ninth Circuit's decision in *Sprint v. County of San Diego, supra*,) that Newpath Networks had an obligation to prove that there was "no set of circumstances exists under which the" City of Irvine regulations "would be valid." The court rejected this claim finding that the Ninth Circuit citation to similar language was dicta.