



# Legal Update - Wireless

## Recent Developments Affecting Local Authority

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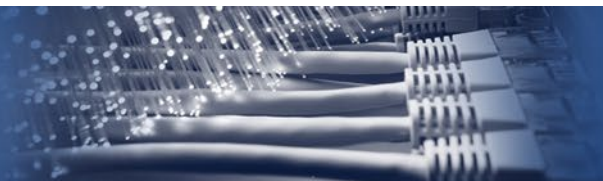
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# Agenda

- Update on state law developments
- Update on federal law developments



# *Update on state law developments*



# State Law

## Concerning ROW placements:

- **Cal. Pub. Util. Code § 7901** – Telephone corporations including wireless companies have a statutory state franchise to construct facilities along and upon any public road or highway. . . in such manner and at such points as not to “incommode the public use of the road or highway”
  - *T-Mobile W., LLC v. City & Cnty. of. San Francisco (2019)* – Discretionary review considering aesthetics ok’d under state law by California Supreme Court
- **Cal. Pub. Util. Code § 7901.1** – Power to reasonably regulate “time, place, and manner” in which roads are accessed. Must be applied to all entities in an “equivalent” manner.
- **Cal Pub. Util. Code § 2902** – regulate use and repair of public streets, location of poles, wires, mains, or conduits of any public utility, on, under, or above any public streets (to the extent not preempted by CPUC regulation)



# State Law

- **Gov. Code 65964** prohibits:
  - Escrow deposit for removal of a facility (bonds ok)
  - Permit of less than 10 years (unless “public safety” or “land use” reasons)
  - Requiring all facilities to be located on sites owned by particular parties
- **Gov. Code 65964.1** (AB 57):
  - Deemed approved remedy for FCC’s 90 and 150 day shot clocks
  - Note: this remedy is *not* available for proposed placements on fire dept facilities
- **Gov. Code 65850.75** (AB 2421):
  - Temporarily imposes 60 day shot clock and mandatory approval of qualifying emergency generators at macro cell sites; does not apply to small cells, distributed antenna systems, or rooftop facilities
  - Sunsets on Jan. 1, 2024
- **Gov. Code 65850.6** intended to allow:
  - Discretionary permit to approve base facilities that may later add collocation facilities
  - No discretionary review of facilities collocated on base facility



# Recent State Laws

- **AB 537 (2021)** took effect on Jan. 1, 2022
  - expands Gov. Code 65964.1 deemed granted remedy to include the 60 and 90 day FCC shot clocks for small cells
- **SB 378 (2021)** took effect on Jan. 1, 2022
  - Requires cities, counties, special districts and publicly owned utilities w/ excavation jurisdiction to allow microtrenching
  - Local agency may refuse only via a written finding that microtrenching for a fiber installation would have a specific, adverse impact on the public health or safety
- **SB 556 (2021) vetoed by Gov. Newsom**
  - would have mandated access to streetlights and traffic lights at regulated rates and shorter timelines than FCC's Small Cell Order



# *Update on federal law developments*



# National Policy On Wireless

- **National deployment policy** – no local decision or regulation can prohibit or have the effect of prohibiting personal wireless service
- **National RF emissions guidelines** – localities can only ensure applicant has shown it will comply with FCC guidelines
- **Timely action required** – deadlines and remedies for failure to act on applications
- **Denials** – Must be in writing and based on substantial evidence
- **Non-discrimination** – No unreasonable discrimination among providers of functionally equivalent services
- **Expedited appeals**
- **Some mandatory approvals** – modifications to existing wireless facilities that qualify as Eligible Facilities Requests must be approved





# FCC Moratoria Order Upheld; Small Cell Order Partially Overturned

*City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020).  
SCOTUS cert petition denied, June 2021.

- FCC's ban on express and de facto moratoria on processing telecommunications facilities applications upheld.
- Aesthetic regulations for small wireless facilities must not prohibit or effectively prohibit the provision of personal wireless services
- Aesthetic requirements for small wireless facilities must be:
  - *Reasonable* ("technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments"); and
  - ~~No more burdensome than those applied to other types of infrastructure deployments;~~
  - ~~Objective and published in advance~~
- Spacing, separation, and setback requirements for small cells are subject to same federal standards
- Strike outs reflect Ninth Circuit decision.



# FCC Effective Prohibition Standard Upheld

- FCC Small Cell Order on Effective Prohibition:
- “...an effective prohibition occurs where a state or local legal requirement *materially inhibits* a provider’s ability to engage in any of a variety of activities related to its provision of a covered service. This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities...an effective prohibition includes materially inhibiting additional services or improving existing services.” (Para. 37)
- “...we reject alternative readings of the effective prohibition language that have been adopted by some courts and used to defend local requirements that have the effect of prohibiting densification of networks. Decisions that have applied solely a “coverage gap”- based approach under Section 332(c)(7)(B)(i)(II) reflect both an unduly narrow reading of the statute and an outdated view of the marketplace. Those cases, including some that formed the foundation for “coverage gap”-based analytical approaches, appear to view wireless service as if it were a single, monolithic offering provided only via traditional wireless towers. By contrast, the current wireless marketplace is characterized by a wide variety of offerings with differing service characteristics and deployment strategies. As Crown Castle explains, coverage gap-based approaches are “simply incompatible with a world where the vast majority of new wireless builds are going to be designed to add network capacity and take advantage of new technologies, rather than plug gaps in network coverage.” Moreover, a critical feature of these new wireless builds is to accommodate increased in-building use of wireless services, necessitating deployment of small cells in order to ensure quality service to wireless callers within such buildings.” (Para.40)
- “...we reject both the version of the “coverage gap” test followed by the First, Fourth, and Seventh Circuits (requiring applicants to show “not just that this application has been rejected but that further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time even to try”) and the version endorsed by the Second, Third, and Ninth Circuits (requiring applicants to show that the proposed facilities are the “least intrusive means” for filling a coverage gap) (FN 94)



# FCC Effective Prohibition Standard Upheld

- Ninth Circuit rejected both arguments made by local government petitioners against the FCC's effective prohibition standard in the Small Cell and Moratoria Orders :
- Local governments argued the FCC's application of the material inhibition standard was inconsistent with *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (en banc) which required showing an actual prohibition.
  - **Court held:** *Sprint* endorsed the material inhibition standard as a method of determining whether there has been an effective prohibition. The FCC here made factual findings, on the basis of the record before it, that certain municipal practices are materially inhibiting the deployment of 5G services. Nothing more is required of the FCC under *Sprint*.
- Local governments contended that the FCC, without reasoned explanation, departed from its prior approach in *California Payphone*, and has made it much easier to show an effective prohibition.
  - **Court held:** *California Payphone*'s material inhibition standard remains controlling. The differences in the FCC's new approach are reasonably explained by the differences in 5G technology. The FCC has explained that it applies a little differently in the context of 5G, because state and local regulation, particularly with respect to fees and aesthetics, is more likely to have a prohibitory effect on 5G technology than it does on older technology. The reason is that when compared with previous generations of wireless technology, 5G is different in that it requires rapid, widespread deployment of more facilities.



# FCC RF Guidelines Unchanged

- FCC (2019) terminated an inquiry into possible updates to RF emissions exposure guidelines
- *Environmental Health Trust et al. v. FCC et al.*, (case no. 20-1025), D.C. Circuit Court of Appeals (2021) majority held the FCC's decision to end the inquiry was arbitrary and capricious
  - *The Court did not overturn the existing FCC guidelines or comment on their merits*
  - *The Court did not order the FCC to change the guidelines but said the FCC must provide a "reasoned explanation" for deciding no changes were warranted*
  - *The existing FCC guidelines remain in effect*



# RF Guidelines Unchanged

- U.S. Court of Appeals (2021) majority stated:  
*“To be clear, we take no position in the scientific debate regarding the health and environmental effects of RF radiation – we merely conclude that the Commission’s cursory analysis of material record evidence was insufficient as a matter of law. As the dissenting opinion indicates, there may be good reasons why the various studies in the record, only some of which we have cited here, do not warrant changes to the Commission’s guidelines.”*



# EFR Rules Changed; Appeal Pending

- FCC 2014 Implementing Order set detailed parameters for EFRs, including in public rights-of-way (codified in 47 CFR § 1.6100)
- **Two subsequent orders**
  - Clarifications Order (FCC 20-75) adopted on 6/9/2020
    - Re-defines “concealment” to exclude ordinary concealment (such as hiding an antenna on the back of a roof or installing it under a tree line). Protections for concealment elements only apply to stealth facilities
    - Limit of 4 ground-mounted cabinets applies separately to *each* EFR and is not cumulative
    - Excludes from definition of “cabinet” smaller pieces of equipment in their own housing.
    - Order is in effect, appeal pending: League of Cal. Cities et al. v. FCC, No. 20-71765 (9th Cir. 2021)
    - Court has agreed to FCC request to keep case on hold until 11/11/2022
  - Expansions Order (FCC 20-153)
    - Adopted on 10/27/2020 and in effect, modifying rules for macro sites only – expanded definition of “site” to all excavation or deployment of transmission equipment outside of the current site by more than 30 feet in any direction



# Other Recent Litigation

## *T-Mobile v. City of San Francisco et al.*, No. 20-CV-08139 (N.D. Cal. 2021)

- T-Mobile sued City seeking court order to issue the permits and approve pending and future applications w/in 60 days. **Ruling:**
  - City not required to issue permits for EFR applications after T-Mobile sent deemed granted notice because the Spectrum Act only prohibits State or local governments from denying qualifying applications (*but note statute says “may not deny, and shall approve”*)
  - No affirmative obligations imposed but T-Mobile’s deemed granted applications should be treated as granted
  - City barred from imposing penalties or preventing T-Mobile from proceeding with installations for applications deemed granted because City didn’t act w/in 60 days



# Other Recent Litigation

## ***Los Angeles SMSA Ltd Partnership dba Verizon v. City of Malibu, No. 2:21-cv-01827-PSG-PVC (C.D. Cal. 2021)***

- Verizon submitted an EFR application to City in 2020
  - City and Verizon did not agree on eligibility as EFR
  - City believed it denied application and pursued incompleteness items for collocation multiple times
  - Verizon believed City did not act and sent deemed granted letter for EFR
  - Court agreed that City staff acted to deny EFR within shot clock and Verizon failed to pursue court remedy within 30 days of EFR denial so court action was untimely
  - On appeal to Ninth Circuit





# Other Recent Litigation

## ***GTE Mobilnet of CA LP v. Carmel-by-the-Sea, No. 5:22-cv-00347 (N.D. Cal. 2022)***

- Verizon submitted an application to City seeking to replace existing wood utility pole with a new wood pole and add SWF
  - PC denied; Verizon appealed; CC denied
- Verizon sued (*not to challenge merits of denial but*) claiming City failed to act
  - Claimed that “in writing” under § 332(c)(7)(B)(iii) requires an issued written denial *delivered* to applicant
  - Claimed it should be entitled to approval under agreement with city
  - Court rejected Verizon’s arguments
  - Held City timely acted by making final decision *available* before deadline and that there was no delivery requirement in federal law
  - Verizon has appealed to Ninth Circuit



# Other Recent Litigation

## ***West Virginia v. EPA*, No. 5:22-cv-00347 (597 U.S. \_\_\_\_ (2022))**

- Supreme Court decision reminds us Major Questions Doctrine puts limit on judicial deference to federal agency rulemaking authority
  - “Precedent teaches that there are “extraordinary cases” in which the “history and the breadth of the authority that [the agency] has asserted,” and the “economic and political significance” of that assertion, provide a “reason to hesitate before concluding that Congress” meant to confer such authority. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159–160. See, e.g., *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 594 U. S. \_\_\_\_, \_\_\_\_; *Utility Air Regulatory Group v. EPA*, 573 U. S. 302, 324; *Gonzales v. Oregon*, 546 U. S. 243, 267; *National Federation of Independent Business v. OSHA*, 595 U. S. \_\_\_\_, \_\_\_\_.
- Under this body of law, known as the major questions doctrine, given both separation of powers principles and a practical understanding of legislative intent, the agency must point to “clear congressional authorization” for the authority it claims. *Utility Air*, 573 U. S., at 324. Pp. 16–20.”
- Under the major questions doctrine, administrative agencies must be able to point to “clear congressional authorization” when they claim the power to make decisions of vast “economic and political significance.”
- Here the majority rejected the EPA’s attempt to regulate carbon dioxide emissions from existing coal- and natural-gas-fired power plants under existing statutory authority



Thank you.

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