Summary of

Sprint Telephony PCS, L.P.

v.

County of San Diego, et. al.

In the Ninth Circuit Court of Appeals

2007

Daniel Pascucci and Nathan Hamler[1]

On June 13, 2007, the United States Court of Appeals for the Ninth Circuit issued a decision that will have important ramifications on the ability of wireless telecommunications providers to challenge local regulatory schemes that impose discretionary zoning regulations on applications to install network facilities.

The decision affirmed a permanent injunction against a discretionary zoning ordinance imposed by the County of San Diego and confirmed that section 253 of the Telecommunications Act of 1996 (47 U.S.C. § 253) protects wireless carriers and provides important limitations on local and state authority to regulate the deployment of wireless networks.

In April 2003, the County of San Diego enacted a set of regulations designed to separate wireless communications networks from other similar land uses and regulate deployment of such network facilities under a custom ordinance designed just for

[1] Daniel Pascucci is a member of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.. He is based in the San Diego office of the firm. Nathan Hamler is an associate of Mintz Levin, also based in the San Diego office. Both served as counsel to Sprint in the County of San Diego case throughout all proceedings in both trial court and on appeal. For further information, contact Daniel Pascucci at 858-320-3005 or Nathan Hamler at 858-320-3010.

wireless equipment. The new regulations, which the County dubbed the "Wireless Telecommunications Ordinance" or "WTO," imposed a new regulatory scheme on applications to install wireless telecommunications facilities within the unincorporated areas of the County. For nearly all proposed sites, the WTO imposed a laborious, discretionary zoning process, which imposed aesthetics-based regulation based on malleable concepts like community character, and which reserved complete discretion to the County to grant, deny or modify a permit subject to any conditions it deemed to be reasonable under the circumstances.

Sprint challenged the WTO under section 253 of the Telecommunications Act of 1996. That section preempts any state or local ordinance that either prohibits or has the effect of prohibiting the provision of telecommunications services. Sprint argued that the WTO's regulatory scheme was so onerous and discretion-laden that it effectively prohibited wireless carriers from building their networks within a reasonable time. The County, on the other hand, argued that Section 253 did not protect wireless telecommunications providers, and that a different section of the Telecommunications Act—47 U.S.C. § 332—was the exclusive federal provision governing local regulation of wireless networks. The County also argued an ordinance could only be challenged under that section if it amounted to an outright ban of the provision of telecommunications services. Finally, the County argued that, to the extent Section 253 protects wireless, it only prevents state or local governments from imposing "franchise" or "entry" ordinances, not traditional zoning ordinances that did

not ostensibly regulate the entry or ability of a carrier to do business in the County market.

In July 2005, the U.S. District Court for the Southern District of California granted Sprint's motion for summary judgment and permanently enjoined the WTO, finding that it violates section 253. The County appealed to the Ninth Circuit.[2]

In April 2007, a three-judge panel of the Ninth Circuit affirmed the district court's injunction, agreeing that the WTO's discretion-laden, subjective-based regulation violates section 253. The County promptly moved for rehearing or rehearing *en banc*. Rehearing *en banc* would have resulted in the court rehearing the case with eleven judges.

The County's rehearing petition drew much attention and support from amici across the country, including the National League of Cities, National Association of Counties, International Municipal Lawyers Association, National Association of Telecommunications Officers and Advisors, League of California Cities, New Jersey State League of Municipalities, Texas Municipal League, Texas City Attorney Association and the California State Association of Counties. Despite this broad amicus support for the County, in a June 13, 2007 decision, the Ninth Circuit refused to rehear the case, denying both the County's petition for rehearing and its petition for rehearing en banc.

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[2] Sprint also appealed a decision by the district court that it is not entitled under section 42 U.S.C. § 1988 to recover damages for the County's violation of section 253.

In its June 13 opinion, the court noted that this case was the first time it had been asked to construe a local ordinance governing wireless telecommunications under section 253. But, relying on its past precedent that had stricken down ordinances that applied to landline telecommunications, the court held that the WTO offends section 253 for the same reasons as the landline ordinances in those past cases, most notably, *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001). Further, the court rejected the County's arguments that section 253 only prohibits "franchise" ordinances or that section 253's application to wireless telecommunication providers is limited by section 332.

In addition to the WTO's general reservations of discretion, which the court noted were almost identical to the provisions struck down in *City of Auburn*, the court singled out the WTO's even more onerous and subjective criteria, noting that "[t]he WTO itself explicitly allows the decision maker to determine whether a facility is appropriately 'camouflaged,' 'consistent with community character,' and designed to have minimum 'visual impact.'" *Sprint Telephony PCS, L.P. v. County of San Diego*, Nos. 05-56076, 05-56435 (9th Cir. June 13, 2007).

The decision affirms that section 253's provisions protect not only traditional landline services but also wireless technologies. Further, the decision affirms that section 253's proscriptions go beyond merely preventing a state or local government from imposing prohibitive franchise or entry requirements. Courts in the Ninth Circuit are guided to look at the substance of a local regulation, not its label, and a state or local law can equally offend section 253 if it does not expressly regulate the entry of

carriers into a state or local market but nonetheless imposes onerous processes for providers to secure the necessary permits to build their facilities.

Since the June 13 decision, the County has filed a second petition for rehearing *en banc*. To date, the Ninth Circuit has not addressed that petition.