

Telecommunication Case U.S. Supreme Court Denies Cert.

On June 29, 2009 the Supreme Court declined to grant review in two cases of interest to local governments: *Sprint Telephony PCS, L.P. v. San Diego County*, 543 F.3d 571 (9th Cir. 2008), *cert. denied*, 77 U.S.L.W. 3366 (U.S. June 29, 2009) (No. 08-759) and *Level 3 Communications, LLC v. City of St. Louis, Missouri*, 540 F.3d 794 (8th Cir. 2008), *cert. denied*, 77 U.S.L.W. 3528 (U.S. June 29, 2009) (No. 08-626).

In the *Sprint* case, the Ninth Circuit upheld the County's wireless telecommunications ordinance and overruled *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), finding that a provider suing a municipality under the Telecommunications Act of 1996 and relying on the preemption sections [47 U.S.C.A. §§ 253, 332] was required to show that the challenged ordinance *actually* prohibited or effectively prohibited the provision of telecommunications or wireless services, and not just a mere possibility of prohibition. Likewise, in the *Level 3* case, a telecommunications services provider challenged the terms of a license agreement between it and St. Louis, arguing that the terms and conditions violated the Telecommunications Act because they prohibited its ability to provide telecommunication services under 47 U.S.C. § 253(a). The Eighth Circuit held that a "mere possibility of prohibition" standard of proof was insufficient to satisfy Section 253(a), and that a plaintiff must show actual or effective prohibition. Because "Level 3 admitted in its response to interrogatories that it "[could not] state with specificity what additional services it might have provided had it been able to freely use the money that it was forced to pay to the City for access to the public rights-of-way," Level 3 failed to meet its burden under that standard.

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