



MEMORANDUM

TO: Our Valued Clients

FROM: Pamela J. Beery, Beery, Elsner & Hammond LLP

SUBJECT: Ninth Circuit Court of Appeals Ruling Overrules *Auburn* –

1. allows regulation of cell towers; and
2. limits application of 47 USC § 253(a) to preempt local regulations.

DATE: November 20, 2008

Overview

The recent decision *en banc* by the Ninth Circuit Court of Appeals in *Sprint Telephony v. County of San Diego*, 2008 U.S. App. LEXIS 19316, Nos. 05-56076, 05-56435, (9th Cir., 2008), has effectively put State and local telecommunication regulation back on its feet after having been turned upside-down for more than seven years. During that time telecommunications providers relied on court rulings which largely held that any state or local regulations that *might* have the effect of prohibiting an entity's entry into a market as precluded by the Telecommunications Act of 1996 ("Act"), be it under §253(a) (right of way regulations) or §332(c)(7) (wireless facility siting requirements). This recent decision results in a consistent interpretation of both sections of the Act such that these matters become a question of *actual* prohibition of service instead of one of potential prohibition.

Background

In 2003, the County of San Diego enacted an ordinance imposing restrictions, permit requirements and procedural guidelines for the construction and location of wireless telecommunications facilities. Sprint filed suit shortly thereafter seeking injunctive and declaratory relief under the Supremacy Clause and 28 U.S.C. §1331, and further seeking damages and attorney fees under 42 U.S.C. §1983, alleging the ordinance prohibited or had the effect of prohibiting the provision of service, in violation of 47 U.S.C. §253(a). The County argued §332(c)(7) was the sole federal law provision in play, as it exclusively governs wireless regulations and, in any event, argued the ordinance was not an effective prohibition of service. The District Court found that a claim under either section was appropriate and that the ordinance did violate §253(a) and therefore permanently enjoined the County from enforcing the

Ordinance. The District Court also held that a 42 U.S.C. §1983 claim for attorneys fees was not cognizable and granted Motion for Summary Judgment in favor of the County on that claim. The Court of Appeals granted rehearing en banc upon the parties' cross-appeal.

The Ninth Circuit's new interpretation of 47 U.S.C. §253(a)

The threshold issue regarding whether §253(a) or §332(c)(7)(B)(i)(II) applied in a challenge to the County's wireless facility siting regulations led the Court to a review of the intent of Congress in passing the legislation. Congress enacted 47 U.S.C. §253 in an effort to "end[] the States' longstanding practice of granting and maintaining local exchange monopolies." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 405 (1999). At the same time Congress also enacted 47 U.S.C. §332(c)(7) preserving the authority of local governments over zoning decisions affecting the placement and construction of wireless service facilities. This part of the Act was applicable only to wireless telecommunications service providers and was a retreat from proposed legislation imposing the FCC's direct regulation – instead preserving traditional local government zoning authority.

The text of §253(a) is virtually identical to that found in companion §332. It reads: "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 or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." The Court noted that the wireless regulation has been interpreted narrowly, such that violations could only result based on actions that impose a city-wide general ban on wireless services or restrictions that amount to an effective prohibition.

By contrast, the Court noted, its interpretation of §253(a) has not "hewn as closely to its nearly identical text." After reciting the tortured history of cases arising since *City of Auburn, et al v. Qwest Corporation*, 260 F.3d 1160 (9th Cir. 2001), the Court at long last acknowledged that it had in *Auburn* "quoted § 253(a) somewhat inaccurately, inserting an ellipsis in the text of §253 (a)."¹ Based on this error, numerous courts have held that regulations which may at some time or in some way *potentially* have the effect of prohibiting service are preempted. This had the effect of releasing telecommunications service providers from having to show any actual or effective prohibition of service, merely requiring a showing of the possibility or potentiality of prohibition.

¹ An "ellipsis," we learned, is a grammatical error resulting from either inserting or omitting words thus incorrectly affecting the meaning of a phrase. Which is exactly what the Ninth Circuit did in *Auburn*, as local governments have been consistently arguing for seven years now. This opinion, and its use of the term "ellipsis" was a welcome means of learning a new word.

The tension between the Court's defined standard and the full text of §253(a), along with the differing interpretation of the near identical language in §332(c)(7)(B)(i)(II), led the Court of Appeals to the current reversal. The tension between the text and the *Auburn* interpretation is cited in the *San Diego* decision as having affected a number of cases before the First, Second and Tenth Circuits, as well as numerous federal district courts.

Given the revised interpretation of the statute, the Court found no prohibition of service in *San Diego*, and further held that it is appropriate for State and local government to exercise their discretion in pursuing valid public interests, such as safety and aesthetics. The Court acknowledged Sprint's argument that an abuse of discretion by State and local governments is possible, but noted that if a telecommunications provider believes that to be true in a given case, the Act provides for an expedited judicial review process in federal or state court.

The Court found Sprint's challenges to the substantive requirements unpersuasive and concluded that the Ordinance does not effectively prohibit Sprint from providing service. Thus, the County's wireless telecommunications ordinance was not preempted by the Act.

The Court also finally put to rest any argument that a violation of either §253 or § 332 of the Telecommunications Act gives rise to a claim for attorneys' fees under 42 U.S.C. § 1983 – a clarification that should help stem the tide of telecommunications industry litigation since it is now clear that they cannot recover their attorneys' fees.

What does the new ruling mean for the *Qwest v. Portland* litigation, and to Oregon cities?

In the *Qwest v. Portland* litigation, pending now since 2001, District Court Magistrate Judge Jelderks recognized the error in the Ninth Circuit's reasoning in *Auburn*, but noted he was compelled to follow it.² The *Qwest* litigation is still pending at the Ninth Circuit awaiting oral argument, and we have officially called the new paradigm arising out of the *San Diego* case to the Court's attention as required by its rules. It remains to be seen how the new ruling will impact our case. Certainly, since *Qwest* was unable to prove any prohibition of service in the case, its claims should not fare well. It remains to be seen whether the Ninth Circuit will simply dispose of the case or will require further proceedings in the District Court.

As to general application of the decision, we believe it confirms the continuing validity of good, strong right of way management regulations by raising the bar significantly on claims by

² See *Qwest Corporation v. City of Portland et. al.*, 200 F. Supp. 2d 1250 at 1255(D. Or., 2002) and *Qwest Corporation v. City of Portland et. al.*, 2006 U.S. Dist. LEXIS 70763 at *8.

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industry that such regulations actually prohibit them from providing service in our communities. As noted above, it also removes the threat of attorneys' fees in these cases, which should have a deterrent effect on the multiple industry legal challenges.

We will keep you advised of developments. In the meantime, please do not hesitate to contact our office with any questions or concerns.