



Where is the California Public Utilities Commission When You Need It? Why the CPUC needs to assert its authority on siting towers

Richard Statler
Vice President of Services

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Vice President of Services
richard@mobilitie.com
Richard has more than 20 years experience in wireless communications, having held a number of senior management positions including those at Alcoa wireless Services, AT&T Wireless Services, OmniAmerica and international positions serving twice as Regional Director for AirTouch International in Europe. Richard holds a degree in Finance from California State University, Northridge and an MBA from Pepperdine University. He also serves on the Board of Directors for the California Wireless Association and is Chairman of the Advisory Board.

The California Public Utilities Commission (CPUC) has the legal authority to regulate cell site construction, but has offloaded that responsibility to local authorities and failed to monitor the impact on the industry. Local jurisdictions, apparently unbeknownst to the CPUC, are erecting impediments to the ubiquitous deployment of wireless networks and, in some cases, even flouting existing laws such as the federal Telecommunications Act of 1996. In order for the deployment of wireless systems to be successful, the CPUC must re-assert its regulatory authority and reverse a growing trend in the State of California by local jurisdictions to delay and deny cell site applications.

Wireless service is an essential communications component for today's citizens as evidenced by nearly 300 million subscribers nationwide. California citizens use wireless telephony to connect with family and friends, conduct business and most importantly communicate during times of crisis. During the recent rash of fires across the state, wireless communications once again proved to be an effective way for first responders on the front lines of the fires to communicate with each other and the media, as well as a way for citizens to connect with one another. Wireless telephony has moved beyond a luxury item to become an essential service for most Americans. Testament to this concept is the simple fact that the CPUC has the authority to regulate the siting of utilities, including towers, just as it regulates other essential services, like the delivery of electrical power and wired telephony.

The Economic Incentive

Today's wireless consumers are moving beyond simple voice communications on the network to embrace connecting to their content wirelessly, whether that is accessing the Internet, sending e-mail or sharing photos. Wireless operators are building and upgrading their networks to be better able to handle these data-intensive applications. A significant portion of the American Recovery and Reinvestment Act of 2009 signed into law by President Obama earlier this year seeks to build more broadband networks. The President has recognized that broadband access, including wireless broadband access, is an essential part of our nation's infrastructure and set aside \$7.2 billion in stimulus funding to help bring broadband services to more Americans. Indeed, the digital highway is

Mobilitie \mō-bil-i-tee\ *verb*

1: the quality of being mobile **2:** the fastest growing tower company in the United States **3:** 50% revenue share and no equipment limits **4:** \$500 million on hand to invest in towers, DAS, and broadband backhaul networks

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an essential component to the U.S.'s economic recovery. It is estimated that every dollar invested in broadband technology leads to a tenfold return to the economy. Wireless services are expected to be a substantial part of the broadband movement going forward as the nation's wireless operators build out advanced generation networks capable of handling streaming video and other yet-to-be-dreamed-of applications. This increasing demand is forcing commercial wireless operators to upgrade their existing cell sites and build new ones to accommodate this demand.

Wireless carriers are good corporate citizens as well; during the late August and early September fires in Thousand Oaks, Calif., where fires raged over 40,000 acres, Verizon Wireless, for example, added — at no cost to others — 130 cell phones, 55 mobile broadband cards for Internet access and two high-speed Internet connections to workers on the front lines in the Angeles National Forest and San Jacinto Mountains, as well as making financial contributions to the local chapters of the American Red Cross. Likewise, AT&T Inc. offered to help residents displaced by the fires through value-added feature services such as voice-mail and call-forwarding features.

And yet, California is notorious for being among the worst states for wireless carriers to try to build new towers to bring better coverage and new advanced services to wireless users, and modify old towers so their networks can operate more efficiently. This negative reputation is frustrating to wireless operators as they try to bring better service to California residents and visitors to the state.

As the sole agency responsible for managing utilities in the nation's most populous state, the CPUC should be a leader in handling complex decisions associated with tower siting, bringing into balance the needs of its citizens with environmental standards.

The CPUC and Tower Siting: A Brief History

Cellular tower sites are governed by federal, state and local regulations. Back in the 1990s, cities were often reluctant to allow towers to be sited across their lands, leading to a hodgepodge of ordinances that were inconsistent across cities, counties and states. Often, planning commissions would table a wireless discussion based on misconstrued health fears. Eventually, federal action was needed to give some framework to tower-siting issues.

Congress approved the Telecommunications Act of 1996 in part to help build wireless networks while at the same time preserving local authority. An essential part of the federal regulation says that municipalities cannot deny tower construction for health reasons as long as federal laws governing radio-frequency emission guidelines are met. Congress has given the Federal Communications Commission the ultimate authority in siting towers. The FCC acknowledged that state and local jurisdictions are not siting towers in a reasonable timeframe by issuing a mandate that said state and local governments must rule on a collocation siting request within 90 days, and any other tower siting application, within 150 days. Despite this acknowledgement, the carrier's only recourse if that deadline is not met is to take the matter to court.

The California Public Utilities Commission also has the authority to regulate tower sites under the California Constitution. CPUC regulation of public utilities pre-empts local regulation, according to Article XII, Section 5. The Legislature further granted the CPUC specific power over siting of public utility facilities, including wireless telephone lines, in Section 762 of the Public Utilities Code: "Whenever the commission, after a hearing, finds that ...new structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such... structures be erected in the manner and within the time specified in the order."

A Shift in Authority

But while the CPUC has the authority to site towers, in recent years the state agency has shifted that authority to local agencies because the CPUC believed that the rules put in place to enable decisions to be made at the local level were being followed — and for a short period of time, that relationship worked. However, the same problems that arose concerning tower-siting issues in the 1990s are again resurfacing throughout California, especially since most of the regulation now takes place at the local government level with little oversight from the state.

The CPUC needs to exercise oversight of local permitting so it can ensure that consistent guidelines are developed throughout the state and that those guidelines meet federal requirements set forth years ago. Failing to take action could result in more than just stalling wireless build-outs; there are economic consequences as well for the state.

The CPUC needs to take back the regulation reins so it can ensure that consistent guidelines are developed throughout the state and that those guidelines meet federal requirements set forth years ago. Failing to take action could result in more than just stalling wireless buildouts; there are economic consequences as well for the state. In fact, California produces the highest wireless service provider payroll of all states.

The jumble of decisions being made today at the local level throughout the state tend to be knee-jerk reactions to a small group of constituents. These uninformed decisions force wireless carriers, municipalities and the court systems to waste untold hundreds of thousands of dollars to litigate decisions instead of resolving them in a more efficient and cost-effective manner. Further, some court fights take years to resolve — a result in which everyone loses: the citizens who demand better cell phone coverage, the wireless operators that have to contend with frustrated customers who can't connect to the network, and the various layers of government, from planning commissions up to federal district appeals courts, which waste precious financial resources on hearings, extra paperwork and litigation. These “stall tactics” don't help California citizens, wireless carriers or the regulators themselves.

Existing laws are in place to prevent this very scenario from happening, but they have been abused along the way and now seem to be the rule, not the exception. For example, The California Environmental Quality Act (CEQA) was enacted in 1970 as a system of checks and balances for land-use development and management decisions in California. As part of this law, municipalities must vote a request up or down within 60 days after an environmental assessment is done. While the theory behind the law is designed to quickly decide an issue, municipalities instead have abused the regulation in that they aren't asking for the environmental assessment until the very end of the process. Because of this abuse, wireless carriers have to go to court to force the municipalities to complete the environmental assessment — which again is a waste of time and resources.

“San Diego's just legendary and Irvine is almost as bad,” said Julian Quattlebaum, a lawyer with Channel Law Group, LLP, a Long Beach-based firm with extensive experience assisting wireless carriers on land-use and siting issues.

With the state and federal laws in place today, most projects should not take more than 90 to 120 days, Quattlebaum estimates. However, projects can drag on for years. A dispute between carriers and the Turtle Rock community in Irvine has been going on for almost eight years. Channel Law Group itself is presently involved in four lawsuits in San Diego covering eight sites. My colleague, Christos Karmis, recently penned an article about siting three towers along the 241 Toll Road in Orange County, Calif., that took eight years and cost nearly \$2 million each — nearly ten times the average site cost.

The phrase “Not in my backyard,” used to convey the sentiment that although people enjoy cell phone service, they do not want towers sited near their property for unconfirmed health reasons or worries about declining property values from the towers. Today, the phrase “Not during my term” effectively represents how some local officials view tower siting. This extreme approach hinders development and stalls progress. These local “leaders” were elected to make decisions, following laws already in place, rather than be inert and ineffective by simply tossing the matter to the court system rather than risk the wrath of a few constituents.

Ironically, a tower-siting issue in Thousand Oaks, Calif., where the recent fires took place, provides a good example of the problems carriers and tower firms face when trying to erect a tower. Wireless operator T-Mobile USA has been unsuccessful in trying to site a tower in the area this year. T-Mobile has an agreement with the existing school district that allows it to site towers on school property. T-Mobile went before the local planning commission, which approved the tower to be sited on the school's property. However, the decision was appealed by the city council. According to an article in the Thousand Oaks Acorn, the local planning commission had approved conditional use permits for three tower facilities on a local school campus. However, the city council appealed the planning commission's decision and further asked the local school district to “conduct its own public hearing, with expert testimony on the potential health hazards of radio frequency (RF) emissions. Under the Federal Telecommunications Act, the city can

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debate only the location and appearance of cell towers and not potential health risks,” according to the news site. The appeal, filed June 10, was then extended to Sept. 23.

In this case, a city councilman said he wasn’t sure T-Mobile had a gap in coverage in the area, and said the cellular carrier should have to prove there was a gap in coverage, according to the article. Siting a cellular tower costs an average of about \$200,000 — not a figure that any cellular carrier spends lightly. Further, the nation’s top four wireless carriers are concerned with building out national networks, and as such have to compare the resources required to site a tower in California with the resources required to site a tower in another region of the country. As operators try to figure out how most effectively to spend their capital expense dollars, building a tower in Texas may be a better use of financial resources than erecting a tower in California, where the carrier is likely to meet resistance. Coverage and safety issues aside, the accompanying jobs that would have come from a California build are then shifted to Texas.

Summary

Wireless communications are an essential service to California residents. People today consume content on the go and enjoy the freedom of not having to be tied to a fixed location to communicate with friends and family, as well as connect with digital content, for both personal and business use. Mobility is the coveted “killer app.” In order to satisfy this increasing demand for voice and data services on the networks, wireless operators need to be able to build new towers and modify existing towers. Updating telecommunications network infrastructure is the first step in trying to meet this increasing demand.

The CPUC needs to reassert its legal authority to regulate wireless network construction. The decision in General Order 159-A to offload that responsibility to local authorities worked okay for a short time. But as wireless carriers and construction companies are building out advanced generation networks to keep up with the increasing demand to go wireless, local government authority has created a mixture of tower-siting rules and regulations that are not based on sound principles and often conflict with federal law. Going forward, the state agency needs to take back its authority to regulate towers so that construction can be done in a transparent and consistent manner, and more importantly, so that California residents do not fall behind the rest of the nation as broadband communications networks are built out.

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