No. 08-759

IN THE

Supreme Court of the United States

SPRINT TELEPHONY PCS, L.P.,

Petitioner,

v.

COUNTY OF SAN DIEGO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* NEXTG NETWORKS OF CALIFORNIA, INC. AND THE DAS FORUM IN SUPPORT OF PETITION

T. SCOTT THOMPSON
Counsel of Record
LESLIE MOYLAN
DAVIS WRIGHT TREMAINE, LLP
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
(202) 973-4200

Attorneys for Amici Curiae

220445

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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STATEMENT OF INTEREST[1]

As more fully set forth in the Argument section below, *Amici Curiae* NextG Networks of California, Inc. ("NextG") and The DAS Forum[2] (jointly "DAS *Amici*") deploy and/or use distributed antenna system ("DAS") networks to provide telecommunications services. DAS *Amici* have a strong interest in this proceeding because the en banc decision of the Ninth Circuit in *Sprint Telephony PCS, LP v. San Diego County*, 543 F.3d 571 (9th Cir. 2008), and in particular the Ninth Circuit's interpretation of 47 U.S.C. § 253 will affect the ability of DAS *Amici* to deploy and provide telecommunications services. Indeed, NextG and other members of The DAS Forum are involved in current

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[1] Pursuant to Rule 37 of the Court's Rules, Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae's* intention to file this brief. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae,* its members, or its counsel made a monetary contribution to its preparation or submission.

[2] The DAS Forum, a membership section of PCIA-The Wireless Infrastructure Association, is a non-profit trade association that acts as a neutral forum dedicated to advancing, developing and shaping the future of distributed antenna systems ("DAS") as a viable component of the nation's wireless telecommunications network, to foster a free and open exchange of information and ideas through broad stakeholder participation, to advocate for responsible public policy decisions, to promote the adoption of interoperable technologies, and to engage in any lawful act or activity in furtherance thereof.

litigation, including in courts in the Ninth Circuit, that may be affected by the Ninth Circuit's decision and thus by the outcome of the Court's resolution of Sprint's Petition for a writ of *certiorari*.

SUMMARY OF ARGUMENT

With the Telecommunications Act of 1996 ("TCA"), Congress enacted sweeping changes to the regulatory and competitive landscape of the telecommunications industry. As stated in the title of the TCA, Congress sought "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." Pub. L. No. 104-104, 110 Stat. 56 (1996). A cornerstone of the TCA and a key to accomplishing Congress' goal was Section 253, 47 U.S.C. § 253. Entitled "Removal Of Barriers To Entry," Section 253(a) declares 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." 47 U.S.C. § 253(a) (emphasis added).

In *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002), the Ninth Circuit had accurately and faithfully applied the text of Section 253 and the intent of Congress to identify the elements of local legal requirements that are preempted by Section 253(a). While not eliminating all subsequent municipal barriers, the Ninth Circuit's *Auburn* standards played an important role in facilitating the

ability of companies to deploy telecommunications networks and services.

Amici Curiae NextG Networks of California, Inc. and The DAS Forum support Sprint's Petition For Certiorari because the Ninth Circuit's en banc decision in this case, reversing *Auburn*, presents an important case of national interest. The Ninth Circuit's narrow reading of Section 253(a) in this case is directly contrary to the intent of Congress, the policy goals of the Federal Communications Commission ("FCC"), and the interpretation of Section 253 by the FCC and several other Circuit Courts. If uncorrected, the Ninth Circuit's en banc decision likely will embolden local governments to erect regulatory regimes so Byzantine as to have the effect of thwarting the deployment of advanced telecommunications technologies and competitive telecommunications services. While unacceptable in any context, the costs, burdens, delays, and uncertainty imposed by such municipal requirements will be particularly detrimental to the ability of new entrants, such as NextG and other DAS Forum members, to enter the market. Moreover, the Ninth Circuit's decision will have a detrimental impact beyond Sprint and purely wireless providers, as it undermines what had been well established principles regarding deployment of telecommunications services in public rights-of-way.

Accordingly, for the reasons identified by Sprint in its Petition and as set forth below, the Petition should be granted.

ARGUMENT IN SUPPORT OF GRANTING THE PETITION

I. BACKGROUND ON NEXTG, THE DAS FORUM, AND DISTRIBUTED ANTENNA SYSTEMS ("DAS")

As wireless telecommunications providers deploy the next generation of wireless services, one of the central obstacles they face is the need for greater capacity (the number of people who can be served at a time) and bandwidth (the ability to carry content-intensive communications, such as e-mail attachments or Internet access). While they may not all be licensed wireless carriers, DAS *Amici* use Distributed Antenna System ("DAS") networks to provide an innovative new technology and telecommunications service that effectively increases wireless network capacity to accommodate data and advanced services.[3]

NextG and several of its competitors and co-members of The DAS Forum are technology-driven start-up companies that provide telecommunications

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[3] For example, NextG is not a wireless carrier but, rather, has been issued necessary certificates of public convenience and necessity by several state regulatory agencies to operate as a competitive telecommunications carrier in those states, to the extent required by those agencies' regulations. *E.g.*, *In re NextG Networks of Cal., Inc.*, CPUC Decision 03-01-061, 2003 WL 288990 (Cal. P.U.C. January 30, 2003); *modified*, CPUC Decision D.07-04-045 at 12 (Cal. P.U.C. 2007). Most independent DAS providers, such as NextG, are "carriers' carriers" who provide service to wireless carriers that in turn provide retail service to end users.

services via DAS networks that they construct on utility infrastructure (e.g., utility and streetlight poles) located in public rights-of-way and utility easements. A DAS network is, basically, a series of small antennas located on utility or street light poles in public rights-of-way or utility easements that are interconnected by fiber optic lines. Where a traditional "macro" wireless cell site such as a tower or monopole typically has a full complement of electronic network equipment located at the site with the antenna, the DAS network splits that traditional cell by placing the electronic network equipment at a central "hub" location and routing the signals to and from the remote antenna "nodes" via the fiber optic lines.

These DAS networks facilitate a greater re-use of the wireless spectrum, since the antennas define small radio coverage cells isolated from each other, each carrying the same capacity and quality as a network delivered by traditional means. In addition, a DAS network in an urban area can provide coverage in many areas or "dead spots" that may be "shadowed" from coverage by the traditional antenna locations. Higher capacity and greater coverage in turn are the necessary building blocks for new, content-intensive wireless telecommunications services that are in demand by consumers. DAS networks also take advantage of existing rights-of-way infrastructure, in the same way as traditional, purely wireline telephone systems.

II. THE COURT'S INTERPRETATION OF SECTION 253 IS IMPORTANT AND WILL HAVE WIDE IMPACT

While technologically innovative and pro-competitive, DAS deployments are subject to far too many local regulatory hurdles precisely like those at issue in this case. Indeed, entry into the telecommunications market by DAS *Amici* and similar new entrants is too often threatened by local governments who want to decide for themselves whether, when, and on what terms such providers may deploy technology and enter the telecommunications market.

The Ninth Circuit's en banc decision in this case reversed nearly a decade's worth of established case law and, in so doing, threatens the ability of telecommunications providers, particularly new entrants such as NextG and other members of The DAS Forum, to deploy their advanced technologies and new services.

The clear and specific standards set forth by the Ninth Circuit in *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002), and subsequent decisions were an important tool, preventing unnecessary disputes and facilitating deployment in many communities. However, even with the clear standards of *Auburn*, NextG, members of The DAS Forum, and other telecommunications industry participants too often faced municipal requirements and actions that severely delayed or effectively denied their ability to provide service. Indeed, NextG and other DAS Forum members have on numerous occasions had to

bring actions to protect their rights under Section 253 of the Communications Act, 47 U.S.C. § 253. *See, e.g., NextG Networks of NY, Inc. v. City of New York,* S.D.N.Y., Case No. 03 Civil 9672 RMB; *NextG Networks of Cal., Inc. v. City of Huntington Beach,* C.D. Cal., Case No. SACV 07-1471 ABC; *NextG Networks of Cal., Inc. v. County of Los Angeles,* 522 F. Supp.2d 1240 (C.D. Cal. 2007); *NextG Networks of Cal., Inc. v. City of Carlsbad,* S.D. Cal., Case No. 06 CV 0650 JAH; *NextG Networks of NY, Inc. v. City of Lynn, et al.,* D. Mass., Case No. 08-11020 LTS; *NextG Networks of Cal., Inc. v. City and County of San Francisco,* Case No. C 05 0658 MHP, 2006 U.S. Dist. LEXIS 36101 (N.D. Cal. June 2, 2006); *NextG Networks of NY, Inc. v. City of Everett,* D. Mass., Case No. 08 11020 NGY; *Newpath Networks, LLC v. City of Irvine,* 2008 WL 2199689 (C.D. Cal. Mar. 10, 2008); *Extenet Systems, Inc. v. City and County of San Francisco,* N.D. Cal., Case No. C 06 06536 MHP.

By reversing *Auburn,* the Ninth Circuit's en banc *Sprint* decision is likely to make entry by DAS *Amici* and others even more difficult. Emboldened by what they perceive as a standard granting cities the ability to impose any requirement and take any action so long as it does not lead to a specific construction permit denial, cities have and will expand their regulatory impositions, particularly on networks that include any "wireless" element. In turn, this expansion of regulatory obstacles to deployment will impede the development of networks to meet consumers' telecommunications demands.

An example is NextG's ongoing litigation with the City of Huntington Beach, California. Under Huntington

Beach's challenged code, NextG is required to obtain all of the following: a franchise (and pay unstated franchise fees), notwithstanding that such a franchise requirement is expressly forbidden under state law; a Wireless Permit; a Conditional Use Permit; Design Review approval; and Encroachment Permits. City Of Huntington Beach, Cal., Municipal Code § 230.96 (available at http://www.surfcity-hb.org/files/users/city_clerk/Chp230.pdf). NextG has estimated that applying for the Wireless Permit will cost approximately $200,000 for a system involving 15 "Nodes" and associated fiber optic lines. Yet, only the Encroachment Permit requirement is imposed on other users of the public rights-of-way (e.g., electric utilities, incumbent telephone, and cable operators), despite that the other, existing facilities are more extensive and frequently larger than NextG's and that NextG competes with incumbent telephone companies and cable television operators. Despite the clear barrier to entry imposed by the City's requirements, in the wake of the en banc decision in *Sprint*, Huntington Beach filed a motion for judgment on the pleadings, arguing that NextG's Section 253 claims must be dismissed on the theory that, under *Sprint*, NextG cannot state a Section 253 claim unless and until it applies for permits and they are denied after the entire process has run its course, no matter that the burden, expense, delay, and uncertainty may have materially inhibited or limited NextG's ability to provide service even before or absent a complete denial. *NextG Networks of Cal., Inc. v. City of Huntington Beach*, Case No. SACV 07-1471 ABC (C.D. Cal.), Docket Entry # 64 at 11-12.

Other DAS Forum members, likewise, have current litigation in the Ninth Circuit and current network deployment plans that may be affected adversely by the *Sprint* decision if not reversed. *See, e.g.*, *Extenet Sys., Inc. v. City and County of San Francisco*, N.D. Cal., Case No. C 06 06536 MHP. Because DAS *Amici* face the prospect of literally hundreds if not thousands of municipal entry requirements, they have a critical interest in the Court granting Sprint's Petition and reversing the en banc decision in *Sprint*.

Until the Ninth Circuit's change in course, Section 253 had been an important and meaningful tool advancing Congressional intent. Absent review and reversal by this Court, the Ninth Circuit's new approach will significantly threaten, if not thwart outright, the continued deployment of new, advanced technologies and services such as DAS networks. Accordingly, the Court should grant Sprint's Petition and reverse the en banc decision.

III. THE NINTH CIRCUIT EN BANC DECISION, IF NOT OVERTURNED, WILL HAVE SIGNIFICANT ADVERSE EFFECTS ON DEPLOYMENT OF NEW TECHNOLOGIES AND COMPETITIVE SERVICES

A. The Intent Of Congress In Enacting The Telecommunications Act Of 1996 Was To Promote Deployment Of Advanced Technologies And Competitive Services

The primary purpose of the Telecommunications Act of 1996 ("TCA"), Pub. L. No. 104-104, 110 Stat. 56 (1996), which amended the Communications Act of 1934, was to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . ." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 1 (1996) (the "Conference Committee Report"). The Conference Committee Report also noted that the purpose of the statute is to provide for a "pro-competitive, de-regulatory national policy framework." *Id.* When Congress passed the TCA, 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." Pub. L. No. 104-104, 110 Stat. 56 (1996).

Indeed, Congress made clear in 47 U.S.C. §157(a) that

> [i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the [FCC]) who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest.

47 U.S.C. § 157(a). In addition, in Section 706 of the TCA (codified at 47 U.S.C. § 157 nt), Congress directed the Federal Communications Commission ("FCC") to "encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." Pub. L. No. 104-104, § 706(a), 110 Stat. 153 (1996) (reproduced in the notes under 47 U.S.C. § 157). Section 706(b) directs the FCC to undertake regular inquiries into the availability of advanced telecommunications capabilities, and if the FCC finds that advanced telecommunications capabilities are not being deployed to all Americans, Section 706(b) requires the FCC to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." Pub. L. No. 104-104, § 706(b), 110 Stat. 153 (1996) (reproduced in the notes under 47 U.S.C. § 157).

As a result of these clear statements of Congressional intent, the policy of promoting competition and new technologies has been at the forefront of communications policy since the TCA was enacted. Promoting deployment of facilities-based competition, and in particular the deployment of advanced technologies, has been the primary focus of the FCC's policies. *See, e.g.*, Jonathan S. Adelstein, Comm'r, FCC, A View on Today's Most Pressing Wireless Issues, Remarks at Fifth Annual Conf. on Spectrum Mgmt., Law Seminars Int'l, Arlington, VA (Sept. 18, 2008), *available at* www.fcc.gov/commissioners/adelstein/speeches2008.html (noting that it is the FCC's mission to "encourage[] the development and availability of innovative tools and services"); *In re Inquiry Concerning the Deployment of Adv. Telecomms. Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to the Telecomms. Act of 1996*, Fifth Report, 23 F.C.C.R. 96615, ¶ 76 (Jun. 12, 2008) ("The Commission's broadband policy is to continue to promote investment in multiple broadband platforms, to promote greater speeds, and to promote related digital technologies and services that will encourage broadband demand."); *In re CommNet Commc'ns Network, Inc.*, Order, DA 07-2032, 2007 FCC LEXIS 3746 ¶ 13 (FCC May 9, 2007) (purpose of wireless spectrum auction rules is "the rapid deployment of new technologies and services to the public"); *E911 Requirements For IP-Enabled Serv. Providers*, 20 F.C.C.R. 10245, at 10333 (Jun. 03, 2005) (separate statement of Comm'r Jonathan S. Adelstein) ("we must continue to promote the deployment of new technologies"); Kathleen Q. Abernathy, Comm'r, FCC,

The Nascent Servs. Doctrine, Remarks at Fed. Comms. Bar Ass'n N.Y. Chapter (Jul. 11, 2002), *available at* www.fcc.gov/Speeches/Abernathy/2002/spkqa217.html (**promoting regulatory** restraint to "facilitate the development of new products and services without the burden of anachronistic regulations, and in turn promote the goal of enhancing facilities-based competition").

Promoting deployment was not left exclusively to the FCC. To effectuate its policy goals, Congress enacted Section 253(a), which 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." 47 U.S.C. § 253(a) (emphasis added). In so doing, Congress gave due consideration to the potential conflict between state and local government regulation and the national need for deployment of advanced telecommunications and information technologies. In Section 253(a), Congress stated a broad general rule preempting local and state entry barriers. To retain some state and local regulatory involvement, Congress reserved in Section 253(b) and Section 253(c) specific areas for local oversight. In Section 253(b), Congress reserved only to states the authority to adopt "requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b). In Section 253(c), Congress reserved to states and local authorities the power to "manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a

competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis. . . ." 47 U.S.C. § 253(c).

This statutory structure has been recognized to provide a broad preemption of local requirements and a narrow reservation of authority to municipalities. *See, e.g., TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396, ¶¶ 103-109 (1997); *Auburn*, 260 F.3d at 1170. Indeed, such a reading of Section 253 is necessary and appropriate to give effect to the goals and policies of Congress in the TCA.

As discussed below, the Ninth Circuit's new interpretation of Section 253 contradicts the intent of Congress and threatens to undermine the policies and actions of the FCC. Accordingly, Sprint's Petition should be granted and the en banc decision in *Sprint* reversed.

B. The Ninth Circuit's New Decision Interprets Section 253 In Conflict With The Language And Intent Of Congress

The Ninth Circuit's en banc decision in *Sprint* purports to correct a perceived grammatical mistake by the Ninth Circuit panel in *Auburn*, but in so doing, the en banc Ninth Circuit went too far. *Sprint*, 543 F.3d at 578. Regardless of whether the *Auburn* court was mistaken in quoting Section 253(a) to say that a local requirement is preempted if it "may . . . have the effect of prohibiting" the ability of a company to provide telecommunications services, the *Auburn* court's interpretation of Section 253(a) and application of it to the facts in that case were absolutely correct when

viewed in light of the language of Section 253 as a whole and the intent of Congress. The Court should grant Sprint's Petition because, in its zeal to remedy a perceived error in grammar, the en banc decision in *Sprint* goes too far, ignoring the intention of Congress and the plain language and structure of Section 253, and the result will have a profound impact on the deployment of advanced telecommunications technologies and services.

1. The Ninth Circuit's En Banc Interpretation Of Section 253 Ignores Well-Established FCC And Court Precedent, As Well As The Intent Of Congress In Enacting The TCA

In *Auburn*, the Ninth Circuit explained that the preemptive language of Section 253 is

> virtually absolute and its purpose is clear – certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has narrowly circumscribed the role of state and local governments in this arena. *Municipalities therefore have a very limited and proscribed role in the regulation of telecommunications.*

260 F.3d at 1175 (emphasis added) (internal citations omitted). Recognizing the pro-competitive, pro-deployment intent of Congress, discussed *supra*, the *Auburn* court correctly interpreted Section 253 to preempt the local ordinances at issue because, as a

whole, the burdensome application process and substantive requirements had "the effect of prohibiting" the provision of telecommunications services and created "a substantial and unlawful barrier to entry into and participation in the Counterclaim Cities' telecommunications markets." *Id.* at 1176.

The en banc panel in *Sprint* takes issue with the *Auburn* court's use of an ellipsis in paraphrasing Section 253 – in particular its statement that Section 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." *Sprint,* 543 F.3d at 578. Yet, setting aside the merits of the *Auburn* quotation, the substantive result in *Auburn* was correct and has been reached even without the "may" language being quoted as the court did in *Auburn*. *See, e.g., RT Commc'ns, Inc. v. Fed. Commc'ns Comm'n*, 201 F.3d 1264, 1268 (10th Cir. 2000) (holding that "the extent to which the statute is a 'complete' bar is irrelevant. § 253(a) forbids any statute which prohibits or has 'the effect of prohibiting' entry. Nowhere does the statute require that a bar to entry be insurmountable before the FCC must preempt it."); *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) ("[A] prohibition does not need to be complete or 'insurmountable' to run afoul of § 253.") (quoting *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002), *cert. denied.*, 538 U.S. 923 (2003)).

For example, the Second Circuit in *TCG New York, Inc. v. City of White Plains* reached the same conclusion

and applied Section 253 to preempt the local ordinance at issue in that case based on the burden it imposed and the discretion contained therein without resorting to the "may" grammatical quotation of *Auburn*. 305 F. 3d at 76. In *White Plains*, the Second Circuit held that the challenged ordinance and franchise in that case violated Section 253(a) based on the face of the requirements, as a whole, but recognized that "the provision that gives the Common Council the right to reject any application based on any 'public interest factors . . . that are deemed pertinent by the City' amounts to a right to prohibit providing telecommunications services, albeit one that can be waived by the City." *Id.* The Second Circuit correctly based its ruling not only on the precedent set by other courts, *id.* ("Courts have held that a prohibition does not need to be complete or 'insurmountable' to run afoul of § 253(a)") (citations omitted), but also that of the FCC – the very federal agency that is charged with effectuating the purpose of the TCA. As the Second Circuit explained:

> The FCC has stated that, in determining whether an ordinance has the effect of prohibiting the provision of telecommunications services, it "consider[s] whether the ordinance materially *inhibits or limits* the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."

Id. (emphasis added) (quoting *In re Cal. Payphone Ass'n*, 12 F.C.C.R. 14191, 1997 WL 400726, at 31 (1997)).

As Sprint explains in its Petition, the statutory text and the intent of Congress support the interpretation that Section 253(a) does *not* preempt only complete prohibitions or outright denials. (Sprint Petition at 17-18). Indeed, as this Court recognized,

> the practical implication of that interpretation is to read out of § 253 the words 'or ha[s] the effect of prohibiting,' by which Congress signaled its willingness to preempt laws that produce the unwanted effect, *even if they do not advertise their prohibitory agenda on their faces. . . . [T]here is no justification for preempting only those laws that self-consciously interfere with the delivery of telecommunications services.*

Nixon v. Missouri Mun. League, 541 U.S. 125, 139-40 (2004) (emphasis added).

As demonstrated in Part III.A., *supra*, Congress could not have been more clear that the fundamental and overriding purpose of the TCA was to eliminate impediments to deployment and market entry. To the extent that it is read to mean that Section 253(a) only preempts local requirements that create a complete ban on or outright denial of the provision of service, the Ninth Circuit's new decision completely ignores Congress' intent in enacting the TCA, and instead goes too far in attempting to fix a perceived grammatical problem in the *Auburn* court's interpretation of Section 253.

C. The Ninth Circuit's Decision Will Deter The Deployment Of New Technologies And Competitive Services

It is important for the Court to grant the Petition because, if the Ninth Circuit's interpretation of Section 253 means that it is essentially only a remedy to be pursued *after* an outright denial of an application for the provision of new services, it may bankrupt new entrants or deter new entrants from even attempting to enter the market. Surely, this is not the outcome intended by Congress in enacting the TCA.

The deployment of new technologies and competitive services requires a significant capital investment – potentially millions of dollars for each community. Simply to undertake the design stage of a DAS network requires significant expense and investment. Uncertainty resulting from wholly subjective, discretionary local requirements creates so much risk that new entrants may not even undertake the investment involved in planning for new services. Moreover, the expense of complying with local application and information requirements may alone be prohibitive of new entrants to the market. And delays of a year or more, coupled with the uncertainty of whether the network will be built at all in the end, will deter or prevent investment in new technologies and competitive services.

New entrants are particularly negatively affected by delay and uncertainty. This is not to say that delay and uncertainty are acceptable for established companies – clearly they are not – but for a new entrant,

such as NextG and other DAS *Amici*, the ability to deploy promptly and begin achieving revenues could be the difference between financial survival and failure. Having to navigate the multiple layers and multiple years of delay and uncertainty imposed by ordinances, such as San Diego County's, before even achieving standing to challenge the requirements could be devastating to deployment and innovation by new entrants. New market entrants in particular cannot afford to spend months or years and tens or hundreds of thousands of dollars to pursue an access application just to develop a record that would then require many more months or years and hundreds of thousands of dollars to litigate. That interpretation itself would thwart Congress' policy goal of prompt deployment of competitive services and new technologies. Instead, Section 253 must be able to eliminate local overreaching proactively to provide certainty and speed to market.

Without the limitation of *Auburn*, cities will continue to impose burdensome, delaying, overreaching requirements that will have the effect of prohibiting the deployment of advanced technologies and services. As Sprint has pointed out, various cities are already moving to impose burdensome ordinances similar to the County of San Diego's in light of the Ninth Circuit's decision. (Sprint Petition at 23). Additionally, as previously stated, Huntington Beach recently filed a motion for judgment on the pleadings, arguing that NextG's Section 253 claims must be dismissed on the theory that, under *Sprint*, NextG cannot state a Section 253 claim unless and until it applies for multiple permits and they are denied. Motion for Judgment on the

Pleadings, filed Dec. 29, 2008 in *NextG Networks of Cal., Inc. v. City of Huntington Beach*, C.D. Cal., Case No. SACV 07-1471 ABC, Docket Entry # 64 at 11-12.

The Court should grant Sprint's Petition to address these important issues.

D. The Court's Review Is Needed To Provide Clarity Regarding The Rights Of Wireline Providers Using The Public Rights-Of-Way

A critical point that may be lost in this case, where the plaintiff is a provider of wireless telecommunications services, is the importance of Section 253 for telecommunications providers such as DAS providers who deploy in the public rights-of-way. Section 253(a)'s preemption of local government regulations clearly applies to all telecommunications service providers, regardless of the technology used. Nonetheless, it appears that because Sprint provides wireless telecommunications services the Ninth Circuit lost sight of well established principles regarding municipal authority over telecommunications services, particularly in the context of public rights-of-way deployment. The Court should grant Sprint's Petition because the Ninth Circuit's decision, if not addressed, may also adversely affect telecommunications companies beyond Sprint or purely wireless providers.

The public right-of-way is already dedicated to telecommunications and utility uses. For over a century, telephone companies have placed their lines on utility poles and in underground conduits in the public rights-of-way, along with electric utilities, cable operators,

sewer, gas, and other such facilities-based providers. In some states, such as California, telecommunications providers are granted explicit, state-wide franchises authorizing them to deploy their facilities in the public rights-of-way. *See, e.g.*, Cal. Pub. Util. Code § 7901. Likewise, in Section 253(c), Congress recognized that telecommunications networks require access to public rights-of-way. 47 U.S.C. § 253(c).

In crafting the balance between its overriding goal of national telecommunications deployment and local government authority, Congress preserved only local "competitively neutral and nondiscriminatory" "manage[ment]" of the public rights-of-way. 47 U.S.C. § 253(c); *TCI Cablevision of Oakland County*, 12 F.C.C.R. 21396 at ¶ 109; *White Plains*, 305 F.3d at 79. Such "management" of the public rights-of-way has been recognized to mean oversight of construction issues, such as bonding, insurance, and safety regulations – not regulation of services or companies. *See, e.g., TCI Cablevision of Oakland County*, 12 F.C.C.R. 21396 at ¶ 103; *see also White Plains*, 305 F.3d at 81 (recognizing that Section 253 only permits regulation of the use of the rights-of-way not telecommunications service); *AT&T Commc'ns of Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 591 (N.D. Tex. 1998), *vacated on other grounds*, 243 F. 3d 928 (5th Cir. 2001) (same). Congress did not provide for municipalities to exclude providers based on subjective evaluations of whether their facilities might be less intrusive elsewhere or whether the provider's service coverage was already sufficient.

Yet, many of the municipal ordinances faced by DAS *Amici* and others do not legitimately manage right-of-way access (or even purport to) since they are imposed solely on the grounds that particular equipment is used in connection with the provision of wireless service. Like San Diego County's Wireless Telecommunications Ordinance and the ordinance in Huntington Beach, municipalities are imposing regulatory regimes based solely on the fact that the networks include a radio frequency element, even when the networks are deployed with existing utility facilities in the public rights-of-way and primarily consist of fiber optic lines. The cities do not impose the same type of regulatory burden on purely wireline telecommunications or utility facilities occupying the same public rights-of-way, even though those other facilities are frequently much larger and more visually intrusive than the wireless elements of a wireless network, thereby creating greater safety and aesthetic concerns in the public right-of-way.

By focusing their discretionary, burdensome requirements only on "wireless" equipment, localities are essentially seeking to control market entry for and regulate an entire segment of telecommunications market competitors. Such discriminatory scrutiny is unwarranted and clearly in conflict with the pro-deployment, pro-competitive policies of Congress and the FCC.

Indeed, by imposing only on one set of competitors a regulatory regime that vastly increases cost and time to market, such requirements patently have the effect of prohibiting the ability to provide telecommunications services by materially limiting or inhibiting the

companies' ability to compete on a fair and balanced legal and regulatory basis. *See, e.g.*, *White Plains*, 305 F.3d at 76; *In re State of Minnesota*, 14 F.C.C.R. 21697, ¶¶ 20-49 (1999) (holding that imposing added costs and increased time to market on new entrants violates Section 253); *In re Public Util. Comm'n of Texas*, 13 F.C.C.R. 3460, ¶ 82 (1997) (holding that "by imposing the costs of providing facilities based service only on [certain carriers], the build-out provisions significantly affect[ed] the ability of [these carriers] to compete against other certificated carriers for customers in the local exchange market"). Yet, according to at least some cities, the Ninth Circuit's en banc decision in this case deprives aggrieved telecommunications providers such as DAS *Amici* a reasonable opportunity to challenge burdensome and discriminatory local regulations. Requiring a telecommunications provider to navigate a laborious, improper application processes to receive a final, negative determination before challenging the improper, federally preempted regulations is counterproductive and contradicts Congressional intent that barriers to providing telecommunications services be removed.

In *Auburn*, the Ninth Circuit correctly identified the "very limited and proscribed role" of municipalities with regard to telecommunications deployment, particularly in the public rights-of-way. 260 F.3d at 1175 (quoting *City of Dallas*, 8 F. Supp. 2d at 591). The *Sprint* decision appears to reject the court's prior, correct interpretation of municipal authority. As a result, at a minimum it creates uncertainty and confusion that will have the effect of deterring investment in and

deployment of new technologies and competitive services. Accordingly, the Court should grant Sprint's Petition.

CONCLUSION

The Ninth Circuit's decision is contrary to the dominant interpretation of Section 253(a) and the only interpretation that would give meaning to the statute and effectuate the intent of Congress. For NextG and other DAS Forum members, fidelity to the purpose of the TCA's broad preemption is vital, as the Ninth Circuit's interpretation could have significant adverse consequences for these telecommunications service providers and the millions of customers they serve. DAS *Amici* therefore urge the Court to grant Sprint's petition for a writ of certiorari.

Respectfully submitted,

T. Scott Thompson
Counsel of Record
Leslie Moylan
Davis Wright Tremaine, LLP
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
(202) 973-4200

Attorneys for Amici Curiae