

**Level 3 Communications v. City of St. Louis  
A Comparison to Sprint v. County of San Diego**

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**I Important Practice Points**

A. At least in the 9<sup>th</sup> Circuit, cellular operators, as telecommunications service providers, can make facial challenges to zoning ordinances under 47 U.S.C. Sec. 253(a). 47 U.S.C. Sec. 332(c)(7) is no longer the sole basis for seeking relief from local zoning decisions over cell tower placement.

B. In the Ninth Circuit, a 253(a) claim rests on the allegation that the ordinance “may prohibit” the provision of cellular service. The 9<sup>th</sup> Circuit has not clearly stated what it means by the “may prohibit” standard. Section 332 contains a standard similar to the standard in 253(a). However, it is hard to square the test the Ninth Circuit applies when it looks to whether a tower siting decision under 332(c)(7) “may prohibit”, although the Circuit claims the tests are not substantively different.

II. The 9<sup>th</sup> Circuit now allows challenges to cell tower siting ordinances under both 332(c)(7) and under 253(a).

1. The court states the more specific provisions of 47 U.S.C. Sec.332(c)(7) do not limit the application of the more general rule of 47 U.S.C. 253(a).

2. A key distinction the court makes is that Sec. 332 (c)(7) applies to zoning “decisions” and Sec 253 applies to zoning “ordinances,” or at least zoning ordinances that are telecommunications-specific. Slip Op. at 7183.

a. “The TCA . . . expressly preserves the authority of local governments to make decisions, subject to certain limitations, regarding the placement of wireless service facilities. . . .” Id at 7173, and

b. “Sec 332(c)(7) represented a conscious choice by the House and Senate conferees to maintain limited state and local control over the placement of wireless facilities.” Id. at 7175.

3. The Court believes its reading is consistent with Congressional intent because Congress included an exclusion of 253(e) in the text of 332(c)(7), so Congress was aware “Sec 253 could affect Sec 332.” Id at 7191.

B. Court’s Own Section Heading says it all: “The Novel Application of Sec 253(a)”. Id. at 7184

1. The Court pays lip service to zoning authority

a. It is “particularly difficult to mount a facial challenge against a zoning ordinance.” Id. at 7185, quoting *MetroPCS* for the statement that zoning rules do not usually indicate a discriminatory application between providers or prohibit wireless services.

b. Does this dicta suggest that the Court was troubled by the Sprint assertion that the wireless tower ordinance was requiring more of cellular operators than of other telecommunications providers? The common understanding of most courts (including the 9<sup>th</sup> Circuit) is that a violation of 253(a) is not caused by discriminatory treatment, per se.

c. “[W]e have recognized that, ‘one of the primary purposes of section 332(c)(7) is to protect the legitimate traditional zoning prerogatives of local governments.’ Quoting *MetroPCS*, Id. at 7192.

2. Then the court slams the new ordinance which “supplements the County’s general zoning ordinance.”

a. The court criticizes the ordinance:

i. It “leaves the authority [in local government] to consider ‘any other relevant impact of the proposed use.’” Id. at 7177.

ii. It permits “seemingly open-ended public hearings. . . .” Id.

b. “In *Auburn* we identified the factors considered by the district court in this case. Our concerns here are almost identical.” Id. at 7194.

- additional submissions to a already voluminous list
- open-ended discretion and threat of criminal penalties
- decision-maker determines whether compliant

c. The court concludes the Ordinance “presents barriers to wireless telecommunications within the County, and is therefore preempted by Sec 253(a).” *Id.* at 7194.

## II What the case does not say

A. The court assumes the San Diego zoning ordinance has “the effect of prohibiting any telecommunications service” but does not discuss why, simply referencing the same concerns as in *Auburn*. But *Auburn* does not provide any real standard for what constitutes a “prohibition”.

B. The court constricts the language in 332(c)(7) as applicable only to appeals of “decisions”, while the operative language in 332(c)(7) refers, like 253(a), to “any regulation”.

C. The court assumes that the ordinance is telecommunications-specific; it does not decide whether 253(a) would be equally offended by application of a general zoning ordinance to towers.

## III Comments

A. Through a series of cases, the 9<sup>th</sup> Cir has read Section 253(a) to reach telecommunications-specific ordinances that “may prohibit” entry, without providing real guidance as to how to apply the standard. Why was the San Diego ordinance inadequate? The Court never says, except in mumblings about “burdensome.”

B. The decision is likely to hurt industry interests over time. The decision will encourage local governments to “freeze in place”, and resist adopting new ordinances which could deal meaningfully with the real differences between technologies attempting to deliver services in local communities. Does a city really have to treat a cell tower the same as an underground conduit? Does a City really have to adopt a zoning ordinance that gives it no discretion to grant a request for an antenna placement, where the applicant develops an innovative approach to minimizing impacts? This means new entrants will not have clear guidance on what is required to enter and actually cuts against the policy the Congress was pushing, to encourage competitive entry.