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Wireless Infrastructure In Public Rights-of-Way: Federal Broadband Initiatives and Recent California Case Law

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I. Introduction

The wireless industry has shifted the focus of new investment towards deploying wireless facilities such as small cells and distributed antenna systems (“DAS”), with many facilities proposed for installation in public rights-of-way. This is driven in large part by the industry’s desire to create additional capacity to meet the growing demand for broadband and data services, and the onset of “5G” networks.¹ These developments have strained existing regulatory frameworks, while at the same time Congress, the Federal Communications Commission (“FCC”), and the state legislature have imposed new rules and constraints on local authorities. This paper examines some of the latest infrastructure-related developments at the federal level and in recent case law, and provides some guiding principles on addressing industry requests in an environment of regulatory uncertainty.

II. Overview of Relevant Federal and State Laws and FCC Regulations

A. *Key Telecommunications Provisions of Federal and California Law.*

47 U.S.C. § 332 (“Section 332”)² preserves local authority over local decisions regarding the placement, construction and modification of wireless communications facilities, subject to the limitations on that authority set forth in that section. Among other things, regulation of the placement, construction, and modification of personal wireless service facilities may not unreasonably discriminate among providers of functionally equivalent services; or prohibit or have the effect of prohibiting the provision of personal wireless services. Section 332 provides that local authorities must take action on a wireless application within a “reasonable period of time” after the request is filed, taking into account the nature and scope of the request. In 2009, the FCC established “presumptively reasonable periods”—referred to as “shot clocks”—for local action:³ 90 days for collocation requests, and 150 days for other requests. These shot clocks apply to small cells and DAS.⁴ Local authorities may not regulate siting based on RF emissions but may require that facilities comply with FCC RF standards.

47 U.S.C. § 1455(a) (commonly referred to as “Section 6409(a)” of the Spectrum Act) provides in part that “a State or local government *may not deny, and shall approve*, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.” The term “eligible facilities request” refers to “any request for modification of an existing wireless tower or base station that involves...collocation of new transmission equipment;...removal of transmission equipment; or...replacement of transmission equipment.” The FCC developed comprehensive

¹ Small Cell Forum, *Small cells market status update*, 14 February 2018 Version: 50-10-02.

² Section 332(c)(7)(A) reads: “Except as provided in this paragraph, 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.”

³ See *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, WT Docket No. 08-165, 24 FCC Rcd 13994 (WTB. 2009), https://apps.fcc.gov/edocs_public/attachmatch/FCC-09-99A1.pdf (“2009 Declaratory Ruling”).

⁴ *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, et al., 30 FCC Rcd. 31 (WTB 2014), https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-153A1.pdf (“2014 Report and Order”).

rules on how to apply Section 6409(a) in a Report and Order released October 21, 2014.⁵ There, the FCC laid out the criteria for determining whether or not an application qualified for treatment as an “eligible facilities request” and adopted a 60-day shot clock for approving those requests, with a “deemed granted” remedy for applicants to invoke if the locality failed to timely act.

47 U.S.C. § 253 (“Section 253”) preempts state and local governments requirements that prohibit or having the effect of prohibiting any entity from providing telecommunications services. Generally speaking this provision applies to wireline facilities.⁶ However, even otherwise preempted provisions survive if they are within one of two safe harbors.⁷ Section 253(b) provides that local governments may “impose, on a competitively neutral basis...requirements necessary to preserve and enhance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications service.” Additionally, Section 253(c) protects state and local authority to “manage the public rights of way” and “require fair and reasonable compensation from telecommunications providers” for public rights-of-way use on a competitively neutral and nondiscriminatory basis.

AB 57 (Quirk), codified under Gov. Code § 65964.1, and effective January 1, 2016, is increasingly being raised by wireless applicants. AB 57 essentially provides a path for applicants to pursue a “deemed granted” remedy related to applications subject to the Section 332 FCC shot clocks. Under AB 57, once the applicable timeline period has expired and as long as all public notices have been provided, applicants may claim that the application is “deemed granted” by providing written notice to the local authority (assuming the locality has not acted on the application before the notice is provided). Local governments may then challenge a “deemed granted” assertion by seeking judicial review within 30 days of receiving the applicant’s notice.

California Public Utility Code sections 7901 & 7901.1. California Public Utility Code section 7901 (“Section 7901”) has been characterized as a “continuing offer extended to telephone and telegraph companies...which offer is accepted by the construction and maintenance of lines...to use the public highways for the prescribed purposes without the necessity for any grant by a subordinate legislative body.”⁸ The provision allows telephone companies to place “poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines” in the public rights of way, subject to local control to

⁵ *Id.* The 2014 Report and Order also adopted new or modified rules for environmental and historic preservation review of small wireless facilities, including DAS and codified an exception to advance notice of the placement of temporary towers under the Antenna Structure Regulation requirements. These changes are outside the scope of this paper. As discussed above, the 2014 Report and Order also clarified some provisions of the Shot Clock.

⁶ Section 253(a) provides as follows: “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.”

⁷ *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1188 (11th Cir. 2001), quoting *In re Missouri Municipal League*, 16 FCC Rcd. 1157, 2001 (2001) (“it is clear that subsections (b) and (c) are exceptions to (a), rather than separate limitations on state and local authority in addition to those in (a).”); *In re Minnesota*, 14 FCC Rcd. 21,697, 21,730 (1999); *In re American Communications Servs., Inc.*, 14 FCC Rcd. 21,579, 21,587-88 (1999); *In re Cal. Payphone Ass’n*, 12 FCC Rcd. 14,191, 14,203 (1997).

⁸ The full text of the statute reads as follows: “Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.”

ensure placements do not “incommode” the public. California Public Utility Code Section 7901.1 is a companion provision; it provides that “municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed...” Cases have extended Section 7901 rights to comingled facilities and to personal wireless service providers seeking to deploy in the public rights-of-way.⁹

B. Overview of Historic and Environmental Review Requirements.

The construction of wireless communication facilities can be subject to environmental and historical review under both federal and state law. Until recently, federal historic preservation and environmental reviews would occur for most wireless projects, including small cells and DAS. However, as discussed in the next section, the FCC has issued an order largely eliminating these federal historical reviews for small cells and DAS. The FCC did not, however, preempt state and local environmental review rules.

In California, at the state level, environmental review of wireless communication facility projects is controlled by the California Environmental Quality Act (“CEQA”). General Order 159A leaves the California Public Utilities Commission (“CPUC”) with no role to play in the siting of macro cell sites, so any CEQA review is typically done in the context of issuing discretionary permits at the local level with the local authority acting as the lead agency. However, the CEQA review with respect to small cells and DAS in the public rights-of-way is less clear, in part because the CPUC routinely issues certificates of public convenience and necessity (“CPCNs”) that make preliminary findings as to whether the deployments will qualify for categorical exemptions—but also may require telephone companies to go back to the CPUC on a project-by-project basis for final CEQA determinations. The review period for the CPUC is only 21 days, and once reviewed, a project will receive a notice to proceed from the CPUC which it issues as “lead agency”. However, applicants do not always undertake the CPUC review before other project applications have been submitted at the local level, and some argue that the local authorities could also serve as lead agency. The CPUC started but never finished a proceeding that examined potentially changing CEQA review responsibilities.¹⁰ In any case, The CPUC’s CEQA determinations may not replace local law unless the CPUC states in no uncertain terms that its CEQA determinations will supersede local law, accompanied by an explicit examination of whether local law is valid under statewide law and policy.¹¹

⁹ *City of Huntington Beach v. Public Utilities Com.* (2013) 214 Cal.App.4th 566, 587-8; *see GTE Mobilenet of Cal. Ltd. V. City of San Francisco* (N.D. Cal. 2006) 440 F.Supp.2d 1097, 1103; *see also Williams Communs. v. City of Riverside* (2003) 114 Cal.App.4th 642 (applying Section 7901 to comingled services on same facilities).

¹⁰ *Order Instituting Rulemaking on the Commission’s own motion into the application of the California Environmental Quality Act to applications of jurisdictional telecommunications utilities for authority to offer service and construct facilities*, Decision 10-05-050, Rulemaking 06-10-006, CAL. PUB. UTIL. COMM’N (rel. May 27, 2011) (granting a stay of GO 170 pending resolution of applications of rehearing).

¹¹ *City of Huntington Beach*, 214 Cal.App.4th at 592 (In other words, “[t]he commission cannot bootstrap a limited, conditional approval . . . into an order that preempts local ordinances.”).

III. Federal Developments - FCC's Broadband Deployment Advisory Committee and Pending Dockets

A. Formation and Work of BDAC.

At the FCC, the latest infrastructure-related developments are framed within the context of efforts to spur broadband deployment—the key underlying premise being that local governments are a “barrier” to such deployments. On January 31, 2017, the FCC created the Broadband Deployment Advisory Committee (“BDAC”), a federal advisory committee to advise regarding formal and informal measures the Commission might take to “accelerate the deployment of high-speed Internet access.”¹²

The BDAC is dominated by industry or industry-affiliated parties. When the BDAC was announced in April 2017, only three of the thirty initial BDAC committee members represented local government interests. The Commission later appointed local government representatives to the working groups, and additional local appointments were made after the Chairman was criticized on the dearth of local and state BDAC membership. Nonetheless, private interests form the overwhelming majority of members, both on the BDAC and throughout its working groups.¹³

The BDAC has churned out a series of industry-favorable recommendations. As of the publication date of this paper, the BDAC has approved a report and recommendation from the following working groups: Competitive Access to Broadband Infrastructure,¹⁴ Removing State and Local Regulatory Barriers,¹⁵ and Streamlining Federal Siting.¹⁶ On January 23-24, 2018, the BDAC met and considered discussion drafts from both the Model Code for States¹⁷ and Model Code for Municipalities working groups.¹⁸ The next BDAC meeting is on April 25, 2018.

The lack of local government representation has led to serious fractures within the Removing State and Local Regulatory Barriers Working Group. On January 23, 2018, the Cities of San Jose, CA, McAllen, TX, and New York, NY filed with the FCC a substantive Minority Report to address the industry-driven recommendations contained in the main report issued by the Removing State and Local Regulatory Barriers Working Group.¹⁹ The Minority Report offered a local government perspective, and called into question the FCC's legal authority to take certain actions related to preempting local authority to regulate the public rights-of-way. On January 25, 2018, Mayor Sam Liccardo of San Jose resigned from the BDAC.²⁰ Miguel Gamino Jr. of the New York City Mayor's Office followed suit on March 28, 2018, citing concerns about

¹² <https://www.fcc.gov/broadband-deployment-advisory-committee>.

¹³ The working groups are: Model Code for Municipalities; Model Code for States; Competitive Access to Broadband Infrastructure; Removing State and Local Regulatory Barriers; Streamlining Federal Siting; and Rates and Fees (*Ad Hoc Committee; formed in 2018*).

¹⁴ <https://www.fcc.gov/sites/default/files/bdac-competitiveaccess-report-012018.pdf>.

¹⁵ <https://www.fcc.gov/sites/default/files/bdac-regulatorybarriers-report-012018.pdf>.

¹⁶ <https://www.fcc.gov/sites/default/files/bdac-federalsiting-report-012018-2.pdf>.

¹⁷ <https://www.fcc.gov/sites/default/files/bdac-modelcode-012018.pdf>.

¹⁸ <https://www.fcc.gov/sites/default/files/bdac-municipalcode-012018.pdf>.

¹⁹ https://ecfsapi.fcc.gov/file/101232920908470/30469970_1.PDF.

²⁰ <http://www.sanjoseca.gov/DocumentCenter/View/74464>. In his resignation letter, Mayor Liccardo stated that “the industry-heavy makeup of the BDAC will simply relegate the body to being a vehicle for advancing the interests of the telecommunications industry over those of the public. The apparent goal is to create a set of rules that will provide industry with easy access to publicly funded infrastructure at taxpayer-subsidized rates, without any obligation to provide broadband access to underserved residents.”

the BDAC's industry-dominated makeup.²¹ On April 10, 2018, David Young, a National League of Cities representative who works as the fiber infrastructure and right of way manager for the City of Lincoln, Nebraska, was appointed to the BDAC.

B. Pending FCC Infrastructure Proceedings.

The BDAC was established while the FCC was conducting three FCC infrastructure proceedings addressing, in large part, the same issues slated for the BDAC's examination. The first proceeding began under then-Chairman Wheeler with the December 22, 2016 release of a Public Notice setting comment dates in response to a Petition for Declaratory Ruling filed by Mobilitie—a fairly new market entrant focused on making deployments in the public rights-of-way on behalf of its wireless provider customer.²² This Petition asked the Commission to interpret Section 253(c) (the public rights-of-way compensation and management savings clause) and to rule that (1) “fair and reasonable compensation” for right of way use includes only those fees sufficient to allow a local authority to “recoup its costs” related to issuing permits and “managing the rights of way;” and (2) “competitively neutral and nondiscriminatory” fees means “charges that do not exceed those imposed on other providers for similar access;” and (3) local authorities must make publicly available public rights-of-way charges previously imposed on other applicants.²³ The Public Notice the FCC released setting comment and reply deadlines greatly expanded the scope of this inquiry. The FCC released a fifteen-page public notice inviting stakeholders “to develop a factual record that will help us assess whether and to what extent the process of local land-use authorities’ review of siting applications is hindering, or is likely to hinder, the deployment of wireless infrastructure,” as well as the extent the FCC may use Sections 253, 332, and Section 6409(a), to address any “barriers to deployment.”²⁴ The record generated in response to this item largely involved lengthy, technical debate between industry parties and local authorities regarding the scope of FCC's authority to act under the statute and a policy debate as to whether right of way fees should or need to be more acutely regulated by the FCC. Many local governments and associations representing local authorities, including the League of California Cities, filed comments²⁵ and reply comments.²⁶

Chairman Pai, shortly after assuming leadership of the FCC in January 2017, released two new items—a Notice of Proposed Rulemaking and Notice of Inquiry under a docket entitled “Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure

²¹ <https://assets.documentcloud.org/documents/4426173/NYC-CTO-Miguel-Gami%C3%B1o-BDAC-Resignation.pdf>.

²² *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling, Public Notice*, WT Docket No. 16-421, 31 FCC Rcd. 13360 (WTB 2016), https://apps.fcc.gov/edocs_public/attachmatch/DA-16-1427A1_Rcd.pdf (“Streamlining Public Notice”).

²³ Mobilitie, LLC, *Petition for Declaratory Ruling*, 1 (filed Nov. 15, 2016), <https://ecfsapi.fcc.gov/file/122306218885/mobilitie.pdf>.

²⁴ Streamlining Public Notice at 2.

²⁵ Joint Comments of League of Arizona Cities and Towns, League of California Cities, California State Association of Counties, New Mexico Municipal League, League of Oregon Cities & SCAN NATOA, Inc., WT Docket No. 16-421 (filed Mar. 8, 2017), [https://ecfsapi.fcc.gov/file/10309065854390/joint%20comments%20AZCT%20CACities%20CSAC%20NMML%20ORCities%20and%20SCAN%20WT%2016-421%20\(filed%2020170308\).pdf](https://ecfsapi.fcc.gov/file/10309065854390/joint%20comments%20AZCT%20CACities%20CSAC%20NMML%20ORCities%20and%20SCAN%20WT%2016-421%20(filed%2020170308).pdf).

²⁶ Joint Reply Comments of the National League of Cities, League of California Cities, et. al., WT Docket No. 16-421 (filed April 7, 2017), <https://ecfsapi.fcc.gov/file/10407758005427/NLC%20SML%20FCC%20WT%2016%20421%20reply%20comments.pdf>.

Investment,”²⁷ and a Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment under a docket entitled “Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment.”²⁸ These two FCC items addressed a wide variety of topics, some of which do not directly involve local government interests. The discussion of those that do generally assumes industry positions as tentative conclusions or asks questions that appear to assume industry points of view. The Accelerating Wireless Broadband NPRM & NOI, for example, sought comment on different legal theories to justify imposing a “deemed granted” remedy on application “shot clocks”²⁹ even though that remedy had already been considered and rejected by the FCC twice as beyond its legal authority.

The two items also sought comment on new areas not previously the focus of FCC proceedings. For example, the Wireline NPRM, NOI, & RFC sought comment on whether various right-of-way management practices, in the wireline context—such as right-of-way access agreements or non-cable telecommunications franchise agreements—should be controlled by FCC-imposed negotiation time limits and fee-related rules.³⁰ In the Wireless NPRM & NOI, the FCC sought comment on the “proper role of aesthetic considerations in the local approval process” and whether aesthetic considerations could be found to “prohibit” deployment.³¹ The FCC also implied there are instances where a municipality’s fees and charges for use of property *outside the public rights-of-way* could “prohibit” deployments within the meaning of Section 332.³² The FCC also raised the specter of abbreviating existing FCC shot clocks³³ and sought comment on how “batch” applications might be treated if the Commission indeed adopts new shot-clock-related rules. The record generated in these two proceedings is voluminous and there was significant local government participation, again including the League of California Cities.³⁴

The FCC has released three orders under these two dockets already. In March 2018, the FCC adopted new rules narrowing the scope of deployments that require environmental and historic review under the National Historic Preservation Act (“NHPA”) and the National

²⁷ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 17-79, 32 FCC Rcd. 3330 (rel. Apr. 21, 2017), <https://ecfsapi.fcc.gov/file/0421294395880/FCC-17-38A1.pdf> (“Accelerating Wireless Deployment NPRM & NOI”).

²⁸ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, WC Docket No. 17-84, 32 FCC Rcd. 3266 (rel. Apr. 21, 2017), <https://ecfsapi.fcc.gov/file/0421885402163/FCC-17-37A1.pdf> (“Accelerating Wireline Deployment NPRM, NOI & RFC”).

²⁹ Accelerating Wireless Deployment NPRM & NOI at paras. 8-17.

³⁰ Accelerating Wireline Deployment NPRM, NOI, & RFC at paras. 103-105.

³¹ Accelerating Wireless Deployment NPRM & NOI at para. 92.

³² *Id.* at paras. 93-94.

³³ *Id.* at para. 18.

³⁴ Joint Comments of League of Arizona Cities and Towns, League of California Cities and League of Oregon Cities, WT Docket No. 17-79 (filed June 15, 2017), [https://ecfsapi.fcc.gov/file/10616785802234/joint%20comments%20AZCT%20CACities%20ORCities%20\(wt%20docket%20no%2017-79\)%20signed.pdf](https://ecfsapi.fcc.gov/file/10616785802234/joint%20comments%20AZCT%20CACities%20ORCities%20(wt%20docket%20no%2017-79)%20signed.pdf); Joint Comments of League of Arizona Cities and Towns, League of California Cities and League of Oregon Cities, WC Docket No. 17-84 (filed June 15, 2017), [https://ecfsapi.fcc.gov/file/10616785802234/joint%20comments%20AZCT%20CACities%20ORCities%20\(wc%20docket%20no%2017-84\)%20signed.pdf](https://ecfsapi.fcc.gov/file/10616785802234/joint%20comments%20AZCT%20CACities%20ORCities%20(wc%20docket%20no%2017-84)%20signed.pdf); Consolidated Joint Reply Comments of League of Arizona Cities and Towns, League of California Cities & League of Oregon Cities, WT Docket No. 17-79, WC Docket No. 17-84 (filed July 17, 2017), [https://ecfsapi.fcc.gov/file/10616785802234/joint%20comments%20AZCT%20CACities%20ORCities%20\(wt%20docket%20no%2017-79\)%20signed.pdf](https://ecfsapi.fcc.gov/file/10616785802234/joint%20comments%20AZCT%20CACities%20ORCities%20(wt%20docket%20no%2017-79)%20signed.pdf).

Environmental Preservation Act (“NEPA”).³⁵ The FCC amended its rules to provide that the deployment of certain wireless facilities by private parties is not either a “federal undertaking” within the meaning of NHPA or a “major federal action” under NEPA. Accordingly, federal review for qualifying deployments is not mandated. The FCC excluded from review under the NHPA facilities that satisfied certain height and size limits, including where “the antenna associated with the deployment...is no more than three cubic feet in volume.”³⁶ Additionally, wireless equipment associated with the structure must be no larger than 28 cubic feet.³⁷ These wireless facilities deployments would continue to be subject to currently applicable state and local government approval requirements, including CEQA.

Some of the most controversial items for local governments were introduced in Notices of Inquiry, suggesting further rounds of rulemaking proceedings are coming, although declaratory rulings, like the one that established the initial FCC “shot clocks” in 2009, are also possible. BDAC recommendations may well figure into these proceedings.³⁸

IV. FCC Reclassification of Broadband

On December 14, 2017, the FCC adopted the Restoring Internet Freedom Declaratory Ruling, Report and Order, and Order (“Restoring Internet Freedom Order”).³⁹ The Restoring Internet Freedom Order is best known for the controversial decision to reclassify broadband Internet access services under the Telecommunications Act of 1996 (“TCA”) from a “telecommunications service” to an “information service” and thereby do away with “common carrier” and “net neutrality” rules adopted by the Wheeler FCC. This order, however, has other significant ramifications including for wireless deployments.

In the Restoring Internet Freedom Order, the FCC stated that facilities used to provide “comingled” services—both telecommunications and broadband services—remain subject to Section 332, which by its terms only applies to facilities used to provide common carrier type services. Particularly, the FCC stated that Section 332(c)(7), despite the reclassification of broadband, “applies to facilities, including DAS or small cells, deployed and offered by third-parties for the purpose of provisioning communications services that include personal wireless services.”⁴⁰ This begs the question, however, as to whether a denial is actionable as an “effective prohibition” when a facility is only necessary in order to provide broadband service.

³⁵ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, WT Docket No. 17-79, 2018 WL 1559856, para. 71 (rel. March 30, 2018), <https://ecfsapi.fcc.gov/file/033033113547/FCC-18-30A1.pdf> (“NHPA & NEPA Order”).

³⁶ NHPA & NEPA Order at para. 71.

³⁷ *Id.* at para. 76.

³⁸ For example, the FCC’s BDAC-related public documents feature a refrain that the BDAC’s recommendations will “enhance the Commission’s ability to carry out its statutory responsibility to encourage broadband deployment to all Americans.” *See, e.g.*, Letter to the Hon. Ryan Costello, https://apps.fcc.gov/edocs_public/attachmatch/DOC-344645A1.pdf; and Statement of Chairman Pai on Broadband Deployment Advisory Committee, <https://www.fcc.gov/document/statement-chairman-pai-broadband-deployment-advisory-committee>.

³⁹ *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, 2018 WL 305638 (rel. Jan. 4 2018), https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-166A1.pdf.

⁴⁰ *Id.* at para. 190.

V. Recent Cases Relevant to Wireless Deployments in the Public Rights-of-Way

Extenet Systems, California, LLC v. City of Burlingame, San Mateo County Super. Ct. No. CIV508756 (filed Nov. 9, 2017)

Extenet applied for eight encroachment permits for a proposed DAS project in the public right-of-way of a residential neighborhood. The City denied 6 of 8 applications based on aesthetic considerations. The Court upheld the City's decision finding that a denial properly made on aesthetic grounds—even alongside improper grounds for denial—is sufficient to support a denial. It further held that the “large number of public comments expressing aesthetic objections” to the proposed DAS nodes provided substantial record evidence for the City's denials. The Court also explained that the objective aesthetic standards contained in the City's ROW Regulations, “provided a safeguard against wholly subjective and arbitrary decision-making.” The Court also found that the City did not violate Section 253: its denial was permitted under (1) its Section 332(c)(7)(A) authority to regulate the “placement, construction, and modification of personal wireless service facilities,” and (2) under Section 253(c), which provides a “safe harbor” to Section 253(a)'s service prohibition language where a local authority exercises its right to “manage the public rights-of-way.” In particular, no prohibition was found *since City had specifically encouraged Extenet to reapply and continue working with the City to find a solution.*

Pacific Bell Telephone Co. vs. City of Livermore, Alameda County Super. Ct. No. RG11607409 (filed Dec. 28, 2017)

The appeals court reversed the trial court's judgement and directed issuance of a writ allowing Pacific Bell Telephone Co. (“AT&T”) to bundle its fiber optic cable with existing telephone lines on existing poles, even where the local zoning ordinance required undergrounding. While the Court upheld the City's authority under Section 7901 to regulate the installation of lines on an aesthetic basis, the City's denial was based on “insufficient” evidence given that the three existing poles at issue in AT&T's application had existing copper telephone lines, as well as cable television and electrical wires—and AT&T had proposed to “bundle” its new lines with existing above-ground lines. Evidence did not support a claim that the aesthetics of the street would be affected since (the court found) the street in question was already “cluttered” with other utility and telecommunications facilities. The Court implied the “sufficient evidence” standard is not fulfilled where a local government considers a project in terms of the cumulative impact of many similar projects in the future.

The Court acknowledges that granting AT&T's “bundling” request would have violated the express terms of the undergrounding ordinance, but ruled that the City should have recognized that its undergrounding rules are “preempted by state law” and used its power to nullify its “invalid regulation” at an administrative hearing.

Aptos Residents Association v. County of Santa Cruz, Crown Castle Inc., Santa Cruz County Super. Ct. No. CV179176 (filed Feb. 5, 2018)

The Court affirmed a lower court decision rejecting the Aptos Residents Association's (“ARA”) petition for a writ of mandate under CEQA. The writ would have overturned the County's approval of 10 permit applications for placement of antennas in the public rights-of-

way. The County deemed the project categorically exempt, without exception, from CEQA under the Class 3 “small structure” exemption,⁴¹ and otherwise found the visual impact of the 10 microcells would be “negligible,” even when considered in conjunction with a nearby PG&E project and a prospective AT&T project. The Court found the Class 3 exemption was properly applied where the County considered all 10 microcells as a single project, as the text of the exemption explicitly contemplates “structures,” plural, and does not mandate consideration of each structure individually—even though applicant Crown Castle filed a separate application for each antenna.

Under CEQA Guidelines, Section 15300.2, a Class 3 exemption may not apply if the location of the project would result in an “ordinarily insignificant” project making a “significant” impact on the surrounding environment (“location” exception); or the cumulative impact of “successive projects of the same type in the same place, over time is significant (“cumulative impact” exception); or where “there is a reasonable possibility that the activity will have a significant effect on the environment due to “unusual circumstances” (“unusual circumstances” exception). The Court found that the ARA presented only speculative evidence insufficient to prove each exception might apply, and did not justify overturning the County’s decision.

***T-Mobile West LLC v. City and County of San Francisco*, 3 Cal.App.5th 334 (2016)**

This decision confirms that cities may apply discretionary review processes to requests under Section 7901 for permanent wireless installations in the public rights-of-way by telephone companies, and those may be decided based on a consideration of aesthetics, as well as other factors. The term “incommoded” in Section 7901 is “broad enough ‘to be inclusive of concerns related to the appearance of a facility.’” The case is precedent for not only requiring discretionary review, but also for denying or conditioning applications for particular locations in the public rights-of-way on aesthetic grounds, including concerns regarding pole heights or underground districts. This case is currently on appeal to the California Supreme Court.⁴²

***T-Mobile S., LLC v. City of Roswell, Ga.*, 135 S. Ct. 808, 190 L. Ed. 2d 679 (2015)**

T-Mobile brought an action against the City of Roswell, challenging its denial of provider's application to build a cell phone tower as a violation of Telecommunications Act. The Supreme Court noted that under Section 332, a locality must, when it denies a siting application, provide reasons clear enough to enable judicial review. A locality's reasons for denying a siting application need not appear in the same writing that conveys the locality's denial, but the locality must provide or make available its written reasons at essentially the same time as it communicates its denial. The relevant “final action” triggering judicial review is the issuance of the written denial notice, not the subsequent issuance of reasons explaining the denial.

VI. How Can Local Governments Respond To This Regulatory Uncertainty?

Local governments should revisit their codes and property leasing models to ensure that small cells and DAS are properly addressed, especially in public rights-of-way. It may seem

⁴¹ 14 CCR § 15303 (exemption for small structures).

⁴² *T-Mobile W. v. City & Cty. of San Francisco*, 385 P.3d 411 (Cal. 2016).

logical to impose a moratorium on new applications during this review period, but moratoria do not toll the FCC's deadlines for actions. Consider and be prepared to answer the following:

- Does your zoning ordinance apply to wireless facilities in the public rights-of-way?
- Will your regulatory process allow you to, within the FCC shot clocks, process a request to place a number of facilities at multiple sites in the right-of-way?
- Have you taken steps to ensure that small facilities, once approved, will not expand into larger facilities?
- Have you developed an approach to leasing government-owned property for new wireless uses that protects the community and recognizes the value of your assets?
- Does your site-specific permitting process appropriately provide for what happens if a facility must be removed, replaced, modified, or abandoned in place?

If the answers to these questions are not immediately apparent for a particular local authority, that authority will face increased risk throughout the siting process. Local governments should also continue to monitor developments, particularly at the federal level where much action is anticipated in coming months, and be prepared to advocate strongly to support local control and local interests.

**Distinctions with a Difference: Leasing and Licensing
Municipal Infrastructure for Wireless Facilities**

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Distinctions with a Difference: Leasing and Licensing Municipal Infrastructure for Wireless Facilities

I. INTRODUCTION

The rise in so-called “small cells” installed in the public rights-of-way has been accompanied by regulatory and legislative efforts to limit the compensation local governments may require for attachments to their infrastructure. The FCC has three open dockets with proposals to impose a cost-based compensation scheme. Since 2016, at least 18 states adopted legislation that restricts local compensation to cost (or in some cases, below-cost) recovery, and similar legislation has been proposed in at least 12 other states. California narrowly defeated small cell preemption when, on October 14, 2017, Governor Brown vetoed SB 649 (Hueso), which would have implemented a ministerial permit process for small cells, and would have required local agencies to accept below-market rates and less-than-full cost reimbursement for attachments to their infrastructure.

Most local government officials and attorneys know that federal and state law significantly curb local *regulatory* authority over wireless facilities. However, whether and to what extent these laws affect local *proprietary* authority is less well understood. This paper surveys the various federal and state laws that affect local authority over wireless facilities, and explains the basis for the freer hand local agencies have in their proprietary capacities.

II. RELEVANT FEDERAL AND STATE LAWS

A. Telecommunications Act

1. Section 332(c)(7)

Section 332(c)(7) of the Federal Telecommunications Act generally preserves local authority over personal wireless service facilities, subject to certain substantive and

procedural limitations.¹ 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.² Local authorities must act within a reasonable time on requests for authorization to construct or alter personal wireless service facilities.³ Denials—and the reasons for the denial—must be in writing and based on substantial evidence in the written record.⁴

Courts routinely interpret the preemptive effect under § 332(c)(7)(B) as cabined to land-use decisions or similar governmental acts undertaken in a regulatory capacity.⁵ In the first reported case to address the issue, the Second Circuit in *Sprint Spectrum LP v. Mills* drew upon the market participant doctrine to hold that § 332(c)(7)(B)(iv) did not preempt school district’s authority to enforce a lease provision that limited the total output power from Sprint’s antennas. The court found that nothing in § 332(c)(7) suggested that Congress intended to preempt local proprietary decisions, and that the school district’s

¹ 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.”).

² See 47 U.S.C. §§ 332(c)(7)(B)(i), (iv).

³ See *id.* § 332(c)(7)(B)(ii).

⁴ 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.”).

⁵ 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).

conduct was “plainly proprietary” because it concerned a single lease rather than some broader public policy.⁶

Two years after the *Mills* case, the Sixth Circuit held in *Omnipoint Holdings, Inc. v. City of Southfield* that personal wireless service providers cannot force municipalities to convey municipal property for wireless facilities.⁷ VoiceStream applied for a permit to build a 150-foot tower on a residential lot surrounded by low-rise single-family homes, which Southfield ultimately denied as inconsistent with the neighborhood.⁸ Although VoiceStream considered a municipal park as an alternative location, it abandoned that option because Southfield insisted on higher rents than the residential property owner.⁹ When VoiceStream attempted to argue that Southfield’s refusal to accept lower rents violated § 332(c)(7)(B), the court held that “the plaintiff simply cannot compel the City to sell or lease a portion of the park if it chooses not to.”¹⁰

The Ninth Circuit’s approach in *Omnipoint Communications, Inc. v. City of Huntington Beach*, evaluates whether a particular act under review qualifies as an adjudicative or regulatory land-use decision Congress intended to regulate under § 332(c)(7)(B). The litigation in this case concerned whether Huntington Beach could enforce a provision in the city charter that required voter approval for large construction projects on municipal land. T-Mobile wanted to build two towers in a city park. Rather than seek voter approval, T-Mobile sued on the theory that the charter provision, as applied to leases for wireless facilities, violated § 332(c)(7).¹¹ The Ninth Circuit held that the voter-

⁶ See *Mills*, 283 F.3d at 420–21.

⁷ See *Southfield*, 355 F.3d at 607.

⁸ See *id.* at 603.

⁹ See *id.*

¹⁰ See *id.* at 607.

¹¹ See *Huntington Beach*, 738 F.3d at 198–99.

approval requirement was not a “land use regulation or decision” preempted by § 332(c)(7) because it merely prescribed the mode by which the city may lease or sell municipal property for certain construction projects.¹² “By its terms, the [Telecommunications Act] applies only to local zoning and land use decisions and does not address a municipality’s property rights as a landowner.”¹³ Although the Ninth Circuit cited *Mills* as consistent with the outcome in *Huntington Beach*, it expressly declined to base its decision on a “freestanding ‘market participant exception’.”¹⁴

2. Section 253(a)

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.¹⁵ 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.”¹⁶

Whether the preemption in § 253(a) reaches contractual relationships remains subject to some significant dispute, but appears to depend on whether the agreement takes on a regulatory character.¹⁷ In 1999, the FCC weighed in on this notion when Minnesota sought a declaratory ruling on whether its plan to grant an exclusive franchise over the entire state highway system to a single fiber optic cable provider violated § 253(a). The FCC indicated that it would find that the statutory phrase “legal requirement”

¹² See *id.* at 199–200.

¹³ See *id.* at 201.

¹⁴ See *id.* at 201 fn.7.

¹⁵ See 47 U.S.C. § 253(a).

¹⁶ See *id.* § 253(c).

¹⁷ See, e.g., *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (finding that § 253 preempts only “regulatory schemes”).

would cover to franchise agreements, but noted that preemption depends on the agreement's impact on other providers' ability compete in a fair and balanced regulatory environment.¹⁸

Consistent with the FCC's guidance in *Minnesota Preemption Order*, federal courts routinely review challenges to local franchise requirements under § 253(a). This approach appears to be premised on the idea that proprietary decisions and the impacts on the market may be indistinguishable from regulatory decisions when the government controls all or substantially all the economic inputs.¹⁹ Although several lower courts have found that § 253(a) does not preempt agreements between public agencies and telecommunications providers, these cases involved narrower agreements that either were, or operated like, a lease.²⁰

3. Section 6409(a)

In 2012, Congress passed the Middle Class Tax Relief and Job Creation Act, which included the so-called "Spectrum Act". The Spectrum Act contains § 6409(a), which mandates that State and local governments approve "eligible facilities requests" for

¹⁸ See In the Matter of the Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in the State Freeway Rights-of-Way, CC Docket No. 98-1, *Memorandum Opinion and Order*, 14 FCC Rcd. 21697, 21708–21716, ¶¶ 20–36 (Dec. 23, 1999); accord In the Matter of Amigo.net, CC Docket No. 00-220, *Memorandum Opinion and Order*, 17 FCC Rcd. 10964, 10967, ¶ 8 (June 13, 2002) (finding that the agreement in the *Minnesota Preemption Order* "would violate section 253(a) because it gave to one party exclusive physical access to the only feasible and cost-effective rights-of-way, and therefore potentially deprived other parties, specifically facilities-based competitors, of the ability to provide telecommunications services.").

¹⁹ See *Reeves, Inc. v. Stake*, 447 U.S. 429, 453 (1980) (Powell, J., dissenting); see also David S. Bogen, *The Market Participant Doctrine and the Clear Statement Rule*, 29 *Sea. Univ. L. Rev.* 543, 544 (2006).

²⁰ 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)").

collocations and modifications to existing wireless towers and base stations so long as such projects did not result in a substantial change.²¹

Section 6409(a) does not preempt local proprietary decisions.²² A government landlord may not be obligated to approve a wireless tenant's request to expand its permitted use under the lease, even when § 6409(a) would require the same government to approve permit applications for the same modification.

B. California Public Utilities Code § 7901

Section 7901 is among the oldest laws in the state.²³ In its current form, the statute provides that:

Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.²⁴

Early court decisions interpreted § 7901 as a “statewide franchise” for telephone and telegraph companies. Local governments cannot require telephone corporations to

²¹ See Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156. (Feb. 22, 2012) (codified as 47 U.S.C. § 1455(a)).

²² See In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, *Report and Order*, 29 FCC Rcd. 12865 at ¶ 239 (Oct. 17, 2014).

²³ In 1850, the same year California entered the Union as the 31st state, the legislature adopted an “Act Concerning Corporations” that granted telegraph corporations “the right to construct lines . . . along the public roads.” See Act Concerning Corporations, Stats. 1850, ch. 128, p. 369; *Los Angeles Cnty. v. So. Cal. Tel. Co.*, 196 P.2d 773, 776 (Cal. 1948) (en banc). In 1872, the legislature codified the act as Civil Code § 536 and, in 1905, amended § 536 to extend the same rights to telephone corporations. See *Los Angeles Cnty. v. So. Cal. Tel. Co.*, 196 P.2d 773, 776 (Cal. 1948) (en banc). In 1959, the legislature recodified § 536 as § 7901 in the then-new Public Utilities Code, and added § 7901.1 as a sister statute to reaffirm and bolster local authority to regulate the time, place and manner in which telephone corporations access the public rights-of-way. See CAL. PUB. UTILS. CODE § 7901.1; see also *T-Mobile West LLC v. City & Cnty. of San Francisco*, 208 Cal. Rptr. 3d 248, 256 (Ct. App. 2016), *rev. granted*, 385 P.3d 411 (Cal. 2016).

²⁴ CAL. PUB. UTILS. CODE § 7901.

obtain a local franchise fee as a precondition to access.²⁵ Likewise, municipalities cannot charge a revenue-generating fee in connection with encroachment or other permits issued to telephone corporations.²⁶ These limitations extend to wireless service providers.²⁷

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.²⁸ 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 within the public rights-of-way. Indeed, the California Constitution regards government property leased at below-market rates as potentially improper gifts.²⁹

III. CONCLUSION

Distinctions between regulatory and proprietary authority make a big difference. Whereas federal and California state laws significantly limit local regulatory authority over wireless facilities, these same laws generally do not affect local proprietary authority over the same installations. Although California state law generally exempts wireless providers who seek access to the public rights-of-way from local franchise fees, this limitation does

²⁵ See *Western Union Tel. Co. v. Hopkins*, 116 P. 557, 561 (Cal. 1911).

²⁶ 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”).

²⁷ See *GTE Mobilnet of Cal. Ltd. P’ship v. City & Cnty of San Francisco*, 440 F. Supp. 2d 1097, 1103 (N.D. Cal. 2006).

²⁸ 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).

²⁹ 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”).

not apply to the jurisdiction's infrastructure. As wireless technologies evolve and increasingly rely on access to existing structures in the public rights-of-way, California local governments should pay close attention to these important distinctions.