

Cell Tower and Small Cell Law: A Regulatory and Transactional Primer

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AGENDA

- *The “shared jurisdiction” of telecommunications laws.*
- *Brief overview of relevant California state laws*
- *Latest on SB 649*
- *Brief overview of relevant federal laws*
- *Latest FCC developments*



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Basic Regulatory Framework in Communications

Federal

- Wireline telecommunications
 - Interstate and international services
- Wireless services
- Information services
- Broadcasting/cable
- Utility pole attachments (IOUs)

State and/or Local

- Wireline telecommunications
 - Intrastate services
- Wireless siting (land use)
- Cable service
- Franchising use of public rights-of-way
- PROW management
- Pole attachments



STATE REGULATORY OVERVIEW



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State Laws Impacting Local Authority Over Telecommunications and Wireless

- No local franchising authority:
 - PUC 7901 state franchise to telephone companies to use PROW, subject to limitations
 - Includes wireless
- Locals do have siting authority in ROW:
 - shall not “incommode the public use”
 - Discretionary review considering aesthetics ok (*T-Mobile v. San Francisco* – pending Cal. Sup. Ct)
 - PUC 7901.1 - reasonable control as to the time, place, and manner in which roads...are accessed
 - PUC 2902 – regulate use and repair of public streets, location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets



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State Laws Impacting Local Authority Over Telecommunications and Wireless

- Limitations on zoning authority:
 - **SB 1627 (2006)**
 - Gov. Code § 65850.6 intended to allow:
 - Discretionary permit to approve base facilities that may later add collocation facilities.
 - No discretionary review of facilities collocated on base facility.
 - Gov. Code § 65964 prohibits:
 - Escrow deposit for removal of a facility. (bonds ok)
 - Permit of less than 10 years (unless “public safety” or “land use” reasons).
 - Require all facilities to be located on sites owned by particular parties.
 - **AB 57 (2015)**
 - extended “deemed granted” remedy to the 90 and 150 day FCC shot clocks



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Pole Attachments

- 47 USC § 224 – federal rules and FCC orders govern attachments by telco, cable, wireless
 - applies to investor-owned utility poles and conduit (not street lights), and excludes municipal and coops
- CPUC exercised right to “reverse preempt” FCC and adopt its own pole attachment rules
- California 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



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SB 649



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SB 649

2017-2018 Regular Session

- Author, Principal Co-Author, Co-Authors
 - Senator Ben Hueso (40th – Imperial County/part of SD County)
 - Assembly Member Bill Quirk (20th – Alameda County)
 - Senator Bill Dodd (3rd – Contra Costa County)
 - Assembly Member Matt Dababneh (45th – San Fernando Valley)
- Summary
 - Streamlined permitting process for small cell wireless facilities
 - Mandatory access to city/county owned “vertical infrastructure” in ROW and property outside ROW at regulated rates
 - Mid-strand attachments exempt
- Status
 - Approved by Senate, May 31 (32-1-7)
 - Approved by Assembly, Sept. 13 (46-16-17)
 - Concurrence by Senate, Sept. 14 (22-10-8)
 - Governor has until October 15 to decide on veto
 - Need 2/3 majority in both houses to override veto
 - If approved, would take effect January 1, 2018



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SB 649 –small cell inclusions

- “Small cell”
 - WTF using licensed or unlicensed spectrum
 - Equipment Volume limits:
 - Antennas on structure, excluding associated equipment, total no more than **6 cubic feet** in volume, whether single array or separate
 - No individual piece of associated equipment on pole structures can exceed **9 cubic feet**
 - Associated equipment on pole structure does not exceed **21 cubic feet**
 - Cumulative total ground-mounted equipment along with associated equipment on pole structure does not exceed **35 cubic feet**
- Small cell includes “micro wireless facility” no larger than 24 x 15 x 12 inch, with exterior antenna no longer than 11 inches



SB 649 – small cell exclusions

- “Small cell” equipment volume does not include:
 - (I) Electric meters and any required pedestal
 - (II) Concealment elements
 - (III) Any telecommunications demarcation box
 - (IV) Grounding equipment
 - (V) Power transfer switch
 - (VI) Cutoff switch
 - (VII) Vertical cable runs for the connection of power and other services
 - (VIII) Equipment concealed within an existing building or structure
- “Small cell” does not include:
 - Wireline backhaul facilities
 - Coaxial or fiber optic cables that are not immediately adjacent to or directly associated with a particular antenna or collocation
 - Wireless facilities placed in certain historic districts or coastal zones
 - The underlying vertical infrastructure



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SB 649 -Regulatory

- Small cell is permitted use, subject to certain local gov't permitting processes, if it satisfies following requirements:
 - Located in PROW in any zone or
 - Located in any zone that includes a commercial or industrial use
 - Complies w/ all applicable federal, state, and local health and safety regulations, including ADA
 - Not located on fire department facility



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SB 649 -Regulatory

City or county may require small cell approval pursuant to:

- Encroachment permit issued consistent w/ Sections 7901 and 7901.1 of Public Utilities Code for placement in PROW;
- Building permit in connection w/ placement outside PROW;
- Any additional ministerial permits, provided they are issued within timeframes [i.e. shot clocks] required by state and federal law.



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SB 649 -Regulatory

Permits may be subject to the following:

- Same administrative permit requirements as for similar construction projects and applied in a nondiscriminatory manner.
- Submittal showing small cell complies with FCC RF emissions regulations.
- Allowed Conditions:
 - permit may be rescinded if construction is not substantially commenced within one year. Rescinded permits may not be renewed or resubmitted at same location for 6 months (absent a showing of good cause).
 - small cells no longer used to provide service to be removed at no cost to locality
 - compliance with building codes, including building code structural requirements.
 - applicant pays all electricity costs associated with small cell.
 - compliance with feasible design and collocation standards for small cells *outside* public right-of-way
 - Indemnification of locality against claims brought by third parties associated with the installation of a small cell



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SB 649 - Regulatory

- Prohibits permits from being subject to:
 - Requirements to provide additional services, including in-kind contributions from applicant (e.g., reserving fiber, conduit or pole space)
 - Submission of additional information other than that required of similar construction projects (except as otherwise provided in SB 649)
 - Limitations on routine maintenance or replacement of small cells that are substantially similar, same size, or smaller
- No permitting requirements or fees on the installation, placement, maintenance, or replacement of micro wireless facilities attached to cables strung between utility poles in compliance with state safety codes



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SB 649 – Other

- *DIVCA Franchise Holders*: with a few exceptions, (i) Cannot be required to obtain any additional authorization or permit to provide communications services; (ii) Cannot be required to pay any tax, fee, assessment or other charge not authorized by DIVCA
- *Reporting Requirement*: by July 1, 2019, and by December 31, 2020, each wireless service provider to report to the Legislature:
 - the number of small cells commenced operating within the state during the prior 18 months
 - geographical location by ZIP Code of the small cells
 - competitively sensitive information may be aggregated and submitted through a third party



SB 649 - Proprietary

- **Vertical infrastructure located in PROW or public utility easements** must be made available for placement of small cells under fair and reasonable fees, terms, and conditions, which may include feasible design and collocation standards.
 - “*Vertical infrastructure*” – all poles or similar facilities owned or controlled by city or county that are in PROW or public utility easements and meant for, or used in whole or in part for, communications service, electric service, lighting, traffic control, or similar functions
 - Facilities are “controlled” by a city or county if the city or county has the right to allow subleases or sublicensing.
 - “*Feasible design and collocation standards*” means reasonable and objective specifications concerning the physical structure, construction, location, and appearance of a small cell, provided that those specifications facilitate the installation of the small cell and may be waived by the city or county on a nondiscriminatory basis
- City or county may reserve capacity on vertical infrastructure if it adopts resolution finding, based on substantial evidence, that capacity is needed for projected city or county uses.



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SB 649 - Proprietary

- **Annual fees for use of “vertical infrastructure”**
 - \$250 plus:
 - Annual attachment rate using modified AB 1027 formula and adopted by ordinance or resolution at public hearing
- Can mutually agree to different rate, charge, term or condition
- **Grandfathering:** existing agreements with a wireless provider or its agent regarding the leases or licenses of vertical infrastructure remain in effect, subject to applicable termination provisions
 - “Wireless service provider” means a provider of “commercial mobile radio service” or “commercial mobile data service,” as defined in 47 CFR Sec. 20.3, using FCC-licensed spectrum radio frequencies.



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SB 649 - Proprietary

- **Non-PROW Property:**
- Prohibits city or county from discriminating against deployment of small cells on its “property” outside public rights-of-way
- Must make space available on property not located in PROW on terms that are at least as favorable as those provided for comparable commercial projects or uses
- Installations shall be subject to reasonable and nondiscriminatory rates, terms, and conditions, which may include feasible design and collocation standards.



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FEDERAL REGULATORY OVERVIEW



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Federal Wireless Laws Impacting State/Local Authority

- **47 U.S.C. § 332(c)(3) (1993)**
 - No State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile services, except States can regulate the other terms and conditions of commercial mobile services
- **47 U.S.C. § 332(c)(7) (1996)**
 - Generally preserves local authority to control placement of personal wireless service facilities, subject to certain substantive and procedural limits
- **47 U.S.C. § 1455(a) (2012) (Sec. 6409)**
 - Applies to all “wireless” applications (broader)
 - Preempts local discretion over certain collocations and modifications to existing wireless sites; i.e., must approve



FCC Wireless Rules and Orders

FCC Shot Clocks & Deemed Grant

(2009, 2014 & pending)

- Sec. 332 (c)(7): 90 and 150 day shot clocks apply to local review of collocations and new sites whether macro or small cells/DAS in PROW
- Sec. 6409(a): “eligible facilities requests” 60 day shot clock and deemed granted remedy apply to local review; specific parameters for EFR affecting structures within and outside PROW
- Mobilitee and 4/20/17 NPRMs in PROW



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Federal Laws Impacting State/Local Authority Over Wireline Telecommunications

- **47 U.S.C. § 253 (1996)**

- Preempts local/state regulations that prohibit or have effect of prohibiting ability of any entity to provide telecommunications services
- But does not reach nondiscriminatory PROW management or compensation requirements
- Mostly interpreted by court decisions

- **FCC Actions (pending)**

- No major FCC rulemakings (2011 ROW NOI went nowhere)
- But ROW management and compensation back on table at FCC today (Mobilitie and 4/20/17 NPRMs)



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LATEST FCC DEVELOPMENTS



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Recurring Theme at the FCC: Local Government as Part of Problem, Not Solution, to Broadband Deployment

Multiple FCC items describe local government policies as “barriers to entry and investment”

- Mobile wireless siting petition
- Wireless and wireline infrastructure proceedings
- Preemption Petition Targeting San Francisco MDU Ordinance
- Multiple Tenants Environment Proceeding
- Section 706 Inquiry



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FCC “Small Cell” Proceedings

- *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; **Mobilitie** LLC Petition for a Declaratory Ruling, DA-16-1427, WT Docket No. 16- 421*
- *Removing Barriers to Investment Needed for America's **5G** Future, Notice of Proposed Rulemaking and Notice of Inquiry WT Docket Nos. 17-79*
- *Accelerating **Wireline** Broadband Deployment by Removing Barriers to Infrastructure Investment, Notice Of Proposed Rulemaking, Notice Of Inquiry, And Request For Comment, WC Docket No. 17-84*



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Selected FCC Issues

- Regulatory
 - Shortening shot clocks for “small cells”
 - More “deemed granted” remedies
 - Proper role of aesthetic considerations
 - Unreasonable discrimination concerns related to more burdensome reviews for telecom than other developments
 - Whether undergrounding could be an effective prohibition to wireless
 - Whether there has been discrimination in treatment of functionally equivalent services
 - Delays in PROW negotiation and approval processes
 - Limiting permit fees



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Small Cell Mania at the FCC

- *Mobilitie Petition, Wireless Barriers NPRM, and Wireline Barriers NPRM*
 - What industry wants (and FCC seems sympathetic):
 - Shorter (60-day) shot clock.
 - “Deemed granted” remedy.
 - Fees limited to costs.
 - Application of §§ 253/332(c)(7) to ROW access and municipal pole access.
 - Other issues (in *Wireline NPRM*):
 - Pole attachment rule revisions (including possibly OTMR).
 - Streamlined service discontinuance and copper retirement requirements.



Selected FCC Issues

- Proprietary
 - Rethinking whether Sections 253/332 apply to localities acting in a proprietary capacity
 - Asking whether it can regulate fees and charges for use of public property – including structures like water towers, poles, light poles and buildings.
 - Localities may be prohibited from obtaining in-kind benefits (free services, free Wi-Fi, free fiber) as a condition of access to street lights.



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Small Cell Mania at the FCC

- BDAC
 - Membership heavily tilted to industry
 - 3 key working groups
 - Removing State and Local Regulatory Barriers Working Group
 - Model Code of Municipalities Working Group
 - Model Code for States Working Group
 - BDAC recommendations as early as November 9



SUMMARY & ACTION ITEMS



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Small Cells - Regulatory Challenges

Any or All Levels of Gov't Could be Involved

- FCC licenses/environmental and historic properties review
- State PUC authorizations/review
- Local zoning and/or encroachment permitting, subject to federal and state restrictions
- CPUC's IOU pole attachment rules or AB 1027 rules (muni electric poles) or unregulated local proprietary



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Summary

- The issue of siting small cells is not going away, regardless of what happens with SB 649 or FCC decisions.
- Deployments raise fundamental jurisdictional questions, challenges in multiple fora
- But also new issues of public concern
- Industry stance is “remove barriers”
- Federal and state levels generally supportive
- Local challenge is to protect and defend public interests in public safety, aesthetics, consumer protection, getting fair value for use of taxpayer funded assets
- But also to prepare for/create opportunities for broader reforms
- To do so requires committing time and resources in defense but ALSO to develop a strategy and vision for the future



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Action Items

- Contact Governor's Office and share your concerns with SB 649.
- Prepare for small cell deployments
 - Consider available assets
 - Factor deployments into ownership strategies
 - Consider your future capacity needs and uses
 - If you haven't had deployment requests yet, consider how you would address them under existing regulatory processes – fix any gaps/ambiguities
- Monitor state and FCC and be prepared to update processes and ordinances to comply with new state and federal rules and market place demands



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Thank You



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