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The Supreme Court May Grant Cert To Decide The Scope Of Preemption Over State Laws Prohibiting Or Effectively Prohibiting Telecommunications Service

The United States Supreme Court recently issued an order inviting the Solicitor General to file a brief expressing the view of the United States as to the cert petitions filed in two cases addressing significant issues regarding the ability of State and local governments to regulate the telecommunications industry.

Section 253(a) of the Telecommunications Act of 1996, 47 U.S.C. § 253(a), provides that “[n]o 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.”

There is currently a split among the Circuits as to the scope of Section 253(a). The Eighth and Ninth Circuits view this provision restrictively, holding that a plaintiff must show actual or effective prohibition, rather than the mere possibility of prohibition, in order to succeed in challenging a state or local regulation under Section 253(a). *Level 3 Commc’ns, LLC v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007); *Sprint Telephony PCS, LP v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (en banc). The First, Second, and Tenth Circuits, on the other hand, employ a less strict standard, holding that a state or local regulation is preempted if it materially inhibits the provision of telecommunications services. *Puerto Rico Tele. Co., Inc. v. Mun. Of Guayanilla*, 450 F.3d 9 (1st Cir. 2006); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004).

The Supreme Court currently has before it certiorari petitions in *Level 3* (08-626) and *Sprint Telephony* (08-759). The local ordinance at issue in *Sprint Telephony* imposes restrictions and permit requirements on the construction and location of wireless telecommunications facilities. At issue in *Level 3* is a licensing agreement requiring the telecommunications provider to pay fees and meet other obligations before accessing streets and right of ways owned by the City of St. Louis. Both cases turn on Section 253(a)'s preemptive scope.

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