City of Santa Clara
The Center of What's Possible

Legislative Advocacy Position

LOCAL AUTHORITY OVER WIRELESS TELECOMMUNICATIONS FACILITIES AND CABLE SERVICES

The wireless telecommunications industry has made efforts to limit or preempt local control over placement of wireless facilities and supporting structures in and outside the rights of way. Several actions by federal and state lawmakers have resulted in: adoption of regulations and orders controlling local authority over placement, including through adoption of "shot clocks" requiring local agencies to complete review of projects within a specified time period. In 2009, the Federal Communications Commission (FCC) ruled that localities are presumed to have violated federal law if they fail to act on requests for placement of wireless facilities on existing structures within 90 days, or 150 days in other cases. In 2014, the FCC issued rules implementing a law passed by Congress in 2012 (the law is referred to as Section 6409). Section 6409 requires localities to act within 60 days to approve requests for modifications of existing and previously approved wireless facilities which do not "substantially change" the physical dimensions of those facilities. The facility is "deemed approved" if the locality fails to act. This could for example, result in future wireless carriers adding up to three additional ground cabinets at any location where ground cabinets were previously approved, or adding a 10 foot, vertical extension to wireless facilities on or off the rights of way, even if the previous facilities were subject to height limits. There are important exceptions to the general rule but it is a significant limit on local authority. AB 57 was passed in 2015, which provides that if a local jurisdiction fails to act on a wireless telecommunication facilities application within the 90 or 150-day timeframes established by the FCC, the carrier may send the locality a notice that the permit has been deemed approved, and the locality bears the burden of going to court to defend its failure to approve.

The FCC has adopted rules in 2018 that effectively remove most federal protections against placement of small cells under the National Historic Preservation Act and the National Environmental Protection Act. In August 2018 it declared that "de jure" and "de facto" moratoria on deployment of wireline and wireless facilities "prohibit" deployment of telecommunications facilities, generally cannot be defended as reasonable right of way management, and are subject to preemption. The FCC's examples of moratoria were not limited to laws that prohibit submission of permits pending adoption of local or state law revisions. Examples of "moratoria" include delays by municipally-owned utilities in acting on pole attachment applications; "freeze and frost" laws that prohibit trucks of certain weight from using roads during seasons when roads are most vulnerable; and overly broad suspension of permitting during emergencies, such as wildfires. Conceivably, limitations on right of way construction during peak periods of use could be challenged. The FCC is expected to act on industry requests that localities be limited to recovering incremental costs for use of the rights of way; and that localities be required to lease space on publicly owned infrastructure, including street lights, at cost. The FCC is also considering shortening shot clocks further, or declaring that the failure to act within a specified period results in the application being "deemed granted."

At the state level, SB 649 was vetoed in 2017, but, if it had passed, the bill would have removed significant local authority over small cell telecommunications facilities within the public right-of-way. The bill would have established a uniform permitting process for small cell wireless equipment throughout the State, and would have fixed the rates local governments could charge for placement of small cell equipment on City owned property. Silicon Valley Power joined with other public power jurisdiction in California to strongly oppose SB 649 and continues to oppose any attempt to preempt local authority over the placement of wireless telecommunication

facilities and access to broadband services. The FCC may very well adopt orders that have many of the same effects as the legislation would have had, if not vetoed.

In addition, the FCC created the Broadband Deployment Advisory Committee (BDAC) in 2017 to advise the Commission on how to accelerate the deployment of high-speed Internet access. Working groups within the BDAC, such as Competitive Access to Broadband Infrastructure, Removing State and Local Regulatory Barriers, and Model Code for Municipalities, have provided recommendations to the FCC. However, the BDAC was controlled by industry – most of the handful of municipal representatives resigned because the BDAC was unwilling to fairly consider municipal proposals. The recommendations that have issued are not favorable to localities, and may provide the foundation for further actions at the federal and state level.

On the congressional side, the Senate Commerce and House Energy & Commerce Committees held five FCC-related hearings in 2017. During those hearings, some witnesses and members of both committees claimed utility pole attachments are a "barrier" to the ubiquitous deployment of broadband technology. At several of those hearings, FCC Chairman recommended that, to foster widespread broadband deployment, Congress should extend FCC jurisdiction to include public power pole attachments. Senators Thune and Schatz introduced the STREAMLINE Small Cell Deployment Act (S.3157) in June 2018. The proposed bill has many of the same provisions that are being considered by the FCC, such as limiting local governments' authority to deny wireless service facility permits and designating timeframes for local governments to approve requests. While the bill is important, the FCC's actions, described above, present a much more immediate threat.

At this time, local governments and municipal utilities throughout California are studying the impact of new technologies, such as small cells, to determine how to best align the public's demand for wireless services with local zoning laws. If a city is unable to exercise its discretion over the permitting of small cells, the results can create significant issues for the community and electric utility operations, including, but not limited to, the following:

- Forced access to public and private property, and public utility easements such as electric substation infrastructure;
- Public safety issues if the city cannot determine if the small cell and associated equipment meet the safety standards for utility poles or other support structures;
- Worker safety issues due to the size and placement of the equipment on utility poles;
- Major aesthetic issues if small cell installations go unchecked. Small cells and their associated equipment can be bulky, create an inconsistent look, and substantially extend the height and size of a pole;
- Pole over-loading/failure issues if a City-owned pole does not have the capacity to serve a small cell; and
- Installation of small cells on historical landmarks.

Additionally, in September 2018 the FCC released a Second Further Notice of Proposed Rulemaking that sought to address how local franchising authorities (LFAs) can regulate incumbent cable operators and cable television services. If adopted, the proposed rules will likely have significant impact on cable franchise fees, public, educational, and government access television (PEG) channels, and other common cable-related obligations in cable franchise agreements. The City may be impacted by these rules as our Municipal Cable Channel 15 is considered a government access channel. The channel is used to provide important information to the public, such as live and recorded airings of Council and Planning Commission meetings, City special events, programs, and public service announcements. The proposed rules will allow all cable-related, in-kind contributions, other than PEG capital costs and build out requirements, to be treated as "franchise fees" subject to the 5% franchise fee cap that a LFA may collect from a cable operator for any twelve-month period. This will have

negative impacts on the City as this holding appears to allow cable operators to deduct the value of franchise requirements, such as PEG channel capacity, connections to programming origination points, and complementary cable services to schools and other public buildings, from their cable franchise fee payments. The proposed rules will also prohibit LFAs from regulating the non-cable services offered over cable systems, other than I-Nets, and prohibit LFAs from regulating the facilities and equipment used in the provision of these non-cable services. While the proposed rules are ambiguous, they can be interpreted to allow certain cable operators to construct and install facilities and equipment for non-cable services in the right-of-way without any local regulation or compensation.

These efforts continue to erode the City's ability to effectively regulate wireless telecommunications and non-cable services facilities and take away local authority on facilities that directly affect our City's residents. Since SVP owns and operates its own public power utility, it is even more alert to proposals that may impact its electric distribution system built on public power poles. City staff will continue to advocate for local control of permitting wireless telecommunications and non-cable services facilities in the public right-of-way.