



Issues of Local Control and Wireless Telecommunication Facilities

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Key Provisions of Telecommunications Law

- 47 U.S.C. § 332
- 47 U.S.C. § 1455(a) (“Section 6409(a)”)
- 47 U.S.C. § 253
- California Public Utility Code §§ 7901 & 7901.1
- AB 57 (Cal. Gov. Code § 65964.1)



FCC Developments

- ***Mobilitie Petition for Declaratory Ruling*** – “Streamlining PN” (December 2016)
- **Broadband Deployment Advisory Committee** (“BDAC”) (January 2017)
- ***Accelerating Wireless NPRM & NOI*** (April 2017)
 - R&O – NHPA exclusion for certain pole replacements (Nov. 2017)
 - Second R&O – NHPA and NEPA exclusions for “small” wireless facilities (March 2018)
- ***Accelerating Wireline NPRM, NOI & Request for Comment*** (April 2017)
 - Wireline R&O, DR & FNPRM (November 2017)
- ***Restoring Internet Freedom Order*** (December 2017) – reclassification of broadband and comingled wireless facilities



Broadband Deployment Advisory Committee (“BDAC”)

- Charged with identifying ways to eliminate “barriers” to infrastructure investment & advise FCC (chartered through 2019)
- **Committee Members & 6 Working Groups**
 - BDAC Committee (state/local = 1/29 members)
 - Model Code for Municipalities (state/local = 1/23 members)
 - Model Code for States (state/local = 3/25 members)
 - Competitive Access to Broadband Infrastructure (state/local = 1/25 members)
 - Removing State and Local Regulatory Barriers (state/local = 4/25 members)
 - Streamlining Federal Siting (state/local = 2/23 members)
 - Rates and Fees (*Ad Hoc Committee; formed in 2018*) (state/local = 4/16)
- Reps from San Jose, CA & City of New York resigned, both citing concerns about industry influence at BDAC
- Final recommendations on reports and model codes slated for April 2018



California Case Law

- ***Extenet Systems, California, LLC v. City of Burlingame*, San Mateo County Super. Ct. No. CIV508756 (filed Nov. 9, 2017)**
 - Denial of 6 of 8 permits for a proposed DAS project in a residential neighborhood on aesthetic grounds upheld by court.
 - Among other things, Court found denial did not effectively prohibit service.
- ***Pacific Bell Telephone Co. vs. City of Livermore*, Alameda County Super. Ct. No. RG11607409 (filed Dec. 28, 2017)**
 - Although court recognized City authority to regulate aesthetics under PUC 7901, it directed issuance of permit for additional above-ground line, finding the street was already “cluttered” with other utility and telecommunications facilities.
- ***Aptos Residents Association v. County of Santa Cruz, Crown Castle Inc.*, Santa Cruz County Super. Ct. No. CV179176 (filed Feb. 5, 2018)**
 - Upheld approval of 10 antenna ROW applications in face of CEQA challenge.
 - Class 3 “small structure” exemption properly applied as a single project.
 - No exceptions applied—speculative evidence of “cumulative impact” alongside future projects is not sufficient to support an exception.
- ***T-Mobile West LLC v. City and County of San Francisco*, 3 Cal.App.5th 334 (2016)**
 - Cities may apply discretionary review processes to requests under PUC 7901 for permanent wireless installations in the public rights-of-way, and applications may be decided based on aesthetics, as well as other factors.



Are you ready?

- 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 public rights-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 city-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?



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Distinctions with a Difference:

Local Proprietary Authority Over Telecommunications Facilities on Municipal Infrastructure

Distinction No. 1

Regulatory *versus* Proprietary

- **Limits on Preemption**

- preemption generally applies only to *regulations* by subordinate governmental bodies
- legislatures need to specify when preemption reaches proprietary governmental functions

- **Important, But Not Always Clear, Distinction**

- **basic test:** was government conduct motivated by public policy or rational economic maximization?
- governments may wear both hats . . . just not at the same time

Preemptive Limits in the Telecom Context

- **General Rule:** Telecom Act preempts only state and local *regulatory* conduct
 - **47 U.S.C. § 332(c)(7)(B)**
 - *Omnipoint Commc'ns v. Huntington Beach*, 738 F.3d 192 (9th Cir. 2013)
 - **47 U.S.C. § 1455(a)**
 - *Infrastructure Order*, 29 FCC Rcd. 12865 (2014)
 - **47 U.S.C. § 253(a)**
 - *Qwest v. Portland*, 385 F.3d 1236 (9th Cir. 2004)
 - *But see In re Minnesota*, 14 FCC Rcd. 21697 (1999)

You Think You Own the Road?

- **Federal Law – Yeah, I do own the road!**
 - *St. Louis v. Western Union*, 148 U.S. 92 (1893)
 - 47 U.S.C. § 253(c)
- **California Law – Well, maybe not the whole road...**
 - cannot require telephone corps to obtain a local franchise fee as a precondition on access to ROW
 - PUC § 7901; *Western Union v. Hopkins* (Cal. 1911); *Williams v. Riverside* (Ct. App. 2003).
 - may still exercise some regulatory authority over aesthetics and temporary construction activities
 - Section 7901 effectively removes one very important stick from the property rights bundle

Distinction No. 2

Real *versus* Personal Property

- **Limits on Statewide Franchise Rights**
 - Section 7901 preempts local franchise authority over telcos but does not grant telephone corps the right to condemn or compel access to other municipal property
 - cities and counties cannot charge telcos “rent” for access to the ***real property*** that makes up the ROW, but can charge for access to their ***personal property*** within the ROW

Aligned Interests and Opportunities

carrier needs

- access to existing infrastructure near users
- power / fiber connection
- predictable licensing and permitting processes
- speed to market

municipal assets

- ROW infrastructure
- power at most locations; fiber at many
- control over proprietary and regulatory process
- single landlord/tenant relationship

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