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File No. 51134.00005

April 24, 2018

Ms. Sandi Maurer
Director
EMF Safety Network
EMFsafe@sonic.net

Re: Local Authority Over Wireless Facilities in Public Rights-of-Way

Dear Ms. Maurer:

You have asked for a general summary regarding the scope of authority of a California municipality to deny applications for placement of wireless communications facilities in public rights-of-way which can be presented to the City of Sebastopol on behalf of the EMF Safety Network. To understand the scope of municipal authority to deny such applications, it is necessary to take into account the legal limitations on such authority, which are also outlined in this letter. In preparing this summary, we examined state and federal law but we did not review the City of Sebastopol's municipal code or any wireless communications facility applications which may be pending before the City. Thus, we note that the City of Sebastopol's code may contain further requirements and restrictions regarding the city's authority over public rights-of-way not addressed in this memo. In addition, the facts and circumstances related to individual wireless applications would also impact this analysis as applied to individual applications. Finally, we note that this is an area where laws are somewhat uncertain and subject to potential change in pending court cases, as well as through pending federal proceedings.

1) Telephone Companies Have State Franchise Rights to Use Public Rights-of-Way.

Under California law, telephone companies have state franchise rights to use public rights-of-way pursuant to Pub. Util. Code Section 7901 ("Section 7901"). Section 7901 has long been interpreted as a statutory grant of a franchise to telephone companies to use and place "telephone lines" in public rights-of-way, and "to erect poles, posts, piers, or abutments for

supporting the insulators, wires, and other necessary fixtures of their lines…".[1] Pub. Util. Code Section 233 defines "telephone line" broadly to include "all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had *with or without the use of transmission wires*." (*emphasis added*). The courts have held that the statutory definition of "telephone line" is sufficiently broad to include a wide range of technologies including facilities and equipment installed by carriers in connection with or to facilitate both wireless and landline telecommunications services.[2] Thus, the statutory franchise right to use public rights-of-way has been interpreted in case law to benefit both wireline companies, that typically hold a Certificate of Public Convenience and Necessity ("CPCN"), issued by the California Public Utilities Commission ("CPUC"), as well as wireless providers, who typically have registered with the CPUC and obtained a Wireless Identification Registration ("WIR").

2) Limitations on State Franchise Rights & Scope of Local Discretionary Authority.

The right of telephone companies to use public rights-of-way to deploy facilities under the state franchise is, however, not unfettered. Specifically, Section 7901 provides that such use must be "in such manner and at such points as not to incommode the public use of the road…". The phrase "incommode the public use" in Section 7901 means "to unreasonably subject the public use to inconvenience or discomfort; to unreasonably trouble, annoy, molest, embarrass, inconvenience; to unreasonably hinder, impede, or obstruct the public use."[3] A recent state appellate court decision in *T-Mobile West LLC v. City and County of San Francisco* has confirmed that cities may apply discretionary review processes to requests under Section 7901 for placement of permanent wireless installations in the public rights-of-way by telephone companies, and those requests may be decided based on a consideration of aesthetics, as well as other factors.[4] "Incommode" is "broad enough 'to be inclusive of concerns related to the appearance of a facility'", and therefore, Section 7901 does not prohibit local governments from conditioning the approval of a particular permanent siting permit on aesthetic concerns.[5] Thus, there is precedent for not only requiring discretionary review and conditioning approvals, but also even denying applications for facilities in particular locations in the public rights-of-way under Section 7901, for example due to aesthetic concerns regarding pole heights or underground

[1] *County of Los Angeles v. General Tel. Co.* (1967) 249 Cal.App.2d 903, 904.
[2] *City of Huntington Beach v. Public Utilities Com*. (2013) 214 Cal.App.4th 566, 587-8 ; *GTE Mobilenet of Cal. Ltd. V. City of San Francisco* (N.D. Cal. 2006) 440 F.Supp.2d 1097, 1103 .
[3] *T-Mobile West LLC v. City and County of San Francisco* (2016) 3 Cal.App.5th 334 at 355, quoting *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 723.
[4] *T-Mobile West LLC*, 3 Cal.App. at 356-358.
[5] *Id.* at 344.

districts.[6] However, we note that the *T-Mobile* case is currently under appeal to the California Supreme Court.

In addition to Section 7901, Pub. Util. Code Section 2902 also protects a local government's right "to supervise and regulate the relationship between a public utility and the general public in matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility, the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets…within the limits of the municipal corporation." This provision is a further basis for a local government to restrict the location of proposed facilities due to public safety reasons or other local concerns or even deny applications in appropriate circumstances.

Further, a local government has the right under Section 7901.1 "to exercise reasonable control as to the time, place, and manner in which roads…are accessed [by telephone companies]."[7] The "time, place and manner" of temporary access refers to "when, where, and how telecommunications service providers gain entry to the public rights-of-way."[8] This includes a requirement for obtaining encroachment permits.

3) Federal and State Limitations On Local Discretionary Authority.

Local authority to regulate and even deny requests for placement of wireless facilities in public rights-of-way is also not unfettered. There are numerous provisions of state and federal law that limit the scope of local authority.

A. Local Denials Cannot Defeat Section 7901 Franchise Rights

As noted earlier, telephone companies have state franchise rights but those rights are limited in that installations cannot "incommode" the public. Where franchise rights and local regulatory authority balance out, particularly for wireless facilities which cannot be placed underground, is somewhat uncertain. For example, if a city were to ban or deny all wireless applications in the public rights-of-way, no matter where located or how they were designed, a telephone company may argue that its Section 7901 franchise rights have unlawfully been denied.

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[6] *Id. See also*, *NextG Networks of Cal., Inc. v. City of Newport Beach*, 2011 U.S. Dist. LEXIS 17013 (C.D. Cal. Feb. 18, 2011); *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716, 724 (9th Cir. Cal. 2009); *Western Union Tel. Co. v. Visalia* (1906) 149 Cal. 744.
[7] See *Huntington Beach,* at 569, fn. omitted.
[8] *T-Mobile West LLC,* 3 Cal.App. at 358, *quoting Palos Verdes Estates,* 583 F.3d at 725.

B. CPUC Action May Preempt Local Authority

The CPUC may have authority to invoke the statewide interest in telecommunications services to take action to preempt a local ordinances for particular telecommunications projects.[9] In that instance, there may be no scope for denial of related local permit applications.

C. Denials Cannot Be Based on Concerns About RF Emissions

A local decision to deny a wireless facility application cannot be based on concerns about RF emissions if the applicant has demonstrated that its facilities will comply with FCC standards.[10] The FCC in 1997 issued OET Bulletin 65, which provides technical guidelines for evaluating compliance with the FCC RF safety requirements.[11]

D. Local Governments Cannot "Prohibit" Personal Wireless Services

Under 47 U.S.C. Section 332 ("Section 332"), a local government cannot regulate the "placement, construction, and modification of personal wireless service facilities" where such regulation has the effect of actually or effectively prohibiting service. In the Ninth Circuit, a regulation, or application denial, prohibits or has the effect of prohibiting the provision of personal wireless services within the meaning of federal law if it: (1) bans the provision of personal wireless services outright or (2) has actually effectively prohibited the provision of such services.[12] Showing the mere potential for prohibition is not sufficient to overcome local discretionary review power.[13]

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[9] *City of Huntington Beach*, 214 Cal.App.4th at 592, citing Newpath Networks LLC v. City of Irvine (C.D.Cal., Dec. 23, 2009, No. SACV 06-550-JVS (ANx)) 2009 U.S.Dist. Lexis 126178 [finding no preemption by PUC under circumstances of the case, but stating that PUC can specifically preempt local regulations through §§ 762 & 1001 powers].

[10] 47 U.S.C. Section 332(c)(7)(B)(iv); see *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation,* Report and Order, ET Docket No. 93-62, FCC 96-326, para. 166 (F.C.C. 1996), https://transition.fcc.gov/Bureaus/Engineering_Technology/Orders/1996/fcc96326.pdf. On August 1, 1996, the FCC adopted the National Council on Radiation Protection and Measurements' recommended Maximum Permissible Exposure limits for field strength and power density for those transmitters operating at frequencies of 300 kHz to 100 GHz. The FCC adopted the specific absorption rate (SAR) limits for devices operating within close proximity to the body as specified within the ANSI/IEEE C95.1-1992 guidelines. *Id.*

[11] https://www.fcc.gov/general/oet-bulletins-line#65.

[12] *Sprint Telephony PCS, L.P. v. Cnty. Of San Diego* (9th Cir. 2008) 543 F.3d 571, at 579 ("*Sprint II*"); *Metro PCS*, 400 F.3d at 730-31.

[13] *Sprint II*, 543 F.3d at 579. Examples of regulations that "effectively prohibit the provision of service" include, e.g., an ordinance requiring that all facilities be underground when, to operate, wireless facilities must be above ground, or, an ordinance mandating that no wireless facilities be located within one mile of a road, where, because of the number and location of roads, the rule constituted an effective prohibition. *Id.* at 580.

A denial can "prohibit" personal wireless services if it prevents a wireless services provider from closing a "significant gap" in its own service coverage.[14] There is no bright-line rule regarding when a coverage gap is "significant," and the determination is based on a fact-specific analysis.[15] To support the contention that a site is necessary to close a coverage gap, the provider must in the application process demonstrate that the requisite gap exists, and that the manner in which it proposes to fill the significant gap in service is the "least intrusive" means.[16] To do so the provider must be able to show that it has made a good faith effort to identify and evaluate less intrusive alternatives, such as consideration of less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, etc.[17] Although a municipality is not compelled to accept the provider's representations, in order to reject them, it must show that there are some potentially available and technologically feasible alternatives, and the provider must have an opportunity to dispute the availability and feasibility of the alternatives favored by the locality.[18]

Further, 47 US.C. Section 253(a) provides that: "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." Generally speaking, this provision applies to wireline facilities. Under Section 253(b), 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," and 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 right-of-way use on a competitively neutral and nondiscriminatory basis. As a matter of statutory interpretation, subsections (b) and (c) are "safe harbors" to subsection (a), allowing certain regulations that would otherwise "prohibit" deployment.[19] In the Ninth Circuit, a plaintiff suing a municipality under allegations that it has "prohibited" service under either Section 253 or 332 "must show actual or effective prohibition, rather than the mere possibility of prohibition."[20]

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[14] *Metro PCS*, 400 F.3d at 731.
[15] *Id.*; *City of Palos Verdes Estates*, 583 F.3d at 727.
[16] *Metro PCS*, 400 F.3d at 734.
[17] *City of Anacortes*, 572 F.3d at 996, fn. 10.
[18] *Id.* at 999.
[19] *BellSouth Telecomns., 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).
[20] *Sprint II*, 543 F.3d at 578; *id.* at 579 ("Because Sprint's suit hinges on the statutory text that we interpreted above—"prohibit or have the effect of prohibiting"—we need not decide whether Sprint's suit falls under § 253 or § 332. As we now hold, the legal standard is the same under either.").

E. Local Decisions Must Be Timely or Face "Deemed Granted" Remedies

Local authorities must comply with federal law that constrains application review timelines. The FCC has established three "shot clocks" for local government action on certain wireless facilities applications. Section 332 provides that local authorities must make a final decision regarding whether to approve or deny an application within a "reasonable period of time" after the request is filed, taking into account the nature and scope of the request.[21] In 2009, the FCC established "presumptively reasonable periods" for local action on a wireless communications facility siting application—typically referred to as the "shot clocks."[22] The shot clocks only applies to wireless facilities used for the provision of "personal wireless services" – that includes only "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services." Applications that propose a "collocation" must be approved or denied within 90 days; applications for all other facilities must be approved or denied within 150 days.

In California, Gov. Code Section 65964.1 provides that if a local government fails to act within the time required by either of the above two FCC shot clocks, the applicant may be in a position to pursue a "deemed approval" of its application by providing notice to the local government, and the local government would have to go to court within 30 days to try to challenge the deemed grant assertion.

A third wireless shot clock was established by the FCC in an order interpreting a law enacted by Congress in 2012 and codified as 47 U.S.C. section 1455(a). Commonly known as "Section 6409(a)," this law 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." Further, 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 has provided guidance as to the interpretation of this statute in a Report and Order released October 21, 2014.[23] There, the FCC laid out the criteria for determining whether or not an application qualified for treatment as an "eligible facilities request" that *must* be approved, and established a 60-day shot clock for approval of these applications.

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[21] 47 U.S.C. Section 332(c)(7)(B)(ii).
[22] See *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b)*, 25 FCC Rcd 11157 (F.C.C. 2010); *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, 24 FCC Rcd 13994 (F.C.C. 2009).
[23] *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 .

F. Other Federal and State Restrictions on Local Authority.

Other federal and state restrictions on local government authority over wireless facility applications include the following:

- Denials must be "in writing" and based on "substantial evidence" contained in a written record.[24]

- A local government may not "unreasonably discriminate" in its siting decisions with respect to providers of "functionally equivalent services."[25]

- No escrow deposit can be required for removal of a wireless telecommunications facility or any component thereof. (a performance bond or other surety or another form of security can be required so long as the amount of the bond security is rationally related to the cost of removal considering information provided by the permit applicant regarding the cost of removal).[26]

- The duration of any permit granted for a wireless telecommunications facility cannot be less than 10 years unless there are public safety reasons or substantial land use reasons. However, a build-out period for the site can be established.[27]

- No requirement can be imposed that all wireless telecommunications facilities be limited to sites owned by particular parties within the jurisdiction of the reviewing authority.[28]

- If a monopole is approved as a "wireless telecommunications collocation facility" in accordance with the requirements of Gov. Code Section 65850.6, then future collocation facilities applications must only go through a ministerial process for approval.

4) Summary and Conclusions.

This memorandum broadly summarizes applicable law as it stands today, but the climate is one of regulatory uncertainty. State and federal law creates a framework under which local governments may review wireless facilities in public rights-of-way. While there is discretion to deny applications on a variety of grounds, in certain instances, local authority is entirely preempted by federal or state law. The leading case upholding local government's power of

[24] 47 U.S.C. Section 332(c)(7)(B)(iii).
[25] 47 U.S.C. Section 332(c)(7)(B)(i)(I).
[26] Gov. Code § 65964(a).
[27] Gov. Code § 65964(b).
[28] Gov. Code § 65964(c).

discretionary review, including a consideration of aesthetics of installations by telephone companies in the public rights-of-way, *T-Mobile West LLC v. City and County of San Francisco*, is under appeal to the California Supreme Court. Further, the FCC is considering several pending proceedings in which it may issue new rules. In addition, both the particulars of a local government's code, as well as the facts and circumstances surrounding a particular wireless facility application, will come to bear on any local decision to deny. As noted at the outset, we did not review the City of Sebastopol's code or any individual applications. The code may contain further requirements and restrictions regarding the city's authority over public rights-of-way not addressed in this memo. In addition, the facts and circumstances related to individual wireless applications would also impact this analysis as applied to individual applications.

If you have any questions, let me know.

Sincerely,

Gail A. Karish
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