



Wireless Update: Shot Clocks, Deemed Granted Remedies and Fee Challenges

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Gail Karish, Partner, Best Best & Krieger

Lutfi Kharuf, Partner, Best Best & Krieger

Christopher Diaz, City Attorney, Colma and Hillsborough
Partner, Best Best & Krieger

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Wireless Update: Shot Clocks, Deemed Granted Remedies and Fee Challenges

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Authors:
Gail A. Karish
Lutfi Kharuf

Introduction

Demand for wireless services really took off shortly after iPhones and other smart phones became available in the mid-2000s, and wireless companies have been investing heavily in generations of network upgrades and expansions ever since, the latest of which is known as 5G or fifth generation networks. CTIA – an industry organization – reports that the U.S. wireless industry invested nearly \$140 billion since 2016, and the number of cell sites increased by 35% during this period.¹ As all construction is local, many cities have experienced both a strong demand for wireless permits and heightened public attention to the applications, as carriers increasingly seek to place these facilities in public rights-of-way and in residential areas. Add to the mix a myriad of new state and federal rules designed to facilitate and speed up local approval of these projects and reduce build-out costs, and you have a situation ripe for litigation. In this paper, we review major state and federal laws and regulations designed to streamline wireless permitting processes and provide remedies when deadlines are missed, including relevant cases interpreting those rules. We also review limits on local fees and costs, and recent cases related to fee challenges.

PART I. SHOT CLOCKS AND REMEDIES

A. Wireless “Shot Clocks” or Timelines for Action

Federal Wireless Shot Clocks

Since 1996, federal law has required local action on wireless applications to be taken within a reasonable period of time. 47 USC 332(c)(7)(B)(ii) provides:

A state or local government or instrumentality thereof shall 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.

However, it wasn’t until 2008 that the industry sought more precise federal rules. In response to an industry petition, the Federal Communications Commission (FCC) established the first two specific timelines for action and coined the term “shot clocks.”² A 90-day shot clock was set for “collocation” applications (adding to existing structures) and a 150-day shot clock for “other” applications. The FCC authority to issue its 2009

¹ See CTIA, “2021 Annual Survey Highlights,” July 27, 2021, <https://www.ctia.org/news/2021-annual-survey-highlights> (last accessed August 2, 2022).

² In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B), WT Docket No. 08-165, 24 FCC Rcd 13994 (WTB. 2009), https://apps.fcc.gov/edocs_public/attachmatch/FCC-09-99A1.pdf (“2009 Ruling”).

Ruling interpreting Section 332(c)(7)(B)(ii) and creating these shot clocks was upheld by the Fifth Circuit Court of Appeals and the U.S. Supreme Court.³

As the FCC's 2009 Ruling was being litigated, in 2012, Congress adopted legislation preempting local authority to deny a new category of wireless applications known as "eligible facilities requests" or "EFRs."⁴ EFRs involve modifications to existing wireless facilities, the rationale for preemption being that localities should not be able to deny non-substantial changes to existing wireless facilities. This short federal statute directed the FCC to develop implementing rules for EFRs which the FCC adopted in 2014, including a new 60-day shot clock.⁵ The 2014 EFR Order was challenged in the courts and upheld by the Fourth Circuit Court of Appeals in 2015.⁶

Having withstood legal challenges to both its 2009 Ruling and its 2014 EFR Order, and facing more industry demands for further relief, once again in 2018 the FCC exercised its authority under Section 332 to establish more shot clocks, among other actions intended to promote and expedite 5G deployments.⁷ In its Small Cell Order, the FCC adopted two shorter shot clocks specifically for "small wireless facility" applications (60 days for collocations and 90 days for new facilities), and clarified and codified its Section 332 shot clock rules.⁸ These and other related FCC orders were challenged in the Ninth Circuit. Most of the new rules, including a ban on moratoria on the processing of telecommunications applications, and the new small cell shot clocks, were upheld.⁹

State Wireless Shot Clocks

The FCC has been clear from the outset that its shot clocks for processing applications run independently of any state timelines for action.¹⁰ Hence, cities must be mindful of state deadlines as well. For example, as with any land use application, the Permit Streamlining Act (Gov. Code § 65920 et seq.) can apply to wireless applications and should be reviewed carefully.

³ *City of Arlington, Texas, et al. v. Federal Communications Commission, et al.*, 668 F.3d 229 (2012); 569 U.S. 290 (2013).

⁴ Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 (Spectrum Act); codified as 47 U.S.C. 1455(a).

⁵ Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, WT Docket No. 13-238, et al., 30 FCC Rcd. 31 (WTB 2014), https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-153A1.pdf ("2014 EFR Order"). The rules are currently codified in 47 C.F.R. 1.6100.

⁶ *Montgomery County, Maryland v. FCC*, 811 F.3d 121 No. 15-1284 (4th Cir. 2015).

⁷ Accelerating Wireless Broadband Deployment, Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9088 (2018) ("Small Cell Order"); Accelerating Wireline Broadband Deployment, Third Report and Order and Declaratory Ruling, 33 FCC Rcd. 7705 (2018) ("Moratorium Order").

⁸ 47 C.F.R. 1.6002 and 1.6003.

⁹ *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020); en banc rehrg den. (2020); cert. den. (2021). The order banning moratoria on the processing of wireless and telecommunications applications was upheld as were other aspects of the Small Cell Order (for example, see discussion of fees *infra*). Though not the topic of this paper, it is worth noting that the Ninth Circuit did not uphold two FCC requirements that aesthetic rules for small wireless facilities be objective and no more burdensome than those applied to other types of infrastructure deployments.

¹⁰ 2009 Ruling at para. 50.

Industry efforts at getting shot clocks enacted into state law in California specifically for wireless facilities applications have met with very limited success. Twice industry-sponsored small cell bills that included shot clocks, among other things, were adopted by the legislature only to be vetoed by the governor.¹¹

The wireless-specific shot clock bill that did get signed into law in California is narrow in scope and time-limited. Citing the importance of wireless services during emergencies, the legislature adopted AB 2421, which Gov. Newsom signed into law on Sept. 29, 2020. The law went into effect on Jan. 1, 2021 and will remain in effect until Jan. 1, 2024. AB 2421 focuses on backup power for macro towers, making a permitted use the installation of specified configurations of standby emergency generators at previously permitted macro cell tower sites. The law does not apply to “rooftop, small cell, or outdoor and indoor distributed antenna system sites.” The shot clock for action on these applications is 60 days, and qualifying applications must be approved.¹²

B. How the Wireless Shot Clocks Function and Ways to Stop Them

Unlike the Permit Streamlining Act, the applicable wireless-specific shot clock will start to run upon receipt of the application.¹³ There are only two ways to toll or stop the running of a FCC shot clock: (1) to provide timely notice of incompleteness (NOI); (2) “toll” the shot clock by mutual agreement with the applicant. Tolling agreements may be reached at any time during the process, and should be in writing signed by both parties.

Initial Submittals – General Rule

For the FCC’s 2009 shot clocks and EFRs, a NOI must be issued within the first 30 days after the submission of an application in order to toll the running of the shot clock. NOIs must be written and specify the missing information and the code provision, ordinance, application instruction, or other publicly-stated procedure requiring that information. There are limits on the scope of information that can be requested for EFRs.¹⁴

Timely issuance of an NOI stops the shot clock until the applicant submits more information, at which point it begins to run again, unless and until the local government issues another timely NOI.

¹¹ SB 649 was vetoed by Gov. Brown in 2017. Gov. Newsom vetoed SB 556 in 2021.

¹² See Gov. Code 65850.75.

¹³ Note the shot clock period cannot be tolled by any mandatory pre-application requirement asserted by the siting authority per 47 C.F.R. Section 1.6003(e). See Small Cell Order at para. 145 (“...we conclude that if an applicant proffers an application, but a state or locality refuses to accept it until a pre-application review has been completed, the shot clock begins to run when the application is proffered. In other words, the request is “duly filed” at that time, notwithstanding the locality’s refusal to accept it.”)

¹⁴ 47 C.F.R. Section 1.6100(c)(1).

It is important for the first NOI to be very thorough because the first NOI for an application serves like a punch list. Any subsequent NOIs must be based on missing information identified by the first NOI.¹⁵

Resubmittals

It is very common for wireless applications to be incomplete on first submittal and require one or more resubmittals. If timely stopped by the prior NOI, the shot clock begins again when the applicant submits supplemental information. The city has only 10 days from receipt of supplemental information to issue another NOI that stops the clock.¹⁶ This cycle can continue until the shot clock runs out, at which point the local government must make a decision or potentially face a “deemed granted” claim. It is important to carefully track the clock throughout the process in order to avoid reaching this point without having discussed with the applicant or ideally agreed to a tolling arrangement or shot clock extension.

Note About EFR Determinations

If an application is submitted as an EFR, but the local government determines that it does not qualify as such, a new shot clock is started as of the date the local government notifies the applicant that the application is not an EFR, as if a new application for the proper type of request were filed that day (i.e., same NOI timeline/process). Thus, it is important to be clear about the action being taken (denial of EFR), to ensure the action is taken by an authorized city representative, and to include a NOI for the correct application type with the denial decision, to stop the new shot clock.¹⁷ Also, one should bear in mind that denials must be in writing, as discussed further below.

Special Rules for Small Wireless Facilities Shot Clocks

For Small Wireless Facilities, the local government has only 10 days from the submission of the application to issue the first NOI, and if the first NOI is issued within such 10 days, the shot clock then *resets* once the applicant submits the supplemental information requested by the city, effectively giving the local government 60 days or 90 days (depending on the application type) from the first resubmittal to act on the application.¹⁸

¹⁵ 47 C.F.R. Section 1.6003(d); 47 C.F.R. Section 1.6100(c)(3).

¹⁶ 47 C.F.R. Section 1.6003(d)(3); 47 C.F.R. Section 1.6100(c)(3).

¹⁷ For example, Verizon challenged whether the City of Malibu had denied an EFR questioning the authority of the City staff member who issued the denial and whether a denial was issued. The City successfully defended the challenge. *Los Angeles SMSA Ltd Partnership dba Verizon v. City of Malibu*, No. 2:21-cv-01827-PSG-PVC (C.D. Cal. 2021); appeal pending before Ninth Circuit (No. 21-56204). By contrast, in *Bd. of Cty. Commissioners for Douglas Cty., Colorado v. Crown Castle USA, Inc.*, No. 18-CV-03171-DDD-NRN (D. Colo. 2020), the court determined a review was a “Presubmittal Review” not constituting a denial because County didn’t use form specifically designed to deny or approve applications.

¹⁸ 47 C.F.R. Section 1.6003(d)(1).

For subsequent determinations of incompleteness, the tolling rules that apply to resubmittals under other Section 332 shot clocks (and discussed above) apply.

More special rules for Small Wireless Facilities relate to batching applications. The FCC rules do not allow a city to refuse to accept batched Small Wireless Facility applications. Batching can take several forms. For example, it could be a single application seeking approval of multiple deployments that are all of a certain category (either all Small Wireless Facility collocations or all new/replacement facilities), or it could be a single application seeking approval for multiple deployments which are a mix of collocations and new/replacement facilities. In the former situation, the presumptively reasonable period of time for acting on the whole batch is equal to that for a single deployment within that category (that is 60 days or 90 days) and in the latter it is equal to 90 days.¹⁹

AB 2421 Shot Clock Rules

For requests for emergency standby generators for macro cell tower sites that qualify under Gov. Code 65850.75, the local government has 10 days from the submission of the application to issue the first NOI. If the NOI is issued within 10 days, the shot clock then resets once the applicant submits the supplemental information requested by the local government, effectively giving the local government 60 days to act on the application from the date of resubmittal.

For subsequent determinations of incompleteness, although the language of AB 2421 is ambiguous and could be read to indicate that the 60-day shot clock resets upon each subsequent resubmittal, a conservative approach would assume the shot clock tolls if the local government provides written notice within 10 days indicating that the supplemental submission did not provide the information identified as missing in the prior NOI.

Managing the Submittal, Resubmittal and Review Process

All the shot clocks run on calendar days which can make timely responses particularly challenging. The one bit of relief in the FCC rules is that they do acknowledge that if a shot clock deadline calculated in this manner falls on a weekend or other holiday, the shot clock date is the next business day after such date.²⁰

Historically, applications were submitted on paper over the counter during business hours and so there were some built-in controls on the submittal and resubmittal process. But many cities have moved to online systems or started accepting emailed documents which can be access or delivered 24/7/365 – and this trend accelerated as a result of the COVID epidemic. To avoid disputes about timing and deadlines, it should be clear in the city’s application forms and materials and online

¹⁹ 47 C.F.R. 1.6003(c)(2).

²⁰ 47 C.F.R. 1.6003(e). It isn’t entirely clear in the text if the next business day rule applies to all deadlines including the date for issuing NOIs but that is a reasonable interpretation and the Section 332 shot clocks are supposed to represent presumptively reasonable periods within which to act.

systems how and when applications can be submitted and when they will be considered received.

One control that can't be implemented lawfully is to stop taking in applications altogether. FCC rules ban moratoria on communications infrastructure deployments meaning cities can't pause acceptance and processing of telecom and wireless applications.²¹

All Permits and Authorizations and Administrative Appeals

FCC rules provide that all permits and authorizations must be issued within the shot clock period.²² Of course, applicants rarely apply for all permits and authorizations at the same time, so it is advisable to be clear in application forms about which permits and authorizations are being sought and to waive rights to obtain permits not applied for within the same timeframe.

Further, "final action" is required, meaning completion of all administrative appeals.²³

For these reasons, it is advisable to review your existing codes, processes and application forms to ensure they are nimble enough to allow a final decision to be made on an application within the applicable shot clock period(s). Though it is possible to get an applicant to agree to toll the shot clock, cities should not count on cooperation.

Special Requirements for Denials

Under federal law, the denial of a wireless application must be "in writing and supported by substantial evidence contained in a written record."²⁴ In a 2015 case before the U.S. Supreme Court, the majority held the federal requirement that the locality's denial decision be supported by substantial evidence necessarily implied that local authorities had to state reasons for denial clearly enough to allow judicial review, and although the denial and reasoning need not be in the same document, they must be essentially "contemporaneous."²⁵ In that instance, the city had provided its reasons for denial in an acceptable form (detailed minutes of a city council meeting) but those minutes were provided 26 days after the date of the written denial. The majority found the reasons were therefore not provided essentially contemporaneously with the denial, in violation of federal law, and remanded the case to the lower court for further

²¹ See Moratoria Order, *supra*. See also 47 C.F.R. Section 1.6100(c)(3).

²² See Small Cell Order, para. 132-137; 47 CFR Section 1.6002(f) definition of "Authorization".

²³ *Global Tower Assets, LLC v. Town of Rome*, 810 F.3d 77 (1st Cir. 2016)

²⁴ 47 U.S.C. 332(c)(7)(B)(iii).

²⁵ *T-Mobile South, LLC v. City of Roswell*, 135 S.Ct. 808 (2015).

proceedings. Other cases have probed the various forms that the “writing” can take,²⁶ and whether there is any delivery requirement in the federal statute.²⁷

C. Deemed Granted and Other Remedies

The Section 332 shot clocks were established as “rebuttable presumptions” of the reasonable period of time within which to act. That meant they served as a guide as to when an applicant might go to court with a claim for expedited relief under 47 USC 332(c)(7)(B)(v) on the basis that it was adversely affected by a “failure to act.”

The presumed remedy for inaction is action. A locality faced with a lawsuit could act (mooting the claim), or defend itself against it by attempting to rebut the presumption that it should have acted within the established shot clock period. Of course, what the applicants really want in this instance is an approval, but the FCC declined industry requests to provide a “deemed granted” remedy or adopt a presumption that the court should issue an injunction granting the application. As the FCC reasoned in its 2009 Ruling:

[M]any courts have issued injunctions granting applications upon finding a violation of Section 332(c)(7)(B). However, the case law does not establish that an injunction granting the application is always or presumptively appropriate when a “failure to act” occurs....While we agree that injunctions granting applications may be appropriate in many cases, the proposals in personal wireless service facility siting applications and the surrounding circumstances can vary greatly. It is therefore important for courts to consider the specific facts of individual applications and adopt remedies based on those facts.²⁸

The situation was different for the EFR shot clock. Here, the FCC determined in 2014 that it did have the authority to establish a deemed granted remedy. For EFRs, under federal rules, if the local government fails to take action on the application within the shot clock period, the request is deemed granted effective at the time the applicant notifies the local government in writing that the shot clock has expired and the application has been deemed granted.²⁹

²⁶ *Capital Telecom Holdings II, LLC v. Grove City, Ohio*, 403 F. Supp. 3d 643, 652 (S.D. Ohio 2019) (holding that there is “no TCA directive specifying what form the municipality’s written decision must take.”); *GTE Mobilnet of California Limited Partnership v. City of Watsonville*, No. 16-cv-03987 NC, 2016 WL 9211684, at *2 (N.D. Cal. Nov. 1, 2016) (holding that video recording by itself was not enough to satisfy the in writing requirement of the TCA); *GTE Mobilnet of CA LP v. Carmel-By-The-Sea*, No. 5:22-cv-00347 (N.D. Cal. 2022) appeal pending (holding video plus draft resolution ok; signed resolution ok).

²⁷ Roswell 574 U.S. at 306 (“[T]he [TCA] does not use any verb whatsoever to describe the conveying of information from a locality to an applicant; it just says that a denial ‘shall be writing and supported by substantial evidence contained in a written record.’”); *GTE Mobilnet of CA LP v. Carmel-By-The-Sea*, No. 5:22-cv-00347 (N.D. Cal. 2022) appeal pending

²⁸ 2009 Order at para. 39 (citations omitted).

²⁹ 47 C.F.R. Section 1.6100(c)(4).

In the same 2014 order, the FCC also confirmed it would not adopt a deemed granted remedy for the Section 332 shot clocks.³⁰

In 2018, the industry asked a third time, and the FCC again confirmed it would not adopt a deemed granted remedy under Section 332, but it did adopt an “enhanced remedy” for small wireless facility applications.³¹ That is, a failure to act on a small wireless facility application (including all necessary authorizations) within the applicable shot clock is presumptively an effective prohibition of the provision of personal wireless services, entitling the applicant to expedited judicial review.

State Law Remedies

Having failed to persuade the FCC to impose a deemed granted remedy for the Section 332 shot clocks, the industry sought deemed granted relief at the state level. In California, it was successful.

In 2015, AB 57 was adopted by the California legislature. Codified under Gov. Code § 65964.1, and effective since January 1, 2016, this statute provides a path for applicants to pursue a “deemed granted” remedy for applications subject to the Section 332 FCC shot clocks adopted in the FCC’s 2009 Ruling. Under AB 57, once the applicable timeline period has expired and as long as all public notices have been provided, applicants may claim that the application is “deemed granted” by providing written notice to the local authority (assuming the locality has not acted on the application before the notice is provided). Local governments may then challenge a “deemed granted” assertion by seeking judicial review within 30 days of receiving the applicant’s notice. AB 537, which took effect January 1, 2022, expanded the reach of the “deemed granted” remedy in Government Code 65964.1 to include applications for “small wireless facilities,” those applications subject to the FCC’s Small Cell Order shot clocks. Finally, note that the remedy in Government Code 65964.1 is not available to a collocation or siting application for a personal wireless services facility where the project is proposed for placement on fire department facilities.

AB 2421 provides that a completed application for an emergency standby generator qualifying under Government Code 65850.75 that is not approved or denied within its shot clock period, shall be deemed approved. Section 65850.75 does not require a notice and has no special language pertaining to judicial review. *City of San Buenaventura v. United Water Conservation District* (2022) 79 Cal.App.5th 110.

³⁰ 2014 EFR Order, para. 281.

³¹ Small Cell Order.

Responding to Deemed Granted Letters

For EFRs, the federal court has held no permit need be issued.³² Further, the city is not foreclosed from litigating whether the application qualifies as an EFR.³³

State law deemed granted remedies may be most suited to litigation in state court.³⁴

Damages

Neither Sec. 332 or Sec. 6409 allow for Section 1983 damages.³⁵

³² T-Mobile v. City and County of San Francisco, No. 20-CV-08139 (N.D. Cal. 2021) held City not required to issue permits for EFR applications because the Spectrum Act only prohibits State or local governments from denying qualifying applications (but note statute says “may not deny, and shall approve”). While no affirmative obligations imposed, T-Mobile’s deemed granted applications should be treated as granted and City was barred from imposing penalties or preventing T-Mobile from proceeding with installations for applications deemed granted because City didn’t timely act.

³³ Bd. of Cty. Commissioners for Douglas Cty., Colorado v. Crown Castle USA, Inc., No. 18-CV-03171-DDD-NRN (D. Colo. 2020) held deemed granted letter has no substantive effect (“purely procedural, a way for applicant to “mark the culmination of the application process”). Request was not a valid EFR because it would defeat specific concealment.

³⁴ City of Santa Ana v. Crown Castle NG West LLC, No. 30-2018-00988480 (2018) initiated by city in state court. Vertical Bridge Development, LLC v. Calexico City Council et al. (S.D. Cal. 2021) initiated by applicant in federal court. Claims dismissed with right to amend, but the court declined to exercise supplement jurisdiction over the state law deemed granted claim.

³⁵ Abrams v. City of Rancho Palos Verdes, 544 US 113 (2005); Bd. of Cty. Commissioners for Douglas Cty., Colorado v. Crown Castle USA, Inc., No. 17-CV-03171-RM-NRN, (D. Colo. 2018), report and recommendation adopted in part, No. 1:17-CV-3171-RM-NRN (D. Colo. 2019).

PART II DEPLOYMENT COSTS AND FEE CHALLENGES

State Law

California cities must comply with a variety of statutes and constitutional provisions when considering fees relating to wireless service.

Proposition 26

In 2010, California voters enacted Proposition 26 which (among other things) amended article XIII C, section 1 of the California Constitution. Prior to Proposition 26, while there were limitations on the ability to adopt taxes (i.e. voter approval requirements), there was no explicit definition of the term. Article XIII C, section 1(e) defined the term “tax” as follows:

(e) As used in this article, "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following:

- (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
- (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
- (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
- (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
- (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
- (6) A charge imposed as a condition of property development.
- (7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

Cal. Const. art. XIII C, §1(e). As such, Proposition 26 defines the term “tax” broadly to include every conceivable type of fee, charge, assessment, levy, or exaction of any kind “imposed” by a local government, unless the fee or charge is exempt. If a fee or charge

is determined to be a “tax” for failing to fall under one of these exemptions, the fee or charge will be unconstitutional unless approved by the voters.³⁶ At least one appellate court has held that a challenge to a fee under Proposition 26 is subject to independent judicial review.

California Mitigation Fee Act

The California Mitigation Fee Act (Cal. Gov’t Code §§ 66000-66025) (“MFA”) governs fees imposed as a condition of development, as well as certain permitting and regulatory fees. Under the MFA, permit processing fees and other regulatory fees, may be imposed to defray the reasonable administrative costs of a local regulatory program and may not exceed the reasonable cost of providing the regulatory service for which the fee is charged. Consistent with Proposition 26 discussed above, a permitting fee that exceeds these limits may be considered an unlawful tax. See Cal. Gov’t Code § 66014, subd. (a). Government Code section 66014 states, in relevant part:

Notwithstanding any other provision of law, when a local agency charges fees for zoning variances; zoning changes; use permits; [...] or under any other authority; those fees may not exceed the estimated reasonable cost of providing the service for which the fee is charged, unless a question regarding the amount of the fee charged in excess of the estimated reasonable cost of providing the services or materials is submitted to, and approved by, a popular vote of two-thirds of those electors voting on the issue.

Additionally, the MFA requires local governments to hold an “open and public” meeting, with full disclosure to the public, regarding the “the amount of cost, or estimated cost, required to provide the service for which the fee or service charge is levied and the revenue sources anticipated to provide the service, including General Fund revenues.” *Id.*, § 66016.

Prior to levying a new fee or service charge, or prior to approving an increase in an existing fee or service charge, a local agency shall hold at least one open and public meeting, at which oral or written presentations can be made, as part of a regularly scheduled meeting.... At least 10 days prior to the meeting, the local agency shall make available to the public data indicating the amount of cost, or estimated cost, required to provide the service for which the fee or service charge is levied and the revenue sources anticipated to provide the service, including General Fund revenues. Unless there has been voter approval, as prescribed by Section 66013 or 66014, no local agency shall levy a new fee or service charge or increase an existing fee or service charge to an amount which

³⁶ While Article XIII C, section 1(e) includes seven explicit exemptions, it also implicitly exempts an eighth category of fees and charges – those that are voluntarily paid by, and not imposed on, payors. To the extent a fee or charge is not explicitly or implicitly exempt from the definition of a “tax”, the fee is characterized as a “tax” subject to voter approval

exceeds the estimated amount required to provide the service for which the fee or service charge is levied.

After adopting a fee schedule pursuant to the above provisions, a local government may not thereafter impose ad hoc fee increases:

Any action by a local agency to levy a new fee or service charge or to approve an increase in an existing fee or service charge shall be taken only by ordinance or resolution. The legislative body of a local agency shall not delegate the authority to adopt a new fee or service charge, or to increase a fee or service charge.

Government Code section 66022 provides that an ordinance or resolution adopting a fee may only be challenged within 120 days of its adoption, provided automatic adjustments may be challenged within 120 days of such adjustment:

Any judicial action or proceeding to attack, review, set aside, void, or annul an ordinance, resolution, or motion adopting a new fee or service charge, or modifying or amending an existing fee or service charge, adopted by a local agency, as defined in Section 66000, shall be commenced within 120 days of the effective date of the ordinance, resolution, or motion.

If an ordinance, resolution, or motion provides for an automatic adjustment in a fee or service charge, and the automatic adjustment results in an increase in the amount of a fee or service charge, any action or proceeding to attack, review, set aside, void, or annul the increase shall be commenced within 120 days of the effective date of the increase.

The Telecommunications Infrastructure Act

The Telecommunications Infrastructure Act applies the MFA standards specifically to telephone corporations. Government Code § 50030, states:

any permit fee imposed by a city, including a chartered city, a county, or a city and county, for the placement installation, repair, or upgrading of telecommunications facilities such as lines, poles, or antennas by a telephone corporation...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.

Section 50030 essentially captures the concepts set forth in the MFA, and applies them to permits for wireless and telecommunications networks.

Free Use of ROW under Pub. Util. Code 7901.

California has a longstanding state statutory franchise for telephone companies to use the public rights-of-way without compensation.³⁷ This statutory right applies to wireless

³⁷ Williams Communications, LLC v. City of Riverside, 114 Cal.App.4th 642 (Cal. Ct. App. 2003).

companies and placement of wireless facilities.³⁸ However, fees for use of City property within public rights-of-way are not regulated at the state level, except for AB 1027, which applies to attachments to municipal utilities' utility poles.³⁹ As noted earlier, California has seen two small cell bills vetoed. Both would have limited fees for use of municipal facilities such as light poles. According to the governor's veto message, the second veto was due to the FCC Small Cell Order already having placed limits on fees for use of municipal facilities.⁴⁰

Examples of Fees

Common fees at issue in wireless permitting disputes include application processing fees, encroachment permit fees (which are imposed for the reasonable regulatory costs associated with permitting construction work and proposed activities encroaching within, under, or over a public agency's ROW), excavation permit fees (which are imposed for the reasonable regulatory costs associated with permitting excavation), street use fees, variable inspection fees, and annual administrative fees.

These costs may be collected in a variety of ways. Some agencies require deposits in set amounts, and bill time on an actual cost basis to be paid from the deposit. Other agencies may choose to adopt a fee that reasonably approximates or estimates the reasonable regulatory costs of the activity for which the fee is imposed.

The agency imposing the fee must take care to establish an evidentiary record supporting the imposition of the fee. If, for example, a city wishes to adopt a permitting fee based on estimated cost under Government Code section 66014, the city must demonstrate, with evidence, how those rates were derived and demonstrate that they are in fact reasonable. Similarly, if an agency wishes to rely on a deposit-based model in order to be reimbursed for actual costs incurred, the agency should ensure that it has a strong record showing what costs were incurred, and how they relate to the regulatory activity.

Federal Limitations Related to Small Wireless Facilities in Public Rights-of-Way

In 2016, a petition was filed by a relatively new entrant, Mobilitie and put out for comment at the end of Chairman Wheeler's chairmanship of the FCC.⁴¹ No action was taken but when Chairman Pai assumed the helm in 2017, he released several notices kicking off proceedings which resulted in several orders in 2018, including the FCC

³⁸ *City of Huntington Beach v. Public Utilities Com.* (2013) 214 Cal.App.4th 566, 587-8 ; *GTE Mobilenet of Cal. Ltd. v. City of San Francisco* (N.D. Cal. 2006) 440 F.Supp.2d 1097, 1103.

³⁹ Pub. Util. code Section 9510 et seq.

⁴⁰ <https://www.gov.ca.gov/wp-content/uploads/2021/10/SB-556-Message-Scan.pdf>

⁴¹ Mobilitie, LLC, Petition for Declaratory Ruling, 1 (filed Nov. 15, 2016).

Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling, Public Notice, WT Docket No. 16-421, 31 FCC Rcd. 13360 (WTB 2016) ("Streamlining Public Notice").

Small Cell Order. The Small Cell Order addressed fees related to wireless facilities installed in the public rights-of-way by interpreting and applying 47 U.S.C. Section 253.

The FCC found that state or local fees charged for the use of public rights-of-way and municipal infrastructure to host small wireless facilities would violate Section 253 unless: (1) the fees are a reasonable approximation of the state or local government's costs, (2) only objectively reasonable costs are factored into those fees, and (3) the fees are no higher than the fees charged to similarly situated competitors in similar situations. Fees for use of public rights-of-way *and* municipal property in public rights-of-ways suitable for hosting small wireless facilities (i.e., utility poles and street lights and traffic lights) were limited to costs. The FCC also established "presumptively reasonable safe harbor" amounts for state and local governments to charge for one time fees to review applications and recurring fees for small wireless facilities in the public rights-of-way (including on municipal poles). The FCC established a safe harbor of \$270 per year per facility for use of the public right-of-way *and* the local government pole in the public right-of-way. One-time fees for review of applications have safe harbors of \$500 for non-recurring fees, including a single up-front application that includes up to five Small Wireless Facilities, with an additional \$100 for each Small Wireless Facility beyond five, or \$1,000 for non-recurring fees for a new pole (i.e., not a collocation). The fees portion of the FCC's Small Cell Order withstood a court challenge by local governments.⁴²

Emerging Issues in Litigation

Crown Castle NG West LLC v. Town of Hillsborough

Crown Castle submitted 16 applications seeking to place 16 small cell antenna nodes with supporting electrical equipment and fiber optic lines on wood poles within the Town's public rights-of-way.. As part of the application process, Crown Castle made an initial deposit of \$60,000 with the Town to cover the processing costs. The applications proceeded through various stages of processing and review, and became the subject of intense public scrutiny, taking up significant staff and consultant time. Ultimately they were denied by the City Manager, which decision was subsequently upheld by the City Council on appeal. The Town did not ask Crown to add to the initial deposit as the applications were being processed, but after the final denial, the Town sent Crown Castle a bill in the amount of \$351,773.25 for fees incurred in processing and reviewing the applications in excess of Crown Castle's \$60,000 deposit ("Fee Demand").

Crown Castle sued the Town in two separate actions in state and federal court.⁴³ On October 18, 2018, Crown Castle filed a Petition for Writ of Mandate and Complaint in state court for to invalidate the Fee Demand as unlawful under the MFA, and to obtain a declaration from the court that the Fee Demand is invalid under the MFA and Government Code section 50030.

⁴² See *City of Portland v. United States*, *supra*.

⁴³ The federal action challenged the merits of the denials. The state action, discussed here, challenged the fees.

The court issued a tentative decision finding that the Fee Demand violated the MFA but did not violate Government Code section 50030. Though the court determined that preemption under Section 253 was not triggered, it found that Crown Castle demonstrated that the Town acted in violation of the Telecommunications Act by an excessive Fee Demand. The court has not yet issued a final decision.

Crown Castle Fiber LLC v. City of Glendale

Unlike *Hillsborough*, Crown Castle challenged fees imposed by the City of Glendale although it had received approval of some of its applications and others were pending. Specifically, Crown Castle paid fees in connection with applications for a 28-node small cell network in the City. These fees included encroachment permit fees, excavation permit fees, and variable inspection fees. The City imposed additional fees on a going-forward basis, including application processing fees, annual administration fees, and annual attachment fees. All fees were designed to recover the City's costs in processing applications, issuing permits, and related regulatory activity or for services and products provided to Crown Castle. The City also reserved the right to charge expert review fees and inspection fees as needed, on a cost and materials basis.

Crown Castle challenged the City's fees on numerous grounds, including that the fees were unreasonable and violated the state and federal law. Crown Castle further argued that any forward-looking fees that do not contain caps acted as a prohibition of service preventing deployment in the City. Crown Castle also argued that any fee that exceeds the amounts set forth in the FCC Small Cell Order are presumed to give rise to a prohibition of service unless the City can demonstrate that such fees reasonably approximate costs, are reasonable, and are non-discriminatory and are no higher than fees charged to similarly-situated competitors in similar situations.

The parties in this litigation underwent mediation and are currently working toward a settlement agreement and dismissal.

CONCLUSION

Processing applications to place wireless facilities within a community is often challenging because the projects can garner public controversy. The natural reaction to controversial projects tends to be to want to slow down the process to allow time to work things out. But that can pose significant risks for cities if they are not familiar with the complex federal rules and timelines on processing wireless applications, and the deemed granted remedies available to applicants under state and federal law for failing to comply with those timelines. Updating codes and forms, ensuring staff is trained on the latest rules, and that systems are in place to track and manage applications can help alleviate these risks. Processing permits and applications for wireless providers can also create significant cost for cities and for applicants. When setting fees to recover such costs, cities must take great care to establish an evidentiary record supporting the basis for calculating their fees. To the extent such fees are charged

based on time and material, cities should preserve records supporting amounts passed through to the applicant.