Latest 9th Circuit Decision on Wireless Facilities Cautions Cities on Federal Preemption of Local Restrictions

by Robert S. Metzger[1]

Practitioner comment on T-Mobile USA, Inc. v. City of Anacortes *(No 08-35493, slip op. (9th Cir. July 20, 2009), available at 2009 WL 2138980).*

The Telecommunications Act of 1996 ("TCA") was enacted with goals that were at once complementary and contradictory—to increase competition and facilitate rapid deployment of new technology, on the one hand, while preserving the autonomy of states and municipalities, on the other.[2] Since enactment, telecommunications service providers, and local and state governments, have resorted to the Act to suit their respective objectives. Providers, driven by technologies and market demand for new services, have continuously sought to install, upgrade and maintain telecommunications facilities upon both private and public property. State and local political leaders, motivated by changing values and community aesthetic objectives, have resisted and sought to regulate and control the installations. The TCA has proven to be an inconsistent guide, at best, to resolving this tension. More than a decade after enactment of the TCA, major questions about local right to control or deny telecommunications installations remain unanswered. Recent decisions in the Ninth U.S. Circuit Court of Appeals clarify the law as to wireless facilities but reveal remaining tension between local prerogatives and provider needs.

Background

The TCA, at section 253(a), provides that no state or local legal requirement "may prohibit or have the effect of prohibiting . . . any interstate or intrastate telecommunications service." At section 332(c)(7), the TCA also provides that the "regulation of the placement, construction, and modification of personal wireless facilities . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services." Both sections 253(a) and 332(c)(7) share very similar language in that they proscribe local actions which "prohibit or have the effect of prohibiting" services.

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[2] *Sprint Spectrum L.P. v. Willoth,* 176 F.3d 630, 639 (2d Cir. 1999).

For a considerable period of time, the law in the Ninth Circuit (which includes Alaska, Washington, Montana, Idaho, Oregon, California, Nevada and Arizona) was receptive to "facial" challenges, under section 253(a), to local ordinances which purported to regulate either wireless or wireline (i.e., landline) facilities. This was the result of the approach articulated in *City of Auburn v. Qwest Corp*., 260 F.3d 1160 (9th Cir. 2001), where the Ninth Circuit invalidated a local ordinance based upon the possibility that its process and substantive provisions "might" have an effect to prohibit telecommunications services. Following *Auburn*, telecommunications carriers and wireless service providers successfully challenged several local government ordinances and permitting actions.[3]

The Ninth Circuit, however, reversed course in September 2008, when it decided *Sprint Telephony PCS v. County of San Diego,* 543 F.3d 571, 576 (9th Cir. 2008) (*en banc*), *cert. denied,* 77 U.S.L.W. 3366 (U.S. June, 29, 2009) (No. 08-759) ("*Sprint II")*. The court reinterpreted section 253(a) and concluded that it had erred in reading the text of the statute to permit challenge to actions which "may . . . have the effect of prohibiting" the provision of telecommunications services. The court acknowledged:

> Our previous interpretation of the word "may" as meaning "might possibly" is incorrect. We therefore overrule *Auburn* and …[hold] that "a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.

Id. at 578. The court also observed that its new interpretation of § 253(a) is "buttressed by our interpretation of the same relevant text in § 332(c)(7)(B)(i)(II)—'prohibit or have the effect of prohibiting.'" The *Sprint II* court cited favorably its 2005 decision, *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 731-33 (9th Cir. 2005) ("*MetroPCS*"), a case involving city regulation of wireless antenna installations, which it described as focusing on "the *actual* effects of the city's ordinance, not on what the effects the ordinance *might possibly* allow." *Id.* (emphasis in original).

Sprint II was a "facial" challenge to a municipal ordinance that was decided, principally, on the basis of section 253(a) of the TCA. That section is concerned with general telecommunications services as distinct from personal wireless services (the subject of section 332(c)(7) of the TCA). *Sprint II* was not instructive on what it would take for a service provider to mount a successful "as applied" challenge.

T-Mobile USA, Inc. v. City of Anacortes, decided by the Ninth Circuit on July 20, 2009, illustrates an "as applied" challenge in the aftermath of *Sprint II*. This recent decision helps clarify the responsibilities of parties to controversies regarding deployment of wireless facilities. *Anacortes* instructs municipalities that, once the provider has made a prima facie case under section 332(c)(7), it is their burden to produce credible, relevant evidence to justify rejection of a provider's proposed installation. The case clearly shows that it is not sufficient for a city to "just say no" to proposed wireless facilities, where a provider proves it has a significant gap in wireless service coverage and has proposed the least intrusive means to close that gap. *Anacortes* also signals that, after *Sprint II*, the Ninth Circuit will focus on the factual circumstances in "as applied" challenges brought under sections 332(c)(7) and 253(a).

[3] In *Auburn*, the Ninth Circuit held that "[t]he scope of federal preemption under section 253 "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 this arena." 260 F.3d at 1175. "Section 253 begins with a broad prohibition against state and local regulation, followed by certain narrow exceptions that leave a 'safe harbor' for limited local regulation." Id. at 1170. Courts applying section 253(a), under the *Auburn* standard, found that certain features of regulations, in combination, have the effect of prohibiting the provision of telecommunications services. Such features include, but are not limited to, "numerous submission or disclosure requirements, retention of discretion by the city to require further disclosures, public hearing requirements, unlimited discretion of the city to grant or deny permits, and civil and/or criminal penalties." *Sprint Telephony PCS, L.P. v. County of San Diego*, 377 F. Supp. 2d 886, 893 (S.D. Cal. 2005) (reviewing cases) ("*Sprint I*").

The Facts

T-Mobile sought the approval of the city of Anacortes, Washington ("City"), to erect a 116-foot monopole antenna on private property located within the city, and submitted elaborate supporting information, including assessment of eighteen alternative sites. The City's consulting expert allowed that the site selected by T-Mobile was the "best position" to achieve radio coverage for the provider's wireless network. Thus, the evidence was that the proposed monopole antenna, at the particular site recommended, was the best and only feasible way to secure needed wireless coverage. There was no dispute over the existence of a coverage gap. Yet, the City rejected T-Mobile's application. In a one-paragraph statement, the City suggested a number of antenna alternatives that it thought sufficient.

The Issue

The key issue was whether T-Mobile had shown an "effective prohibition" of wireless services under section 332 of the TCA. Under applicable law in the Ninth Circuit, a local decision denying a permit can be overturned, for violation of federal law, where the applicant shows both the existence of a "significant gap" in wireless coverage and that it has proposed the "least intrusive means" to close the gap.

The Decision

The Ninth Circuit ruled that the service provider must make a prima facie showing of a gap in coverage and that it had considered and selected among the least intrusive means to close the gap. The Ninth Circuit determined that as T-Mobile had made its prima facie showing, the burden shifted to the City to show that there were any potentially available and technically feasible alternative sites. The court found that the City failed to adequately rebut T-Mobile's prima facie showing that no other location was available and feasible.[4] Thus, the Ninth Circuit found that denial of T-Mobile's permit application constituted an "effective prohibition" of coverage in violation of section 332(c)(7) of the TCA. The court upheld the remedy granted at the District Court, namely an order obligating the City to issue a permit to T-Mobile to construct the monopole antenna at the site the provider had selected.

The Significance

Anacortes informs cities that they cannot summarily deny an application accompanied by credible evidence of a wireless coverage gap and a showing that the installation proposed is the least intrusive of reasonable alternatives actually considered. *Anacortes* also is very helpful to establish the evidentiary burdens imposed upon applicant and city. The Ninth Circuit (in *MetroPCS*) previously had adopted the "significant gap" and "least intrusive means" standard of deciding "effective prohibition" under section 332(c)(7).[5] *Anacortes* is the first application of that test since *Sprint II.* Apart from providing an approach

[4] While the City identified six possible alternative sites, T-Mobile presented evidence that none of these sites were available. One was objectionable because its location, adjacent to a hospital, could interfere with the flight of emergency helicopters. Another possible site was on the grounds of a community high school; it was unavailable where the school district had received but declined T-Mobile's offer. Sites to which T-Mobile had no right of access were ruled out. *Anacortes*, 2009 WL 2138980 at 7-9. Also of interest is that the court concluded that an in-home (WiFi) technology offered by T-Mobile ("HotSpot@Home") was "not relevant to a determination of the least intrusive means." Id. at 6. For a variety of reasons, including the fact that the service must be separately purchased by individual customers, and works only within the homes of individual subscribers, the Court concluded the availability of this service "has no effect on the significant gap in T-Mobile's cell phone coverage." Id. Such private service was not considered a means available to a carrier to secure area coverage.

[5] MetroPCS was a challenge to a decision by the San Francisco Board of Supervisors denying permission to construct a wireless antenna on top of a city parking structure. 400 F.3d at 718. The case was an "as applied" challenge since the plaintiff contested the decision made by the Board acting under the San Francisco Planning Code, but not the Code itself. Id. at 720. On the claim under § 332(c)(7), the Ninth Circuit adopted a test, previously employed in the Second and Third Circuits, that "a locality can run afoul of the TCA's 'effective prohibition' clause if it prevents a wire-less provider [sic] from closing a 'significant gap' in service coverage." Id. at 731. The Ninth Circuit explained that "a local regulation creates a 'significant gap' in service (and thus effectively prohibits wireless services) if the *provider in question* is prevented from filling a significant gap in its own service network." Id. at 732 (emphasis in original; citation omitted). The Ninth Circuit also adopted the requirement, of

for trial court consideration of conflicting evidence, *Anacortes* serves as guidance relevant to local administrative proceedings. The instructions of the Ninth Circuit, as to what constituted a sufficient prima facie case in *Anacortes*, should assist carriers to understand what is expected, in the administrative record, and how it will be assessed in the event of subsequent litigation. Cities cannot expect to sustain adverse action on carrier applications without evidence sufficient to rebut the carrier's prima facie showing. That lesson, alone, should caution cities not to deny permit applications unless they possess strong evidentiary support.

Certain important subjects, however, were not addressed by *Anacortes*.

- *Anacortes* was decided under section 332(c)(7) of the TCA and it concerns a wireless facility, namely a monopole antenna, to be located on private property. This raises the question of how permit actions affecting installations within the public rights-of-way will be resolved. In the Ninth Circuit, it is well-established that local governments may consider aesthetics when deciding whether to permit installation of wireless facilities on private property subject to local zoning laws.[6] Since *Sprint II*, the Ninth Circuit also accepts that local decisions made under zoning laws are inherently "discretionary" in character.[7] As explained blow, however, installations of wireless or wireline telecommunications facilities within the public rights-of-way—particularly in California—cannot reflect the same deference to zoning laws and local discretion.

- *Anacortes* used a test to determine "effective prohibition" under section 332(c)(7) which looks to technical attributes of wireless service from the standpoint of the user (coverage "gap") and the provider ("least intrusive means"). These considerations may not apply, at least directly, to evaluating local actions affecting telecommunications services challenged under section 253(a). The definition of services, which section 253(a) seeks to protect, is considerably broader than its counterpart under section 332(c)(7).[8]

Issues Specific To California

The Ninth Circuit has observed that the TCA "does not affect or encroach upon the *substantive* standards to be applied under established principles of state and local law." *MetroPCS, supra* at 724 (emphasis in original). Zoning laws serve as the basis for local regulation of telecommunications facilities when

the Second and Third Circuits, that "the provider . . . show that 'the manner in which it proposes to fill the significant gap in service is the *least intrusive on the values that the denial sought to serve*." Id. at 734 (emphasis in original; citations omitted). The approach employed in MetroPCS has been applied subsequently in the Ninth Circuit to cases challenging denial of permits for wireless antenna installations. E.g., *Cingular Wireless, LLC v. Thurston County*, 425 F.Supp. 2d 1193 (W.D. Wa. 2006); *MetroPCS Inc., City and County of San Francisco*, 2006 WL 1699580 (N.D. Cal. June, 16, 2006); *Bay Area Cellular Telephone Co. v. City and County of San Francisco*, 2005 WL 3157490 at *8 (N.D. Cal. Nov. 23, 2005).

[6] In *Anacortes*, the Ninth Circuit readily acknowledges the validity of aesthetic considerations for local land use (zoning) decisions affecting wireless installations. *Anacortes*, 2009 WL 2138980 at * 5 (citing *Sprint II*, 543 F.3d at 580). Accommodation of such concerns is the essence of the "least intrusive means" test used by the Second, Third and Ninth Circuits in personal wireless services installation cases under section 332(c)(7).

[7] In *Sprint II,* the Ninth Circuit recognized that section 332(c)(7)(A) preserves the authority of local governments over zoning decisions regarding the placement and construction of wireless service facilities. *Sprint II*, 543 F.3d at 576. The court also allowed that "[a] certain level of discretion is involved in evaluating any application for a zoning permit." Id. at 580. Comparable discretion, however, is not available to municipalities in California, where its exercise, as applied to installations proposed within the public rights-of-way, would conflict with state law in the form of sections 7901 and 7901.1 of the Public Utilities Code.

[8] The Second Circuit, in *Sprint Spectrum, L.P. v. Willoth*, *supra*, first considered what was meant by Congress by "personal wireless services" (as are to be protected by 332(c)(7)). The court's conclusion, rendered in 1999, was that "the plain focus of the statute is on whether it is possible for a user in a given remote location to reach a facility that can establish connections to the national telephone network." 176 F.3d at 643. Such a narrow definition is facially anachronistic today, when wireless devices are routinely connected to broadband networks and used for a array of business, personal and governmental purposes. Section 253(a), by contrast, is sweeping: it precludes state or local action that may prohibit "the ability of *any* entity to provide *any* interstate or intrastate telecommunications service." (Emphasis added.)

deployed upon private property. However, in California, installations which are within the *public rights-of-way* are controlled by state law, which limits local government authority.

- In California, telephone utilities are provided a "franchise," under section 7901 of the Public Utilities Code, to access the public rights-of-way with minimal local interference. Under § 7901.1, local governments only may regulate "time, place, and manner" of installations to assure that encroachment by utilities does not "incommode" the ability of the public to access the public streets and thoroughfares.

  - California courts have long upheld the "vested right" of telephone corporations to enter and use the public rights-of-way.[9] It makes no difference whether, in the exercise of this franchise within the public rights-of-way, a telecommunications service provider intends to install "wireless" or "wireline" facilities. California cities, under section 7901.1(a), have only the ability to exercise "reasonable control as to the time, place, and manner in which roads . . . are accessed." Local actions in excess of the limited authority conferred by state law are void.[10]

  - The role of local authorities in granting permits to build within the public rights-of-way is largely "ministerial," meaning local authorities may only exercise limited judgment or discretion when reviewing the permits. Historically, local governments in California may not impose aesthetic considerations when deciding upon encroachment permit applications for telecommunications facilities.[11]

Conclusion

Between *Auburn* and *Sprint II*, most cases in the Ninth Circuit arising under Section 253(a) involved "facial" challenges to municipal ordinances. *Sprint II* means that courts in the Circuit will face cases challenging local actions denying permits for both wireless and wireline facilities, in private property as well as in the public rights-of-way. *Anacortes* assists to understand how the courts will adjudicate an "as applied" challenge under section 332(c)(7) to decisions on permits for wireless facilities. Yet to be established is a standard to apply to municipal acts challenged as an "effective prohibition" of "telecommunications services" under section 253(a). For a number of reasons, the 332(c)(7) test, articulated in *MetroPCS* and employed in *Anacortes*, cannot be directly applied to 253(a) cases. As noted previously, the technical basis of the 332(c)(7) test assumes utilization of wireless facilities and technology. While certain language ("prohibit or have the effect of prohibiting") is held in common, there are important differences in these statutory provisions. The "telecommunications services" to be protected by section 253(a) are defined more broadly than those addressed by section 332(c)(7). The nature and degree of deference granted to state or local authority also differs. Section 253(b) disclaims any intent to affect the ability of a State to "protect the public

[9] Decades of case law under section 7901 show California courts have limited municipal authority in order to foster development and modernization of communications services in California. *E.g.*, *County of Los Angeles v. Southern California Telephone. Co.*, 32 Cal. 2d 378, 382 (1948); *Pacific Telephone & Telegraph v. City and County of San Francisco*, 51 Cal. 2d 766, 774-75 (1959); *Williams Communications, Inc. v. Riverside*, 114 Cal. App. 4th 642, 652 (2003).

[10] "'If otherwise valid legislation conflicts with state law, it is preempted by such law and is void. A conflict exists if the local legislation 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.'" *O'Connell v. City of Stockton*, 41 Cal. 4th 1061, 1072 (2007) (citations omitted).

[11] Ninth Circuit decisions recognize the limited authority of local governments, in California, to consider aesthetics when deciding upon permits for installations in the public rights-of-way. *Sprint PCS Assets, L.L.C. v. City of Law Canada Flintridge*, 435 F.3d 993, 996 (9th Cir. 2006), found that a federal court should examine whether a permit denial is "based on 'substantial evidence in the context of a applicable *state and local law*.'" (Emphasis in original.) The Ninth Circuit found that "under [Public] Utilities code §§ 7901 and 7901.1, local regulators retain *no authority* to deny permits based on aesthetics." Id. at 998 (emphasis added.) Evidence of aesthetic effects could not be considered to satisfy the federal requirement that permit denial be "supported by substantial evidence." The *La Canada Flintridge* decision was amended at 448 F.3d 1067 (2006) to clarify that a local ordinance (promoting aesthetic objectives) in violation of a state law cannot constitute "substantial evidence" supporting a permit denial under federal law.

safety and welfare."[12] Section 253(c) advises that nothing in the section is to affect the authority of a State or local government "to manage the public rights-of-way."[13] Section 332(c)(7)(A), in contrast, explicitly seeks preservation of local zoning authority as to “placement, construction, and modification of personal wireless facilities.” Finally, section 332, at (c)(7)(B)(ii) and (iii), imposes procedural requirements upon the decision of local authorities, i.e., that local governments must act on wireless applications “within a reasonable period of time” and that adverse decisions be “in writing” and “supported by substantial evidence contained in a written record,” which have no counterpart in section 253.

A contemporary test, to determine “effective prohibition” under section 253(a), should recognize that much has changed in the 13 years since enactment of the TCA. There have been profound changes in the services delivered by telecommunications service providers, in the technologies they employ—and in the expectations of consumers. *Anacortes* may suggest the following prospective approach:

> An “effective prohibition” is presented, and thus preempted under section 253(a), where state or local government action has the affect of impairing or preventing a carrier from providing, to a particular community, any telecommunications services that it then can offer and is prepared to deliver.

The purposes of the TCA are to promote competition and the rapid deployment of new telecommunications technologies. These require an approach which recognizes that the “telecommunications services,” which the Act seeks to protect against state or local action, have greatly evolved and expanded. Categorical distinctions between “personal wireless services” and “telecommunications services” have blurred if not been rendered obsolete by new technologies already employed. Contemporary broadband telecommunications services may be delivered by wireless or wireline means, or a combination of both. Where a provider presents evidence that it is capable of offering a service, including “advanced” broadband services, and that a local action has impaired or precluded its ability to do so, then *Anacortes* may be analogized to suggest that the provider has made a prima facie case of “effective prohibition.” Respecting authority preserved by sections 253(b), the burden then should shift to the local government to justify restrictive or prohibitory action, with credible evidence, as non-discriminatory, necessary to protect the public safety and welfare

[12] By “public safety and welfare,” Congress meant, among other things, “to make certain that emergency services, such as 911, are available to the public.” H.R. Rep. No. 104-204, at 75 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 41. Wireless telecommunications are increasingly important to public safety. Consumers are replacing landline devices and relying exclusively on cellular phones. *See* Roger Cheng, *AT&T Gets Another iPhone Boost,* Wall St. J., July 24, 2009, *available at http://online.wsj.com/article/SB124834102512675297.html?mod=dist_smartbrief* (reporting that AT&T customers disconnected 772,000 landlines in the second quarter of 2009, while the company added 1.4 million wireless subscribers). Another reason is Enhanced 9-1-1 (“E911”) services, which enable first responders to locate wireless callers to emergency services within one-hundred meters of the caller’s location. Considering the increasing importance of wireless services to public safety, local governments contravene the intentions of Congress by actions which frustrate deployment of wireless infrastructure necessary to assure signal coverage.

[13] Whether states and local governments, in management of the public rights-of-way, may apply aesthetic considerations, is a subject that has generated considerable controversy. In *Auburn*, the Ninth Circuit stated that under section 253(c), "[l]ocal governments must be allowed to perform the range of vital tasks necessary to preserve the *physical integrity* of streets and highways . . . . The types of activities that fall within the sphere of appropriate rights-of-way management . . . include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them." 260 F. 3d at 1177 (emphasis added). The subsequent *Sprint II* decision did not repudiate this aspect of the earlier *Auburn* ruling. Telecommunications service providers will argue that section 253(c) authorizes local regulations only with respect to the *physical* use and management of the rights-of-way. Where state law limits the delegation of authority to municipalities, as in California, local governments may be preempted by federal law should they attempt to apply aesthetic criteria, or achieve aesthetic goals (such as mandatory undergrounding) to permitting of facilities to be installed in the public rights-of-way. *See Pac. Tel. & Tel. Co. v. City and County of San Francisco*, 197 Cal. App. 2d 133, 152 (1961) ("[B]ecause of the state concern in communications, the state has retained to itself the broader police power of granting franchises, leaving to the municipalities the narrower police power of controlling location and manner of installation.").

and authorized by state law. As in *Anacortes*, local acts would be preempted if the city cannot present sufficient evidentiary rebuttal. Federal courts could order local governments to issue necessary permits.

To the extent that *Sprint II* emboldened local governments to believe that they can act aggressively to regulate, restrict and control prospective installations of wireless and wireline telecommunications facilities, *Anacortes* should act as a restraint. Telecommunications service providers seek to secure the public good by continuing to install, improve and maintain their networks—and there is no question that the public's demand for reliable, powerful and available services continues to grow. *Anacortes* shows that restrictive local government actions will be viewed critically in light of the purposes of the TCA.

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