MEMORANDUM OF LAW

DATE: November 09, 2001

TO: THE COMMITTEES ON NATURAL RESOURCES AND CULTURE AND LAND USE AND HOUSING

FROM: City Attorney

SUBJECT: TELECOMMUNICATIONS

At the Land Use and Housing Committee of September 19, 2001, the Committee conducted a workshop on cellular telephones. At the workshop, a number of issues concerning the Telecommunications Act were raised which were referred to the City Manager for future consideration. While the City Manager will report to the Committee on the issues identified, many of them contained legal implications. In anticipation of future workshops and other inquiries concerning telecommunications issues, this report provides a legal framework in which to address the issues raised during the September 19, 2001 workshop.

I. INTRODUCTION TO TELECOMMUNICATIONS

A. Telecommunications Act of 1996

Under the Telecommunications Act of 1996, 47 U.S.C. 151-710 [the Act], the federal government has primary authority to regulate telecommunications services. The Act was intended "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced technologies and services . . . . by opening all telecommunications markets to competition . . . ." H.R. Conf. Rep. No. 104-458 at 208 (1996).

B. Telecommunications in California

Under federal and state law, local authority over land use and the use of public rights-of-way by telecommunication companies varies depending upon the intended use on the property. In California, there are five key statutes that must be harmonized by local authorities in their attempt to exercise local control. Two of the five are federal statutes found within the Act, at sections 253 (removal of barriers to entry and local government authority to manage the public rights-of-way) and 332 (mobile services and preservation of local zoning authority). The other three statutes are located in the California Public Utilities Code, at sections 7901 (essentially granting telephone companies a statewide franchise to install telephone lines along public streets), 7901.1 (reserving local agencies the right to regulate time, place, and manner restrictions

on access to public streets by telephone companies), and in the Government Code, at section 50030 (limiting permit fees to the reasonable cost of providing service).

C. Definitions Under the Telecommunications Act

To understand the Act, a few important terms must be defined.

> "Telecommunications" means ". . . the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. 153 (43).
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> "Telecommunication service" means ". . . the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. 153 (46).
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> "Telecommunications carrier" means ". . . any provider of telecommunications services . . . ." 47 U.S.C. 153 (44).
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> "Wire communications" or "communications by wire" means the transportation of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission. 47 U.S.C. 153 (52).
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> "Personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services. 47 U.S.C. 332(c)(7)(C)(i).
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> "Commercial mobile service" means, ". . . any mobile service . . . that is provided for profit and makes interconnect services available (A) to the public . . ." 47 U.S.C. 332(d)(1). Common commercial mobile services include, but are not limited to, cellular telephone services, paging, and personal communication services.

II. OVERVIEW OF WIRE COMMUNICATIONS UNDER FEDERAL AND STATE LAW

A. Federal Law

Judicial action on local public rights-of-way has been governed by Section 253(a) of the Act, entitled "Removal of Barriers to Entry". To this end, and to advance the national policy framework, the Act, in part, forbids any state or local legal requirement that would "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate

telecommunications service." 47 U.S.C. 253(a). However, within certain parameters, the Act reserves the right of local authorities to regulate the use of the public rights-of-way:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or 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.

47 U.S.C. 253(c).

> Courts across the nation are struggling with the appropriate interpretation of section 253(c). They seek to balance the local authorities' rights to obtain "fair and reasonable compensation" for use of public rights-of-way and to establish requirements for management of the public rights-of-way with those rights of the telecommunication services providers under the Act. When local authorities adopt public rights-of-way ordinances, telecommunications service providers typically allege the ordinances constitute "discriminatory" treatment," "a barrier to entry," or produce the "effect" of being a barrier to entry. Each case turns on individual state law, applied against the backdrop of the Act, and case results vary dramatically from state to state, circuit to circuit.

1. Local Authorities Retain the Right to Manage the Public Rights-of-Way

Under federal and state law, local authorities retain the authority to manage public rights-of-way. However, that authority is subject to much debate between telecommunication providers and local authorities. Unfortunately, the FCC, the federal courts, and Congress are equally unclear about the parameters of what constitutes appropriate rights-of-way management by local authority.

a. The FCC Decisions Related to Local Authorities Management of the Public Rights-of-Way

In *In the Matter of TCI Cablevision of Oakland County, Inc.*[1], the FCC has stated:

We recognize that section 253(c) preserves the authority of state and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way. We have previously described the types of activities that fall within the sphere of appropriate rights-of-way management in both the Classic Telephone Decision and the OVS Orders, and that analysis of what constitutes appropriate rights-of- way management continues to set the parameters of

local authority. These matters include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.

However, the FCC expressed concern that some local authorities may be reaching beyond traditional rights-of-way management and imposing a "third tier" of telecommunication regulations, governing the relationship among telecommunications providers, or the rates, terms and conditions under which telecommunication services are offered to the public. *Id.* at para.105.

> The FCC looked to the Act's legislative history for examples of proper rights-of-way management. For example, the FCC has cited Senator Dianne Feinstein who, during the floor debate on section 253(c), offered additional examples of the types of local restrictions that Congress intended to permit under section 253(c), including requirements that:
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> > (1) "regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts;" (2) require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed upon other utility companies;" (3) "require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation;" (4) "enforce local zoning regulations;" (5) "require a company to indemnify the City against any claims of injury arising from the company's excavation."

City of Auburn v. Qwest Corporation, 247 F.3d 966 (9th Cir. 2001), Order and Amended Opinion, 260 F. 3d 1160, 1177 (9th Cir. July 10, 2001), cert. pending sub nom. *City of Tacoma v. Qwest Corporation*, No. 01-596 (U.S. filed October 9, 2001), quoting *In re Classic Telephone, Inc.*, 11 FCC Rcd 13082, P39 (quoting 141 Cong. Rec. S8172 daily edition June 12, 1995) (statement of Sen. Feinstein, quoting letter from the Office of City Attorney, City and County of San Francisco.)

b. The Federal Courts

In several decisions, the federal courts have also discussed the requirements that can be imposed by local governments consistent with the Act. For example, in *Omnipoint Communications, Inc., v. Port Authority of New York and New Jersey*[2], the Port Authority denied Omnipoint access to the Lincoln and Holland Tunnels because the Tunnels already contained telecommunication providers. The district court found that the Port Authority properly exercised its rights to manage the public rights-of-way and therefore denied Omnipoint's request for injunctive relief on discriminatory grounds. The court held that under those particular circumstances, the Port Authority's failure to allow an additional telecommunication provider access rights in the public rights-of-way (the Tunnels) did not constitute discrimination under section 253 or section 332.

A New York federal district court reviewed one city's requirements for placement of equipment in public rights-of-way and approval process in detail, in *TCG New York, Inc. v. City of White Plains,* 125 F. Supp. 2d 81 (S.D.N.Y. 2000). The court used a two-step analysis, first reviewing the requirements and process to determine if they "prohibit or have the effect of prohibiting" the service provider from providing telecommunications services (section 253(a)), and then determining whether the requirements are permitted nonetheless under section 253(c). 125 F. Supp. 2d at 87 *ff*. Under the first step, the court found that "while the City's requirements admittedly do not impose an explicit prohibition on TCG, the regulations coupled with the City's long delay in moving forward with the approval process have effectively prohibited TCG from providing telecommunications services in White Plains." 125 F. Supp. 2d at 89.

The court held that most of the city's requirements for information fell within the safe harbor protection of section 253(c) because they managed the public rights-of-way. Those included information regarding the proposed franchise area, construction schedule, location of the telecommunications system, and ownership of the company and its affiliates. The city could not however, require a description of the telecommunications services to be provided, information regarding proposed financing for operation and construction, or proof of the applicant's legal, financial, and technical qualifications to hold the franchise. 125 F. Supp. 2d at 91-92. The court held that the city could require basic legal protections such as performance bonds, security, insurance and indemnification, provisions to ensure quality workmanship and construction, engineering site plan, provisions to minimize disruption of the streets, inspection of facilities in the rights-of-way, and inspection of books and records to the extent necessary to ensure accurate fee information. 125 F. Supp. 2d at 93-95. Nevertheless, the city was precluded by the Act from requiring city council approval based on broad public interest considerations. 125 F. Supp. 2d at 92-93. Finally, this court held that a city does not have the authority to grant or deny a franchise based on its own discretion. *Id*.

2. Local Authorities May Charge Fair and Reasonable Compensation for the Use of the Public Rights-of-Way

The courts have also addressed what can be charged by cities as "fair and reasonable compensation" that is also "competitively neutral and nondiscriminatory" under section 253(c) of the Act. In *White Plains* for example, the court held that the fees to be charged by the city could include "general revenues and other considerations not directly related to a municipality's expenses in maintaining the rights-of-way," such as "'rent' for the use of city-owned property for private purposes," within the meaning of "fair and reasonable compensation" under the Act. *Id.* at 96.

In 1999, the First Circuit Court of Appeals denied a preliminary injunction to a telecommunications provider alleging discriminatory treatment in requiring applications and fees as part of management of the rights-of-way. *Cablevision of Boston, Inc. v. Public Improvement Commission of the City of Boston,* 184 F.3d 88 (1st Cir. 1999). In that case, the City of Boston had allowed another company to pull cable through its existing electrical conduit without complying with the application process used for construction of new conduit. The court ruled that the nondiscrimination requirement of section 253(c) did not impose an affirmative obligation on local governments to "ensure a level playing field among telecommunications providers." 184 F.3d at 104. Rather, if a city "decides to regulate for its own reasons (e.g., to minimize disruption

to traffic patterns), section 253(c) would require that it do so in a way that avoids creating unnecessary competition inequities among telecommunications providers." 184 F.3d at 105. *See also, Omnipoint Communications, Inc., v. Port Authority of New York and New Jersey,* 1999 WL 494120 (S.D.N.Y. 1999) (trial court denied preliminary injunction because requirements imposed by Port Authority for use of public rights-of-way in tunnels did not exceed the local agency's powers under the Act).

In *TCG Detroit v. City of Dearborn*[3], the Sixth Circuit Court of Appeals upheld the City's right to charge a franchise fee of four percent of gross revenues for laying fiber-optic cable in the city. The court held that the charge was "fair and reasonable" under section 253(c) of the Act. The court also found that the fee was nondiscriminatory under section 253(c), even though the local exchange carrier, Ameritech, was not, pursuant to Michigan law, subject to the fee. Ameritech had built its infrastructure many years earlier and held franchise rights under earlier laws giving it immunity from the new franchise fees. This state-granted immunity for Ameritech did not render the fee, as applied to TCG, discriminatory for purposes of section 253(c). 206 F.3d at 625.

3. Ninth Circuit Court of Appeals - Rulings in California

In the recently decided case, *City of Auburn*, the Ninth Circuit (which includes all California federal courts), departed from the reasoning of the First and Sixth Circuit Courts of Appeal discussed above by severely restricting the ability of local governments to impose regulations. The *Auburn* case arose out of an issue relating to Qwest's obligation, under state law, to pay the cost of relocating telecommunications facilities (wireline facilities) made necessary by right-of-way improvements. However, the litigation quickly expanded into a challenge by Qwest, claiming that the State of Washington's right-of-way ordinances were preempted under section 253 of the Act.

The Court's original opinion adopted the premise that preemption under section 253 was "virtually absolute" with respect to "telecommunications regulation." 247 F.3d at 980. As in *White Plains, supra*, the Court in *Auburn* conducted a detailed review of the City's franchise application process and authority to deny access to the public rights-of-way to an applicant. The *Auburn* court concluded that each of the various application requirements, when taken together, formed a barrier to entry in violation of the Act. 247 F.3d at 981. The court also concluded that the various requirements (e.g. financial, legal and technical qualifications for holding a franchise) regulated the telecommunications companies and were not directly related to rights-of-way management. Auburn's allegations that these requirements indirectly related to the use of the public rights-of-way were dismissed by the court as "too tenuous of a connection." 247 F.3d at 985.

In July 2001, after a motion for rehearing, the Ninth Circuit amended eight sections of its decision. The court modified its ruling and instead held that the effect of the franchise application requirements taken together, constituted a barrier to entry. *Id.* Amendment No. 5. The court further stated that a franchise is not *per se* preempted by the Telecommunications Act of 1996. *Id.* Amendments 5 and 6.

Relying upon the original *Auburn* decision, in May 2001, a federal district court struck down the City of Berkeley's telecommunication ordinance. *Qwest Communications Corp. v. City of Berkeley,* 146 F. Supp. 2d 1081 (N.D. Cal. May 23, 2001). The district court held that, "[t]he Ordinance vests significant discretion in the City to grant or deny permission to use its public rights-of-way based upon an open ended set of criteria and requirements." *Id.* at 1097.

B. California Public Utilities Code

Public Utilities Code section 7901 states that, "[t]elegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, 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 of the road or highway or interrupt the navigation of the waters."[4] Thus, once a telephone service provider has obtained its certificate of public convenience and necessity [CPCN] from the California Public Utilities Commission, it has been granted a state wide franchise. With CPCN in hand, the telephone service provider may avail itself of the benefits under Public Utilities Code Section 7901. Under section 7901, local authorities are prohibited from requiring telephone companies to obtain a local franchise agreement or pay local franchise fees. Cal. Pub. Util. Code 7901; *City of San Diego v. Southern California Telephone Corporation*, 42 Cal. 2d 110, 116 (1954). Notwithstanding the rights granted to telephone providers under section 7901, cities still retain "the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." Cal. Pub. Util. Code 7901.1.

As noted above, the Ninth Circuit deviates in its interpretation of the Act from other federal circuits with respect to the limitations on local jurisdictions to regulate public rights-of-way. See *City of Auburn*, 260 F. 3d 1160; and *Qwest Communications Corp.* 146 F. Supp. 2d 1081. Congress and the FCC have provided some guidance to district courts and local authorities for acceptable rights-of-way management. However, local authorities are cautioned by court decisions that the more expansive the regulation over the telecommunication provider, the more likely the courts, especially the Ninth Circuit Court of Appeals, will find the regulation invalid.

III. OVERVIEW OF WIRELESS ANTENNAS AND FACILITIES UNDER FEDERAL AND STATE LAW

A. Federal Law Relate to Zoning and Land Use Issues

Federal authority to regulate wireless service providers is primarily found in section 332 of the Act. Federal law generally preempts local regulation of wireless services. However, local authorities maintain some control over building and zoning issues. Local authorities are preempted from regulating facilities on the basis of radio frequency emissions to the extent that the emissions comply with FCC standards.

The Act reserves to local authorities zoning control over personal wireless service facilities. Specifically, "[E]xcept as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions

regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. 332(c)(7)(A). The Act has two general limitations upon local authority. First, the regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof "shall not unreasonably discriminate among providers of functionally equivalent services." Second, the regulation ". . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. section 332(c)(7)(B)(i). As with wired telecommunications, the scope of these restrictions has been subject to interpretation by the courts.

1. Unreasonable Discrimination Among Providers

Regulations imposed by local authorities for the placement, construction, and modification of personal wireless facilities "shall not unreasonably discriminate among providers of functionally equivalent services." 47 U.S.C. 332(c)(7)(B)(i)(I). In the Conference Report to the Telecommunications Act of 1996, Congress stated the intent of the prohibition against discrimination is "to ensure that a State or local government does not in making a decision regarding the placement, construction and modification of facilities of personal wireless services . . . unreasonably favor one competitor over another." *AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach,* 155 F. 3d 423, 426, n. 3. (4th Cir. 1998). Additionally, it is Congress' intent to "provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally application zoning requirements even if those facilities provide functionally equivalent services." *Id*.

Thus, the Act explicitly contemplates that some discrimination is allowed among providers of functionally equivalent services[5]. 47 U.S.C. 332(c)(7)(B)(i)(I). Any such discrimination need only be reasonable. *AT&T Wireless PCS,* 155 F. 3d at 427. The fact that a decision has the effect of favoring one competitor over another, in and of itself, is not actionable under the Act. *Id.*

2. Local Regulations that Prohibit or Have the Effect of Prohibiting Service

Regulations imposed by local authorities for the placement, construction, and modification of personal wireless facilities "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. 332(c)(7)(B)(i)(II).

a. Siting Decisions as a Prohibition on Service

Local regulations that prohibit or have the effect of prohibiting service are preempted by the Act. This preemption applies to regulations that result in either a blanket prohibition of providing services or which, when applied on a case-by-case basis, is a denial of every submitted application. *AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998). In other words, local authorities may not use siting decisions to deny wireless telecommunications service. "This does not mean that the denial of a permit for *a particular site* amounts to the denial of *wireless services* because services can be effected from numerous sites in various combinations, sometimes not even within the area to be served. It

follows, therefore, that case-by-case denials of permits for particular sites cannot, without more, be construed as a denial of wireless services." *360 Degrees Communications Company of Charlottesville v. The Board of Supervisors of Albemarle County*, 211 F.3d 79, 86 (4th Cir. 2000); see also *AT&T Wireless PCS v. City Council of Virginia Beach*, 155 F.3d at 428-29.

Certainly, local policies or general bans against any siting of wireless service facilities would violate section 332(c)(7)(B)(i)(II). Moreover, indications by a local government that repeated individual applications will be denied because of a generalized hostility to wireless services may also violate section 332(c)(7)(B)(i)(II). But whether a single denial of a site permit could ever amount in effect to the prohibition of wireless service is a difficult question that is decided on a case-by-case basis. *360 Degrees Communications*, 211 F. 3d at 86; and *AT&T Wireless*, 155 F. 3d at 428.

This does not mean, however that a wireless service provider could never establish that an individual adverse zoning decision has the "effect" of violating section 332(c)(7)(B)(i)(II). Rather, a wireless service provider would be required to prove to a court that this denial is representative of a local authorities' broader policy to preclude wireless service. *360 Degrees Communications*, 211 F. 3d at 86.

b. Closing Gaps in Service

A local government may reject an application for construction of a wireless service facility in an under-served area without effectively prohibiting personal wireless services if the service gap can be closed by less intrusive means. *Town of Amherst v. Omnipoint Communications Enterprises, Inc.*, 173 F. 3d 9, 14 (1st Cir. 1999) ("Individual denial is not automatically a forbidden prohibition," but disallowing "the only feasible plan . . . might amount to prohibiting wireless service.").

Often wireless service providers seek to install an antenna in order to close a gap in existing service coverage. The doctrine of prohibiting "gaps" is designed to protect the users, not the carriers. *Cellular Telephone Co. v. Zoning Board of Ho-Ho-Kus*, 197 F. 3d 64, 70 (3rd Cir. 1999) ("there is a "gap" in personal wireless services when a remote user of those services is unable either to connect with the land-based national telephone network, or to maintain a connection capable of supporting a reasonable uninterrupted communication"). (Citation omitted.)

In *Sprint Spectrum, L.P. v. Willoth*[6], the court held that the effect of local zoning policies and decisions have the effect of prohibiting wireless communication services only if they result in a "significant" gap in the availability of wireless services. "Where the holes in coverage are very limited in number or size (such as the interiors of buildings in a sparsely populated area, or confined to a limited number of houses or spots as the area covered by buildings increases) the lack of coverage likely will be de minimis so that denying applications to construct towers necessary to fill these holes will not amount to a prohibition of service." *Id.* at 643-644.

The provider seeking to close the gap will be required to show the local authority "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. This will require a showing that a good faith effort has been made to identify and evaluate less intrusive alternatives, e.g. that the provider has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antenna on existing structures, etc." *APT Pittsburgh Limited Partnership v. Penn Township Butler County of Pennsylvania*, 196 F. 3d 469, 480 (3rd Cir. 1999).

Following *Willoth* and *Ho-Ho-Kus*, the district court in *Airtouch Cellular v. The City of El Cajon*[7], upheld the City's denial of Airtouch's application for a conditional use permit to construct and maintain wireless communication facilities on top of and adjacent to a water tower owned by Padre Dam Municipal Water District. The court found that "[s]ince the area at issue in this case is already served by other providers, the City's decision does not 'have the effect of prohibiting the provision of personal wireless services.'" *Id.* at 1167.[8]

B. Radio Frequency (RF) Emissions Under Federal Law

Federal law prohibits a local authority from regulating personal wireless facilities based upon radio frequency emissions. "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 U.S.C. 332(c)(7)(B)(iv).

The FCC standards regulate RF emissions from personal wireless facilities and preempt cities from regulating not only the "placement, construction and modification" of a personal wireless service facility based on RF emissions, but also the operation of such a facility. *Cellular Phone Taskforce v. FCC*, 205 F. 3d 82 (2d Cir. 2000). Thus, a local ordinance that prohibited a personal wireless service's antennas from operating in a manner that interfered with the city's public safety system was found preempted by federal law. *Southwestern Bell Wireless, Inc. v. Johnson County Bd. Of Commissioners*, 199 F. 3d 1185 (1999). While local authorities may not be able to regulate RF emissions, they may be able to impose a reasonable requirement upon a personal wireless facility operator to demonstrate its facility does not exceed FCC standards. This authority appears to flow from within the statute, " . . . to the extent that such facilities comply with the Commission's regulations concerning such emissions." 47 U.S.C. 332(c)(7)(B)(iv).

C. Moratorium Under Federal Law.

Federal law does not specifically allow for or prohibit cities from adopting a moratorium for the construction of wireless facilities. The Act requires local governments to "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request." 47 U.S.C. 332(c)(7)(B)(ii). The Act expressly provides that the calculation of "a reasonable period of time" should "[t]ake into account the nature and scope of [the] request." *Id.*

In *Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. 1036, 1040 (W.D. Wash. 1996),

the court held that the City's six-month (effective for up to one year) moratorium on issuing permits for additional wireless communications facilities was not a prohibition on wireless facilities, nor did it have a prohibitory effect. The court reasoned that "[i]t is rather, a short-term suspension of permit-issuing while the City gathers information and processes applications. Nothing in the record suggests that this is other than a necessary and bona fide effort to act carefully in a field of rapidly evolving technology." *Id*. at 1040.

In *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732 (C.D. Ill. 1997), the court held that a six-month review period (non-moratoria) was reasonable, even though the usual duration of zoning procedures in the community was two to three months. In *SNET Cellular, Inc. v. Angell*, 99 F. Supp. 2d 190 (D.R.I. 2000), the court held that the 15-month period (non-moratoria) it took the board to reach its decision did not constitute an unreasonable delay.

Accordingly, if the City Council were to enact legislation imposing a moratorium, it must be reasonable. Moreover, the City must act during this time to modify its existing land use regulations.

D. Denial By City Must be Supported By Substantial Evidence

The Act requires any decision by local government to deny a request to "place, construct, or modify personal wireless service facilities" to be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. 332(c)(7)(B)(iii). "Substantial evidence 'does not mean a large or considerable amount of evidence, but rather such evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Cellular Telephone Co. v. Zoning Board of Ho-Ho-Kus*, 197 F. 3d at 71 (quoting, *Pierce v. Underwood*, 487 U.S. 552 (1988)). In other words, "substantial evidence is more than a scintilla of evidence but less than a preponderance." *Omnipoint Communications, Inc. v. City of Scranton*, 36 F. Supp. 2d 222, 228 (M.D. Pa. 1999) (citation omitted).

The court will review the written record as a whole in making its decision, including all evidence unfavorable to the agency's position. *Airtouch Cellular v. The City of El Cajon*, 83 F. Supp. 2d at 1164; *Omnipoint Corp. v. Zoning Hearing Board of Pine Grove Tp.,* 181 F. 3d 403, 408 (3rd Cir. 1999); *Cellular Telephone Co. v. Zoning Board of Ho-Ho-Kus*, 197 F. 3d at 71. The court must apply a common sense standard of reasonableness to the substantial evidence standard. The court is not bound to accept as substantial evidence impossible, incredible, unfeasible, or implausible testimony, even if it is not refuted or impeached. *Airtouch Cellular v. The City of El Cajon*, 83 F. Supp. 2d at 1164.

E. Damages Based Upon a Violation Under Civil Rights Statutes (42 U.S.C. Sections 1983 and 1988)

Some providers challenging the regulations of local governments have sought damages and attorney's fees under the civil rights statutes. The Third Circuit denied such a request holding that the Act "contains a remedial scheme which is sufficiently comprehensive to infer Congressional intent to foreclose a section 1983 remedy." *Omnipoint Communications Enterprises, L.P. v. Newtown Township*, 1999 WL 387205 (E.D. Pa. 1999). See also, *Omnipoint*

Communications Enterprises, L.P. v. Charlestown Township, 2000 WL 128703 (E.D. Pa. 2000); *National Telecommunication Advisors v. City of Chicopee*, 16 F. Supp. 2d 117 (D. Mass. 1998). In *AT&T Wireless PCS v. City of Atlanta*, 210 F. 3d 1322 (11th Cir. 2000), vacated 223 F. 3d 1324 (11th Cir. 2000), and reinstated 250 F. 3d 1307 (11th Cir. 2001) (denying section 1983 damages and attorney fees.) The Ninth Circuit Court of Appeals has not ruled on this issue.

F. "Compensation" for Wireless Facilities in the Public Rights-of-Way

California Government Code section 50030 limits the *permit fees* for the placement, installation, repair, or upgrading of telecommunications facilities that can be charged by a city to a "telephone corporation" that has been authorized by the California Public Utilities Commission and Federal Communications Commission to provide telecommunication services. Permit fees "shall not exceed the reasonable costs of providing the service for which the fee is charged and shall not be levied for general revenue purposes." Id.

California Public Utilities Code section 234(a) defines "telephone corporation" to include "every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state." "Telephone line" includes wireless telephone transmissions. Cal. Pub. Util. Code 233. Therefore, when it comes to use of the public rights-of-way, any permit fee charged by the City cannot exceed the reasonable cost of providing the service for which the fee is charged.

1. Is California's statewide franchise (California Public Utilities Code section 7901) prohibition of wired telecommunication providers equally applicable to wireless telecom providers?

Section 7901 was written to grant a statewide franchise to wire carriers and to remove local governments from the franchising process. However, the state's relationship to wireless carriers is distinctly different because a wireless telecommunication provider obtains their authorizations from the FCC alone, and not from California's Public Utilities Commission. Further, per section 332(c)(3) of the Act, California may not regulate the rates or entry into business of wireless carriers. Therefore, California may not "franchise" wireless providers in the sense it franchises wire carriers under Section 7901. In that respect, Section 7901 would not be "applicable to wireless telecom providers." However, that does not leave the City free to impose fees beyond reasonable costs, due to the intervention of Section 50030. Finally, the Ninth Circuit in *Auburn* found that certain ordinances adopted by Washington municipalities applicable to wireless telecom providers violated Section 253(c) of the Telecommunications Act. *City of Auburn v. Qwest Corporation,* 260 F.3d at 1174, (regulating the services or business operations of the service provider).

Separate from the issue of "fair and reasonable compensation"(discussed above) is the issue of non-discriminatory and competitively neutral compensation under section 253(c) of the Act. Imposing an identical public right-of-way fee on wireline and wireless carriers could be susceptible to challenge as being discriminatory or not competitively neutral under section 253(c). In essence, wireline providers' lines traverse the streets while wireless providers' public rights-of-way facilities, if any, are only located on specific, discrete sites; wireline providers

inherently use much more public rights-of-way than wireless providers. Therefore, charging wireless providers the same (or greater) public right-of-way fee as wireline providers, would not satisfy the non-discrimination and competitively neutral requirements of section 253(c).

Neither California nor the Ninth Circuit has ruled upon this issue, but there are a couple of cases suggesting that this argument may be viable. In *AT&T Communications of the Southwest, Inc. v. City of Dallas*[9], the district court held that a city's effort to impose on a wireless carrier the same gross revenue-based fee it imposed on the local telephone company was discriminatory under section 253(a). Similarly, in *PrimeCo Personal Communications, L.P. v. Illinois Commerce Commission*, 196 Ill. 2d 70 (2001), where the Illinois Supreme Court held that a state law allowing cities to impose a gross revenue-based public rights-of-way fee on both wireless & wireline carriers violated the Uniformity Clause of the state constitution as applied to wireless carriers because wireless providers did not use the public rights-of-way in the same manner as wireline providers.[10]

Based upon the foregoing, a cost-based fee per location would be appropriate under Government Code section 50030 so long as a cost-based fee is also being charged to wireline providers. Such a fee structure would avoid the blanket application of a single fee, that would likely be found to discriminate against wireless providers.

A. Compensation for Wireless Facilities on City Property

The fees that may be charged by the City to telecommunications providers for locating wireless facilities on property owned by the City but not within any public right-of-way are governed by California Government Code section 50030 and section 332(c)(7) of the Act. As discussed above, Government Code section 50030 limits the *permit* fees that can be charged by the City to "the reasonable costs of providing the service for which the fee is charged."

At least one telecommunications service provider has argued that Government Code section 50030 limits the City to charging only cost recovery based fees and prevents the City from charging rent for use of its non-right-of-way property. Section 50030, however, specifically applies only to "permit fees." Further, the legislation enacting that section included a finding by the Legislature that section 50030 "does not constitute a change in existing law." Stats. 1996, c.300 (S.B.1896). Section 50030 was intended only to codify existing law that permit fees must be cost based, and to clarify application of that law to telecommunications installations. *Id.*

Any other fees to be charged by the City must "not unreasonably discriminate among providers" or "have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. 332(c)(7)(B)(i). Rent charged by the City for placement of a telecommunication facility in, for example, a City park, is compensation for use of the property owned by the City. *See, in dicta, Quest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d at 1100. The fair market value, and thus the rent charged for use of a particular site, is likely to vary from location to location. That difference, however, is not "discrimination" under the Act if it is reasonably based on fair market values, and all providers are subject to the same fair market rates. *AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach*, 155 F.3d at 427 (any discrimination need only be reasonable).

Fees charged under existing City policy for facilities placed in parks include cost-recovery based permit and application fees, and a uniform fair market rent that is divided into an up-front payment of $20,000 and an additional $14,400 per year. According to the report to the Park and Recreation Board dated January 10, 2001, this rent amount is based on a market survey averaged to provide consistency among parks. This approach may also avoid claims of discrimination among providers, as each provider is charged the same amount. We are not aware of any court decisions directly addressing these issues.

H. Does Preemption of Local Zoning Authority Violate the Tenth Amendment?

In *Southwestern Bell Wireless, Inc. v. Johnson County Board of Commissioners*, 199 F.3d 1185 (10th Cir. 1999), the Tenth Circuit held that federal preemption of State or local government zoning authority did not violate the 10th Amendment.[11] However, in a divided Fourth Circuit opinion, each member of a three judge panel reached a different result. One justice concluded that preemption violated the 10th Amendment; a second justice concluded it did not; and the third justice did not reach the constitutional issue at all. *Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County*, 205 F.3d 688 (4th Cir. 2000). There is no judicial guidance on the viability of this argument in the Ninth Circuit.

IV. WOULD A PROHIBITION ON TELECOMMUNICATIONS FACILITIES IN OR ON PARKLAND VIOLATE THE TELECOMMUNICATIONS ACT?

As stated above, a local government cannot use its zoning laws to effectively ban the provision of personal wireless services in a community. 47 U.S.C. 332(c)(7)(B)(i)(II). At the same time, however, the Act preserves the right of the City to enforce its zoning laws, and to regulate the time, place, and manner of the installation, maintenance, operation, and repair of a provider's facilities. *AT&T*, 975 F. Supp. at 940, n.10; 47 U.S.C. 332(c)(7)(A).

Necessarily then, the question of whether a prohibition of telecommunication facilities in parks violates the Act depends upon how the City is otherwise accommodating telecommunication services. For example, a zoning ordinance allowing telecommunication facilities only on privately-owned sites could violate the Act if such sites are not adequate to provide service to an area. Edward H. Ziegler, *Zoning for Cellular and Personal Wireless Facilities*, 21 Zoning and Planning Law Report 61 (West 1998). Impractical or infeasible regulations regarding the manner of installation, could have the same effect. *Id.* In order to show that a zoning regulation amounts to a prohibition of wireless services in a particular area and is in violation of the Act, a plaintiff must show that under the existing zoning rules, no sites are available or would be approved to provide wireless service to an area. *Virginia Metronet, Inc. v. Bd. of Supervisors of James City County, Va.*, 984 F. Supp. 966 (E.D. Va. 1998).

Assuming for the sake of discussion that sufficient alternative sites for telecommunication facilities existed under the City's zoning laws without including parks, then conceivably the City could prohibit facilities in parks. The difficulty in making such an assumption, however, is gauging the needs of the ever-changing and growing telecommunications industry in serving San Diego's varied developments and landscapes. In residential neighborhoods without much commercial or other private, non-residential

development, the question would be particularly close unless telecommunication facilities are permitted on private residential property.

The City can, however, prefer some sites over others through its zoning ordinances. For example, in *Omnipoint Communications, Inc. v. City of Scranton*, 36 F. Supp.2d at 222, 233, the city's zoning ordinance expressed a preference for placement of communication antennae in non-residential buildings of more than five stories. Although the city granted another company a variance to place antennae on a residential building in excess of five stories, the court upheld the city's decision to deny a variance for a two-story residential building.

V. ARE TELECOMMUNICATION FACILITIES LOCATED ON PARKLAND THAT HAS BEEN DEDICATED TO PARK AND RECREATIONAL USE CONSISTENT WITH SECTION 55 OF THE CITY'S CHARTER?

Section 55 of the San Diego Charter provides that City-owned land that has been dedicated by the City for park use will be used only for park and recreational purposes unless a changed use or purpose has been authorized by the electorate.

> All real property owned in fee by the City heretofore or hereafter formally dedicated in perpetuity by ordinance of the Council or by statute of the State Legislature for park, recreation or cemetery purposes shall not be used for any but park, recreation or cemetery purposes without such changed use or purpose having been first authorized or later ratified by a vote of two-thirds of the qualified electors of the City voting at an election for such purpose.

San Diego Charter 55. We are not aware of any decision by a California court deciding whether a telecommunications facility, or other similar utility, is a proper park purpose for dedicated parkland. Several courts have reviewed various proposed park uses and their analysis is helpful here. Additionally, this Office has over the years, issued several legal memoranda addressing the issue of proper park use, including placement of utilities in or on parkland.

> The courts have taken an expansive view in defining what is a proper park and recreational use for parkland dedicated by a city. Although a dedication of park land by a private individual is construed strictly according to the terms of the grant and in favor of the intent of the grantor, a dedication by a city is construed less strictly because the city is the grantor. *Spires v. City of Los Angeles*, 150 Cal. 64, 66 (1906)*; Slavich v. Hamilton*, 201 Cal. 299, 303 (1927); *City and County of San Francisco v. Linares*, 16 Cal. 2d 441, 444 (1940). Thus, the approach taken by the courts has been to look at the particular circumstances of the case, and determine whether the proposed use is inconsistent with the purposes of the dedication or substantially interferes with it. *Id.*; 11 McQuillan, *The Law of Municipal Corporations*, 33.74 (3d ed. 1991).

In *Slavich*, for example, the California Supreme Court held that leasing park property to the highest bidder for the construction of a memorial building to be used primarily as a meeting hall by veterans organizations was consistent with park purposes. It would "not be such a

diversion of the property from its use for park purposes" that it is inconsistent with park use. 201 Cal. at 309. In addition to being a monument to the cause of patriotism, the building itself would cover "a minor part" of the park, be of "beautiful ornamental and architectural design," and be surrounded by landscaping in common with the rest of the park. 201 Cal. at 307.

In *Linares*, the California Supreme Court held that an underground parking garage was an appropriate use for Union Square, a park that had been dedicated in 1850 by the Town of San Francisco. The question before the Court was whether this sub-surface use conflicted with the original dedication of the land for park use. 16 Cal.2d at 443-444. The Court found the sub-surface parking garage to be consistent with the use of Union Square as a park, even though the park would not be usable for ten months during construction, and even though the entrance and exit to the garage would take up six and one-half percent of the park. 16 Cal.2d at 447.

Consistent with the principles set forth above, this Office has opined that underground sewage and sludge lines are not inconsistent with a dedicated park purpose. 1990 City Att'y MOL 211. Although the surface of the park would be disturbed during construction, as in *Linares*, the disturbance would be temporary, and the completed project would not interfere with the park. *Id*. at 215. This Office has also opined that an above-ground clean-out maintenance station for an underground sludge line would not be proper if "visibly situated," but would be permissible if located underground such that it does not detract from or interfere with proper park use. 1994 City Att'y MOL 559.

As indicated in the case law and the prior memoranda issued by this office, whether a proposed use in a park is proper depends upon the particular facts of that situation. The first step in the analysis for any park in the City of San Diego is determining that the park has in fact been dedicated by the City or State for park and recreational use. If so, the proposed location and siting of the telecommunication facility in the park becomes crucial. A facility that is designed and sited so as not to detract from or interfere with the park or its uses, does not violate the dedication to park use or Charter section 55.

This standard is included in Part B.2. of Council Policy 700-06, Encroachments on City Property:

> . . . The City may grant authorization for encroachment on dedicated or designated parkland and open space if it is determined by the responsible department that the requested action would not only meet criteria for General City property as stated above, but would also be consistent with City Charter Section 55; i.e., that it would not change or interfere with the use or purpose of the parkland or open space. . . . In addition . . . proposed telecommunications facilities must be disguised such that they do not detract from the recreational or natural character of the parkland or open space. Further, proposed telecommunications facilities must be integrated with existing park facilities, and must not disturb the environmental integrity of the parkland or open space.

The criteria that apply to "General City property" are listed in Part B.1:

> . . . that the requested action would not violate any deed restrictions related to the City property, map requirements, or other land use regulations; would not be detrimental to the City's property interests; would not preclude other appropriate use; would be consistent with the City's General Plan; and would otherwise be prudent and reasonable.

Under Council Policy 700-06, the Park and Recreation Department is tasked with determining whether a proposed telecommunications facility meets these criteria, and for a minor telecommunications facility, whether encroachment should be authorized.

> In the application of Council Policy 700-06, the phrase "would not change or interfere with the use or purpose of the parkland or open space," has been interpreted to mean that the equipment enclosure for a telecommunications facility can be placed above-ground within the park in an area that is not usable for and does not detract from any park purpose. We believe that this interpretation, taken with the other criteria of Policy 700-06, is consistent with Charter Section 55. As a matter of policy, however, a more conservative application of Charter Section 55 could require that all such equipment located in a park be placed underground. Also as a matter of policy, the Council could limit the placement of telecommunications facilities in parks. Any such policy, must however, be coordinated with the City's zoning laws, regulations, and policies regarding placement of telecommunications facilities within the City so as not to constitute a ban or prohibition on service under the Act.

VI. ACCESS TO THE CITY'S SEWER AND STORMWATER COLLECTION SYSTEMS

Recently, a telecommunications company [Company] that is neither a "common carrier"[12] under the Act nor a possessor of a CPCN issued by the California Public Utilities Commission, proposed to install fiber optic cable in the City's sewer and stormwater collection systems. City Council expressed concern that allowing this Company to proceed with the installation could lead to the System being overrun with telecommunication wires and equipment.

The applicability of federal and state law to installation and operation of telecommunication lines in sewer and stormwater pipes has never been addressed by federal or California courts. Currently, there are no such completed installations in the United States. Existing litigation and case law centers around telecommunication lines installed beneath streets and on utility poles.

As stated above, section 253 only limits the City's authority to regulate providers of telecommunications services. This Company's offering to the City does not meet the above definition of "telecommunications service." The Company does not offer telecommunications services to the public, but instead will sell or lease capacity in its fiber optic network to telecommunication carriers who in turn will offer telecommunication services to the public. As such, the restrictions on local authority under the Act most likely do not apply to this Company's proposal.

This conclusion finds support in *Virgin Islands Telephone Corp. v. Federal Communications Commission*, 198 F. 3d 921 (D.C. Cir. 1999). The case involved a subsidiary of AT&T that constructs and maintains undersea fiber optic cable systems for lease to other carriers. The Virgin Islands Telephone Corporation challenged the subsidiary's application to operate a cable system in the Virgin Islands, alleging the subsidiary was a telecommunications carrier subject to stricter application requirements of the Act. The Court of Appeal disagreed, and determined the subsidiary was not a telecommunications carrier. The Court held that leasing capacity to other carriers is not a telecommunications service, and therefore the Act did not apply to the subsidiary's application.

Neither does state law limit local authority over the installation of telecommunication lines in the System. Section 7901 of the Public Utilities Code assures telecommunication companies access to the public right-of-way for installation and operation of telecommunication lines. The right-of-way includes public roads and highways, but not sewer or stormwater pipes in the right-of-way. Those pipes are City facilities. The City can refuse to permit all proposed installations of telecommunication lines in the System if it desires.

An argument could be made that allowing Company to install fiber optic cable in the System converts those parts of the System into a right-of-way. See *Gulf Power Co. v. Federal Communications Commission*, 208 F. 3d 1263, 1281 (11th Cir. 2000), Carnes *dissenting* [If a utility allows even limited access to its poles for wire communications, it is subject to mandatory access for all pole attachments.] No California court has rendered a published opinion on the question.

The City nevertheless is granted broad discretion to manage the public right of way by Public Utilities Code section 7901.1(a) and section 253(c) of the Act. In *New Jersey Payphone Association v. Town of West New York*, 130 F. Supp. 2d 631, 637 (D. N.J. 2001), a town expressed alarm that if its exclusive franchise ordinance for pay phones was struck down, the right-of-way would be overrun with pay phones. The Court responded that the town's ability to manage the right-of-way and pre-approve pay phone sites was an obvious solution to the town's concerns. *Id.*

Similarly, in the proposed License with Company, the proposed route of the fiber optic network must be approved by the City prior to installation. The network cannot interfere with the conveyance of wastewater. Furthermore, installation in any sewer pipe may only be accomplished by means which do not penetrate the inner surface of the pipe or otherwise compromise the pipe's structural integrity. The City's authority to manage access to the System is stronger than its authority over public streets and parks because of the potential threat to health and safety involved with the conveyance of wastewater. Other limitations related to health and safety may be adopted by the City which would apply to all potential installations in the System.

CONCLUSION

Local government is restricted by both federal and state laws in its ability to regulate telecommunication facilities. Nonetheless, local government may impose reasonable restrictions and fees directly related to management of public rights-of-way. In addition, on property that is

owned by the City, but not a public right-of-way, the City may require reasonable compensation for use of the property. All regulations imposed by the City must not unreasonably discriminate between providers. The City retains the right to impose time, place, and manner restrictions on telecommunication facilities.

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