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Wireless in the Right of Way: All things Permitting and Leveraging your Assets

Bennett Givens and Brittany Weidner

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Best Best & Krieger serves as a trusted partner and strategist to public and private sector clients across the nation. With offices spanning from coast to coast, the firm's attorneys provide innovative legal solutions and cost-effective representation, working to protect and advance clients' interests at every turn. BB&K is recognized for decades of groundbreaking successes, loyal service, and a culture of inclusion and respect.

Presenters



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Agenda



1. Latest Wireless Installation Trends
2. Utilities' Right to Use ROW
3. Federal and California Laws, Regulations, and FCC Orders
4. Permit Applications, Shot Clocks, and Administrative Appeals
5. Pole Attachments
6. New Updates

Latest Wireless Installation Trends

Wireless Industry Players



Carriers

- Offer services directly to end users
- Own and operate network equipment
- AT&T, T-Mobile, Verizon, Dish Wireless, etc.

Infrastructure Providers

- Offer services to carriers
- Own and operate support structures (REITs)
- American Tower, Crown Castle, SBA, ExteNet, etc.

Backhaul Providers

- Own and operate wireless / wireline data transport networks
- Cable cos., Crown Castle, ExteNet, ISPs

Types of Facilities



Macro Cell Sites

- A high-power antenna in a mobile network that serves a large area from a single site.
- Often placed on monopoles, guyed or lattice towers, or some rooftops which may be owned by one entity and shared by many service providers.

Small Cells

- A low-powered antenna that serves a small area (10m to 1 or 2km), which may be interconnected to other facilities by fiber or wireless backhaul.
- Typically placed on low structures (~35ft.); not shared with others.
- “Small” refers coverage area, not necessarily equipment size.
- Multiple synonyms (e.g. picocells, femtocells, microcells, etc.)

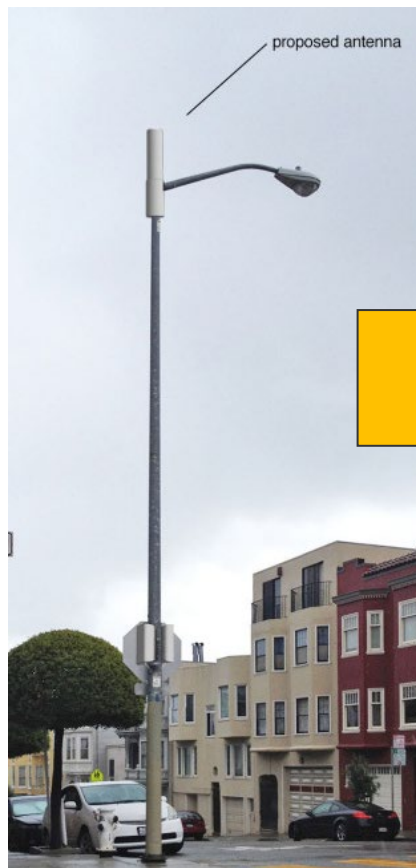
Types of Facilities



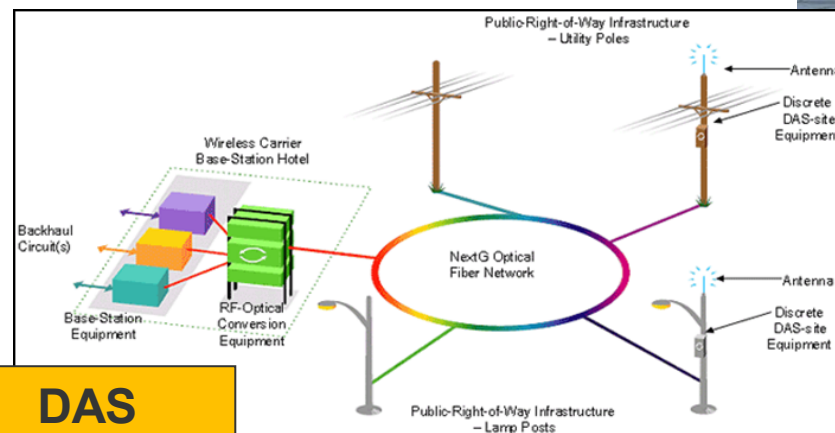
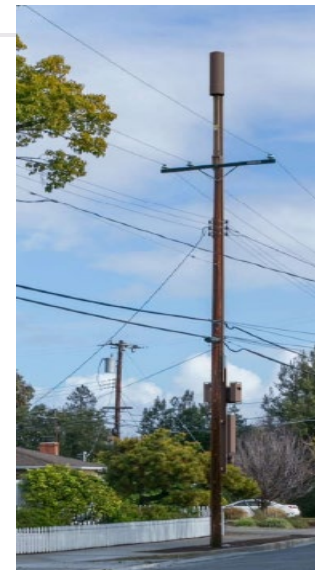
Distributed Antenna Systems (DAS)

- A network of spatially separated antennas (nodes) connected to a common source (a hub) via a transport medium (often fiber optics) that provide wireless service within a specific geographic area.
- May be outdoor (“oDAS”) or indoor (“iDAS”).
- DAS systems can be owned by one entity and shared by a two or three providers.
- Similar to small cells, antennas do not need to be as high as traditional macrocells.

Types of Facilities



Small Cells



DAS

Figure 2: Distributed Antenna System



Macro Cell Site

UTILITIES' RIGHTS TO USE THE ROW

How do utilities get into the ROW?

Communications Utilities' Right to Use the ROW

Jurisdictional Framework

Key Federal Actors

- **Congress:** Enacted Communications Act of 1934, Pole Attachment Act of 1973, Telecommunications Act of 1996, Spectrum Act (2012) and several other statutes
- **Federal Communications Commission:** Regulates interstate and international communications through orders, regulations and decisions

Key State Actors

- **Legislature:** Has enacted state franchises for telephone and cable, several other statutes specifically related to wireless
- **California Public Utilities Commission:** Has legislative and judicial powers
 - “Regulates services and utilities, protects consumers, safeguards the environment, and assures Californians’ access to safe and reliable utility infrastructure and services.”
 - “Also includes hundreds of individuals who inspect track, municipal rail systems, electric and communications wire and poles, and gas pipelines.”
 - CPUC mainly responsible for rules on safety of infrastructure.

Role of CA local governments

- Local governments mainly regulate certain safety aspects of placement and aesthetics (within limits).
- Decisions must comply with limits in state and federal law.

Communications Utilities' Right to Use the ROW

Wireless and Wireline Facilities

Wireline and Wireless Authority



- Cal. Pub. Util. Code Section 7901
 - Grants state franchise to telephone companies to use public rights-of-way, subject to limitations (may not “incommode the public use”).
 - Telephone companies can use public rights-of-way without payment of compensation to local governments who own or control the ROW, per this state statutory franchise
 - Applies to wireless companies and facilities
 - However, this does not grant use of City owned or controlled property *within* public rights-of-way (more on that later)

Incommoding the Public Use



- *T-Mobile West LLC et al. v. City and County of San Francisco et al.*, 6 Cal. 5th 1107 (2019).
 - Existing 9th Circuit legal authority established that local review authority under PUC 7901 included aesthetic regulations *Sprint PCS Assets v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716
- Cal. Supreme Court upheld local regulation of aesthetics under PUC 7901
- Confirms definition of “Incommode the public use” 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.”

Incommoding the Public Use



- *Pacific Bell Telephone Co. vs. City of Livermore*, Court of Appeal, 1st District, Division 3, (filed Dec. 28, 2017)(unpublished, 2017 WL 8232408)
 - Court recognized City authority to regulate aesthetics under PUC 7901.
 - However, it directed issuance of permit for additional above-ground line on utility pole, finding
 - the street was already “cluttered” with other utility and telecommunications facilities and
 - the denial decision lacked substantial evidence to support conclusion that the overlashed line would incommode the public’s use.

Communications Utilities' Right to Use the ROW

Cable and Video Providers

Cable and Video Providers



- DIVCA (Pub. Util. Code 5800 et seq)
 - Historically, cable franchising was local government decision in California, subject to some federal limitations such as a cap on franchise fees (charge for use or ROW) at 5% of gross revenues.
 - Between 2005 and 2015, over 20 states including California enacted laws giving the state franchising authority over cable operators and “video service providers.”
 - DIVCA requires operators to obtain a franchise from the California Public Utilities Commission, as the sole video franchise authority within the state of California and (2) pay a 5% franchise fee to local governments.
 - The statutory DIVCA video franchise lasts for a 10-year term
 - DIVCA permits local governments to require operators to provide public, educational, and governmental (PEG) cable access channels, and to impose via ordinance a fee for the cost of those channels in the amount of 1% (or up to 3% in certain circumstances)
 - No CPCN required to build facilities

CPUC & CPCNs



- Certificate of Public Convenience and Necessity (CPCN) for telephone corporations that provide full facilities-based/limited-facilities based and/or resold competitive local exchange services, interexchange services, and/or fixed interconnected VoIP services.
 - PUC § 1001 (a). A railroad corporation whose railroad is operated primarily by electricity, street railroad corporation, gas corporation, electrical corporation, telegraph corporation, telephone corporation, water corporation, or sewer system corporation shall not begin the construction of a street railroad, of a line, plant, or system, or of any extension thereof, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require its construction.
- PUC § 1013 Registration for telephone corporations that provide non-facilities based and/or resold competitive local exchange services, interexchange services, and/or fixed interconnected VoIP services
- Wireless ID Registration (D.94-10-031) for wireless service providers

Federal and California Laws, Regulations, and FCC Orders

National Policy On Wireless



- **National deployment policy** – no local decision or regulation can prohibit or have the effect of prohibiting the provision of personal wireless service
- **National RF emissions guidelines** – FCC sets the RF emissions safety standards; local jurisdictions cannot regulate placement based on RF emissions except to ensure applicant has shown it will comply with FCC guidelines
- **Timely action required** – deadlines for action on applications (known as “shot clocks”) between 60 and 150 days and remedies for failure to timely act on applications
- **Written Denials** – must be in writing and based on substantial evidence in the record
- **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 (EFRs) must be approved and there is a deemed granted remedy for failing to timely act

The Federal Legal Framework

Telecommunications Act (1996) - 47 U.S.C. § 332(c)(7)

- Applies to all applications for “personal wireless services facilities”
- Preempts local/state regulations that prohibit or have effect of prohibiting ability of any entity to provide personal wireless services
- Generally preserves local authority to control placement of person wireless facilities, subject to substantive and procedural limits

Telecommunications Act - 47 U.S.C. § 253

- Preempts local/state regulations that prohibit or have effect of prohibiting ability of any entity to provide telecom services
- Nondiscriminatory RoW management and compensation protected

Middle Class Tax Relief Act (2012) - 47 U.S.C. § 1455(a) & 2014 EFR Implementation Order

- Applies to all “wireless” applications (broader)
- Requires approval of certain collocations/modifications to existing sites (“eligible facilities requests”)
- *2014 Order* set the basic EFR rules, including 60-day shot clock and deemed approved remedy

FCC Regulations

- Orders, declaratory rulings and regulations interpret federal statutes
- Carry the force of law

RF Emissions – FCC Authority



- “No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.” 47 USC §332(c)(7)(B)(iv).
- FCC directed by Congress to “prescribe and make effective rules regarding the environmental effects of radio frequency emissions”

RF Emissions and Perceived Negative Health Impacts



- Direct or indirect concerns over the perceived health effects of RF emissions may not serve as substantial evidence to support the denial of an application, where an applicant has demonstrated compliance with the FCC's standards for RF emissions.
 - See, e.g. *AT&T Wireless Services of California LLC v. City of Carlsbad*, 308 F. Supp. 2d 1148 (S.D. Cal. 2003) (“The TCA prohibits local government from basing their decision to deny a permit to construct a wireless site upon evidence which finds its support in fear over the health effects of RF emissions. H.R. Conference Report No. 104-458, 201 (1996).”)
- Claims that a proposed wireless facility will result in diminished property values that are rooted in a concern about the perceived effects of RF emissions cannot constitute substantial evidence supporting a denial of a wireless facility application.
 - *California RSA No. 4 v. Madera County*, 332 F.Supp.2d 1291, 1309 (E.D. Cal. 2003); *AT&T Wireless Services of California LLC v. City of Carlsbad*, 308 F.Supp.2d 1148, 1161(S.D. Cal. 2003)

RF Emissions and ADA/FHA



ADA and FHA Claims –Hypersensitivity to RF emissions does not require accommodation under the Americans with Disabilities Act.

Wolf v. City of Millbrae, 2021 WL 3727072 (N.D. Cal)

- Plaintiff claimed that RF emissions from a cell tower above his housing complex caused him to suffer from "electromagnetic hypersensitivity" (EHS), and requested that City order accommodations be made under the ADA and FHA by either turning the tower off or requiring the company to relocate the tower site
- Court held that Plaintiff's claims against the City for violation of the ADA and FHA were unreasonable because his requests would require the City to violate § 332(c)(7)(B)(iv).
 - Court found that "it would be improper under the ADA to subject a defendant to the threat of litigation for the purpose of accommodating a plaintiff under the ADA."
 - Court applied the same reasoning for Plaintiff's FHA claim—"granting Plaintiff's accommodation request would require the City to regulate RF emissions in violation of the TCA and its implementing regulations. This accommodation would require the City to face liability for violating federal law and is thus not reasonable."

No Unreasonable Discrimination Among Providers of Functionally Equivalent Services



- Discrimination based on “traditional bases of zoning regulation” such as “preserving the character of the neighborhood and avoiding aesthetic blight” are reasonable
- Courts have looked at whether the facilities in question are “similarly situated in terms of their ‘structure, placement, or cumulative impact’.”

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

Expedited Appeals for Final Action



- Action on Application must be “final” under Section 332 before applicant may commence action in a court of competent jurisdiction.
- “Final action” triggering appeal rights under Sec. 332 requires completion of all administrative appeals
 - See, e.g., *New Cingular Wireless PCS, LLC v. Cnty. of Marin California*, No. 20-CV-07915-SI, 2021 WL 662171, at *4 (N.D. Cal. Feb. 19, 2021) (citing First and Seventh Circuit tests for “final action”)
- Shot clocks for reasonable time to act run until final action

Recent FCC Orders



- **2018 – Moratoria Order:** Banned express and *de facto* moratoria on processing telecommunications facilities applications
- **2018 – Small Cell Order:** Adopted new limitations on local authority over “small wireless facilities”
- **2019 – In-Kind Order:** Interpreted scope of cable franchise authority to include wireless devices
- **2020 – EFR Clarifications Order:** FCC adopted “clarifications” to Section 6409 rules.
- **2020 – EFR Expansions Order:** A site expansion up to 30 feet in any direction does not constitute a substantial change

2018 Moratoria Order



- *De jure* moratoria and *de facto* moratoria on wireless and wireline deployment generally “prohibit or effectively prohibit” provision of telecom services in violation of federal law, and are not saved from preemption as a form of rights-of-way management
- *De facto* moratoria are “...state or local actions that are not express moratoria, but that effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium.” (§139)
- *Example*: street cut moratoria that don’t allow alternative means of deployment such as aerial lines
- Went into effect immediately

In the Matter of Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment, FCC 18-111, Third Report and Order and Declaratory Ruling, WT Docket No. 17-79

2018 Small Cell Order



- Establishes special rules for small wireless facilities (SWFs)
 - Defines “small wireless facility” (SWF)
 - Redefines “effective prohibition” (materially inhibit)
 - Sets new 60-day and 90-day shot clocks for action
 - Limits fees and rents that can be charged for use of public right-of-way and municipal infrastructure for placement of small cells to reasonable, cost-based fees, and creates “safe harbors” (\$500, \$1000, and \$270)
 - Adopts new standards for limiting aesthetic regulations
 - Also holds:
 - All permits/authorizations subject to FCC shot clocks
 - Collocation does not require existing wireless facilities, only an existing structure
- Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79*
- *City of Portland v. FCC*, 969 F.3d 1020 (9th Cir. 2020)
 - Partially upheld *2018 Small Cell Order*

What are “Small Cells”?

- Facilities that are:
 - Mounted on structures 50 feet in height or less; or
 - Mounted on structures no more than 10% taller than adjacent structures; or
 - Do not extend existing structures to a height of more than 50 feet or by more than 10%, whichever is greater
- Accessory equipment no more than 28 cubic feet
- Antennas no more than 3 cubic feet
- Typically smaller facilities serving smaller coverage area than macro sites
- Small cell facilities are the next step in wireless technology deployments
- Distributed Antenna System or DAS is a type of small cell network
- Common location for deployment is in public right-of-way

Small Cells in the ROW



FCC on Small Cell Aesthetics



- Aesthetic requirements (including undergrounding) not preempted if:
 - reasonable,
 - ~~no more burdensome than those applied to other types of infrastructure deployments~~, and
 - ~~objective~~ and published in advance.
- “...aesthetic requirements that are reasonable in that they are technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments are also permissible.” (Para. 84-89.)
- Small Cell Order partially upheld by *City of Portland v. FCC and USA*, 969 F.3d 1020 (9th Cir. 2020)
 - Vacated the above noted requirements in the *2018 Small Cell Order*.

Eligible Facilities Requests

47 U.S.C. 1455(a) (Sec. 6409)



- Any request for modification of an existing wireless facility that does not substantially change the physical dimensions of the eligible support structure involves—
 - (A) collocation of new transmission equipment;
 - (B) removal of transmission equipment; or
 - (C) replacement of transmission equipment.
- State or local jurisdiction **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.

2020 EFR Clarification Order



- Declaratory ruling “clarifies” rules
 - Reduces protections for existing concealment of “non-stealth” facilities
 - Limits enforcement of aesthetic conditions
 - Height increases for towers outside of the public rights of way
 - Cap of four equipment cabinets applies to each EFR individually, no cumulative impact
 - Easier trigger to 60-day shot clock
 - Reduces requirement for environmental review process in certain cases involving historical properties/structures

Implementation of State and Local Governments’ Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012, 35 FCC Rcd. 5977 (2020)

- Recent Decision in Ninth Circuit (*League of Cal. Cities, et al. v. FCC*, No. 20-71765 (9th Cir.))

9th Circuit Appeal of 2020 EFR Clarification Order



- Petitioners challenged FCC’s 2020 EFR Clarification Order (*League of California Cities v. FCC*, No. 20-71765 (9th Cir. Sept. 13, 2024))
 - Invalidated FCC’s attempt to make conceal mean only “disguise” to the exclusion of “hide”
 - Narrowed FCC ruling re. limit on new equipment cabinets by construing it to mean there is a cumulative limit on the number of cabinets
 - Upheld FCC’s decision that the 6409 shot clock begins when an applicant both (1) takes the first procedural step the local jurisdiction requires, and (2) submits written documentation showing that a proposed modification is an EFR —noting that a locality that wants its own form to be first procedural step can adopt such a requirement
 - Upheld FCC’s interpretation of the height limitation as long as the change does not (1) increase the height of the tower by more than 10%, or (2) place another antenna array more than 20 ft above nearest existing antenna, whichever is greater
 - Upheld the FCC’s express evidence rule concluding that the ruling is not retroactive

2020 EFR Expansion Order



- **New Rule**: any excavation or deployment within 30 feet or less of existing site = not a substantial change
- Applies only to towers outside the ROW

Implementation of State & Loc. Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012, 35 FCC Rcd. 13188 (2020)

Substantial Changes –Thresholds



Criteria	Towers Outside of RoW	Other Support Structures & ROW
Height	20 feet or ten percent	10 feet or 10 percent
Width	20 feet or tower width	6 feet
Equipment Cabinets	4 maximum per application	None if no ground cabinets; otherwise same, plus volumetric limits
Excavation	within 30 feet of the existing site*[new]	Not outside the current site and further restricted to proximity to other ground equipment
Concealment	cannot “defeat” the concealment elements	
Compliance with Prior Permit Conditions	changes must comply with all prior conditions except where only non-compliance meets FCC thresholds on height, width, cabinets or excavation	

Substantial Changes

Other Important Notes



- **Except for Concealment Elements, Rules May Effectively Preempt**
 - Local zone height limits
 - Restrictions on legal non-conforming uses that make all alterations to those facilities subject to local discretion
- **EFR Height Increases Are Cumulative - Height Limits Apply From Size of Facility As Initially Approved, Or As Increased Prior to February 22, 2012**
 - No cumulative limit on other criteria
- **General Health and Safety Laws Not Preempted**
 - Examples: building codes, fire codes, air quality regulations, public safety regulations

EFR Processing Pitfalls



- Don't fall in trap of applicants asking if application qualifies as an EFR **BEFORE** complete application submittal
2014 Order is clear: Applicant requests, you decide.
 - Be wary of questions like, can I apply for EFR based on this scope of work?
 - Be clear that the applicant has not yet applied
 - Proper evaluation requires an examination of all of the factors in 47 C.F.R. § 1.6100(b)(7)
- Know what's required of a complete application vs. what can be examined later in a different permit application.
Be wary of:
 - Applicant claiming its lease granting an easement for access and utilities to place fiber within existing conduit satisfies EFR requirements
 - Plans that don't show any utilities
 - These approaches mischaracterize EFR requirements and do not allow proper evaluation
 - To qualify as EFR, applicant must show there is no excavation or deployment outside the existing site/easements

EFRs Processing Pitfalls cont'd



- Denials – “[I]f the reviewing State or municipality finds that Section 6409(a) does not apply (because, for example, it proposes a substantial change), we provide that the presumptively reasonable timeframe under Section 332(c)(7) will start to run from the issuance of the State's or municipality's decision that Section 6409(a) does not apply.” *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd. 12865, 12958 ¶ 220 (2014).
- If application does not qualify as an EFR:
 - *Make sure the denial is in writing, based on substantial evidence* (non-EFR case: *Cellco P'ship d/b/a Verizon Wireless v. City of Milwaukee*, No. 23-CV-1581-BHL, 2024 WL 329001 (E.D. Wis. Jan. 29, 2024) (“The City did not give Verizon even a basic explanation for the denials that was tied to anything in the record. This failure makes any judicial review (beyond mere “rubber-stamp” review) virtually impossible.”))
 - *Note any appeal rights*
 - *Identify the new applicable FCC shot clock*
 - *Include an NOI for any missing items in the “new” application to stop the clock*

Permit Applications, Shot Clocks, and Administrative Appeals

FCC Shot Clocks on Local Action

Summary of FCC Shot Clocks



FCC Category		Applicable Shot Clock
<u>Eligible Facilities Requests (EFR)</u> Must involve modification to existing wireless facility (tower or base station) and meet size and other requirements to qualify as EFR		60 days
<u>Small Cells (Small Wireless Facility (SWF))</u> Must be personal wireless services facility that meets size and other requirements to qualify as SWF.	Placement on existing structure (need not be existing wireless facility)	60 days
	New	90 days
<u>Collocations</u> Must involve placement of personal wireless services facility (that does not qualify as EFR or SWF) on existing structure which need not have wireless facility already on it		90 days
<u>Other</u> Personal wireless services facility that does not fall in any other category		150 days

How to Toll the Shot Clock



- There are only two ways to toll or stop the running of a shot clock:
 - (1) to provide timely notice of incompleteness (NOI);
 - (2) “toll” the shot clock by mutual agreement with the applicant. Tolling agreements may be reached at any time during the process, and should be in writing signed by both parties.

Notice of Incompleteness (NOI) Process



- NOI must be issued w/in first 30 days after application submission to toll shot clock (Special Rule for Small Wireless Facilities – 10 days initial NOI)
- NOIs must be written and specify missing info and code provision, ordinance, application instruction, or other publicly-stated procedure requiring that info
 - For EFRs, local jurisdiction may only request info reasonably related to determining whether the application constitutes an EFR
- Timely issuance of NOI stops shot clock until applicant submits supplemental info, at which point it begins to run again, unless and until the local jurisdiction issues another timely NOI

Notice of Incompleteness Process



- Local jurisdiction has 10 days from receipt of supplemental info to issue another NOI
- Any subsequent NOIs must be based on missing info from first NOI
- Shot clock stops when local jurisdiction timely submits a NOI to applicant and begins again when applicant submits supplemental info
- Cycle can continue until shot clock runs out, at which point local jurisdiction must make a decision or face a “deemed granted” determination
- If local jurisdiction fails to issue an NOI w/in 30 days of application filing (or within 10 days of filing supplemental info), it may still issue an NOI, but shot clock is not tolled during the time it takes the applicant to respond

Federal Deemed Granted Remedies



- **Deemed Granted Permits**

- If 332(c)(7) deadlines missed, local jurisdiction may show that delay was justified (rebuttable presumption)
- Under Section 6409, if deadline passes applicant may notify community that application is “deemed granted”
- What does “Deemed Granted” require?
 - No affirmative action required by local jurisdiction under federal law

- **Judicial Review**

- Deemed grant flips normal process upside down: local jurisdiction must sue applicant to prevent “deemed granted” permit from becoming effective
- FCC suggests review limited to whether facility was eligible facilities request or unsafe

State Deemed Granted Remedies



- Government Code 65964.1
 - California has a “deemed granted” remedy for all non-EFR applications
 - Gov Code 65964.1 first adopted in 2016, and was amended by AB 537 in 2021, to include small cell applications.
 - The only wireless applications *not* subject to a deemed granted remedy under Gov Code 65964.1 are those proposed for placement on fire department facilities.
 - To trigger remedy, Applicant must send notice that an FCC shot clock was missed
 - Local jurisdiction then has 30 days to challenge the notice in court
 - Recent case law suggests no affirmative action needed on behalf of local jurisdiction, i.e. if not challenged, notice itself can act as permit

Relocation

- Wireless, Wireline, and Cable/Video Service providers:
 - CPUC 7901 and 7901.1 – Reasonable ROW control permits local governments to require relocation
 - Right of telephone and telegraph corporation to construct or lay lines in city streets was subject to implied obligation to relocate facilities at corporation's own expense when necessary to make way for proper governmental use of streets, and corporation's action for judgment declaring such right was not objectionable as action to adjudicate title to realty. *Pacific Tel. & Tel. Co. v. City and County of San Francisco* (App. 1 Dist. 1961) 17 Cal.Rptr. 687, 197 Cal.App.2d 133.

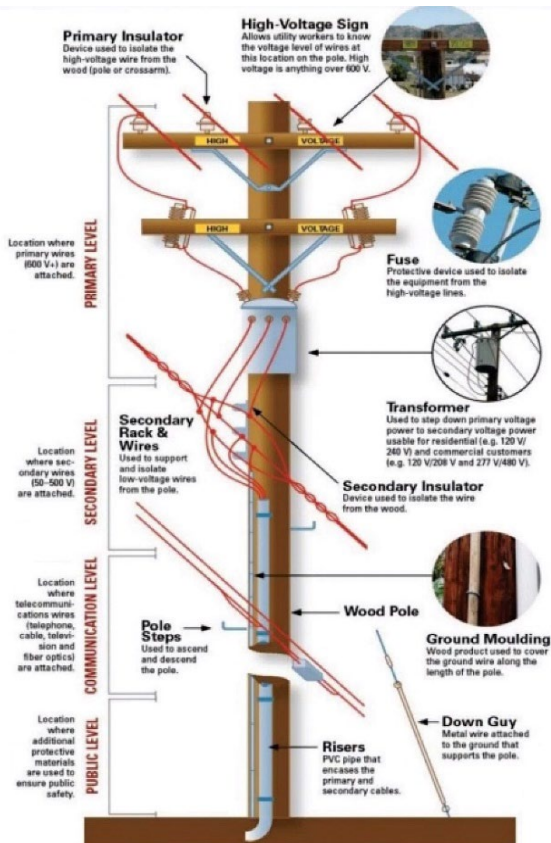
Relocations



- Please be aware of potential disqualification of certain projects from relocation due to funding source and whether or not it is in connection with a private development
- Weighing public/private benefit of particular street project
- *Pacific Tel. & Tel. Co. v. Redevelopment Agency of City of Redlands* (App. 4 Dist. 1977) 142 Cal.Rptr. 584, 75 Cal.App.3d 957.
 - Telephone company required to relocate underground facility and not entitled to compensation—city and redevelopment agency were acting in proprietary capacity
 - Company not denied procedural due process on theory that it was not afforded notice and opportunity to be heard—no taking or damaging of company's property

Pole Attachments

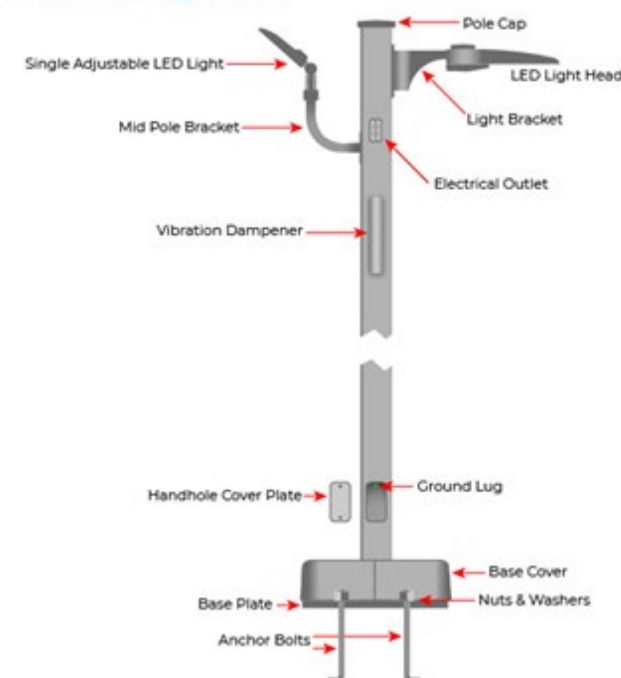
Examples of Pole Attachments



<http://inside.edison.com/q1212>



Typical Parts of a Light Pole



Lightmart.com



Melnorthey.com

Joint Pole Ownership



- Northern California Joint Pole Association (NCJPA) or the Southern California Joint Pole Committee (SCJPC), which track ownership of and activity on jointly owned poles and invoice members for their activities. Many utility poles in California are subject to joint ownership arrangements; for example, the NCJPA has 40 members, and Southern California Edison states that 70% of its poles are jointly owned.



- Pole Owner
 - Investor Owned Utilities
 - Local Publicly Owned Electric Utilities
 - Municipalities
- Pole Type
 - Utility poles
 - Street lights/traffic lights/street signs
- Type of Attachment (communications/non-communications)

Federal and State Authority for Utility Poles



- Federal
 - 47 USC § 224 – federal rules and FCC orders govern attachments by telco, cable, wireless
 - FCC regulates the rates, terms, and conditions for pole attachments when a State does not regulate such matters
 - States can reverse preempt and adopt their own rules by meeting certain requirements
 - Federal law only applies to investor-owned utility poles and conduit (not street light poles), and excludes municipal and cooperatives
- State
 - CPUC exercised right to “reverse preempt” FCC and adopt its own pole attachment rules
 - California also adopted AB 1027 (2011)
 - Requires access and cost-based rates for communications attachments to utility poles (not street lights) of local publicly owned electric utilities
 - Discussed more later

47 U.S.C. § 224



- “The term “utility” means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.”

CPUC Rules: Investor Owned Utility Poles



- Cal. Pub. Util. Code Section 767
- CPUC Order D.98-10-058 provided competitive local exchange carriers and cable television providers with nondiscriminatory access to public utility infrastructure.
- CPUC Order D.16-01-046 provides wireless carriers with nondiscriminatory access.

AB 1027 – Local publicly owned electric



- PUC 9510 et seq dictates access to local publicly owned electric utilities' poles and support structures by cable television corporations, video service providers, and telephone corporations
- Includes timelines for reviewing pole attachment requests and a cost-based formula for establishing pole attachment rates.
- Rates and terms must be adopted through public hearings

FCC Small Cell Order Limits on Fees for Wireless Attachments on Municipal Poles



- FCC reviewed its pole attachment rate formula for investor-owned utilities, small cell legislation in 20 states, and comments in the record to determine “safe harbor” fees that do not violate federal law
 - (a) \$500 for non-recurring fees, including a single up-front application that includes up to five Small Wireless Facilities, with an additional \$100 for each Small Wireless Facility beyond five, or \$1,000 for non-recurring fees for a new pole (i.e., not a collocation) intended to support one or more Small Wireless Facilities;
 - (b) \$270 per Small Wireless Facility per year for all recurring fees, including any possible ROW access fee or fee for attachment to municipally-owned structures in the ROW.”

Authorization to Use Municipally-Owned Poles in the ROW - Master License Agreement



- A master license agreement (MLA) is used when an applicant proposes to install a SWF on municipally-owned poles in the public right-of-way
- An MLA is another authorization to be completed within the shot clock period
- The MLA should contain all necessary terms for the installation of SWFs on municipally-owned poles, including the following topics:
 - Compensation (one-time and recurring fees)
 - Construction (responsibility for make-ready work, maintenance, repairs, and replacements)
 - Indemnification and waiver
 - Performance bond (if required)
 - Insurance (various types and required coverage amounts)
 - Site by site approvals through supplements

Best Practices: MLA



- Develop a template and request carrier feedback on the template prior to receiving applications
- If you choose to use a safe harbor for rent, consider a fallback market rate if the FCC Small Cell Order is overturned
- Be sure to charge for other non-recurring costs (e.g. inspections, make ready)
- Costs escalate – include escalators
- Make all supplements coterminous with MLA

New Updates

Gov. Code Section 65964.3 – Batch Broadband Permit Processing (AB 965)



- Local agencies required to undertake “batch broadband permit processing.”
- Batch broadband permit processing is the simultaneous processing of two or more (and as many as 25 or 50) broadband permit applications for substantially similar broadband project sites under a single permit.
- Broadband projects can encompass wireless facilities, fiber optic connections, and related equipment.
- Sites for broadband projects are deemed "substantially similar" if they have similar equipment and design but differ in location.
- Local agencies can impose "reasonable limits" on the number of broadband project sites in a single permit.
 - Cities with <50,000 population and counties with <150,000 can limit to not less than 25 project sites.
 - Larger cities and counties must set a minimum of 50 project sites
- A broadband project site can only be removed from a permit grouping if agreed upon by the applicant or to expedite approval of similar sites.

Microtrenching SB 378 (2021)



- Cities (including charter cities), counties, special districts and publicly-owned utilities with jurisdiction to approve excavations must allow microtrenching, a new construction technique for the installation of underground fiber.
- Gov. Code 65964.5 defines a “microtrench” as “a narrow open excavation trench that is less than or equal to 4 inches in width and not less than 12 inches in depth and not more than 26 inches in depth and that is created for the purpose of installing a subsurface pipe or conduit.”
- Local agencies may need to adopt or amend existing policies, ordinances, codes or construction rules to allow for microtrenching and to establish permit review and installation inspection fees, including costs to expedite processing and review if the applicant so elects
- A local agency may refuse to allow microtrenching only by making a written finding that microtrenching for a fiber installation would have a specific, adverse impact on the public health or safety.
- Safety standards such as CPUC General Order 128 applicable to underground electrical supply and communication systems and the state DigAlert noticing requirements continue to apply.



Questions?

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