State and Local Regulation of Wireless Facilities in the Public Right-of-Way

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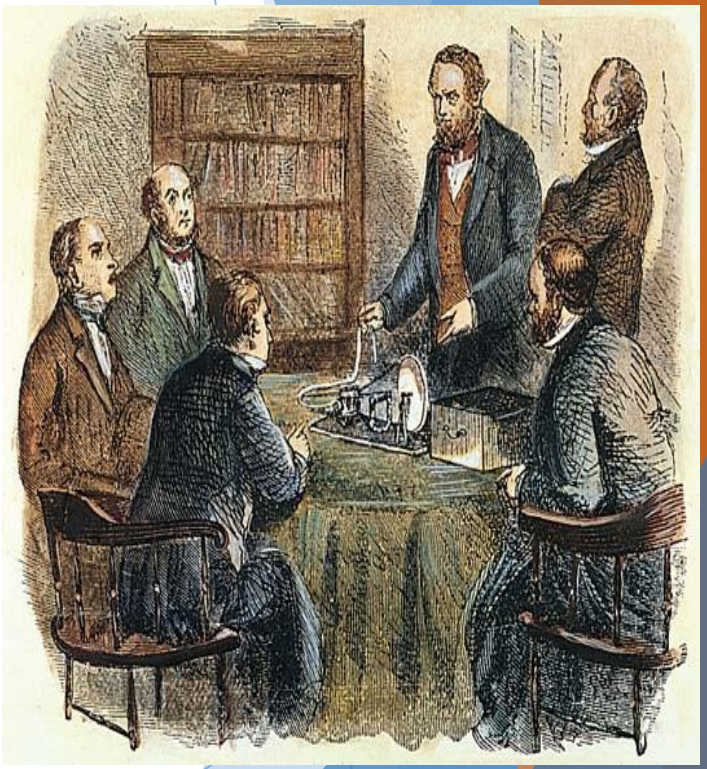
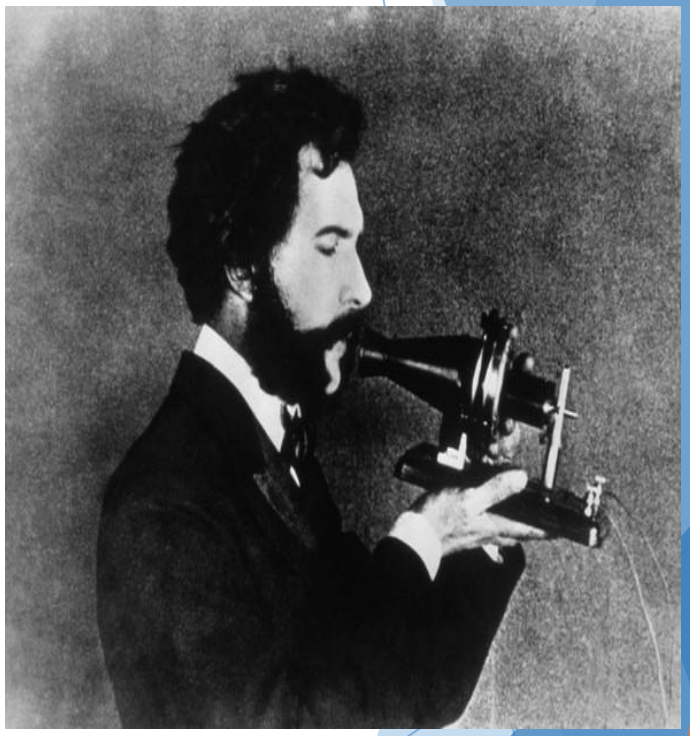
OUR STORY BEGINS IN 1850 WHEN CALIFORNIA BECOMES A STATE

- Samuel Morse invented the telegraph in 1832 and California wanted to make sure that its citizens got the benefit of this new technology.
- In its first session in 1850, the Legislature added to the Laws of the State of California a Chapter entitled “Telegraph Companies.” (1850 Cal. Stats., ch. 128)
- California authorized telegraph companies to “construct lines of telegraph” along the “roads and highways” within the State.
- Many States adopted similar provisions.



Language to that Effect Has Remained Part of California Law Since

- In 1878, Alexander Graham Bell invented the telephone.
- In 1905, the Legislature repealed and reenacted the franchise right, adding telephone corporations. (1905 Cal. Stats., ch. 385.)
- In 1951, the Legislature reenacted the provision as Section 7901 of the Public Utilities Code, without altering it. (1951 Cal. Stats., ch. 764.) Still the law today.



Not Surprisingly, Litigation Ensued

- Initially, cases focused what was the nature and extent of the grant:
  - *Western Union Tel. Co. v. Hopkins* (1911) 160 Cal.106, 119 – held that language was an offer of a franchise to telegraph corporations.
  - *Sunset Tel. and Tel. Co. v. Pasadena* (1911) 161 Cal. 265, 283-284 – held that the right to maintain a telephone line was a "municipal affair."
  - *Pac. Tel. & Tel. Co. v. City & County of San Francisco* (1959) 51 Cal.2d 766, 776 – held that "telephone service is not at the present time a municipal affair but is a matter of statewide concern."

What Authority is Left to Local Governments?

- Local governments cannot require telephone corporations to obtain a franchise for the privilege of using the public right-of-way to install and maintain telephone lines.
- The privilege granted under the terms of the Section 7901 is not unlimited. (*Western Union Tel. Co. v. City of Visalia* (1906) 149 Cal. 744, 750.)
- A telephone corporation may not install facilities that "*incommode* the public use of the road or highway." (Public Utilities Code section 7901 (emphasis added).)

What in the Heck Does Incommode Mean?

- Webster's 1828 dictionary:"[t]o give inconvenience to; to give trouble to; to disturb or molest in the quiet enjoyment of something, or in the facility of acquisition. It denotes less than annoy, vex or harass."
- Merriam-Webster online: "to give inconvenience or distress to: disturb."
- The Oxford English Dictionary: "[t]o subject to inconvenience or discomfort; to trouble, annoy, molest, embarrass, inconvenience."

What Do the Courts Say It Means?

- Local regulation, and local exercise of the police power, can permissibly act as “a restriction of and burden upon a franchise already existing." (*City of Visalia*, 149 Cal. at p. 751.)
- Localities retain the authority to “control . . . [the] location and manner of construction” of telephone lines. (*Pacific Tel. & Tel. Co. v. City & Cty. of San Francisco* (1961) 197 Cal.App.2d 133,146.)
- A number of courts have construed the term broadly to include aesthetic concerns. (See *T-Mobile West LLC v. City & County of San Francisco* (2016) 3 Cal.App.5th 334, 350-56 (*review granted*); *Sprint Telephony PCS v. Cty. of San Diego*, 44 Cal.Rptr.3d 7534 [review granted and later dismissed]; *Sprint PCS Assets v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 720.)

Other State Laws Concerning Local Regulation of Telephone Corporations

- Public Utilities Code section 2901 – a city may not "to surrender to the commission its powers of control to supervise and regulate . . . the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets"
- Public Utilities Code section 7901.1 – "municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed"
- Government Code section 50033 – permit fees for telecommunications facilities cannot "exceed the reasonable costs of providing the service for which the fee is charged and shall not be levied for general revenue purposes"
- Government Code section 65964.1 – established a "shot clock" for permits for wireless facilities. 90 days for collocations and 150 days for new wireless facilities
- SB 649??

Why Do We Care About this Now?

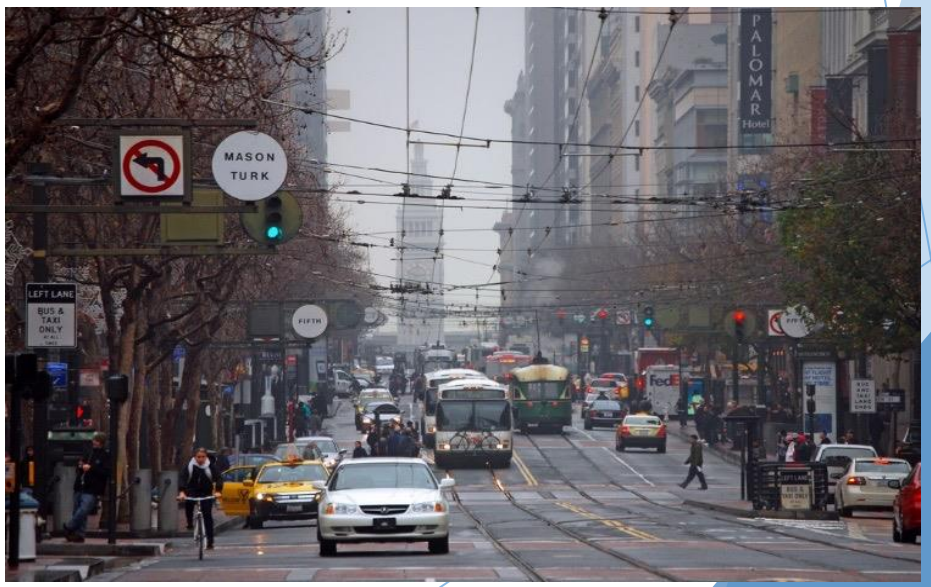
Our streets have changed a lot since the 1850s.

South Park, 1856, looking westward toward Third Street, and the soon to be developed "South of Market" area.
Source: San Francisco History Center, San Francisco Public Library

Third Street "South of Market" 1856

Montgomery North of California Street 1856

What Do Our Streets Look Like Today?



What About the Number of Telephone Companies?

San Francisco in 1905

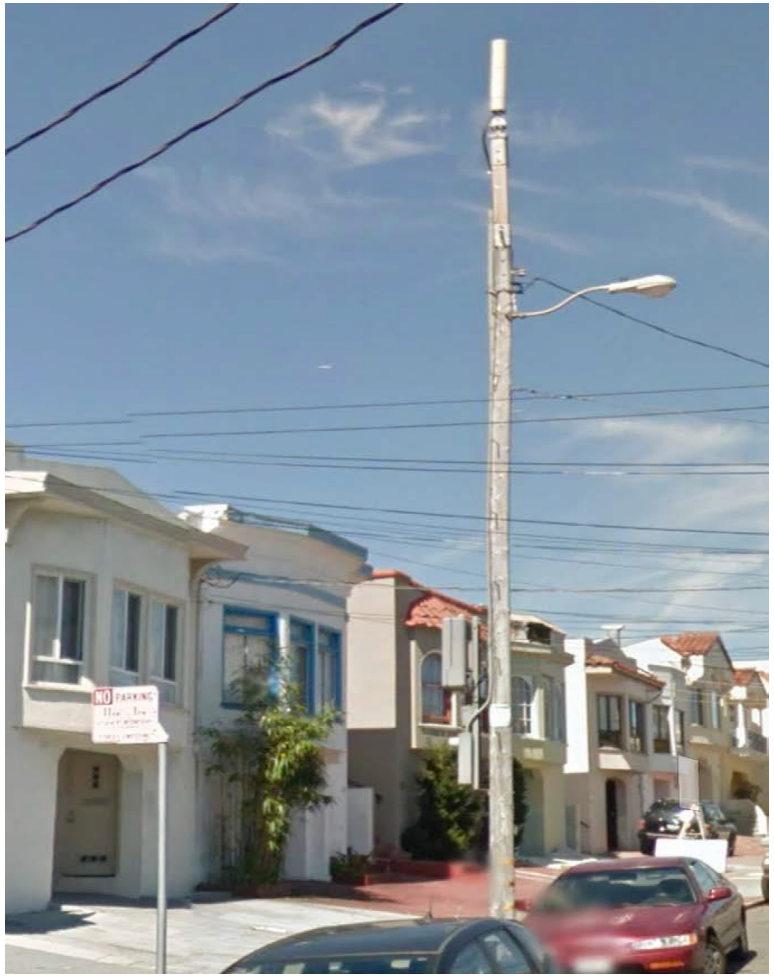
What About the Number of Telephone Companies?
San Francisco Today

It’s Not Just About Telephone Lines

- Utility poles are now ubiquitous.
- More cars, buses, bicycles, fire hydrants, street light, traffic signals, etc.
- Court found in 2014 that San Francisco had 47,994 street-mounted facilities. *San Francisco Beautiful v. City & Cty. of San Francisco* (2014) 226 Cal.App.4th 1012, 1025.

What Have Carriers Installed in the Public Right-of-Way?

What Can Cities Do to Improve the Design?



What About On City-Owned Poles?

T-Mobile v. City & County of San Francisco

Now Before the California Supreme Court

- In 2007, San Francisco adopted an ordinance requiring a personal wireless service facility site permit to install wireless facilities in the public right-of-way.
- NextG sued under federal law. NextG prevailed at first, but when the Ninth Circuit reversed *City of Auburn v. Qwest* the court granted rehearing and denied NextG's motion for summary judgment.
- San Francisco then adopted a new permitting scheme for personal wireless service facilities.
- In both permitting schemes, San Francisco made clear that the purpose of the ordinance was aesthetic regulation.

T-Mobile v. City & County of San Francisco

Now Before the California Supreme Court

- T-Mobile challenged San Francisco's ordinance.
- Among other things, T-Mobile claims that Public Utilities Code section 7901 and section 7901.1 preempt the ordinance.
- T-Mobile claims that Supreme Court in *City of Visalia* said "incommode" means "obstruct."
- T-Mobile argues that section 7901.1 limited local regulation to "time, place, and manner," which does not include aesthetics.
- T-Mobile also argues that permit requirement subjects wireless carriers to unequal treatment.

T-Mobile v. City & County of San Francisco

Now Before the California Supreme Court

- After a trial, trial court ruled for City.
- Court of Appeal upheld the trial court's ruling.
- Supreme Court granted review. Might have done so because of the earlier dismissal of *Sprint v. Cty. of San Diego*.
- Matter is nearly fully briefed.
- Thanks to Jeff Melching of Rutan & Tucker SCAN submitted a brief in support of the City.
- Decision will likely be sometime in 2018.

What Issues are Before the Supreme Court?

1. Is a local ordinance regulating wireless telephone equipment on aesthetic grounds preempted by Public Utilities Code section 7901?

2. Is such an ordinance, which applies only to wireless equipment, prohibited by Public Utilities Code section 7901.1, which permits municipalities to "exercise reasonable control as to the time, place and manner in which roads, highways, and waterways are accessed" but requires that such control "be applied to all entities in an equivalent manner"?

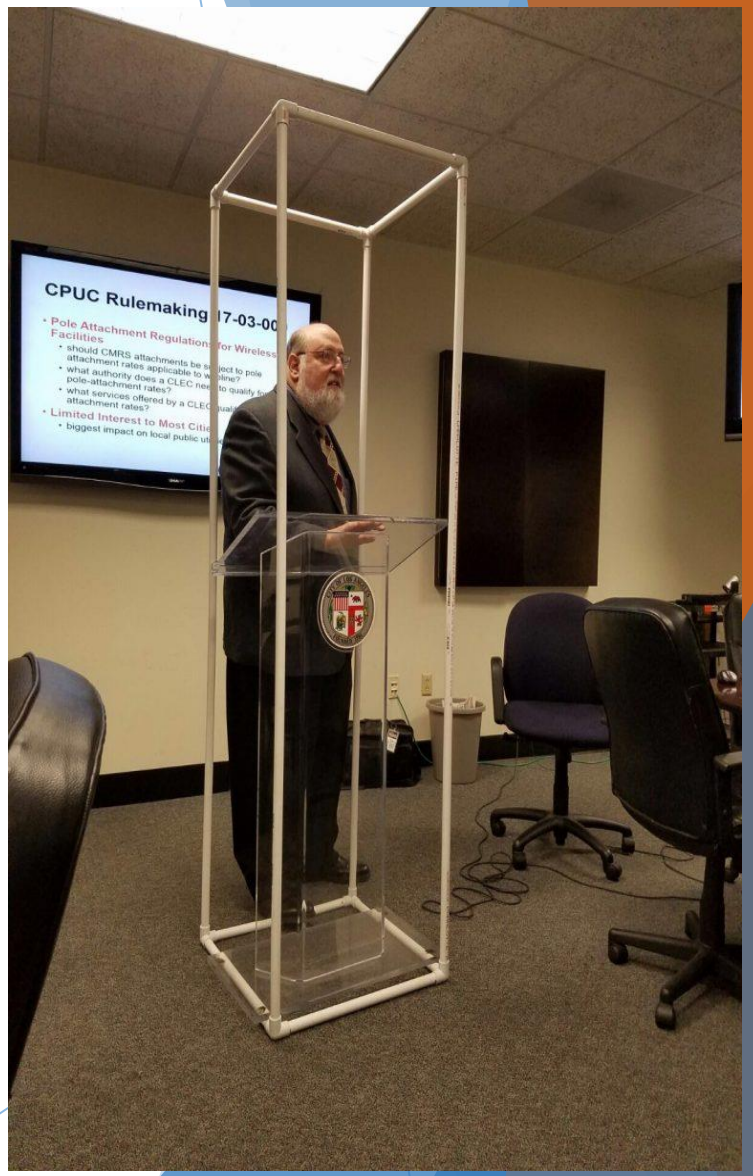
3. What is the appropriate standard for a facial preemption challenge to a local ordinance?

Is that All We Have To Worry About?

- Unfortunately no.
- Carriers want the Legislature to change the law.
- In 2016, there was AB 2788, which local governments helped stop.
- In 2017, there is SB 649:
  - Could moot the *T-Mobile* case with respect to "small cells."
  - Appears to preempt local authority to issue discretionary permits (except in historic districts and coastal zones).
  - Requires local governments to allow the installation of "small cells" on their "vertical infrastructure."
  - Limits compensation to $850 per pole per year, regardless of value, risk, cost, etc.

SB 649 - Small Cells Are Not So Small

- Term was meant to refer to coverage are—not the size of the equipment
- Equipment boxes can be up to 21 cubic feet, which doesn't include the following:
  - up to nine cubic feet of antennas
  - electric meter and any required pedestal
  - concealment elements
  - telecommunications demarcation box
  - grounding equipment
  - power transfer switch
  - cut-off switch



SB 649-Small Cells Are Not So Small

- Also doesn't include "micro wireless" facilities than can be installed on fiber optic lines.
- Elephant in the room is federal law.
  - Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 (codified at 47 U.S.C. § 1455(a)).
  - Requires a State or local government to approve a "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."

What Can Local Governments Do?

- Good news is SB 649 is *not* the law yet. Still needs to be heard in Senate Appropriations Committee and both Houses.
- Contact your Senators and Congresspersons.
- Lobby the Governor's office if the bill passes.
- Look into separating local regulation of wireless facilities (police power) in the public right-of-way and on private property (zoning).
- Monitor CPUC Rulemaking 17-03-009. Largely concerns pole attachment rates, but could address streetscape issues.