

**Before the
FEDERAL COMMUNICATIONS COMMISSION**

Washington, D.C. 20554

In the Matter of)
)
)
Petition for Declaratory Ruling to Clarify)
Provisions of Section 332(c)(7)(B) to Ensure)
Timely Siting Review and to Preempt under)
Section 253 State and Local Ordinances that)
Classify All Wireless Siting Proposals as)
Requiring a Variance)
_____)

WT Docket No. 08-165

**COMMENTS OF FAIRFAX COUNTY, VIRGINIA IN OPPOSITION
TO PETITION FOR DECLARATORY RULING FILED BY CTIA**

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I. Summary.

Fairfax County, Virginia (“Fairfax County” or “County”), submits the following comments in response to the Public Notice issued by the Federal Communications Commission (“Commission”) on August 14, 2008.¹ Fairfax County opposes the relief requested in the Petition for Declaratory Ruling (“Petition”) filed by CTIA-The Wireless Association (“CTIA”) and urges the Commission to deny it.

CTIA’s Petition asks the Commission to significantly impinge on local zoning authority by: (1) establishing inflexible deadlines for local zoning authorities to act on applications relating to the siting and placement of telecommunications facilities; (2) imposing draconian remedies if such deadlines are not met; and (3) preempting state and local laws that require “zoning variances” for telecommunications facilities. The deadlines proposed in CTIA’s Petition are unreasonable and wholly contrary to the plain language of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the “Act”),² which explicitly preserves the authority of local zoning authorities over the siting of telecommunications facilities and confers on local governments a reasonable period of time to act on such applications “taking into account the nature and scope of such request.” Moreover, the imposition of such inflexible deadlines is unnecessary in Virginia as a practical matter because the majority of siting applications for telecommunications facilities are already subject to stringent deadlines imposed by state law. The remedial relief requested in CTIA’s Petition for a violation of the proposed deadlines is also

¹ *Wireless Telecommunications Bureau Seeks Comment On Petition For Declaratory Ruling By CTIA – The Wireless Association To Clarify Provisions Of Section 332(c)(7)(B) To Ensure Timely Siting Review And To Preempt Under Section 253 State And Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance*, WT Docket No. 08-165 (2008) (“Public Notice”).

² The provisions of the Act cited by CTIA are codified at 47 U.S.C.A. §§ 253 and 332 (2003).

legally flawed because Congress has provided an exclusive remedy in the Act for a violation of its provisions, and the Commission is legally precluded from rewriting that remedy in the manner proposed by CTIA. Finally, the precedents cited by CTIA in support of its effort to preempt state and local laws relating to the scope of local zoning authority over telecommunications facilities were recently overruled, leaving CTIA's argument for such relief in shambles. As detailed more fully below, entering the declaratory judgment requested by CTIA would substantially erode the local zoning authority that was explicitly preserved by Congress in the Act, and the County urges the Commission to deny it.

II. Introduction.

Under the guise of "clarifying" certain provisions of the Act, CTIA's Petition asks the Commission to issue a declaratory judgment that would severely impede the exercise of local zoning authority over the siting of telecommunications facilities. First, CTIA's Petition asks the Commission to declare that if a state or local zoning authority has not taken final action within 45 days after an application is submitted on a wireless facility siting application that only involves collocation, or within 75 days after an application is submitted regarding any other wireless facility siting application, it has failed to act on the application within the meaning of Section 332(c)(7)(B)(v) of the Act. Secondly, CTIA asks the Commission to find that if these deadlines are not satisfied, the application will be deemed approved, or, alternatively, that a court must presume that a telecommunications carrier is entitled to an injunction ordering the local zoning authority to grant the siting application unless it can justify the delay. The third ground of the Petition asks the Commission to "clarify" that the Act bars zoning decisions that have the effect of prohibiting an additional entrant from offering service in a given area. CTIA also asks, in its fourth request for relief, that the Commission preempt, pursuant to Section 253(a) of the

Act, state and local laws that automatically require wireless service providers to obtain a “variance” before siting their facilities on the theory that such a requirement effectively prohibits the provision of telecommunications services.

As to the first and second grounds of the Petition, CTIA’s position is legally flawed because Section 332(c)(7)(A) of the Act states that except as explicitly provided in the Act, “nothing in this chapter 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.” Further, state and local governments are explicitly allowed, in the text of Section 332(c)(7)(B)(ii), a “reasonable period of time” to act upon zoning applications for telecommunications facilities “taking into account the nature and scope of such request.” Moreover, Congress provided in the Act an exclusive remedy for redressing a locality’s failure to act, which consists of filing an action in a court of competent jurisdiction as provided in Section 332(c)(7)(B)(v) of the Act. Accordingly, the Commission does not have the legal authority to grant the requested relief.

However, even assuming, *arguendo*, that the Commission possesses the legal authority to impose the inflexible deadlines requested in CTIA’s Petition, the imposition of such deadlines is as a practical matter completely unnecessary in Virginia in general and in Fairfax County in particular. In the past five years in the County, the only zoning or land use approval that has been required for the majority of telecommunications facility siting applications is a determination by the Fairfax County Planning Commission that a proposed telecommunications facility is substantially in accord with the County’s Comprehensive Plan as required by Va. Code Ann. § 15.2-2232 (2008) (also referred to as a “2232 application”). Such 2232 applications are already subject to stringent deadlines set forth in Va. Code Ann. § 15.2-2232(F), which states

that the failure of a planning commission to act on any application for a telecommunication facility within 90 days of submission shall be deemed approval of the application by the planning commission, unless the governing body has authorized an extension of time for consideration (which may not exceed a period of 60 days), or the applicant has agreed to an extension of time. Fairfax County has strictly adhered to these deadlines in processing 2232 applications for telecommunications facilities.³

A relatively small number of telecommunications facility siting applications in Fairfax County have historically also been subject to a second land use approval process, a special exception application. Special exception approval is required for a wide variety of uses in Fairfax County, including heavy industrial uses, high intensity commercial uses such as service stations and convenience stores, and other uses that “by their nature or design can have an undue impact upon or be incompatible with other uses of land.” *See* The Zoning Ordinance for the County of Fairfax, Virginia (“Zoning Ordinance”) § 9-001; www.fairfaxcounty.gov/zoning. With the exception of cellular towers,⁴ telecommunications facilities are allowed by right in Fairfax County in all commercial and industrial districts, in any zoning district within a utility

³ In light of these state law requirements, CTIA’s allegations about delays in an unnamed Virginia county are particularly suspect. More specifically, CTIA lists “examples of egregious delays” including the following: “In a Virginia county outside Washington, D.C., wireless facility siting applicants currently face typical processing times of 1-2 years for new towers.” (Petition at 14, 26.) Counsel for Fairfax County contacted CTIA five separate times (including two phone conversations, two voicemail messages, and a letter that was both faxed and mailed) and asked CTIA to identify that County. (*See* Attachment A.) CTIA never responded. The County urges the Commission to rely on the kinds of detailed and verifiable data that the County and other local governments have submitted and not to usurp the authority of local governments over land-use matters based on unsubstantiated, anonymous allegations made solely by CTIA and other parties who stand to profit from them.

⁴ Cellular towers are allowed by right in Fairfax County in all industrial zoning districts and by special exception in all other zoning districts. *Id.*

transmission easement of 90 feet or more, and on all real property zoned to public use. A special exception is generally required only for the establishment of such facilities in residential districts.⁵ *See* Zoning Ordinance § 2-514. A special exception approval constitutes a legislative act by the County's Board of Supervisors and requires two public hearings, which must be advertised in accordance with Virginia law. The abbreviated timeframes proposed by CTIA would essentially preclude the exercise of this local zoning authority, and would place telecommunications facilities in a far superior position to all other land use applicants in the County in a manner that is contrary to the text and legislative history of the Act.

The third and fourth grounds of the Petition are less clearly articulated by CTIA, and therefore have uncertain applicability to the existing County processes for telecommunications facility siting applications. The third ground of the Petition would not appear to affect the County's interests because it does not currently have any policies in place that would preclude competing telecommunications carriers from offering service in the same area. As to the fourth ground of the Petition, Fairfax County does not currently require variances for telecommunications facilities, and it therefore ostensibly is also not affected by this portion of the Petition. However, to the extent that CTIA intended to encompass a special exception process within the use of the term "variance," Fairfax County requires such approval only in limited circumstances. Further, if CTIA's Petition is intended to secure the wholesale preemption of the special exception approval process, the Commission lacks any legal authority whatsoever for granting such relief. As set forth more fully in the following discussion, the authorities cited in CTIA's Petition have been recently overruled and its preemption argument is

⁵ Under limited circumstances, antennas may also be established by right in residential districts.

legally and factually baseless. For all of these reasons, the County urges the Commission to deny CTIA's Petition.

III. The Inflexible Deadlines Proposed in the First and Second Grounds of CTIA's Petition Are Contrary to the Plain Language of Section 332(c)(7) of the Act And In Any Event Are Not Factually Warranted.

A. The Rigid Deadlines for Local Government Action Proposed in the Petition Are Contrary to the Plain Language of the Act.

As evidenced by the plain language of the Section 332(c)(7)(A) of the Act and its legislative history, Congress intended to preserve the ability of local governments to require individualized land use reviews of telecommunications facilities. In addition, Congress clearly did not intend to impose upon local governments unique or faster time limits for processing such approvals that place a telecommunications carrier in a superior position to all other zoning applicants. Rather, the Act was directed at ensuring that telecommunications facilities are treated in the *same manner* as all other facilities and at preventing a local government from effectively prohibiting the provision of wireless services.

In directing zoning authorities to "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," the Act explicitly directs that reasonableness be measured by "*taking into account the nature and scope of such request.*" 47 U.S.C. § 332(c)(7)(B)(ii) (emphasis added). The legislative history of this section reemphasizes that point:

Under subsection (c)(7)(B)(ii), decisions are to be rendered in a reasonable period of time, taking into account the nature and scope of each request. If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, *the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames on a case-by-case basis.*

H.R. Conf. Rep. No.104-458, at 208 (emphasis added).

CTIA's proposal to establish inflexible timeframes within which local authorities must act on telecommunications facility applications is directly contrary to the above-cited language because inflexible deadlines fail to take into account the nature and scope of a request to site a wireless facility. Moreover, the imposition of such inflexible timeframes creates an extraordinarily favorable position for telecommunications carriers vis-à-vis all other land use applicants. Further, if CTIA's Petition is granted it would be virtually impossible to conduct the type of hearing that is envisioned in Section 332(c)(7)(B)(iii), one at which "substantial evidence contained in a written record" is adduced to allow the locality to produce a written decision upon a zoning application. Accordingly, imposition of the inflexible "shot clocks" proposed in CTIA's Petition is wholly contrary to the plain language of Section 332(c)(7)(A) of the Act that carefully preserved the authority of localities "over decisions regarding the placement, construction, and modification of personal wireless facilities."

B. Virginia State Law Already Imposes Truncated Deadlines that Govern the Processing of Most Wireless Facility Siting Applications, and Applications are Deemed Approved if Such Deadlines are Not Met.

Even if one assumes, *arguendo*, that the Commission possesses the legal authority to issue the declaratory judgment requested by CTIA, such action is as a practical matter completely unnecessary and unwarranted in the Commonwealth of Virginia in general and in Fairfax County in particular. Over the past five years, the majority of telecommunication facility siting applications in Fairfax County have been subject only to review pursuant to Virginia Code Ann. § 15.2-2232, a process whereby the local planning commission determines whether a proposed telecommunications facility is substantially in accord with the adopted comprehensive plan for the locality. Virginia Code Ann. § 15.2-2223 (2008) requires each locality to adopt a

comprehensive plan, and, upon adoption, the comprehensive plan controls the general or approximate location, character, and extent of each feature⁶ shown on the plan, including personal wireless service facilities, pursuant to Va. Code Ann. § 15.2-2232(A). Any person who proposes a new feature that is not already shown on the comprehensive plan must submit the feature to the local planning commission, so that the local planning commission can determine if the feature's proposed location is substantially in accord with the adopted comprehensive plan.

Id.

Importantly, Va. Code Ann. § 15.2-2232 already imposes strict and expedited time limits on the planning commission's processing of applications for telecommunications facilities. Va. Code Ann. § 15.2-2232(F)⁷ explicitly provides that the local planning commission must act upon a 2232 application for a telecommunications facility within 90 days after an application is submitted, unless the applicant agrees to an extension of time or the local governing body authorizes an extension of time, but any such extension may not exceed a period of 60 additional days. If a planning commission fails to act within these time limits, Va. Code Ann. § 15.2-2232(F) states that the application is deemed approved by the local planning commission.

The process to obtain approval of any structure, facility, or use under Va. Code Ann. § 15.2-2232 is thus expedited, but nevertheless a reasonable amount of time is required to complete the review of a 2232 application. The process commences with the filing of a 2232

⁶ With some exceptions, features include any "street or connection to an existing street, park or other public area, public building or public structure, public utility facility or public service corporation facility other than a railroad facility or an underground natural gas or underground electric distribution facility of a public utility within its certificated service territory, whether publicly or privately owned." Va. Code Ann. § 15.2-2232(A).

⁷ Subsection F of Va. Code Ann. § 15.2-2232 was added by the Virginia General Assembly in 1998. 1998 Acts of Assembly, Chapter 683.

application with staff from the Fairfax County Department of Planning and Zoning. County staff reviews the application, assists the applicant in providing the information necessary to process the application, and coordinates with the applicant in an effort to ensure that the application complies with all laws and regulatory requirements. In cases involving new towers and monopoles in particular, significant County staff time is required for the investigation of site alternatives and a study of the potential impacts of such a facility through the use of visual studies such as on-site height tests, which must be scheduled sufficiently in advance to allow members of the community to participate. After such a period of investigation, staff issues a report containing background information and recommendations concerning the application, ensures that any advertisement requirements for any required public hearing on the application are met, and assists the Planning Commission in the hearing on the application.

In accordance with Fairfax County's existing procedures for processing such 2232 applications, "low impact" sites, which include facilities to be located on existing buildings, communication towers, and monopoles, are not subject to a public hearing process before the Planning Commission, but the application is placed on the Planning Commission's agenda for purposes of obtaining the Commission's decision as to whether or not the proposed telecommunications facility is indeed a "feature shown" on the Comprehensive Plan. Applications for features that are not already shown on the adopted Comprehensive Plan, typically new monopoles and towers, require a public hearing before the Planning Commission pursuant to Va. Code Ann. § 15.2-2232(A). In such cases, Va. Code Ann. § 15.2-2204 requires advertisement of the public hearing at least once a week for two successive weeks in a

newspaper of local circulation, and such advertisements may occur not less than 5 days nor more than 21 days before the public hearing on the application.⁸

Because of the advertisement requirements, a 2232 application requiring a public hearing is generally scheduled for hearing before the Planning Commission on the outer limits of the 90-day deadline provided by Va. Code Ann. § 15.2-2232(F), and the time allotted to staff to process such applications is already compressed to the maximum degree possible. Over the past five years, the Fairfax County Planning Commission has acted favorably on 359 applications for approval of telecommunication uses pursuant to Va. Code Ann. § 15.2-2232, with an average processing time of 79.8 days, a reflection of the fact that 332 of the 359 applications were features shown and did not require a public hearing. For more complex siting proposals, typically those involving new towers or monopoles, a 60-day extension must often be requested to allow staff to investigate and process the 2232 application. Therefore, it would be virtually impossible to process *all* telecommunications facility siting applications, without regard to complexity, within the 45- and 75-day timeframes proposed by CTIA.

In the past five years, only a relatively small percentage of telecommunications facilities in the County have also required special exception approval. In general, special exceptions are required in Fairfax County only for certain uses which, by their nature, should be reviewed on a case-by-case basis to assess and mitigate the impact of the proposed use on other existing uses of land. *See* Zoning Ordinance § 9-001. Special exceptions are required for a variety of uses in Fairfax County including commercial and industrial uses with special impact (such as convenience stores, car washes, hotels, marinas, and large retail establishments), light and heavy

⁸ Va. Code Ann. § 15.2-2232 states that notices of all public hearings pursuant to that Code provision shall comply with Va. Code Ann. § 15.2-2204.

public utility uses, and a variety of transportation uses, among many others. *See* Zoning Ordinance §§ 9-001 to 9-626. Thus, in Fairfax County, the special exception approval requirements are not limited to telecommunications facilities; rather, such facilities are not treated any differently than a multitude of other uses of special impact.

Relatively few telecommunications facility siting applications require special exception approval because such facilities (with the exception of towers) are allowed by right in Fairfax County in all commercial and industrial districts, in any zoning district within a utility transmission easement of 90 feet or more, and on all real property zoned to public use. *See* Zoning Ordinance § 2-514. Under circumstances set forth in the Zoning Ordinance, antennas are allowed by right in residential districts, but usually special exception approval is required for the siting of telecommunications facilities in a residential zoning district. *Id.* Cellular towers are allowed by right in industrial districts and by special exception in all other districts. *Id.*

Special exception applications are, like 2232 applications, filed with the Fairfax County Department of Planning and Zoning, and staff reviews such applications and works closely with the telecommunications providers and the community to improve the application so that, among other things, the effects of the telecommunications facility on the surrounding community are reasonably mitigated. The applicable criteria for approval of a special exception for a telecommunications facility are set forth in Zoning Ordinance §§ 9-001, 9-006, 9-104, and 9-105. Such special exception conditions allow the local governing body to fulfill the following objectives: (1) ensure that where necessary for aviation safety antenna structures that exceed 100 feet in height operate a steady red marker light (Zoning Ordinance § 9-105(4)); (2) impose reasonable conditions to ensure that the telecommunications facility will not adversely affect the use of neighboring properties in residential districts through the use of reasonable measures such

as landscaping and screening and requirements that antennas be designed to blend into the structure on which they are mounted (Zoning Ordinance §§ 9-001, 9-105); (3) require telecommunications facilities to locate in commercial or industrial districts, rather than residential districts when possible (Zoning Ordinance § 9-104(3)); and (4) require the removal of all antennas and telecommunications facilities from residential districts within 120 days after the cessation of the use (Zoning Ordinance § 9-105(5)). Importantly, the special exception approval process also allows the County to take into account any existing environmental constraints on the proposed site (including its delineation as a floodplain or resource protection area) and to mitigate the impacts of the proposed telecommunications facility in light of these environmental constraints.

The Virginia Code does not prescribe specific timeframes for processing special exception applications, in contrast to the 2232 applications that are subject to a statutorily mandated deadline. However, it should be noted that it necessarily takes time to process any special exception application, and the amount of time required depends on the nature and scope of a particular siting application. Among other things, staff must thoroughly investigate the proposal, accept and process community input, work with the applicant to make improvements to the proposal that allow the use to mesh with its otherwise incompatible surroundings, and conduct visual compatibility testing. In many such cases, the special exception process has resulted in a final product that is acceptable to both the telecommunications carriers and the community through the use of such eminently reasonable measures such as landscaping and screening, reductions in unnecessary height of monopoles or towers, and the use of less obtrusive telecommunications structures such as tree or stealth monopoles.

If, however, the Commission erroneously decides to adopt the inflexible deadlines proposed in CTIA's Petition, it is imperative that any reasonable time requirement commence only upon acceptance by the locality of a complete and accurate application, rather than upon the mere submission of an application. The time limits requested by CTIA in the Petition begin from the time of application submission, which fails to appreciate the fact that land use applications submitted by telecommunication providers reflect varying degrees of accuracy, completeness, and research into site issues and the locality's requirements. Current processing times necessarily depend on the amount of time required to obtain complete and accurate application information and are greatly influenced by many issues that are identified after an application has been received. Unless these issues are resolved, approval or construction of the facility may not proceed. Examples of such issues include environmental restrictions such as resource protection areas and wetlands, historic district impacts, a review of all applicable zoning conditions that may affect the proposed telecommunication facility use, leasing restrictions, yard and other zoning requirements, and community concerns frequently involving visual compatibility. While such issues are not present with all applications, they are frequently encountered and would be difficult, if not impossible, to satisfactorily address under the time limits proposed in CTIA's Petition.

In summary, the Commission should not effectively prohibit any meaningful zoning approval review by imposing the unworkable and unreasonable deadlines requested in CTIA's Petition. To the contrary, this is precisely the type of local zoning authority that Congress intentionally and explicitly preserved in enacting Section 332(c)(7) of the Act, striking a measured balance between the legitimate objectives served by the exercise of local zoning authority and the undisputed need for effective wireless coverage throughout the County.

Likewise, imposition of unworkable and inflexible deadlines for consideration of such applications flies in the face of the language used by Congress in Section 332(c)(7)(B)(ii) of the Act, which states that the amount of time allowed for taking action on a telecommunications facility siting application necessarily must take “into account the nature and scope of such request.” Establishing an even more truncated processing time for applications than is already mandated by state law would be onerous to the County and would radically undermine the successful manner in which Fairfax County has processed telecommunications facility siting applications for many years.

C. CTIA’s Request That the Commission Write an Additional Remedial Scheme Into the Act is Legally Flawed Because the Act Already Provides an Exclusive Remedy for a Violation of its Provisions.

CTIA’s Petition is premised on its conclusion that the Commission has the legal authority to enter a declaratory judgment establishing that if the 45- and 75-day deadlines for deciding zoning applications filed by telecommunications carriers are not satisfied, the zoning application at issue shall be deemed approved or, alternatively, a court must presume that the application should be granted unless the locality can justify the delay. However, Congress already established an exclusive remedy for a locality’s failure to act on an application for a telecommunications facility in Section 332(c)(7)(B)(v) of the Act, which provides that any person who is adversely affected by a locality’s failure to act upon an application may petition a court of competent jurisdiction for relief, and “[t]he court shall hear and decide such action on an expedited basis,” unencumbered by any presumptions. The United States Supreme Court has held that Section 332(c)(7) of the Act explicitly provides the method of enforcing the Act, and it therefore may be inferred that Congress intended to exclude all other means of enforcement. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005). Further, although CTIA

relies extensively on *Alliance for Community Media v. Federal Communications Commission* to support the contrary position, that decision construed a different section of the Communications Act, significantly one that did not explicitly preserve local authority and one that did not explicitly provide that a locality had a reasonable period of time to act based on the circumstances of each individual application. 529 F.3d 763, 779 (6th Cir. 2008) (construing Section 621 of the Communications Act). Further, the Sixth Circuit decision represents the views of only one federal district court. Because an exclusive remedy has already been provided by Congress for any failure by a local government to act, the Commission lacks the legal authority under *Abrams* to grant a different remedy in the manner suggested in the Petition, either through deeming an application automatically approved or by establishing a presumption that the application should be granted unless the locality can justify the delay. The Commission therefore should decline CTIA's invitation to engage in reversible error by superimposing a remedial scheme on the Act that is contrary to its explicit terms.

IV. CTIA's Petition Requests that the Commission Preempt State and Local Laws in A Number of Material Areas, and Such Preemption is Not Authorized by Either Sections 253 or 332 of the Act.

If the Commission grants CTIA's Petition, it will have the effect of preempting state and local laws in a number of substantive areas. First, granting the first and second grounds of CTIA's Petition would have the effect of preempting the deadlines to act on 2232 Applications that were established by the Virginia General Assembly in Va. Code Ann. § 15.2-2232(F). Second, establishing the inflexible deadlines requested in the first and second grounds of CTIA's Petition would have the effect in many cases of preempting the advertising requirements set forth in Va. Code Ann. § 15.2-2204 for public hearings because such requirements could not be satisfied as a result of the truncated deadlines for processing such applications that are proposed

in CTIA's Petition. Third, CTIA asks the Commission in the fourth ground of its Petition to preempt state laws that require a "variance" before siting telecommunications facilities, relying exclusively upon Section 253(a) of the Act as support for granting such relief. Although Fairfax County does not require a "variance" for siting such facilities, as discussed more fully above, it does require special exception approval under relatively limited circumstances. Therefore, the County responds to this point in the event that CTIA's nomenclature for this process incorrectly assumed that a "variance" includes a special exception.

Preemption of the foregoing state and local laws is contrary to both sections 253(a) and 332 of the Act. Section 332(c)(7)(A) states that state and local authority over decisions regarding the siting of personal wireless facilities must be preserved, subject only to the limited exceptions enumerated therein. Sections 332(c)(3) and 332(c)(7) of the Act explicitly define the universe of circumstances under which a state or local law will be preempted. These circumstances include regulation of the environmental effects of radio frequency emissions, imposition of various rate-setting measures, discrimination among providers of functionally equivalent services, and actions that have the effect of prohibiting the provision of wireless service, *but not* the preemption of state and local laws relating to zoning approval of telecommunications facilities. To the contrary, as noted by the Second Circuit in *Cellular Phone Task Force v. Federal Communications Commission*, 205 F.3d 82 (2d Cir. 2000), Congress carefully circumscribed the power of the Commission to preempt state and local laws under the Act, "removing from the FCC the power to '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.*'" *Id.* at 96 (citing 47 U.S.C. § 332(c)(7)(A)) (emphasis in original). The Second Circuit further noted that pursuant to the explicit

language of the Act, “[s]tates and local governments, therefore, retain these powers subject to explicit limitations described in subsection (B)” of Section 332(c)(7) of the Act. *Id.* Similarly, the Fourth Circuit has held that Section 332(c)(7)(B)(i)(II) applies only to general bans on service and not to decisions regarding individual zoning applications for the siting of telecommunications facilities, observing that to allow this section to operate as a ban on individual zoning decisions “would effectively nullify local [zoning] authority by mandating approval of all applications.” *AT&T Wireless, PCS v. City Council of Virginia Beach*, 155 F.3d 423, 428 (4th Cir. 1998). Section 332, therefore, does not support CTIA’s request to preempt state and local laws in the manner requested in its Petition.

Likewise, Section 253(a) of the Act, which is exclusively cited by CTIA as support for its fourth request that the Commission preempt state and local laws requiring a “variance,” is also limited in scope to state and local government laws and regulations that have the effect of prohibiting an entity from providing wireless telecommunications services. As support for its contention in the fourth ground of the Petition that Section 253(a) preempts state laws requiring a “variance,” CTIA relies heavily upon the Ninth Circuit Court of Appeals’ decision in *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001) and a decision of a three-judge panel of the Ninth Circuit in *Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700 (9th Cir. 2007). (Petition at 35-36.) However, both *Auburn* and the decision of the three-judge panel in *Sprint Telephony* were effectively overruled by the Ninth Circuit following a rehearing *en banc* in *Sprint Telephony PCS, L.P. v. County of San Diego*, Record Nos. 05-56076 and 05-56435 (9th Cir. September 11, 2008) (copy attached as Attachment B). The Ninth Circuit observed in the *en banc* decision that its prior rulings, including its decision in *Auburn*, had impermissibly expanded the actual text of Section 253(a) of the Act to include a prohibition against local

regulations that create a “substantial barrier” to the provision of telecommunications services. *Sprint Telephony*, Slip Op. at 12709. Based on the precise language of Section 253(a), the Ninth Circuit overruled its prior decision in *Auburn* and the decision of the three-judge panel in *Sprint Telephony* in this regard, concluding that a showing that a locality could *potentially* prohibit the provision of telecommunications services is insufficient to prove a violation of either Section 253(a) or Section 332(c)(7)(B)(i)(II) of the Act. *Sprint Telephony*, Slip Op. at 12713 (emphasis in original) (citing *Level 3 Commc’ns LLC v. City of St. Louis*, 477 F.3d 528, 532-33 (8th Cir. 2007)). The Ninth Circuit further observed in its *en banc* decision in *Sprint Telephony* that the Commission itself has held that a regulation must actually or effectively prohibit the provision of services to be preempted by Section 253(a) of the Act. *Sprint Telephony*, Slip Op. at 12711 (citing *In re Cal. Payphone Ass’n*, 12 F.C.C.R. 14191, 14209 (1997)). Thus, where a local regulation simply “imposes a layer of requirements for wireless facilities in addition to the zoning requirements for other structures,” such requirements do not in and of themselves have the effect of prohibiting the construction of personal wireless facilities in violation of the Section 253(a) of the Act. *Sprint Telephony*, Slip Op. at 12714. Further, the Ninth Circuit ruled in the *en banc* decision that a local governing body’s exercise of discretion over the placement of wireless telecommunications facilities, through consideration of the relevant impacts of the proposed use and/or through the imposition of appropriate conditions to modify the impacts of such use, does not violate either Section 253(a) or Section 332(c)(7)(B)(i)(II) of the Act. *Sprint Telephony*, Slip Op. at 12715.

Thus, the legal authorities cited in CTIA’s Petition as support for preempting state and local laws relating to the zoning authority of local governments have been overruled, leaving CTIA’s preemption argument in shambles. As to the first and second grounds of the Petition,

CTIA's request that the Commission preempt state and local laws that pertain to the timing and processing of zoning approvals for telecommunications facilities is not supported by either Section 332 or Section 253(a) of the Act. As to the fourth ground of the Petition, the fact that a local government exercises discretionary control over the placement of wireless telecommunications facilities through a zoning approval process does not, pursuant to either Section 332 or Section 253(a) of the Act, have the effect of prohibiting the provisions of telecommunications services. *Sprint Telephony*, Slip Op. at 12714; *Cellular Phone Task Force*, 205 F.3d at 96. Therefore, CTIA's preemption argument is legally baseless.

V. Conclusion.

Fairfax County opposes the relief requested in CTIA's Petition and urges the Commission to deny it. The time limits and remedial scheme for violating such deadlines requested in CTIA's Petition are contrary to the text of the Act and its legislative history. Moreover, the inflexible deadlines requested in CTIA's Petition for local governments to act are practically unnecessary in light of existing state laws and wholly unreasonable. As to the limited number of telecommunications facilities that require special exception approval in the County, such a zoning approval process is not preempted by either Sections 332 or 253(a) of the Act, and to the contrary the County's ability to require such approvals falls squarely within the local zoning authority that was preserved by Congress in Section 332(c)(7)(A) of the Act. For all of these reasons, Fairfax County respectfully requests that the Commission deny CTIA's Petition.

Respectfully submitted

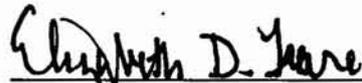
FAIRFAX COUNTY VIRGINIA

By 
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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September 2008 I caused a true copy of the foregoing to be sent by first class mail, postage prepaid, to: Christopher Guttman-McCabe, Vice President, Regulatory Affairs, CTIA-The Wireless Association, 1400 16th Street, NW, Suite 600, Washington, D.C. 20036. Additionally, a copy was sent to Best Copy and Printing, Inc., via e-mail sent to FCC@BCPIWEB.com.


Counsel



County of Fairfax, Virginia

To protect and enrich the quality of life for the people, neighborhoods and diverse communities of Fairfax County

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September 4, 2008

VIA FACSIMILE AND U.S. MAIL

Christopher Guttman-McCabe
CTIA – The Wireless Association®
1400 16th Street, NW Suite 600
Washington, DC 20036
Facsimile: (202) 785-0721

Re: Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance

Dear Mr. Guttman-McCabe:

This is to reiterate the request I made when we spoke on August 28, 2008, and that I repeated in the follow-up voicemails I left for you on September 2 and 3, and that I made again in my conversation with your colleague Andrea Williams (whose name also appears on the Petition) on September 3. My request is that you identify the unnamed Virginia county to which the above-referenced Petition refers at pages 14 and 26 as follows: "In a Virginia county outside Washington, D.C., wireless facility siting applicants currently face typical processing times of 1-2 years for new towers." I now supplement those requests, and ask that you please also identify to me the applicants to which those statements refer.

In light of the fast-approaching deadline for filing initial comments, I would appreciate your providing me this information as promptly as possible. You may call me at the phone number given above or you can reach me at the direct dial number I left on your voicemail.

Sincerely,

Erin C. Ward
Assistant County Attorney

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPRINT TELEPHONY PCS, L.P., a
Delaware limited partnership,
*Plaintiff-Appellant/
Cross-Appellee,*

and

PACIFIC BELL WIRELESS LLC, a
Nevada limited liability company,
dba Cingular Wireless,
Plaintiff,

v.

COUNTY OF SAN DIEGO, a division
of the State of California; GREG
COX, in his capacity as a
supervisor of the County of San
Diego; DIANNE JACOB, in her
capacity as a supervisor of the
County of San Diego; PAM
SLATER, in her capacity as a
supervisor of the County of San
Diego; RON ROBERTS, in his
capacity as a supervisor of the
County of San Diego; BILL HORN,
in his capacity as a supervisor of
the County of San Diego,
*Defendants-Appellees/
Cross-Appellants.*

Nos. 05-56076
05-56435

D.C. No.
CV-03-1398-BTM
OPINION

Appeals from the United States District Court
for the Southern District of California
Barry Ted Moskowitz, District Judge, Presiding

12699

ATTACHMENT B

Argued and Submitted
June 24, 2008—Pasadena, California

Filed September 11, 2008

Before: Alex Kozinski, Chief Judge, and
Andrew J. Kleinfeld, Michael Daly Hawkins,
A. Wallace Tashima, Sidney R. Thomas, Barry G. Silverman,
Susan P. Graber, Ronald M. Gould, Marsha S. Berzon,
Richard C. Tallman, and Jay S. Bybee, Circuit Judges.

Opinion by Judge Graber;
Concurrence by Judge Gould

COUNSEL

Daniel T. Pascucci and Nathan R. Hamler, Mintz Levin Cohn Ferris Glovsky and Popeo PC, San Diego, California, for the plaintiff-appellant/cross-appellee.

Thomas D. Bunton, Senior Deputy County Counsel, County of San Diego, San Diego, California, for the defendants-appellees-cross-appellants.

Andrew G. McBride and Joshua S. Turner, Wiley Rein LLP, Washington, D.C.; William K. Sanders, Deputy City Attorney, San Francisco, California; Joseph Van Eaton, Miller & Van Eaton, P.L.L.C., Washington, D.C.; John J. Flynn III, Nossaman, Guthner, Knox & Elliott, LLP, Irvine, California; T. Scott Thompson, Davis Wright Tremaine, LLP, Washington, D.C.; and Elaine Duncan and Jesus G. Roman, Verizon California, Inc., Thousand Oaks, California, for amici curiae.

OPINION

GRABER, Circuit Judge:

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in U.S.C. Titles 15, 18 & 47) (“the Act”), precludes state and local governments from enacting ordinances that prohibit or have the effect of prohibiting the provision of telecommunications services, including wireless services. In 2003, Defendant County of San Diego enacted its Wireless Telecommunications Facilities ordinance. San Diego County Ordinance No. 9549, § 1 (codified as San Diego County Zoning Ord. §§ 6980-6991, 7352 (“the Ordi-

nance’’)). The Ordinance imposes restrictions and permit requirements on the construction and location of wireless telecommunications facilities. Plaintiff Sprint Telephony PCS alleges that, on its face, the Ordinance prohibits or has the effect of prohibiting the provision of wireless telecommunications services, in violation of the Act. The district court permanently enjoined the County from enforcing the Ordinance, and a three-judge panel of this court affirmed. *Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700 (9th Cir. 2007). We granted rehearing en banc, 527 F.3d 791 (9th Cir. 2008), and we now reverse.

FACTUAL AND PROCEDURAL HISTORY

The County of San Diego enacted the Ordinance “to establish comprehensive guidelines for the placement, design and processing of wireless telecommunications facilities in all zones within the County of San Diego.” San Diego County Ordinance No. 9549, § 1. The Ordinance categorizes applications for wireless telecommunications facilities into four tiers, depending primarily on the visibility and location of the proposed facility. San Diego County Zoning Ordinance § 6985. For example, an application for a low-visibility structure in an industrial zone generally must meet lesser requirements than an application for a large tower in a residential zone. *Id.*

Regardless of tier, the Ordinance imposes substantive and procedural requirements on applications for wireless facilities. For example, non-camouflaged poles are prohibited in residential and rural zones; certain height and setback restrictions apply in residential zones; and no more than three facilities are allowed on any site, unless “a finding is made that collocation of more facilities is consistent with community character.” *Id.* An applicant is required to identify the proposed facility’s geographic service area, to submit a “visual impact analysis,” and to describe various technical attributes such as height, maintenance requirements, and acoustical information, although some exceptions apply. *Id.* § 6984. The proposed

facility must be located within specified “preferred zones” or “preferred locations,” unless those locations are “not technologically or legally feasible” or “a finding is made that the proposed site is preferable due to aesthetic and community character compatibility.” *Id.* § 6986. The proposed facility also must meet many design requirements, primarily related to aesthetics. *Id.* § 6987. The applicant also must perform regular maintenance of the facility, including graffiti removal and proper landscaping. *Id.* § 6988.

General zoning requirements also apply. For example, hearings are conducted before a permit is granted, *id.* § 7356, and on appeal, if requested, *id.* § 7366(h). Before a permit is granted, the zoning board must find:

That the location, size, design, and operating characteristics of the proposed use will be compatible with adjacent uses, residents, buildings, or structures, with consideration given to:

1. Harmony in scale, bulk, coverage and density;
2. The availability of public facilities, services and utilities;
3. The harmful effect, if any, upon desirable neighborhood character;
4. The generation of traffic and the capacity and physical character of surrounding streets;
5. The suitability of the site for the type and intensity of use or development which is proposed; and to
6. Any other relevant impact of the proposed use[.]

Id. § 7358(a). The decision-maker retains discretionary authority to deny a use permit application or to grant the application conditionally. *Id.* § 7362.

Soon after the County enacted the Ordinance, Sprint brought this action, alleging that the Ordinance violates 47 U.S.C. § 253(a)¹ because, on its face, it prohibits or has the effect of prohibiting Sprint's ability to provide wireless telecommunications services. Sprint sought injunctive and declaratory relief under the Supremacy Clause and 28 U.S.C. § 1331, and damages and attorney fees under 42 U.S.C. § 1983. The County argued that § 253(a) did not apply to the Ordinance, because 47 U.S.C. § 332(c)(7) exclusively governs wireless regulations, and that, in any event, the Ordinance is not an effective prohibition on the provision of wireless services. The County also argued that damages and attorney fees are unavailable because Congress did not create a private right of action enforceable under 42 U.S.C. § 1983.

The district court first held that facial challenges to a local government's wireless regulations could be brought under either § 253(a) or § 332(c)(7), because neither is exclusive. The district court next held, relying on our decision in *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), that the Ordinance violated § 253(a). The district court therefore permanently enjoined the County from enforcing the Ordinance against Sprint. Finally, the district court held that a claim under 42 U.S.C. § 1983 for a violation of § 253(a) was not cognizable and granted summary judgment to the County on that claim. The parties cross-appealed. A three-judge panel of this court affirmed, and we granted rehearing en banc.

¹In its complaint, Sprint also alleged that the Ordinance violated another subsection of 47 U.S.C. § 253. The district court dismissed that cause of action for failure to prosecute, and Sprint does not challenge that dismissal on appeal.

STANDARDS OF REVIEW

We review for abuse of discretion the district court's grant of a permanent injunction, but review its underlying determinations "by the standard that applies to that determination." *Ting v. AT&T*, 319 F.3d 1126, 1134-35 (9th Cir. 2003).

DISCUSSION

Sprint argues that, on its face, the Ordinance prohibits or has the effect of prohibiting the provision of wireless telecommunications services, in violation of the Act. As a threshold issue, the parties dispute *which* provision of the Act—47 U.S.C. § 253(a) or 47 U.S.C. § 332(c)(7)(B)(i)(II)—applies to this case.

A. *The Effective Prohibition Clauses of 47 U.S.C. § 253(a) and 47 U.S.C. § 332(c)(7)(B)(i)(II)*

When Congress passed the Act, it expressed its intent "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 110 Stat. at 56; *see also Ting*, 319 F.3d at 1143 ("[T]he purpose of the . . . Act is to 'provide for a pro-competitive, deregulatory national policy framework . . . by opening all telecommunications markets to competition.'" (quoting H.R. Rep. No. 104-458, at 113 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 124)). The Act "represents a dramatic shift in the nature of telecommunications regulation." *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n*, 184 F.3d 88, 97 (1st Cir. 1999); *see also Ting*, 319 F.3d at 1143 (characterizing the Act as a "dramatic break with the past"). Congress chose 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) (Thomas, J., concurring in part, dissenting in part).

[1] Congress did so by enacting 47 U.S.C. § 253, a new statutory section that preempts state and local regulations that maintain the monopoly status of a telecommunications service provider. *See Cablevision of Boston*, 184 F.3d at 98 (“Congress apparently feared that some states and municipalities might prefer to maintain the monopoly status of certain providers Section 253(a) takes that choice away from them. . . .”). Section 253(a) states: “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 to provide any interstate or intrastate telecommunications service.”

The Act also contained new provisions applicable only to *wireless* telecommunications service providers. The House originally proposed legislation requiring the Federal Communications Commission (“FCC”) to regulate directly the placement of wireless telecommunications facilities. *See* H.R. Rep. No. 104-204(I), § 107, at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61. But the House and Senate conferees decided instead to “preserve[] the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement.” H.R. Rep. No. 104-458, § 704, at 207-08 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 222.

[2] Accordingly, at the same time, Congress also enacted 47 U.S.C. § 332(c)(7). Section 332(c)(7)(A) preserves the authority of local governments over zoning decisions regarding the placement and construction of wireless service facilities, subject to enumerated limitations in § 332(c)(7)(B). One such limitation is that local regulations “shall not prohibit or have the effect of prohibiting the provision of personal wireless services.” *Id.* § 332(c)(7)(B)(i)(II).

We have interpreted § 332(c)(7)(B)(i)(II) in accordance with its text. In *MetroPCS, Inc. v. City of San Francisco*, 400 F.3d 715, 730-31 (9th Cir. 2005), we held that a locality runs

afoul of that provision if (1) it imposes a “city-wide general ban on wireless services” or (2) it actually imposes restrictions that amount to an effective prohibition.

[3] Our interpretation of § 253(a), however, has not hewn as closely to its nearly identical text. Again, § 253(a) states: “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 to provide any interstate or intrastate telecommunications service.” In *Auburn*, we became one of the first federal circuit courts to interpret that provision. We surveyed district court decisions and adopted their broad interpretation of its preemptive effect. *Auburn*, 260 F.3d at 1175-76. In the course of doing so, we quoted § 253(a) somewhat inaccurately, inserting an ellipsis in the text of § 253(a). *Id.* at 1175. We held that “[s]ection 253(a) preempts ‘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.’ ” *Id.* (quoting *Bell Atl.-Md., Inc. v. Prince George’s County*, 49 F. Supp. 2d 805, 814 (D. Md. 1999), *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2000)); *see also Qwest Commc’ns Inc. v. City of Berkeley*, 433 F.3d 1253, 1258 (9th Cir. 2006) (invalidating the locality’s regulations because they “may have the effect of prohibiting telecommunications companies from providing services”); *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004) (emphasizing that “regulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted [by § 253(a)]”). It followed from that truncated version of the statute that, if a local regulation merely “create[s] a substantial . . . barrier” to the provision of services or “allows a city to bar” provision of services, *Auburn*, 260 F.3d at 1176, then § 253(a) preempts the regulation. Applying that broad standard, we held that the municipal regulations at issue in *Auburn* were preempted because they imposed procedural requirements, charged fees, authorized civil and criminal penalties, and—“the ultimate cudgel”—reserved discretion to the

city to grant, deny, or revoke the telecommunications franchises. *Id.*

Our expansive reading of the preemptive effect of § 253(a) has had far-reaching consequences. The *Auburn* standard has led us to invalidate several local regulations. See *Berkeley*, 433 F.3d at 1258 (holding that Berkeley's regulations were preempted by § 253(a)); *Portland*, 385 F.3d at 1239-42 (reversing the district court's holding that Portland's regulations survived preemption and remanding for additional analysis). Three of our sister circuits also have followed our broad interpretation of § 253(a), albeit with little discussion. See *P.R. Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (citing *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269 (10th Cir. 2004)); *Santa Fe*, 380 F.3d at 1270 (quoting *Auburn*, 260 F.3d at 1176); *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002). Applying our *Auburn* standard, federal district courts have invalidated local regulations in tens of cases across this nation's towns and cities. See, e.g., *NextG Networks of Cal., Inc. v. County of Los Angeles*, 522 F. Supp. 2d 1240, 1253 (C.D. Cal. 2007); *TC Sys., Inc. v. Town of Colonie*, 263 F. Supp. 2d 471, 481-84 (N.D.N.Y. 2003); *XO Mo., Inc. v. City of Maryland Heights*, 256 F. Supp. 2d 987, 996-98 (E.D. Mo. 2003).

But the tension between the *Auburn* standard and the full text of § 253(a) has not gone unnoticed. See *City of Portland v. Elec. Lightwave, Inc.*, 452 F. Supp. 2d 1049, 1059 (D. Or. 2005) ("The Ninth Circuit's interpretation of the scope of section 253(a) appears to depart from the plain meaning of the statute . . ."); *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250, 1255 (D. Or. 2002) (construing the *Auburn* standard as dictum because reading § 253(a) as preempting regulations that *may* have the effect of prohibiting telecommunications services "simply misreads the plain wording of the statute"), *rev'd by Portland*, 385 F.3d at 1241 ("Like it or not, both we and the district court are bound by our prior ruling [in *Auburn*]."); see also *Newpath Networks LLC v. City of Irvine*,

No. SACV-06-550, 2008 WL 2199689, at *4 (C.D. Cal. Mar. 10, 2008) (noting that “the Court is sympathetic to Irvine’s argument that judicial decisions in this area have not been particularly instructive in telling municipalities how they may regulate in accordance with the . . . Act”). Recently, the Eighth Circuit rejected the *Auburn* standard and held that, to demonstrate preemption, a plaintiff “must show actual or effective prohibition, rather than the mere possibility of prohibition.” *Level 3 Commc’ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532-33 (8th Cir. 2007); see also *AT&T Commc’ns of Pac. Nw., Inc. v. City of Eugene*, 35 P.3d 1029, 1047-48 (Or. Ct. App. 2001) (implicitly rejecting the *Auburn* standard).

[4] We find persuasive the Eighth Circuit’s and district courts’ critique of *Auburn*. Section 253(a) provides that “[n]o State or local statute or regulation . . . may prohibit or have the effect of prohibiting. . . provi[sion of] . . . telecommunications service.” In context, it is clear that Congress’ use of the word “may” works in tandem with the negative modifier “[n]o” to convey the meaning that “state and local regulations shall not prohibit or have the effect of prohibiting telecommunications service.” Our previous interpretation of the word “may” as meaning “might possibly” is incorrect. We therefore overrule *Auburn* and join the Eighth Circuit in holding that “a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.” *Level 3 Commc’ns*, 477 F.3d at 532.

Although our conclusion rests on the unambiguous text of § 253(a), we note that our interpretation is consistent with the FCC’s. See *In re Cal. Payphone Ass’n*, 12 F.C.C.R. 14191, 14209 (1997) (holding that, to be preempted by § 253(a), a regulation “would have to actually prohibit or effectively prohibit” the provision of services); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (holding that the two-step *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), analysis applies to

FCC rulings). Were the statute ambiguous, we would defer to the FCC under *Chevron*, as its interpretation is certainly reasonable. 467 U.S. at 843. Our narrow interpretation of the preemptive effect of § 253(a) also is consistent with the presumption that “express preemption statutory provisions should be given a narrow interpretation.” *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm’n*, 410 F.3d 492, 496 (9th Cir. 2005).

Our present 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.” In *MetroPCS*, to construe § 332(c)(7)(B)(i)(II), we focused on the *actual* effects of the city’s ordinance, not on what effects the ordinance *might possibly* allow. 400 F.3d at 732-34. Indeed, we rejected the plaintiff’s argument that, because the city’s zoning ordinance granted discretion to the city to reject an application based on vague standards such as “necessity,” the ordinance necessarily constituted an effective prohibition. *Id.* at 724, 732. Consequently, our interpretation of the “effective prohibition” clause of § 332(c)(7)(B)(i)(II) differed markedly from *Auburn*’s interpretation of the same relevant text in § 253(a). Compare *MetroPCS*, 400 F.3d at 731-35 (analyzing, under § 332(c)(7)(B)(i)(II), whether the city’s ordinance and decision *actually* have the effect of prohibiting the provision of wireless services), with *Portland*, 385 F.3d at 1241 (“[R]egulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted [by § 253(a)].”); compare also *MetroPCS*, 400 F.3d at 732 (rejecting the argument that “the City’s zoning ‘criteria,’ which allow for [permit] denials based on findings that a given facility is ‘not necessary’ for the community, are ‘impossible for any non-incumbent carrier to meet’ and thus constitute an effective prohibition of wireless services”), with *Auburn*, 260 F.3d at 1176 (holding that the city’s ordinance is an effective prohibition under § 253(a), in large part because the “city reserves discretion to grant, deny, or revoke the [telecommunications] franchises”).

When Congress uses the same text in the same statute, we presume that it intended the same meaning. See *N. Sports, Inc. v. Knupfer (In re Wind N' Wave)*, 509 F.3d 938, 945 (9th Cir. 2007) (applying the presumption); *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) (“We must presume that words used more than once in the same statute have the same meaning.”); see also *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion) (“[W]e begin with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.”); *id.* at 261 (O’Connor, J., concurring in the judgment) (stating that the presumption should apply in the absence of “strong evidence” to the contrary). We see nothing suggesting that Congress intended a different meaning of the text “prohibit or have the effect of prohibiting” in the two statutory provisions, enacted at the same time, in the same statute.

[5] Our holding today therefore harmonizes our interpretations of the identical relevant text in §§ 253(a) and 332(c)(7)(B)(i)(II).² Under both, a plaintiff must establish either an outright prohibition or an effective prohibition on the provision of telecommunications services; a plaintiff’s showing that a locality could *potentially* prohibit the provision of telecommunications services is insufficient.

Because Sprint’s suit hinges on the statutory text that we interpreted above—“prohibit or have the effect of prohibiting”—we need not decide whether Sprint’s suit falls under § 253 or § 332. As we now hold, the legal standard is the same under either.

²We make no comment on what differences, if any, exist between the two statutory sections in other contexts.

B. *The Effective Prohibition Standard Applied to the County of San Diego's Ordinance*

[6] Having established the proper legal standard, we turn to Sprint's facial challenge to the Ordinance. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).³

The Ordinance plainly is not an outright ban on wireless facilities. We thus consider whether the Ordinance effectively prohibits the provision of wireless facilities. We have no difficulty concluding that it does not.

The Ordinance imposes a layer of requirements for wireless facilities in addition to the zoning requirements for other structures. On the face of the Ordinance, none of the requirements, individually or in combination, prohibits the construction of sufficient facilities to provide wireless services to the County of San Diego.

[7] Most of Sprint's arguments focus on the discretion reserved to the zoning board. For instance, Sprint complains that the zoning board must consider a number of "malleable and open-ended concepts" such as community character and

³The Supreme Court and this court have called into question the continuing validity of the *Salerno* rule in the context of First Amendment challenges. See, e.g., *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008); *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 971-72 (9th Cir. 2003). In cases involving federal preemption of a local statute, however, the rule applies with full force. See *Hotel & Motel Ass'n*, 344 F.3d at 971 ("To bring a successful facial challenge outside the context of the First Amendment, 'the challenger must establish that no set of circumstances exists under which the [statute] would be valid.'" (alteration in original) (quoting *Salerno*, 481 U.S. at 745)); see also *Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995) (unanimous opinion) (applying *Salerno* to a federal preemption facial challenge to a state statute).

aesthetics; it may deny or modify applications for “any other relevant impact of the proposed use”; and it may impose almost any condition that it deems appropriate. A certain level of discretion is involved in evaluating any application for a zoning permit. It is certainly true that a zoning board *could* exercise its discretion to effectively prohibit the provision of wireless services, but it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the competing goals of an ordinance—the provision of wireless services and other valid public goals such as safety and aesthetics. In any event, Sprint cannot meet its high burden of proving that “no set of circumstances exists under which the [Ordinance] would be valid,” *Salerno*, 481 U.S. at 745, simply because the zoning board exercises some discretion.

[8] The same reasoning applies to Sprint’s complaint that the Ordinance imposes detailed application requirements and requires public hearings. Although a zoning board could conceivably use these procedural requirements to stall applications and thus effectively prohibit the provision of wireless services, the zoning board equally could use these tools to evaluate fully and promptly the merits of an application. Sprint has pointed to no requirement that, on its face, demonstrates that Sprint is effectively prohibited from providing wireless services. For example, the Ordinance does not impose an excessively long waiting period that would amount to an effective prohibition. Moreover, if a telecommunications provider believes that the zoning board is in fact using its procedural rules to delay unreasonably an application, or its discretionary authority to deny an application unjustifiably, the Act provides an expedited judicial review process in federal or state court. *See* 47 U.S.C. § 332(c)(7)(B)(ii) & (v).

[9] We are equally unpersuaded by Sprint’s challenges to the substantive requirements of the Ordinance. Sprint has not identified a single requirement that effectively prohibits it from providing wireless services. On the face of the Ordinance, requiring a certain amount of camouflage, modest set-

backs, and maintenance of the facility are reasonable and responsible conditions for the construction of wireless facilities, not an effective prohibition.

That is not to say, of course, that a plaintiff could never succeed in a facial challenge. If an ordinance required, for instance, that all facilities be underground and the plaintiff introduced evidence that, to operate, wireless facilities must be above ground, the ordinance would effectively prohibit it from providing services. Or, if an ordinance mandated that no wireless facilities be located within one mile of a road, a plaintiff could show that, because of the number and location of roads, the rule constituted an effective prohibition. We have held previously that rules effecting a “significant gap” in service coverage could amount to an effective prohibition, *MetroPCS*, 400 F.3d at 731-35, and we have no reason to question that holding today.

[10] In conclusion, the Ordinance does not effectively prohibit Sprint from providing wireless services. Therefore, the Act does not preempt the County’s wireless telecommunications ordinance.

C. *Section 1983 claim*

[11] We adopt the reasoning and conclusion of the three-judge panel that 42 U.S.C. § 1983 claims cannot be brought for violations of 47 U.S.C. § 253. *Sprint Telephony*, 490 F.3d at 716-18; *accord Santa Fe*, 380 F.3d at 1266-67; *see also Kay v. City of Rancho Palos Verdes*, 504 F.3d 803, 812-15 (9th Cir. 2007) (holding that § 1983 claims cannot be brought for violations of 47 U.S.C. § 332).

AFFIRMED with respect to the § 1983 claim; otherwise REVERSED. Costs on appeal awarded to Defendants - Appellees/Cross-Appellants.

GOULD, Circuit Judge, concurring:

I concur in full in Judge Graber's majority opinion, holding that Section 253(a) preempts any state or local law that actually or effectively prohibits provision of telecommunication services. I write separately to add my view that normally local governments will have the ability to enforce reasonable zoning ordinances that might affect where and how a cellular tower is located, but that will not effectively prohibit cellular telephone service. Zoning ordinances, in my view, will be preempted only if they would substantially interfere with the ability of the carrier to provide such services. Cases of a preempted zoning ordinance will doubtless be few and far between, and the record in this case shows that telecommunication services here were not effectively barred by the zoning ordinance.