Wireless Antenna Issues

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WIRELESS ANTENNA ISSUES

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WIRELESS ANTENNA ISSUES[1]

I. Introduction

Wireless antenna siting raises significant political and legal issues that are becoming ever more complex. A decade ago, localities revised local zoning codes to accommodate the placement of large towers in their communities; now communities are revisiting those codes as providers seek to place new or replacement installations on utility poles and light standards in the rights of way. City Attorneys – often in the face of heated public opposition to wireless placements and threats of litigation from wireless service providers and tower companies - must advise local decision-makers on the complex interplay of federal law, Federal Communications Commission (FCC) regulations and orders, state statutes and California Public Utilities Commission (CPUC) rules and orders, and local ordinances – all of which can impact the approval process and the proposed deployment.

The law on wireless antenna issues is in constant flux In February, 2012, Congress passed, and the President signed, as part of the payroll tax deduction extension, a new law governing "collocation" of facilities on existing wireless towers that *immediately* affects all local governments. Applicable rules are changing through legislative, administrative and judicial action and interpretations; the FCC is being asked to revise wireless siting rules it recently adopted. Further complexities can arise because local jurisdictions can sometimes have a dual role -- both regulatory and proprietary.

Moreover, demand for wireless services has led to a surge in deployments of traditional and new technologies, and to this flurry of legislative, administrative and judicial activity. Local government is often accused of being an impediment to use of new technology and to rapid deployment of broadband, raising new challenges for local communities and their legal counsel. This paper provides guidance on key federal and state level aspects of the legal framework within which cities review wireless antenna siting projects, and examines recent developments in technology, and in federal and state law impacting local government authority in this area.

II. Federal Regulatory Framework

There are three principal federal statutes that potentially impact local authority over wireless communications facilities. 112 P.L. 96, Sec. 6409 (Section 6409), 47 U.S.C. § 332(c)(7) (Section 332(c)(7)) and 47 U.S.C. § 253 (Section 253). Section 6409 was adopted as part of the Middle Class Tax Relief and Job Creation Act of 2012, signed into law on February 22, 2012. Section 6409, addresses the placement and replacement of facilities on existing wireless towers. 47 U.S.C. § 332(c)(7) was adopted as part of the Telecommunications Act of 1996 (1996 Act) and generally preserves local authority over wireless tower placement and sets parameters for local action on applications for placement of wireless facilities. Wireless providers also contend that local authority over the placement of wireless facilities is affected by Section 253, which

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preempts local laws and regulations that prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services. We discuss each of these provisions below – with the caution that there have been no cases or regulations interpreting Section 6409, and it is highly questionable as to whether Section 253 has any meaningful applicability where wireless providers are involved.

A. Section 6409 – Mandatory Collocation

"Collocation" of facilities involves the installation or modification of facilities on existing support structures for wireless systems. Section 6409 was adopted in part in response to complaints by the wireless industry that states and localities were refusing to approve even minor modifications to existing towers.[2]

Section 6409 provides, in the part most relevant to this paper:

> (a) Facility Modifications.—
>
> (1) In general.-- Notwithstanding [47 U.S.C. § 332(c)(7)] or any other provision of law, 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.
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> (2) Eligible facilities request.-- For purposes of this subsection, the term "eligible facilities request" means any request for modification of an existing wireless tower or base station that involves--
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> (A) collocation of new transmission equipment;
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> (B) removal of transmission equipment; or
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> (C) replacement of transmission equipment.
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> (3) Applicability of environmental laws.-- Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969.[3]

This new law is effective immediately, and assuming that the federal government may require a local or state government to approve anything – that is, assuming the law is

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[2] 112 P.L. 96, Sec. 6409.

[3] Section 6409 also authorizes federal agencies to grant easements for use of federal property for wireless installations, and provides for the development of a standard federal contract for placement of antennae on federal facilities. This could, of course, affect local communities which contain federal buildings, or which abut or encompass federal lands.

constitutional[4] - it effectively requires localities to adjust existing codes and processes to comply with the new requirements. The central problem for city attorneys is that it is unclear what, exactly, the new law requires.

Key terms are undefined. The new law only applies to existing "wireless towers" and "base stations." Neither term is defined. Similar terms are used in some FCC orders (including orders adopted in connection with the FCC's discharge of its responsibilities under the National Historic Preservation Act[5] (NHPA)). Under those orders, for example, a "tower" is a facility solely dedicated to supporting a wireless facility, and hence would not include light or utility poles.

The new law requires approval of changes to eligible facilities that do not "substantially change" the physical dimensions of either the tower, or of the base station. The term "substantially change" is not defined. The wireless industry will likely take the position that this term is limited to changes that are "substantial" in a *quantitative* sense. However, it is also possible to read "substantial" in a *qualitative* sense: *e.g.* a change that would block sightlines or pedestrian access to an area might be "substantial" even if minor in a quantitative sense. Likewise, a change in the shape of an antenna that creates a physical hazard (because of wind-loading or earthquake issues) could also be "substantial" even if, quantitatively the area occupied were identical. There are FCC orders that address "substantial change," but it is not clear those orders – which were adopted in connection with the FCC's discharge of its duties under the NHPA – could or should apply under the new law.

The FCC has the authority to define the undefined terms and implement the new law, but it has not commenced a rulemaking to do so. Until it does so, localities must be in a position to apply the law themselves, which means that each locality that wishes to comply with the law will need to define what sorts of installations are subject to the "substantial change" test, and develop processes for reviewing applications where the applicant claims it is entitled to collocate as a matter of law. If the FCC commences a rulemaking, local governments will have a significant interest in participating to protect their interests.

Wireless providers are likely to make very broad claims concerning local obligations under the new law. It is worth noting:

- The law *does not* on its face require ministerial approval of applications for modification of existing wireless towers.
- It *does not* on its face prevent localities from requiring submission of an application for a collocation.
- It *does not* on its face give a wireless provider a private right of action against a local government.

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[4] Compelling approval, as Section 6409 appears to do, may raise significant issues under *Printz v. United States*, 521 U.S. 98 (1997) and *New York v. United States*, 505 U.S. 144 (1992).

[5] Public Law 102-575, as amended, codified as 16 USC § 470 et seq.

The law may effectively preempt the California Environmental Quality Act (CEQA) and other California laws to the extent that those laws require consideration of factors that are not tied to "physical dimension." The law may be of particular significance for existing towers that are "non-conforming uses," where no further modifications are permitted, and local attorneys may need to carefully consider how non-conforming uses can be addressed in light of the new law.

B. Section 332(c)(7)

Through Section 332(c)(7), Congress sought to establish a "pro-competitive, deregulatory national policy framework"[6] while preserving local zoning/land use authority over personal wireless service facilities.[7] "Personal wireless services" are defined in the statute to mean commercial, common carrier, and unlicensed mobile services, including cellular telephone.[8]

Section 332(c)(7) begins by stating that "except as provided in this paragraph" nothing in the Communications Act "shall limit or affect the authority of a state or local government " over "decisions regarding the placement, construction and modification" of "personal wireless service facilities." The paragraph then: (a) establishes several federal standards which a valid zoning decision must satisfy (discussed below); (b) limits local authority to make zoning decisions based on RF emissions concerns; (c) gives the courts and the FCC concurrent jurisdiction to resolve cases where the denial of an application is based upon RF emissions; and finally (d) gives the courts exclusive jurisdiction to resolve all other siting disputes. The review provision requires a provider to file any court challenge within 30 days of the date a locality acts, or fails to act, on a wireless application, and requires the court to hear the dispute on an expedited basis.

When considering the application of the statute, it is important to know the intended use of a proposed facility because the *only* types of wireless facilities covered by Section 332(c)(7), are those that are "for the provision of personal wireless services." The term "personal wireless services" is defined in the statute to mean "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services." This definition does *not* appear to include wireless broadband internet access services. Recent federal district court decisions have adopted the view that siting applications for facilities for the provision of wireless broadband Internet access services are excluded from Section 332(c)(7) where the facilities are only to be used in connection with the provision of Internet access services. If a proposed facility is for commingled uses, Section 332(c)(7) would only apply if the provision of personal wireless services is one of the commingled uses.[9]

1. Limitations on Local Authority

While the statute preserves local zoning authority over "the placement, construction, and

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[6] H.R. Conf. R. 104-458 at 113 (1996).

[7] *Id*. at 207.

[8] 47 U.S.C. § 332(c)(7)(C).

[9] *Clear Wireless LLC v. Bldg. Dep't of Lynbrook*, 2012 U.S. Dist. LEXIS 32126, 14-23 (E.D.N.Y. Mar. 8, 2012). The court cites another court decision that reached a similar conclusion, *Arcadia Towers LLC v. Colerain Tp. Bd. of Zoning Appeals*, No. 10-CV-585, 2011 WL 2490047, at *2 (S.D. Ohio June 21, 2011).

modification of personal wireless service facilities,"[10] it subjects this authority to five limitations, namely:

- Such regulation shall not unreasonably discriminate among providers of functionally equivalent services;
- Such regulation shall not prohibit or have the effect of prohibiting the provision of personal wireless services;
- Requests for authorization must be acted on within a reasonable period of time after the request is filed, taking into account the nature and scope of such request;
- Decisions to deny a request shall be in writing and supported by substantial evidence contained in a written record;
- Such regulation may not be on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the FCC's regulations concerning such emissions.

Below we examine how these five limitations have been interpreted by the courts, with an emphasis on precedent relevant to California.

Before turning to that discussion, practitioners should recognize that in November 2009, the FCC responded to a petition for a rulemaking by the wireless industry by issuing a Declaratory Order asserting that it could "implement" Section 332(c)(7), and establish rules to clarify any unclear term in the legislation.[11] The FCC took action in two principal areas:

It established a prohibition standard. The FCC declared that "a State or local government that denies an application for personal wireless service facilities siting *solely* because 'one or more carriers serve a given geographic market' has engaged in unlawful regulation that 'prohibits or has the effect of prohibiting the provision of personal wireless services'." The impact of this part of the ruling on California will likely be minimal under existing Ninth Circuit precedent, discussed below.

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[10] *Ibid*.

[11] *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B),* 24 FCC Rcd. 13994 (2009), *Order on Reconsideration,* 48 C.R. 1271(2009) (Shot Clock Order).

It established a "Shot Clock". The FCC established a nationwide standard for a "reasonable period of time" to process wireless applications. The FCC established two time periods: 90 days for action upon a collocation request and 150 days for action upon a new siting application. The time runs from the date a "complete application" is filed. However, in order to toll the time for action on an application, a locality must notify the applicant that an application is incomplete within 30 days of receipt. This notification deadline may be particularly significant in a community that has a bifurcated review process, since an application may be complete for purposes of the first stage of a review, but incomplete for the later stages of a review. Under the FCC rule, however, the 30-day notification deadline runs from the date the application is filed, not the date it is sent for review to a particular department or board.

The FCC ruling provides that a locality that fails to meet the FCC deadlines (unless the provider and the locality agree to extend them) has presumptively failed to act within a reasonable period of time. If a locality fails to meet the deadlines (unless the provider and locality agree to extend them) the provider has 30 days to ask a court to review the local action (or failure to act).

Concerned local governments appealed the FCC's order, arguing that Congress had specifically precluded the FCC from implementing any part of Section 332(c)(7), except the provisions dealing with RF radiation, and that Congress had not intended for the FCC to establish national shot clocks. Instead (localities argued) the timeliness of a local action is to be assessed in light of the time a community requires to consider other zoning applications. The legislative history to Section 332 was strong on both points. Nonetheless, in January 2012, the Court of Appeals for the Fifth Circuit decided that, notwithstanding the statutory language and legislative history, the FCC had authority to implement Section 332 and courts had to defer to the FCC's interpretation of that provision.[12]

On the merits, while the court upheld the "shot clock" established by the FCC, the court emphasized that the shot clock merely established a "presumption," which could be rebutted by a community facing a court challenge in the same way as any presumption may be rebutted. Once the presumption is rebutted, the court emphasized, the burden of proof shifts to the wireless applicant to prove that the locality had failed to act in a reasonable period of time, and that the local action had otherwise violated Section 332. The FCC's presumptions no longer have any force once the burden shifts back to the applicant.

Because a court ruling giving the FCC authority to adopt rules governing state and local planning processes has significant implications in our federal system, and because the FCC is being asked to use its authority to adopt stricter rules that may be more intrusive, local governments asked the Fifth Circuit to reconsider its ruling with respect to FCC jurisdiction *en banc*, but were denied. This ruling may be the subject of a further appeal, but for now, however, the FCC rules remain in place.

The impact of this part of the ruling for California is difficult to predict. As discussed later in this paper, California jurisdictions must comply with the Permit Streamlining Act (PSA) when processing applications. The PSA can impose a shorter time period than the shot clock

[12] *City of Arlington v. Federal Communications Commission*, 668 F.3d 229(2012).

rules, but the PSA clock is triggered differently. The PSA provides that the time limits established by the PSA do not apply in the event that federal statutes or regulations *require* time schedules which exceed such time limits.[13] However, acknowledging that existing state and local rules may impose different timelines than are established under the FCC's shot clock, the FCC clarified that the shot clock was to apply "independent of the operation" of the local rules, as follows:

> …where the review period in a State statute or local ordinance is shorter than the 90-day or 150-day period, the applicant may pursue any remedies granted under the State or local regulation when the applicable State or local review period has lapsed. However, the applicant must wait until the 90-day or 150-day review period has expired to bring suit for a "failure to act" under Section 332(c)(7)(B)(v). Conversely, if the review period in the State statute or local ordinance is longer than the 90-day or 150-day review period, the applicant may bring suit under Section 332(c)(7)(B)(v) after 90 days or 150 days, subject to the 30-day limitation period on filing, and may consider pursuing any remedies granted under the State or local regulation when that applicable time limit has expired. Of course, the option is also available in these cases to toll the period under Section 332(c)(7) by mutual consent.[14]

As a result, in processing applications, California jurisdictions must be cognizant of both the timeline imposed by the shot clock rules and that established by applicable local rules.

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In the court decisions discussed below, issues arose before the FCC shot clock rules were adopted, or in which the shot clock rules simply did not play a significant role. The court rulings by and large remain important in assessing the validity of local ordinances under Section 332.

a. Unreasonable discrimination among providers of functionally equivalent services

Section 332(c)(7)(B)(i)(I) provides that a local government may not "unreasonably discriminate" in its siting decisions with respect to providers of "functionally equivalent services."

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[13] Gov. Code § 65954.
[14] Shot Clock Order, ¶50.

Congress intended to provide local governments with flexibility to apply general zoning requirements while treating facilities that "create different visual, aesthetic, or safety concerns differently."[15] The Ninth Circuit has concluded that discrimination based on "traditional bases of zoning regulation" such as "preserving the character of the neighborhood and avoiding aesthetic blight" are reasonable.[16] Courts have looked to whether the facilities in question are "similarly situated in terms of their 'structure, placement, or cumulative impact'."[17] Unreasonable discrimination has been found, for example, when local authorities have previously allowed identical (or larger) facilities to be placed in similar locations,[18] and when local governments have failed to allow providers to "collocate" similar equipment on existing poles.[19]

b. Prohibitions on the provision of personal wireless services

Section 332(c)(7)(B)(i)(II) provides that a local government "shall not prohibit or have the effect of prohibiting the provision of personal wireless services."

Most circuit courts agree that a local zoning authority *potentially* runs afoul of this provision if its enforcement of local requirements creates a "significant gap" in service coverage. The Ninth Circuit finds a significant gap if the particular provider seeking to install facilities has a gap in its own service network, even if other companies provide service in an area.[20] In recognition of growing consumer use of cell phones indoors, at least one circuit and a lower court in California has ruled that "in-building" coverage may be a consideration in the "significant gap" analysis.[21]

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[15] H.R. Conf. R. 104-458 at 208 (1996). See *Helcher v. Dearborn County*, 500 F. Supp. 2d 1100, 1118 (S.D. Ind. 2007).

[16] *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 727 (9th Cir. 2005).

[17] *Id.* at 727; *Airtouch Cellular v. City of El Cajon*, 83 F. Supp. 2d 1158 (S.D. Ca. 2000).

[18] *Ogden Fire Co. No. 1. v. Upper Chichester Twp*., 504 F.3d 370, 394 (7th Cir. 2007).

[19] *Nextel Partners, Inc. v. Town of Amherst*, 251 F. Supp. 2d 1187, 1195 (W.D.N.Y. 2003); *Nextel West v. Town of Edgewood*, 479 F. Supp. 2d 1219, 1232 (D.N.M. 2006).

[20] *MetroPCS, Inc. v. City and County of San Francisco*, at 732; The First Circuit also uses this standard, *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620, 631–33 (1st Cir. 2002). The Fourth Circuit requires at least a significant gap, and may require more. *360 Degrees Communs. v. Bd. of Supervisors of Albermarle Cnty.*, 211 F.3d 79, 86-87 (4th Cir. 2000) the Second and Third Circuits find there is no significant gap if any single provider offers coverage in the relevant area. This is sometimes called the "one-provider" rule. *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 642–643 (2d Cir. 1999); *Nextel West Corp. v. Unity Township*, 282 F.3d 257, 265 (3d Cir. 2002). A Third Circuit district court, however, recently found that this "one provider" rule was inconsistent with the FCC Order discussed above. *Clear Wireless LLC v. City of Wilmington*, 2010 WL 3463729 at *2 (D. Del. 2010); *Liberty Towers, LLC v. Zoning Hearing Bd*., 2010 WL 3769102 (E.D. Penn. 2010).

[21] *T-Mobile Central, LLC v. Unified Government of Wyandotte County/ Kansas City, Kan*., 528 F. Supp. 2d 1128, 1169 (D. Kan. 2007), aff'd in part, 546 F.3d 1299 (10th Cir. 2008); *MetroPCS Inc. v. City & County of San Francisco*, 2006 U.S. Dist. LEXIS 43985, 28-34 (N.D. Cal. June 16, 2006)("In so holding, the court is mindful that the TCA does not guarantee MetroPCS seamless coverage in every location within the Richmond district. Indeed, courts have expressly recognized that the presence of 'dead zones,' or pockets in which coverage does not exist, are not actionable for purposes of arguing effective prohibition claims under the TCA. See *MetroPCS*, 400 F.3d at 733 ("the TCA does not guarantee wireless service providers coverage free of small 'dead spots'"); see also 360 [Degrees] *Communs. Co. v. Bd. of Supervisors*, 211 F.3d 79, 87 (4th

If a court finds that a local restriction creates a "significant gap," the provider then has to make some showing as to the intrusiveness or necessity of its proposed means of closing the gap.[22] The circuits are split as to the required showing. The Second and Third Circuits require the provider to show that "the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve." The First and Seventh Circuits, by contrast, require a showing that there are "no alternative sites which would solve the problem." The Ninth Circuit adopted the "least intrusive" as opposed to the "no viable alternative test."[23]

It is an open question whether finding a significant gap in service alone is sufficient to find a "prohibition." Courts appear to recognize that there could be a denial of some applications and that the statute "cannot guarantee 100% coverage".[24] Thus, there is a need to balance the obvious interest in protecting local zoning authority with the concern over establishing prohibitions. The Ninth Circuit recently gave three examples of an effective prohibition: 1) an ordinance requiring all facilities to be underground and the plaintiff introducing evidence that to operate, its wireless facilities must be above ground; 2) an ordinance mandating no wireless facilities be located within one mile of a road, and a plaintiff showing that because of the number and location of roads, this meant it could not place wireless facilities anywhere; and 3) an ordinance that produced a significant gap in wireless coverage and left no feasible alternative facilities or site locations.[25]

c. Action within a reasonable period of time

Section 332(c)(7)(B)(ii) provides that a local government "shall act on any request for authorization . . . within a reasonable period of time after the request is duly filed . . . taking into account the nature and scope of such request."

Legislative history suggests Congress did not intend to give preferential treatment to the wireless industry, or to subject their requests to any but the generally applicable time frames for zoning decisions.[26] No rigid timetables were intended.[27] There have been few cases interpreting

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Cir. 2000) (same); *Second Generation Props., L.P. v. Town of Pelham*, 313 F.3d 620, 631 (1st Cir. 2002) (same). Here, however, MetroPCS has proven that its lack of in-building coverage within the Richmond district is widespread, and qualifies as more than mere 'dead spots.'").

[22] *MetroPCS, Inc. v. City and County of San Francisco*, at 734.

[23] *Id.* at 735. *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 642–643 (2d Cir. 1999); *Nextel West Corp. v. Unity Township*, 282 F.3d 257, 265 (3d Cir. 2002); *Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Bd. of Easttown Tp.*, 331 F.3d 386, 398, 33 Envtl. L. Rep. 20218 (3d Cir. 2003). The Fourth Circuit recently rejected both tests, in favor of a fact-based, case-specific inquiry: "the application of any specific formula…ultimately would require a broader inquiry whether the denial of a permit for a particular site had the effect of prohibiting wireless services, within the meaning of subsection (B)(i)(II)." *T-Mobile Northeast LLC v. Fairfax County Bd. of Supervisors*, 2012 U.S. App. LEXIS 4197, 14-15 (4th Cir. Va. Mar. 1, 2012)

[24] See *T-Mobile Northeast, supra;* see also *New Cingular Wireless PCS, LLC v. Fairfax County Board of Supervisors*, No. 10-2381 (4th Cir., March 19, 2012); *MetroPCS Inc. v. City & County of San Francisco*, 2006 U.S. Dist. LEXIS 43985, 28-34 (N.D. Cal. June 16, 2006).

[25] *Sprint Telephony PCS v. County of San Diego,* 543 F.3d 571, 580 (9th Cir. 2008), cert. den. 129 S. Ct. 2860 (2009).

[26] H.R. Conf. R. 104-458 at 208 (1996). See also *Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. 1036, 1040 (W.D. Wash. 1996).

this reasonableness requirement. (But see Shot Clock discussion above).

d. Denial must be "in writing" and "supported by substantial evidence"

Section 332(c)(7)(B)(iii) specifies that a local government's decision to deny a request must be "in writing and supported by substantial evidence, contained in a written record." Courts have addressed both the "substantial evidence" and the "in writing" requirements.

Legislative history suggests Congress intended the test to be the traditional standard used for judicial review of agency actions.[28] The Ninth Circuit defines the standard as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[29] The plaintiff carries the burden of proving that no substantial evidence supports the zoning authority's decision.[30] The court reviews the record in its entirety, including evidence that is unfavorable to the zoning authority.[31]

Courts have evaluated the presence or absence of substantial evidence not against any federal standard, but against substantive standards set by state law or local zoning ordinances.[32] As the Ninth Circuit has explained, "[w]e must take applicable state and local regulations as we find them and evaluate the City decision's evidentiary support (or lack thereof) relative to those regulations."[33] However, if local law is preempted by state law, the local law is not controlling, notwithstanding the 1996 Act.[34] Courts have applied the "substantial evidence" test to a number of local requirements including "necessity" requirements,[35] and visual impact or aesthetic considerations.[36] The test is highly deferential to the determinations of zoning authorities.

With respect to the "in writing" requirement, the Ninth Circuit requires local governments to "issue a written denial separate from the written record" which "contain[s] a

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[27] *Id*. at 1040.

[28] H.R. Conf. R. 104-458 at 208 (1996).

[29] *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 725 (9th Cir. 2005).

[30] *VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 830–31, (7th Cir. 2003); *American Tower LP v. City of Huntsville*, 295 F.3d 1203, 1207 (11th Cir. 2002); *Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.3d 51, 63, 31 Envtl. L. Rep. 20578 (1st Cir. 2001).

[31] *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1218 (11th Cir. 2002).

[32] *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 724 (9th Cir. 2005).

[33] *Id.* at 726.

[34] *Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge*, 448 F.3d 1067, 1071 (9th Cir. 2006), for additional opinion, see, 182 Fed. Appx. 688, 250 Pub. Util. Rep. 4th (PUR) 420 (9th Cir. 2006).

[35] *Ibid*. at 725.

36 *AT&T Wireless Services of California LLC v. City of Carlsbad*, 308 F. Supp. 2d 1148, 1161 (S.D. Cal. 2003)

sufficient explanation of the reasons for the . . . denial to allow a reviewing court to evaluate the evidence in the record supporting these reasons."[37] As the Ninth Circuit has put it: "While the bare language of the Act may not require more than the briefest written disposition, it also does not compel a strictly minimalist construction, and the purposes of the "in writing" requirement would be ill-served by allowing local zoning authorities to issue . . . opaque, unelaborated ruling[s]."[38]

e. Regulation on the basis of environmental effects of radio frequency emissions

Section 332(c)(7)(B)(iv) stipulates that no state or local government may regulate cell tower placement based on "the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions."

A zoning authority's consideration of health effects evidence, including potential effects on property values due to potential radio frequency emissions, may not serve as "substantial evidence."[39] However, one court has found that in deciding between alternative sites, a local government may "maximize the distance between the monopole and other municipal uses" (such as homes and schools), based, in part, on a policy of "prudent avoidance," at least when no other factor differentiated two finalists.[40]

C. Remedies

The 1996 Act also provided remedies in court and at the FCC for persons adversely affected by final actions that they consider to be "inconsistent" with these limitations. One possible remedy for a zoning authority's violation of the limitations in Section 332(c)(7) is an order compelling the local authority to issue the requested permit.[41] The Supreme Court has squarely rejected the claim that a provider wrongly denied a license should also be entitled to damages and attorney fees under 42 U.S.C.A. § 1983.[42] The Ninth Circuit has also ruled that compensatory damages are generally not appropriate for violations of this provision of the 1996 Act.[43]

D. Section 253

Another provision of the 1996 Act, codified as 47 U.S.C. § 253, has also played a role in challenges to wireless siting decisions and local requirements. Section 253(a) preempts any state or local legal requirement that prohibits, or has the effect of the prohibiting, " the ability of any entity to provide telecommunications service," with two exceptions of particular importance to

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[37] *Ibid.* at 722.

[38] *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 722 (9th Cir. 2005).

[39] *AT&T Wireless Services of California LLC v. City of Carlsbad*, 308 F. Supp. 2d 1148, 1159 (S.D. Cal. 2003); *Id.* at 736.

[40] *New York SMSA Ltd. Partnership v. Town of Clarkstown*, 99 F. Supp. 2d 381, 392 (S.D. N.Y. 2000).

[41] *AT&T Wireless Servs. of Cal., LLC v. City of Carlsbad*, at 1167-68.

[42] *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 125 S. Ct. 1453, 161 L. Ed. 2d 316 (2005).

[43] *Kay v. City of Rancho Palos Verdes*, 504 F.3d 803, 815 (9th Cir. 2007).

local governments. Section 253(b) protects from preemption nondiscriminatory police power regulations necessary to "protect the public safety and welfare" or "to safeguard the rights of consumers." Section 253(c) preserves local authority "to manage the public rights-of-way [and]…to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." Even if a local compensation requirement is "prohibitory" under Section 253(a), it cannot be preempted if it is otherwise "reasonable" and non-discriminatory.

Because of the "except as provided in this paragraph" language in Section 332, there is a substantial, and outstanding question as to whether Section 253 could ever be used to challenge a wireless siting ordinance, or a particular siting decision. Nonetheless, starting in about 2005 wireless providers sought to exploit a series of Section 253(a) decisions that had read Section 253 to preempt not only local requirements that "prohibit" but also those that "may prohibit" the ability to provide service.[44] At the district court level, some wireless providers enjoyed initial success relying on Section 253, as some courts seemed to read Section 253 to preempt local laws that "might" prevent an entity from providing service.[45] The "may prohibit" standard as applied by those courts was much less stringent than the standard that had been applied in interpreting the similar "effective prohibition" language in Section 332.

This situation changed dramatically in 2008 when the Ninth Circuit (*en banc)* ruled that the "may prohibit" standard that was announced in the *Auburn* case was in error and that to prevail on a Section 253 claim, a provider was required to show an "actual or effective prohibition," not the mere possibility of a bar to service.[46] This largely harmonized the Section 332 test for "effective prohibition" and the Section 253 test for effective prohibition. That court gave three examples of what would be an effective prohibition.[47] Interestingly, the Ninth Circuit did not decide whether Section 253 can apply in a wireless siting case. In the *San Diego* case, the court concluded that it did not have to address that issue, because the plaintiff's claim failed on the merits in any event.

We return to the relationship between Section 253 and Section 332 in the "developments to watch" section.

E. The Local Government as Property Owner

The federal laws discussed above apply to local authorities in their exercise of *regulatory* authority but may not apply to decisions taken in a *proprietary* capacity. For example, at least one court has recognized that to the extent a local government acts not as a zoning authority or

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[44] See, e.g, *City of Auburn v. Qwest Corp*., 260 F.3d 1160 (9th Cir. 2001) (overruled by, *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008). cert. den. 129 S. Ct. 2860 (2009)).

[45] See *Verizon Wireless (VAW) LLC v. City of Rio Rancho, NM*, 476 F. Supp. 2d 1325 (D.N.M. 2007); but see *Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700 (9th Cir. 2007), reh'g en banc granted, 527 F.3d 791 (9th Cir. 2008) and on reh'g en banc, 543 F.3d 571 (9th Cir. 2008), petition for cert. den. 129 S. Ct. 2860 (2009).

[46] *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008), pet. for cert. cert. den. 129 S. Ct. 2860 (2009).

[47] *Id.* at 580, pet. for cert. cert. den. 129 S. Ct. 2860 (2009). See discussion above in part II.B.1.d.

regulator, but as a property owner for its own sites, the local government may request and obtain different RF emissions conditions.[48]

III. State Law

Wireless entry into the market has not been regulated in any significant way at the state level. In the Omnibus Budget Reconciliation Act of 1993, Congress removed states authority to regulate entry and rates of wireless (CMRS) providers effective in 1994.[49] In 1998, the CPUC adopted GO 159A, an order which applies specifically to the construction of wireless facilities by cellular service providers, and defers to local governments on land use approvals.[50] In general, California state law has historically deferred to local authorities (exercising police powers not in conflict with laws of general application[51]) on zoning and siting issues related to communications facilities, within certain parameters discussed below. However, the CPUC determination to treat distributed antenna systems (DAS) as telephone companies under Public Utilities Code Section 7901 (Section 7901), may impact the ability of local governments to regulate the location of DAS wireless facilities.

A. Sections 7901 and 7901.1

Under Section 7901 telephone corporations "may construct lines of telegraph or telephone lines along and upon any public road or highway … 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." Section 7901.1 provides "consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads…are accessed," which, at a minimum requires that the control "be applied to all entities in an equivalent manner."

B. SB 1627 (Government Code Sections 65850.6 and 65964)

SB 1627 was enacted in 2006 to facilitate the collocation of wireless facilities, and took effect on January 1, 2007. The statute provides parameters on the procedural and substantive zoning regulations that can be adopted by local entities. Note, however, that the new federal collocation law, Section 6409 will apply to collocations.

Gov. Code § 65850.6

Government Code Section 65850.6(b)(4) requires that new facilities that may later have facilities collocated with them (we will refer to these new facilities as "base facilities") must undergo CEQA review consisting of the adoption of a negative declaration or mitigated negative declaration, or certification of an environmental impact report. This means that if a particular base facility is planned to accommodate collocated facilities, cities cannot use a CEQA categorical exemption to approve the base facility.

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[48] *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002).

[49] Public Law No: 103-66, 42 U.S.C. 629(A)(1) and (2).

[50] GO 159A is available at this link: http://162.15.7.24/PUBLISHED/Graphics/611.PDF.

[51] See California Constitution, Article XI, Section 7; Cal. Pub. Util. Code § 2902.

Cities are required to use some type of discretionary permit, such as a CUP or site development permit, to approve base facilities that may later have facilities collocated with them. In the process of awarding the discretionary permit required for a base facility, cities are required by Gov. Code §65850.6(c) to hold at least one public hearing, and provide certain public notices of the hearing.

Section 65850.6(a) prohibits cities from requiring discretionary permits for collocated facilities if several requirements are met:

- The collocated facility is consistent with the local requirements applicable to the base facility where equipment will be collocated.
- The base facility where equipment will be collocated received a discretionary permit from the city.
- The base facility received CEQA review consisting of a negative declaration, mitigated negative declaration, or environmental impact report.
- The facility does not require a subsequent or supplemental environmental impact report (based on "substantial changes" in the project or its circumstances, or new information).
- The collocated facility incorporates all mitigation measures required by the CEQA document for the base facility.

A corollary to these requirements is that if any of them are not met with respect to a particular collocated facility, a city can presumably require a discretionary permit for that facility.

Generally speaking, cities may establish standards that will control how many antennas can be collocated on a facility, and to control the specifications for the additions. Sections 65850.6 (b)(1) and (b)(3) allow cities to establish standards for:

- Types of base facilities that are allowed to include collocated facilities
- Height, location, bulk, size of the base facility
- Percentage of a base facility that may be occupied by collocation facilities
- Aesthetic and design requirements for the base facility
- Compliance with zoning designations, the general plan, and any applicable specific plans

Gov Code 65850.6(b)(2) permits a city to establish standards for a proposed collocation facility, including:

- any types of collocation facilities that may be allowed on a base facility
- height, location, bulk, and size of allowed collocation facilities
- aesthetic or design requirements for a collocation facility

In acting on new facilities that will fall within Section 65850.6, cities should consider whether to also address allowable collocations under the new federal law, Section 6409. Also note that facilities that were not permitted for collocation under 65850.6 will still have the ability to pursue collocations under Section 6409.

Section 65850.6(f) prohibits cities from taking into account RF emissions in evaluating proposed wireless telecommunications facilities, except to the extent authorized by federal law. In essence, cities can require only that facilities meet FCC standards for emissions. As discussed earlier, Section 332(c)(7) already preempts cities from regulating the location, construction, or operation of wireless telecommunications facilities on similar grounds.

Gov. Code § 65964

The other provision of SB 1627 is Gov. Code § 65964 which prohibits three types of conditions from being imposed on wireless telecommunications facilities. Cities may not:

- Require an escrow deposit for removal of a facility or any of its components. Cities can still require that a bond be posted to cover the cost of removal, but must "take into consideration" the project applicant's estimate of removal costs.
- Limit the duration of any permit for a facility to less than 10 years, unless there are "public safety reasons" or "land use reasons." Cities are still permitted to require a site to be built and operational within a certain amount of time.
- Require all facilities to be located on sites owned by particular parties.

C. Permit Streamlining Act (Gov. Code § 65920 et seq.)

The PSA establishes a number of different time frames for approval of "projects" that can apply to wireless facilities applications, and should be reviewed carefully. For example, recently a cell tower company's CUP was granted by a court, on a motion for summary judgment, on the grounds that the city had failed to approve or disapprove the project within 60 days from the determination by the lead agency that the project was exempt from CEQA and that failure to act "shall be deemed approval of the permit application for the development project."[52] The city did not dispute the allegation that it had not granted or denied the CUP within 60 days after the project was found to be exempt under CEQA. The case does not discuss who the lead agency was but it seems likely that the city was the lead agency and determined the project was exempt. Even though the parties mutually agreed to extend the time to approve or deny the application, the court nonetheless rejected the city's claim that the tower company was estopped from asserting its PSA claim because the parties' agreement specified a deadline date beyond the 90-day extension period permitted by the PSA.[53] As with any land use application, cities should determine whether the PSA applies and, if it does, take care to bring the application to hearing within the applicable timelines.

As discussed earlier, the FCC's "shot clock" rules also apply independent of the PSA requirements, and should be separately tracked.

IV. Developments to Watch

A. Industry Expands Deployments of Distributed Antenna System (DAS)

A DAS is a hybrid collection of smaller wireless antennas or "nodes" often linked together by wireline facilities that carry traffic from the nodes/antenna sites to the wireless provider's backhaul network. Originally, DAS deployments were designed and developed for indoor use to improve coverage in public spaces such as sports facilities, shopping malls, and convention centers. For several years now these DAS facilities are increasingly being deployed in public rights-of-way both by traditional wireless carriers and by companies specializing in this niche type of service. The latter typically obtain a Certificate of Convenience and Necessity (CPCN) from the CPUC to act as a "carrier's carrier." Outdoor DAS deployments are used to increase the capacity of the networks, particularly to meet the growing demand for data transmission with the growth in popularity of smartphones.

DAS deployments raise a number of complex legal issues because they do not fit squarely into one or other of the traditional categories of "wireless" and "wireline" facilities, and existing codes and regulations may not adequately contemplate or address these types of deployments. For example, if a DAS provider is proposing to install facilities in the hopes of becoming a carrier's carrier to multiple existing wireless providers, how should the gap issue be addressed? This area of law is currently very contentious and there are numerous federal and state law cases pending on placement issues within the public rights of way.

DAS providers try to exploit what they view as inconsistencies or gaps in the regulatory framework. Some of the arguments DAS providers make include:

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[52] *In re Cell Tower Litigation*, Case No. 07cv399, 2011 U.S. Dist. LEXIS 96599, *28 (Aug. 26, 2011).
[53] Gov. Code § 65950 (b).

- That local zoning rights preserved by Section 332(c)(7) are only applicable to wireless providers – and do not apply to DAS facilities providers. Most localities reject this claim because Section 332(c)(7) applies to "personal wireless service facilities."
- That DAS providers have the same right as wireline providers to place facilities in right of way and hence localities cannot regulate antennae any more than they can regulate placement of poles. The Ninth Circuit has concluded consideration of aesthetics – often a key concern in wireless siting – is consistent with state telephone franchise.[54] Lower court decisions recognize a city's right to regulate the placement of a DAS system in the city's rights-of-way and to deny access on aesthetic grounds, provided that, the provider is not effectively prohibited from providing wireless service.[55] Further, cities often have undergrounding districts and undergrounding requirements applicable to telephone companies that would prohibit poles and overhead facilities. DAS providers argue that they are exempt from undergrounding rules because wireless facilities cannot be placed underground.
- That zoning codes do not apply at all to the rights-of-way, and even if they do, discretionary processes do not apply given Section 7901. In fact, some localities apply zoning codes, and others apply right of way ordinances to regulate placement of wireless facilities within the rights of way. And others apply both. It is important to revisit existing codes to ensure that they properly address placement of shorter antennas in rights-of-way.
- That access to the right-of-way includes the right to install their facilities on city property (street lights, poles, etc) in the rights-of-way.
- That, because they are entitled under Sections 7901 and 7901.1 to place facilities in the rights-of-way, DAS providers cannot be required to consider alternatives outside the public right of way, something that would be acceptable under Section 332(c)(7)).[56]

In describing these arguments, we do not mean to suggest that the DAS providers will prevail on all of them, or even that all DAS facilities may be placed in the rights of way under the authority of Section 7901. However, it is important for counsel for local government to understand the complexity of the arguments being made.

B. FCC Launches Inquiry into Right of Way Management and Wireless Siting Policies and Practices

In 2011, as part of its implementation of its National Broadband Plan, the FCC launched a wide-ranging Notice of Inquiry proceeding targeting the right of way and wireless siting authority of local governments under the perceived notion that local governments were hindering

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[54] *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716, 722-723 (9th Cir. 2009).

[55] *Newpath Networks v. City of Irvine*, SACV 06-550-JVS (Dec. 23, 2009); *NextG Networks v. City of Newport Beach*, SACV 10-1286 DOC (Feb. 18, 2011).

[56] See *Ibid.* at FN 11 and 12.

broadband deployment.[57]

DAS and cellular providers responded in force, and asked the FCC to extend significant benefits to their industry, including:

- New shot clocks
- Limits on review of collocation applications
- Limits on right to restrict DAS
- Requiring localities to provide same access to rights of way for DAS and wireline
- Adopting new interpretations of Sections 332 and 253 to limit local authority
- Limit fees that can be charged for use of government property to which cellular providers may wish to attach (light poles, water towers, etc.)

Local governments and national associations participated with significant and thoughtful responses. For now, the FCC has opted for convening "workshops" such as the one it held on DAS and Small Cell Sites in February 2012. But the threat remains that the FCC will take action in the docket, and localities need to remain vigilant and active in this proceeding.

C. CPUC Asserts Broad CEQA Authority over Certain Telecommunications Projects

In December 2010, the CPUC issued GO 170, an order focused on the CPUC's CEQA review responsibilities concerning telecommunications projects.[58] GO 170 was very troubling to local authorities as, among other things, the CPUC took the view that for telephone and telegraph corporations, as defined in Pub. Util. Code §§ 234 and 236 (essentially companies with CPCNs), it was "the only agency that can issue discretionary permits for telecommunications projects,"[59] relegating local agencies to the issuance of ministerial permits. GO 170 also established broad categories of exemptions, and a confusing exemption process.

A year later, in response to petitions for rehearing by the California League of Cities and others, the CPUC agreed to vacate GO 170 and resume the rulemaking.[60] In its Order, however, the CPUC maintained that its authority over public utilities permits it to preempt local jurisdictions on telecommunication facilities siting.[61] However, the CPUC recognized that "the

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[57] *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59 (Apr. 7, 2011).

[58] Final Decision Adopting General Order Specifying Review Procedures Pursuant to California Environmental Quality Act, Rulemaking 06-10-006, Decision 10-12-56 (issued December 23, 2010).

[59] *Id.* at 30.

[60] Order Granting Rehearing of Decision 10-12-56 (issued December 19, 2011).

[61] *Id.* at 8-10 (citing caselaw establishing that the CPUC has paramount authority where it exercises its authority in a lawful order concerning a matter of statewide concern).

policy reasons leading us to preempt local discretionary review of telecommunications may be reconsidered[.]" [62]

In March 2012, the rulemaking was reassigned from Administrative Law Judge (ALJ) Maribeth A. Bushey to ALJ Kelly A. Hymes. Cities should be prepared to participate in this proceeding to protect local interests.

[62] *Id.* at 10.

March 27, 2012

PENDING ACTIONS

NewPath Networks, LLC, v. The City of Davis, USDC, Eastern District Case No. 2:10-cv-00236-GEB-KJM

NewPath Networks, LLC ("NewPath") submitted an application in 2009 to construct a DAS facility in the City of Davis. Staff issued NewPath 37 encroachment and related building permits to construct its DAS facility. On December 5, 2009, the City Manager rescinded all 37 permits on the grounds that (1) NewPath did not comply with the City's Wireless Telecommunication Facilities Ordinance, DMC, Article 40.29 ("Wireless Ordinance"); (2) the permits for ground based fiber and conduit relied on the location of wireless facilities that had not been approved and may not have met location requirements for wireless facilities in the City's ordinances; (3) other permits relied on access to public property that is not within public rights of way with permitted access; and (4) certain of the proposed poles and other above-ground facilities are proposed for locations that do not permit above ground facilities.

NewPath subsequently filed suit against the City on January 28, 2010 in the United States District Court, Eastern District of California (Case No. 2:10-cv-00236-GEB-DAD) and sought a preliminary injunction allowing it to proceed with its DAS project. The Court denied NewPath's motion on or about March 19, 2010.

The City of Davis v. NewPath Networks, LLC, CPUC Case No. 10-03-011

The City of Davis filed a complaint against NewPath Networks, LLC (since acquired by Crown Castle) with the California Public Utility Commisison on March 23, 2010 (CPUC Case No. 10-03-011), alleging violations of CEQA and violations of NewPath's November 2009 Notice to Proceed ("NTP") issued by the CPUC.

The parties agreed to stay NewPath's federal court case and the City's CPUC case to allow NewPath/Crown Castle to file a new application for a revised DAS project that would go through a conditional use permit process, including consideration by the Planning Commission and the City Council. The Planning Commission held three hearings over several months to consider NewPath/Crown Castle's CUP application and subsequently recommended denial of the Project. NewPath/Crown Castle appealed and the application is now before the City Council. The City Council held an initial public hearing on the application on March 20, 2012 and a further hearing is scheduled for April 3, 2012.

NextG Networks of California, Inc. v. City of Newport Beach, Central District of California, Case No. SACV10-01286 DOC (JCx)

- In August 2009, NextG submitted seven permit applications to the city for the installation of telecommunications facilities at seven sites within the city, all on or near Pacific Coast Highway. In response to the Public Notices, the City received numerous letters and emails from residents opposing NextG's permit applications. The city council denied the five applications to install new poles on Pacific Coast Highway and approved, with

conditions, the two applications to install equipment on existing Southern California Edison poles on Marcus Avenue and Santa Ana Avenue.

- NextG filed an action in federal court under the TCA alleging the city's denial was not supported by substantial evidence. BB&K represented the City of Newport and the trial court found in **favor of the city**, rejecting NextG's challenge.

    - The trial court found substantial evidence based upon the fact that NextG was proposing installation of new monopoles in the PROW along the scenic Pacific Highway. The proposed new monopoles directly conflicted with the city's municipal code, which prohibits installation of new above-ground facilities in the PROW where facilities are undergrounded. The trial court also concluded the city had substantial evidence to deny the permits based on aesthetics and detriment to nearby residents, property owners, and businesses. The evidence in the record supporting the negative aesthetic findings included photo simulations of the new monopoles, along with numerous communications from residents opposing the new monopoles on aesthetic grounds.

- **CURRENT STATUS:** NextG appealed to the Ninth Circuit where the action is still pending. However, briefing has been stayed while NextG applies for permits at alternative locations within the city. If those locations are approved, then the appeal will be dismissed.

NewPath Networks, LLC v. City of Irvine, Case No. SAC 06-0550-JVS, Central District of California (filed June 12, 2008)

- NewPath filed an application for a DAS network consisting of 23 wireless telecommunication facilities in the Turtle Rock neighborhood in Irvine that would accommodate three carriers. The City denied the entire application.

- **CURRENT STATUS:** The case was set for trial in September 2010, but the district court issued an order remanding the case to the City and called for NewPath to file a supplement to its 2009 CUP permit application. The action is stayed pending further proceedings before the City, though the court has granted an extension for NewPath to file its supplemental application to March 28, 2012 with a further status report due May 22, 2012.

NextG Networks of California, Inc. v. City of Huntington Beach, Orange County Superior Court, Case No. 30-2009-00119646-CU-OR-CJC & Fourth District Court of Appeal, Division 3 Case No.

- NextG applied for permits to install a DAS system within the City of Huntington Beach consisting of 15 nodes, as well as aerial underground fiber cable, and approximately

8,696 feet of underground fiber cable. A portion of the project was completed, including installation of 8 nodes. The remaining seven nodes include three new poles. The city filed an action in the CPUC asserting violations of CEQA. NextG also filed a lawsuit against the city in the state court asserting the city's undergrounding requirements and permit process violated NextG's right to access the PROW under PUC §§ 7901 and 7901.1.

- **CPUC Action** (*See Application of NextG Networks of California,Inc. (U6745C) for Authority to Engage in Ground-Disturbing Outside Plant Construction* (CPUC D. 11-01-027 and D. 10-10-007)) – The CPUC prepared a negative declaration for NextG's project. NextG also challenged NextG's right to access the PROW under PUC §§ 7901 and 7901.1, asserting that NextG, which like NewPath builds facilities for wireless providers but does not directly provide wireless services, was not a "telephone corporation" and that its facilities were not "telephone lines" under PUC § 7901.
    - The CPUC disagreed and concluded that NextG is a "telephone corporation" permitted to use the PROW pursuant to PUC § 7901 and that the CPUC granted NextG a CPCN as a telephone corporation.
    - The CPUC further concluded that PUC § 7901 applies to wireless carriers, as well as wireline carriers, because the definition of a "telephone line" is broad enough to reach wireless equipment.
    - According the CPUC, the applicability of PUC § 7901 is a determination that lies exclusively with the CPUC in its regulation of telephone corporations (*i.e.*, the CPUC asserts it has exclusive jurisdiction to decide applicability of PUC § 7901).
    - The validity of the CPUC's decision is now pending before the Fourth District Court of Appeal, Division 3 (Court of Appeal Case No. G044796).
- **State Court Action –** NextG challenged the city's application of its undergrounding and permitting requirements to NextG under PUC §§ 7901 and 7901.1. The city likewise challenged NextG's authority to access the city's PROW under PUC § 7901.
    - In February 2011, the trial court agreed with the CPUC's ruling that NextG was a "telephone corporation" and that its wireless facilities were "telephone lines" pursuant to PUC § 7901.
    - The Court of Appeal stayed the trial court action pending resolution of its review of the CPUC's decision in Case No. G044796 (*see* Court of Appeal Case No. G045030). A status conference is currently set in the trial court for April 13, 2012.

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