Wireless Facilities in Our Right of Way: Whose Streets are These Anyway?

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I. INTRODUCTION

On May 3, 2018, I presented a paper to this Conference that described the legal distinction between municipal regulatory and proprietary authority over wireless facilities in the public rights-of-way. My thesis was that, while various provisions in federal and state law curtailed local police powers, neither hindered the freedom cities enjoyed in their proprietary capacities. Less than six months later, on September 26, 2018, the Federal Communications Commission ("FCC") issued new regulations that contradicted the United States Constitution, the federal Communications Act, Supreme Court precedent and—of course—most everything I said on that day in May.

Part II in this paper revisits the basic California and federal statutory provisions applicable to local control over communication facilities and their relation to property rights. Part III summarizes the FCC's 2018 rulemakings, their impacts on the law and the litigation and legislative responses to these changes. Finally, Part IV offers some perspective on the current state of municipal property rights over their ROW infrastructure and a few practical pointers.

II. STATUTORY CONTEXT

A. California Law

Public Utilities Code § 7901 grants telephone corporations the right to operate within the public rights-of-way without a local franchise.[1] Early court decisions interpreted § 7901 as a "statewide franchise" for telephone and telegraph companies. Local governments cannot require telephone corporations to obtain a local franchise fee as a precondition to access.[2] Likewise, municipalities cannot charge a revenue-generating fee in connection with encroachment or other permits issued to telephone corporations.[3] These limitations extend to wireless service providers.[4]

However, the so-called statewide franchise covers only the real property that comprises the public rights-of-way and does not compel municipalities to grant access to their personal property, such as street lights, traffic signals and other street furniture.[5] This is a distinction with an important difference. Whereas § 7901 may preclude market-rate compensation for the general right to use the public rights-of-way, municipalities may charge a market rate for telecommunications equipment attached to their infrastructure

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[1] *See T-Mobile W. LLC v. City and Cnty. of San Francisco*, S238001 (Cal. Apr. 4, 2019).
[2] *See Western Union Tel. Co. v. Hopkins*, 116 P. 557, 561 (Cal. 1911).
[3] *See* CAL. GOV'T CODE § 50030; *Williams Communications, LLC v. City of Riverside*, 8 Cal. Rptr. 3d 96, 106 (Ct. App. 2003) (invalidating fees charged as "rent or an easement or license fee in consideration for such use of the City's streets").
[4] *See GTE Mobilnet of Cal. Ltd. P'ship v. City & Cnty of San Francisco*, 440 F. Supp. 2d 1097, 1103 (N.D. Cal. 2006).
[5] *See, e.g.*, *NextG Networks of Cal., Inc. v. City of Newport Beach*, No. SACV 10–1286 DOC (JCx), 2011 WL 717388, at *8 (C.D. Cal. Feb. 18, 2011).

within the public rights-of-way. Indeed, the California Constitution regards government property leased at below-market rates as potentially improper gifts.[6]

B. Federal Law

1. Section 332(c)(7)

Section 332(c)(7) generally preserves local authority over personal wireless service facilities, subject to certain substantive and procedural limitations.[7] Local governments may not (1) prohibit or effectively prohibit personal wireless services; (2) unreasonably discriminate among functionally equivalent service providers; or (3) regulate personal wireless service facilities based on the environmental effects from radio frequency emissions to the extent such emissions meet FCC guidelines.[8] Local authorities must act within a reasonable time on requests for authorization to construct or alter personal wireless service facilities.[9] Denials—and the reasons for the denial—must be in writing and based on substantial evidence in the written record.[10] Federal courts from around the United States have routinely interpreted the preemptive effect under § 332(c)(7)(B) as cabined to land-use decisions or similar governmental acts undertaken in a regulatory capacity.[11]

2. Section 253

Section 253(a) bars any "State or local statute, regulation, or other State or local legal requirement" that prohibits or effectively prohibits any person's or entity's ability to provide any telecommunications service.[12] However, a safe harbor provision preserves State and local authority to manage the public rights-of-way and to require "fair and reasonable compensation" on a "competitively neutral and nondiscriminatory basis . . . if the compensation required is publicly disclosed by such government."[13]

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[6] *See* CAL. CONST., ART. XVI, § 6; *see also Allen v. Hussey*, 225 P.2d 674, 684 (Cal. Ct. App. 1950) (finding that a $1-per-year lease from an irrigation district to a private person to operate an airport constituted a "gift").

[7] *Compare* 47 U.S.C. § 332(c)(7)(A) (preserving local authority), *with id.* § 332(c)(7)(B) (listing exceptions to the local authority preserved in subsection (A)); *see also Omnipoint Communications, Inc. v. City of Huntington Beach*, 738 F.3d 192, 195 (9th Cir. 2013) ("We conclude that § 332(c)(7)(A) functions to preserve local land use authorities' legislative and adjudicative authority subject to certain substantive and procedural limitations.").

[8] *See* 47 U.S.C. §§ 332(c)(7)(B)(i), (iv).

[9] *See id.* § 332(c)(7)(B)(ii).

[10] *See id.* § 332(c)(7)(B)(iii); *see also T-Mobile So. LLC v. City of Roswell*, --- U.S. ---, 135 S.Ct. 808, 816 (2015) ("Because an entity may not be able to make a considered decision whether to seek judicial review without knowing the reasons for the denial of its application, and because a court cannot review the denial without knowing the locality's reasons, the locality must provide or make available its written reasons at essentially the same time as it communicates its denial.").

[11] *See, e.g.*, *Huntington Beach*, 738 F.3d at 199–200; *Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601, 607 (6th Cir. 2004); *Sprint Spectrum LP v. Mills*, 283 F.3d 404, 420 (2nd Cir. 2002).

[12] *See* 47 U.S.C. § 253(a).

[13] *See id.* § 253(c).

The Ninth Circuit interprets § 253(a) as preempting only regulatory schemes" and not reaching contractual relationships.[14] Several lower courts have also found that § 253(a) does not preempt agreements between public agencies and telecommunications providers.[15]

3. Section 6409

Section 6409(a) requires that State and local governments "may not deny, and shall approve" any "eligible facilities request" for a wireless site collocation or modification so long as it does not cause a "substant[ial] change in [that site's] physical dimensions."[16] FCC regulations interpret key terms in this statute and impose certain substantive and procedural limitations on local review.[17] In 2014, the FCC expressly found that Section 6409 does not apply to "proprietary" decisions by state or local governments.

III. RECENT FCC RULEMAKINGS

In 2017, the Commission opened two related rulemaking proceedings intended to dramatically reinterpret provisions in the Communications Act and preempt state and local authority over wireless and wireline communications infrastructure deployments.[18] In 2018, the Commission acted on these proceedings and issued two controversial orders broadly preempting state and local authority over communications infrastructure.[19]

A. *Moratorium Order*

On August 2, 2018, the FCC adopted the *Moratorium Order*, which held that "Section 253 applies to wireless and wireline telecommunication services", "both [express

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[14] *See Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (finding that § 253 preempts only "regulatory schemes").

[15] *See, e.g.*, *Superior Communications v. City of Riverview*, 230 F. Supp. 3d 778, 794-95 (E.D. Mich. 2017) (relying in *Mills* to find that a city's refusal to approve an upgrade to a tenant's equipment did not violate § 253(a) because the denial could not be properly characterized as "regulation"); *T-Mobile W. Corp. v. Crow*, No. CV08-1337-PHX-NVW, 2009 WL 5128562, at *16 (D. Ariz. Dec. 17, 2009) (finding that ASU's "grant of an exclusive right to NextG to install the DAS and manage facilities is the proprietary decision of a property owner, not a 'regulation' or 'legal requirement' under § 253(a)").

[16] *See* 47 U.S.C. § 1455(a).

[17] *See* In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, *Report and Order*, 29 FCC Rcd. 12865 (Oct. 17, 2014) (codified as 47 C.F.R. §§ 1.40001, *et seq.*) [hereinafter "*Infrastructure Order*"].

[18] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry and Request for Comment, 32 FCC Rcd 3266 (2017) (hereinafter "*Wireline NPRM*"); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330 (2017) (hereinafter "*Wireless NPRM*").

[19] *See In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, FCC 18-111, Third Report and Order and Declaratory Ruling, -- FCC Rcd ---- (Aug. 2, 2018) (hereinafter "*Moratorium Order*"); *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, FCC 18-133, Declaratory Ruling and Third Report and Order, -- FCC Rcd ---- (Sep. 26, 2018) (hereinafter "*Small Cell Order*").

and *de facto*] moratoria violate [S]ection 253(a) and generally do not fall within the [S]ection 253(b) and (c) exceptions."[20]

> Express moratoria refer to:
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> > state or local statutes, regulations, or other written legal requirements that expressly, by their very terms, prevent or suspend the acceptance, processing, or approval of applications or permits necessary for deploying telecommunications services and/or facilities.[21]

This classification includes temporary moratoria imposed to protect new resurfaced roads, observe "freeze and frost" periods in colder states and to allow municipalities to develop local regulations in response to regulatory and technological changes.[22] The FCC found that Congress' safe harbor in Section 253(c) for "right-of-way management" did not encompass these purposes.[23]

> *De facto* moratoria refer to:
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> > state or local actions that are not express moratoria, but that effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium."[24]

In the FCC's view, a *de facto* moratorium exists when "applicants cannot reasonably foresee when approval will be granted . . . ."[25] Although most examples the FCC cited to illustrate a *de facto* moratorium concerned protracted contract negotiations between municipalities and service and/or infrastructure providers, the FCC ultimately explained that fee disputes fall outside the definition for a *de facto* moratorium.[26]

Exceptions to the FCC's ban on moratoria come few and far between. For example, the FCC found that a temporary moratoria on new deployments may be permissible after a natural disaster, but only if the *state* imposes the moratorium and only if such moratorium is competitively neutral, necessary to address the disaster at hand and limited to only those geographic areas impacted by such disaster.[27] Local government right-of-way management must relate to the provider's actual uses and include functions such as coordinating construction schedules; determining insurance,

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[20] *Moratorium Order* at ¶¶ 142 and 144.
[21] *Id.* at ¶ 145.
[22] *See id.* at ¶¶ 145–148.
[23] *See id.* at ¶ 148.
[24] *Id.* at ¶ 149.
[25] *Id.* at ¶ 151.
[26] *Compare Moratorium Order* at ¶ 150 (citing vague anecdotes from Lightower, CTIA, T-Mobile and others), *with id.* at ¶ 159 ("For purposes of this Declaratory Ruling, we exclude the imposition of fees from the definition of de facto moratoria").
[27] *Id.* at ¶ 157. The FCC spills significant ink on this subject, even though the administrative record contains precisely zero evidence that any state ever imposed such a moratorium.

bonding and indemnity requirements; establishing and enforcing building codes; and tracking users and uses to prevent interference among them.[28]

B. *Small Cell Order*

On September 26, 2018, the FCC adopted the *Small Cell Order* that further limited local authority over wireless infrastructure deployments. This section summarizes the many changes in the law in this order that became fully effective on April 15, 2019.

1. Small Wireless Facilities: A New Regulatory Classification

The FCC defines a "small wireless facility" through a multi-part test that largely focuses on physical dimensions.[29] Although some criteria concern the site location, the definition does not depend on whether the facility is or would be located within the public rights-of-way.

The overall height must be less than 50 feet, no more than 10% taller than adjacent structures or no more than 50 feet or 10% taller than the support structure, whichever is greater.[30] Each antenna must be less than three cubic feet in volume, with no cumulative limit on antennas or antenna volume.[31] All non-antenna equipment, which includes any preexisting equipment plus any new equipment, must be less than 28 cubic feet in volume.[32]

The photograph below shows what a typical small wireless facility may look like. This installation includes two six-foot long antennas, each less than three cubic feet, mounted on a typical street light with a 22.5-cubic-foot equipment cabinet mounted in the parkway.

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[28] *See id.* at ¶ 160.
[29] *See* 47 C.F.R. § 1.6002(l).
[30] *See id.* § 1.6002(l)(1). This complex height restriction is derived from the FCC rules for categorical exclusion from preconstruction authorization and the FCC's obligation to conduct environmental review. *See* 47 C.F.R. § 1.1312.
[31] *See* 47 C.F.R. § 1.6002(l)(2).
[32] *See id.* § 1.6002(l)(3).

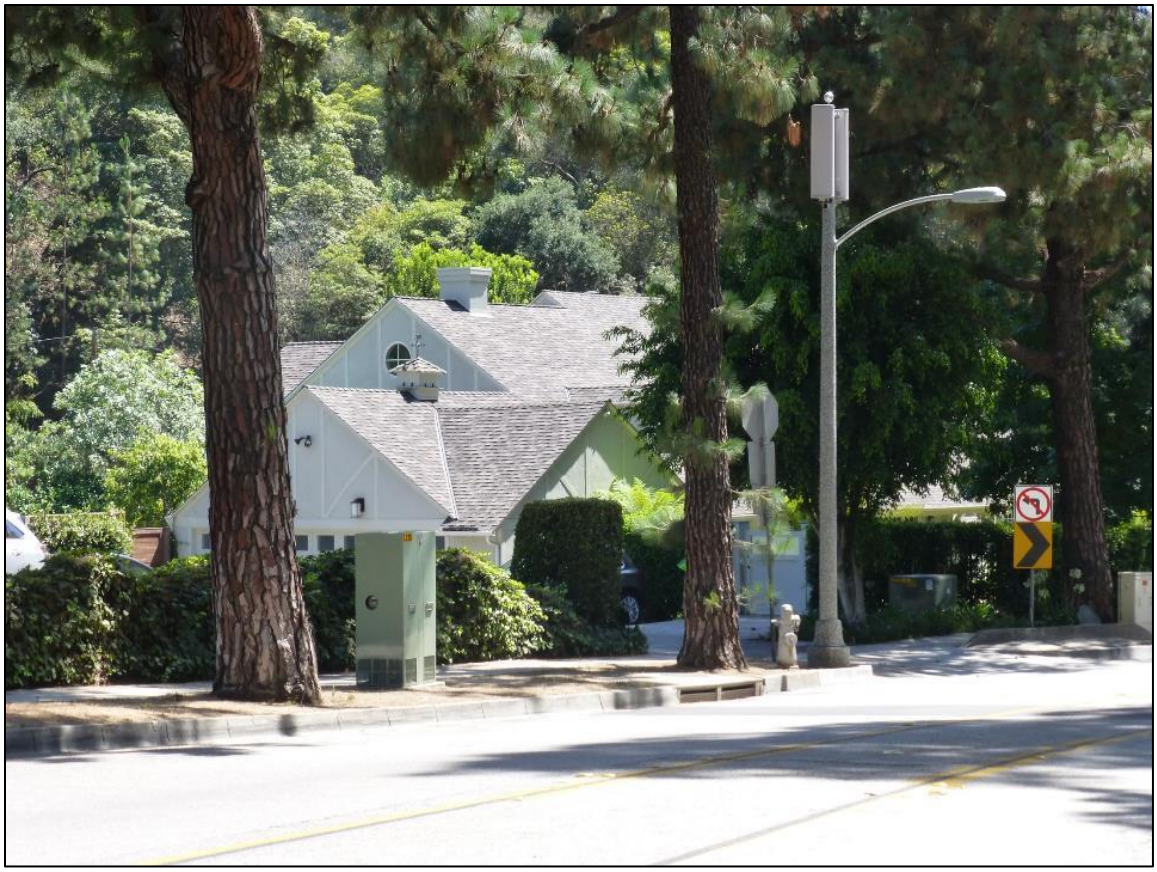

Figure 1: Sample small wireless facility on existing street light. (Photo by Dr. Jonathan L. Kramer.)

Location restrictions are mostly nominal. First, the facilities must not be subject to antenna structure registration under the FCC's rules.[33] Registration is required for any structure over 200 feet tall or within a specific distance from an airport that depends on terrain and airport size.[34] Second, the facilities must not be located on Tribal lands.[35] Finally, the facilities must not be placed or operated in a manner that violates the FCC's standards for human exposure to RF emissions.[36]

2. Abrogated Distinction Between Regulatory and Proprietary Capacities

In a departure from doctrine and precedent, the FCC declared that its regulations would be equally applicable to state and municipal proprietary conduct as it would be to regulatory conduct. The FCC stated that interpretations in the *Small Cell Order*:

> extend to state and local governments' terms for access to public ROW that they own or control, including areas on, below, or above public roadways, highways, streets, sidewalks, or similar property, as well as their terms for use of or attachment to government-owned property within such ROW, such

[33] *See id.* § 1.6002(l)(4).
[34] *See* 47 C.F.R. § 17.7.
[35] *See* 47 C.F.R. § 1.6002(l)(5); *see also* 36 C.F.R. § 800.16(x) (defining "Tribal lands").
[36] *See id.* § 1.6002(l)(6).

as new, existing and replacement light poles, traffic lights, utility poles, and similar property suitable for hosting Small Wireless Facilities.[37]

The FCC reasoned that the preemption in the Communications Act extends to proprietary conduct absent any express reservation in the statute and, in the alternative, that all state and local conduct with respect to the public rights-of-way must be regulatory because it necessarily furthers local public policies.[38] The upshot is that all state and local conduct in connection with wireless or wireline communication facilities is now potentially subject to judicial review under Section 253, Section 332(c)(7) or both.

3. Effective Prohibitions

The FCC reinterpreted the "effective prohibition" restrictions in Sections 332 and 253 to align with the FCC's 1997 decision in *California Payphone*, which held that a local ordinance violated Section 253(a) if it "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[39] This "new" test purports to replace existing judicial interpretations—such as the Ninth Circuit's "significant gap" test in *MetroPCS* and "actual prohibition" test in *Sprint Telephony*—and substantially lower the bar for preemption.[40]

Perhaps because the *California Payphone* test is clear as mud, the FCC clarified its application to state and municipal fees and aesthetic regulations:

i. Restrictions on Fees

"Fees" subject to the *Small Cell Order* include one-time charges, annual charges to use or attach to municipal property and annual charges for the right to access and use the public ROW.[41] All these fees must be (1) reasonably approximate to costs, (2) objectively reasonable and (3) no higher than those charged to similarly-situated competitors in similar situations.[42]

The FCC also established fee "safe harbors".[43] One-time fees at or below $100 per collocation application or $1,000 per new pole application and annual fees at or below $270 for both access to municipal poles and the pubic ROW are "presumptively reasonable".[44] These are not fee caps. Rather, these levels set the threshold for evidentiary presumptions: the challenger bears the burden at trial when fees are at or

[37] *See Small Cell Order* at ¶ 92.
[38] *See id.* at ¶ 93–96. Both these rationales are deeply flawed.
[39] *See id.* at ¶ 37 (citing *In re California Payphone Ass'n*, 12 FCC Rcd. 14191, 14206 at ¶ 31 (Jul. 16, 1997)).
[40] *See Small Cell Order* at ¶¶ 37–40; *see also id.* at ¶ 40 n.94 ("we reject both the version of the "coverage gap" test followed by the First, Fourth, and Seventh Circuits . . . and the version endorsed by the Second, Third, and Ninth Circuits").
[41] *See id.* at ¶ 50 n.131.
[42] *See id.* at ¶ 50.
[43] *See id.* at ¶¶ 78–80.
[44] *See id.* at ¶ 79.

below these levels, whereas the local government bears the burden in a challenge to fees that exceed these thresholds.[45]

ii. Restrictions on Aesthetics and Other Non-Fee Requirements

All aesthetic and other non-fee regulations must be (1) reasonable, (2) no more burdensome than those applied to other infrastructure deployments, (3) objective and (4) published in advance.[46] The FCC attempted to explain its test as just another way to promote a cost-based regulatory scheme: unsightly infrastructure deployments impose a "cost" on communities and so communities may impose certain aesthetic restrictions to offset those costs.[47]

"Reasonable" aesthetic restrictions mean those that are "technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments . . . ."[48] The "technically feasible" component is not well elaborated within the *Small Cell Order* but the FCC did mention that it would consider some undergrounding and minimum separation requirements unreasonable to the extent such requirements rendered the deployment technically infeasible.[49] However, at the same time, the FCC did not prohibit either undergrounding or minimum separation requirements.[50]

The "no more burdensome" element is ambiguously described in the *Small Cell Order* and lacks a clear definition. On one hand, the FCC says that aesthetic regulations for wireless facilities must be "no more burdensome than those applied to *other* infrastructure deployments," which appears to refer to all other infrastructure whether related to wireless facilities or not.[51] In the very next paragraph, the FCC says wireless aesthetic rules must be "applie[d] to *similar* infrastructure deployments" in order to show that the rules are "directed at remedying the impact of *wireless* infrastructure deployment."[52]

4. Shot Clocks

The *September Order* also modified the shot clock rules that interpret the presumptively reasonable time for local review. As explained below, the FCC continues to require state and local governments to do more with less time and fewer resources.

General Shot Clock Rules: The FCC created a newer, shorter shot clock for small wireless facilities and reinterpreted "collocation" to effectively cut the presumptively reasonable timeframe for most new macro sites in half. Small wireless facilities on any

[45] *See Small Cell Order* at ¶ 80.
[46] *See id.* at ¶ 86.
[47] *See id.*at ¶ 87.
[48] *See id.*at ¶ 87.
[49] *See id.*at ¶¶ 90–91.
[50] *See id.*
[51] *See Small Cell Order* at ¶ 86 (emphasis added).
[52] *See id.* at ¶ 87 (emphasis added).

existing structure (whether the structure has wireless facilities on it or not) must processed in 60 days and small wireless facilities on new structures must be processed in 90 days. Whereas “collocation” used to mean two wireless facilities in the same location, the FCC now defines it to mean a wireless facility on any existing structure whether the structure has prior-existing wireless facilities on it or not. To further complicate matters, this new definition for collocation does not apply to “collocations” under Section 6409, which still means two wireless facilities in the same location. Table 1 summarizes these classifications.

Table 1: Basic Shot Clock Classifications

Shot Clock	Application Type
60 Days	1. Section 6409 (i.e., modification to an existing wireless facility that does not cause a substantial change) 2. Small wireless facility attached to an existing structure (i.e., utility pole, tower, streetlight, traffic signal, building, etc.)
90 Days	1. Small wireless facility attached to a new/replacement structure 2. Mounting/installation of non-small wireless facility to an existing structure (i.e., rooftop, building facade, field light, etc.)
150 Days	1. New, freestanding non-small wireless facilities (i.e., tower, monopole, monopine, etc.) 2. Non-small wireless facilities on a replacement structure (i.e., replacement field light at a public park)

The shot clock begins to run when an application is submitted whether the application is complete or not. For macro sites and eligible facilities requests, the shot clock never resets, it only pauses and resumes. For small wireless facilities, the shot clock resets once if the first submittal is “materially” incomplete, but thereafter only pauses and resumes for each incomplete notice and resubmittal.

Completeness Review Rules: Incomplete notices remain subject to the same byzantine regulatory scheme as before but with shorter deadlines for small wireless facilities. Application requirements must be in some publicly stated format (*e.g.* municipal code, wireless policy, online materials, handouts, checklists, guidelines, etc.) available to the applicant prior to submittal. The first incomplete notice must contain all the missing or incomplete information and any overlooked or later-discovered incompleteness cannot be used as a basis to deem the application incomplete. The incomplete notice must specifically cite the incompleteness and the publicly stated requirement the applicant failed to meet.

Prior to the *September Order*, local officials could use the first 30 calendar days to review a submittal and determine whether to issue an incomplete notice and would always have 10 calendar days after a resubmittal to evaluate compliance with the incomplete notice. Now, for small wireless facilities, the FCC requires both the initial and any subsequent completeness reviews to be performed within 10 calendar days. Table 2 summarizes these rules.

Table 2: Summarized Completeness Review Rules

APPLICATION COMPLETENESS REVIEW		
	Small Wireless Facilities	**Other Wireless Facilities**
Initial Submittal	1. Shot clock begins on day 1 on the day after the application is submitted (i.e. if submitted on a Monday, day 1 begins on Tuesday) 2. 10 days to review for completeness 3. Must identify all incomplete/missing documentation in the first notice 4. Notice must identify incomplete/missing documentation based on publicly stated application requirements 5. Notice must reference the specific rule/regulation(s) (i.e. application requirement) that is incomplete/missing 6. Shot clock resets to **day 0** upon resubmittal if the application is deemed "materially incomplete" in a timely and valid written notice 7. Shot clock may reset only one time	1. Shot clock begins on day 1 on the day after the application is submitted 2. 30 days to review for completeness 3. Must identify all incomplete/missing documentation in the first notice 4. Notice must identify incomplete/missing documentation based on publicly stated application requirements 5. Notice must reference the specific rule/regulation (i.e. application requirement) that is incomplete/missing 6. Shot clock tolls/pauses on the date the city issues a timely and valid written notice 7. Shot clock does not reset
Resubmittal	1. Shot clock resumes on day 0 if reset 2. Shot clock resumes on the day after the application is submitted (i.e. if deemed incomplete on day 9, day 10 begins on the day after resubmittal) 3. 10 days to review for completeness to toll/pause the shot clock 4. Shot clock tolls/pauses if the application remains incomplete based on materials the city identified in the prior incomplete notice	1. Shot clock resumes on the day after the application is submitted (i.e. if deemed incomplete on day 9, day 10 begins on the day after resubmittal) 2. 10 days to review for completeness to toll/pause the shot clock 3. Shot clock tolls/pauses if the application remains incomplete based on materials the city identified in the prior incomplete notice

If the state local government fails to properly and timely issue an incomplete notice, the application is deemed complete by the operation of law. However, municipalities and applicants may "toll" (i.e., pause) the shot clock by mutual agreement.

Batched Applications for "Small Wireless Facilities": State and local governments cannot refuse to process "batched" applications for small wireless facilities. The FCC defines a "batch" as either multiple separate applications submitted at the same time or a single application submitted for multiple sites. The FCC places no upper limit on how many facilities can be included in one "batch".

The longest shot clock applicable to a single site in the batch applies to the entire batch. For example, if an applicant submits a batch of five total small wireless facilities on

existing utility poles, the entire batch is subject to one 60-day shot clock. Alternatively, if an applicant submits a batch of seven total small wireless facilities with six on existing utility poles and one on a new pole, the entire batch is subject to one 90-day shot clock.

Remedies: The FCC did not extend a "deemed granted" remedy for failures to act within the shot clock timeframe for small wireless facilities. Rather, the FCC established two evidentiary presumptions against municipalities: first, the municipalitiy is presumed to have failed to act within a reasonable time as required under § 332(c)(7)(B)(iii) and, second, the municipality's failure to act is presumptive evidence that it intended to effectively prohibit personal wireless service facilities under § 332(c)(7)(B)(i)(II). Although rebuttable, these presumptions together happen to be the common findings that federal courts rely on to grant injunctive relief and order local officials to issue the permits sought by the applicant.

C. Pending Litigation and Legislative Responses

To no one's surprise, local public agencies, municipal utilities and investor-owned utilities filed various petitions for review against both the *Moratorium Order* and the *Small Cell Order*. The litigation involves 14 separate petitions for review: nine by local public agencies, four by wireless service providers and one by investor-owned utilities. The total petitioners, intervenors and amici exceed 100 real parties in interest.

The litigation wound its way through a procedurally complex path to the Ninth Circuit. The first petition filed against the *Moratorium Order* established venue in the Ninth Circuit by a first-in-time rule.[53] In an initially successful forum-shopping gambit, several wireless providers filed petitions against the FCC's *Small Cell Order* in circuits unfriendly to municipalities.[54] These petitions each contained a single claim: that the FCC's *Small Cell Order* did not go far enough and should have included a deemed granted remedy for shot clock violations. Although the Tenth Circuit was selected by judicial lottery, the court ultimately held that the two orders constituted the "same order" for judicial review purposes and transferred the *Small Cell Order* petitions back to the Ninth Circuit.[55]

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[53] *See* 28 U.S.C. § 2112(a)(1) (establishing venue where the first petition was filed if no petition was filed within the first 10 days after publication in the Federal Register). The American Public Power Ass'n filed a petition against the *Moratorium Order* in the Eleventh Circuit, which was subsequently transferred to the Ninth Circuit and consolidated with Portland's petition.

[54] *See* 28 U.S.C. § 2112(a)(1) (triggering a judicial lottery to determine venue when multiple petitions are filed in different circuits within the first 10 days after publication in the Federal Register).

[55] *Puerto Rico Tel. Co., Inc. v. FCC*, No. 18-2063 (1st Cir. Oct. 25, 2018); *Verizon v. FCC*, No. 18-3255 (2nd Cir. Oct. 25, 2018); *Sprint Corp. v. FCC*, No. 18-9563 (10th Cir. Oct. 25, 2018); *AT&T Servs. Inc. v. FCC*, No. 18-1294 (D.C. Cir. filed Oct. 25, 2018). Although forum shopping in agency review cases is not *per se* impermissible, the alleged coordination between the FCC and wireless carriers in a plan to dilute the judicial lottery process is. On January 24, 2019, the House Committee on Energy and Commerce and the House Subcommittee on Communications and Technology requested information from the FCC on alleged coordination with the industry petitioners who challenged the *Small Cell Order* in favorable circuits. *See* Letter from Frank Pallone, Jr., Chairman, House Committee on Energy and Commerce, to Ajit Pai, Chairman, FCC (Jan. 24, 2019), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/FCC%20Ltr%201.24.19.pdf.

At the time this paper was submitted, the litigation was under a temporary abeyance and without a briefing schedule. The abeyance was triggered by petitions for reconsideration filed with the FCC, which allows agencies the opportunity to change their minds before further litigation ensues. The temporary status is because no one genuinely expects the FCC to change its mind. In a rare move for appellate courts, the Ninth Circuit has prudently ordered a case management conference with its most senior appellate commissioner to determine whether and at what pace the litigation should move forward notwithstanding the pending administrative proceedings.

Hijinks at the FCC have not gone unnoticed on Capitol Hill. On January 14, 2019, Representative Anna Eshoo (D-CA-18) introduced the "Accelerating Broadband Deployment by Empowering Local Communities Act of 2019" ("H.R. 530"). This bill would void the *Moratorium Order* and the *Small Cell Order*.[56] A companion bill in the Senate is expected to be introduced by Senator Diane Feinstein sometime in April. Although encouraging and well-supported by local officials, the likelihood that either bill will be signed into law seems low.

V. TAKEAWAYS AND PRACTICAL RESPONSES FOR CALIFORNIA CITIES

Taken together, the *Moratorium Order* and the *Small Cell Order* turn municipal property rights within the public ROW upside down. Municipal proprietary acts or omissions potentially subject to the same restrictions applicable to regulatory conduct. At the same time, these regulations fundamentally change the traditional zoning process—with subjective standards and public participation—into something akin to a ministerial review. To further confuse the matter, the FCC's recent regulations are currently the law but may not be for much longer. Opposition is broad, organized and fortunate to have the law on their side.

California cities should consider the following responses:

- **Narrow the Scope of Site License Agreements:** Prior to the FCC's recent rulemakings, broad "master license agreements" or "MLAs" made good sense as a vehicle to avoid potentially repetitious negotiations between carriers and cities. However, an MLA entered at this time may lock the city into a long-term agreement on regulated terms and conditions that may not be the law after judicial review of the *Small Cell Order* is completed. While cities may not be able to deny access to all their infrastructure under the current law, a more prudent approach to limit the impact of agreements for the use of city-owned infrastructure would be to proceed by a separate license for each small wireless facility (or at least a significantly shorter term if an MLA is still desirable for other reasons).

[56] H.R. 530 (Eshoo) § 2 ("Actions by the Federal Communications Commission in "Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment" (83 Fed. Reg. 51867) and the Federal Communications Commission's Declaratory Ruling in "Third Report and Order and Declaratory Ruling" (FCC 18–111) shall have no force or effect.")

- **Skip the Negotiation Process:** If the FCC dictates the price for access to the city's infrastructure, what incentive is there to negotiate away any other protections? By developing template license agreements that include the regulated terms and conditions mandated by the FCC, the city can avoid negotiation and ensure that all other terms and conditions are protective of their rights. By the same token, this approach mitigates the lost efficiencies of an MLA versus an individual site license. The template license agreement should be a requirement for a complete application to avoid wasting staff time on applications for city-owned infrastructure if the carrier balks at the city's terms.

- **Don't Accept Less than Your Actual Costs—But Keep Your Receipts:** The FCC's "presumptively reasonable" fees are ridiculously low and, in many cases, wouldn't even cover an hour of staff time. Carriers have routinely told cities that they won't pay more than $100 per application and, when forced to pay the actual fee, do so under protest. The truth is that the FCC does allow for cost recovery but places the burden on the city to prove up their costs that exceed the presumptively reasonable threshold. If your city hasn't done a recent cost study, now would be a good time to get one underway. In any event, cities should be closely tracking their staff time and material costs to protect their right to cost recovery.

- **Adopt Flexible Regulatory Structures:** The turbulent technological and regulatory landscape suggests that whatever cities do today will be wrong six months from now. Moreover, ordinances can take time more time to develop, introduce, adopt and implement than the FCC allows for most small wireless facility permit reviews. Cities should consider amendments to their code that allow the legislative body to adopt resolutions with policies and procedures for these facilities. This more nimble and flexible structure will enable quicker responses to changes in the law or technology.

- **Consider Whether Subjective Zoning Standards Can be Rearticulated as Objective Criteria:** The *Small Cell Order* requires that aesthetic requirements be objective. This means that traditional findings for approval, such as "the use will not be injurious to neighborhood character", are no longer enforceable. Cities should take the time to think about what makes a particular use "injurious to neighborhood character" and try to articulate those criteria in an objective way. For example, if the city has invested in beautifully landscaped medians or adopted view preservation procedures, alternative objective criteria might prohibit installations in specific locations or above a specific height limit to minimize the impacts these facilities would have on those community assets.

- **Be Realistic About What the FCC Rules Allow:** The regulations in the *Moratorium Order* and the *Small Cell Order* are manifestly intended to prevent cities from exercising their traditional authority in both their proprietary and regulatory capacities. Although there is good reason to believe that the FCC overstepped its authority, these regulations are the still the law. Conversations with the public and with elected officials about whether public hearings are possible

within the timeframes allotted, whether facilities can be prohibited in residential areas and whether the carriers can be forced to provide meaningful community benefits above the cost to issue the permits will be difficult. But these are necessary conversations to have in order to develop a response that is most appropriate for your community.