

## Recent Developments: Right-of-Way Governance/Wireless Facilities Siting (4/28/11)

### CPUC

#### **Decision Adopting GO 170**, dated December 10, 2010 (“Decision”)

(Proceedings in R.06-10-006; <http://docs.cpuc.ca.gov/published/proceedings/R0610006.htm>)

- The Decision appears to assert that the CPUC has sole authority to issue discretionary permits and conduct CEQA reviews for telecommunications construction projects in the PROW (“PROW projects”).
- The League of California Cities and the California State Association of Counties (“League” -- represented by the San Francisco City Attorney) and SCAN NATOA (“SN” -- represented by the Pasadena City Attorney) have filed a petition for rehearing and a motion for a stay; AT&T and certain “small local exchange carriers” have also filed a petition for rehearing (“petitions/motion”); several carriers are opposing the petitions/motion (e.g., NewPath, NextG, Verizon).
- According to the League/SN, the Decision was issued without a hearing or adequate notice; the CPUC has not acted on the petitions/motion to date, there are no CPUC rules requiring a hearing or any action by the CPUC and it is unknown whether or when the CPUC will rule on the petition/motions.
- The League/SN argue that the Decision exceeds the CPUC’s authority; violates local governments’ constitutionally-protected due process and police power rights; conflicts with CEQA requirements and established CPUC rules and policy; and is ambiguous and subject to misinterpretation (“[t]he problems with the Decision are underscored by the fact that the parties cannot even agree on what it means or requires;” League/SN reply memorandum, 2/18/11, p. 11).
- The League/SN maintain that the Decision has caused confusion about local governments’ authority to issue discretionary permits and/or conduct environmental reviews, and may result in some carriers asserting that PROW projects are not subject to local CEQA review; attorneys for the League/SN advise that they are unaware to date of specific legal challenges to permit procedures based on the Decision.<sup>1</sup>
- The Long Beach City Council is expected to enact a new ordinance in May 2011 (passed by the Planning Commission on 4/7/11; temporary moratorium expires in 5/11) which sets specific design/development standards for PROW projects; the Long Beach City Attorney advises that the draft ordinance was rewritten to avoid a possible legal challenge by replacing discretionary requirements (not challenged by any carriers in the public comment process) with ministerial review procedures.

### FCC

#### **Notice of Inquiry**, dated April 7, 2011 (“NOI”)

(Proceedings in FCC 11-51/WC Docket No. 11-59;

[http://www.fcc.gov/daily\\_releases/daily\\_business/2011/db0407/FCC-11-51A1.pdf](http://www.fcc.gov/daily_releases/daily_business/2011/db0407/FCC-11-51A1.pdf))

- Seeks input from interested parties in regard to right-of-way permitting and siting, among other things to: “reduce unnecessary obstacles to obtaining access to rights of way and siting wireless facilities;” “promote [] increased uniformity with respect to [] practices and policies;” and potentially promulgate nationwide rules for right-of-way permitting/siting by local governments (NOI, p. 6).
- Comments are due within 60 days of the NOI’s publication in the Federal Register.
- The League’s “City Advocate Weekly” (4/12/11) warns that the NOI “has the potential to greatly impact the public right-of-way;” a similar process led to a 2009 FCC ruling imposing a nationwide “shot-clock” deadline for processing PROW project permits, which the League/SN opposed (on appeal in the 5<sup>th</sup> Circuit, *Arlington v. FCC*).
- For more information: <http://www.natoa.org/policy-advocacy/fcc-issues-of-interest/fcc-noi-webinar-replay.html>

### Resources/contacts

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<sup>1</sup>NewPath is challenging the cities of Irvine and Davis in two pending federal cases on the grounds that state and federal law allegedly pre-empt and prevent local authorities from conducting discretionary permit reviews for DAS (distributed antenna system) networks (involving multiple poles which NewPath sought to install in Davis and Turtle Rock, planned communities without overhead utilities). It is unknown whether the Decision has been cited as support for NewPath’s position in either case.