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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SPRINT TELEPHONY PCS, Plaintiff and Appellant, v. COUNTY OF SAN DIEGO et al., Defendants and Respondents.	D045957 (Super. Ct. No. GIC813987)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Hayes, Judge. Affirmed.

Buchanan Ingersoll, Daniel T. Pascucci and Nathan R. Hamler for Plaintiff and Appellant.

Ledoux Esquire Inc., Stephen R. Ledoux and Andrew D. Mastin for T-Mobile USA, Inc., as Amicus Curiae on behalf of Plaintiff and Appellant.

John J. Sansone, County Counsel, and Thomas D. Bunton, Senior Deputy County Counsel, for Defendants and Respondents.

Jennifer B. Henning for California State Association of Counties, as Amicus Curiae on behalf of Defendants and Respondents.

Dennis J. Herrera, City Attorney (San Francisco), Burk E. Delventhal, Chief Government Team Deputy, Owen J. Clements, Chief of Special Litigation, Theresa L. Mueller, Chief Energy and Telecommunications Deputy, and William K. Sanders, Deputy City Attorney, for League of California Cities and City and County of San Francisco as Amicus Curiae on behalf of Defendants and Respondents.

Local governments, reacting to the rapid expansion of wireless cellular communications and accompanying infrastructure, have adopted ordinances to regulate the placement and aesthetics of wireless cellular telephone towers and ancillary equipment through a discretionary permitting process. The Wireless Telecommunications Ordinance (WTO) adopted by defendant County of San Diego (County), the enforceability of which is challenged in this appeal by plaintiff Sprint Telephony PCS, L.P. (Sprint), prescribes an approval process for applications to install cellular telephone infrastructure, including equipment that will be installed in a public right of way (ROW) within County's jurisdiction. In this action, Sprint argues the WTO is invalid under Public Utilities Code section 7901,[1] asserting that section 7901 prevents local governments from regulating the installation of telecommunications equipment in the ROW except insofar as is necessary to accommodate the public's right to use the ROW.[2] County contends the rights conferred by section 7901 do not apply to cellular

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1 All statutory references are to the Public Utilities Code unless otherwise specified.

2 Sprint does not in this proceeding contend the WTO is unenforceable insofar as it prescribes a permitting process for installing telecommunications equipment on property outside of public roads or highways. However, in a concurrent federal action (see *Sprint*

telephone equipment at all, or alternatively, the statutory scheme preserves to local governments the power to regulate the location and appearance of equipment placed in the ROW. The trial court upheld the validity of the WTO, and this appeal followed.

I

FACTUAL BACKGROUND

A. The Relevant Statutory Scheme

Section 7901 provides:

> "Telegraph 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."

Telephony PCS, L.P. v. County of San Diego (S.D.Cal. 2005) 377 F.Supp.2d 886), Sprint asserted the WTO is unenforceable in its entirety because it violates the Federal Telecommunications Act of 1996 (Pub.L. 104-104, 110 Stat. 56) (the TCA), and more particularly offends title 47 United States Code section 253, as a "local statute or regulation . . . hav[ing] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." The federal district court, although acknowledging federal law permits local governments to impose aesthetic requirements or placement restrictions in the exercise of their zoning authority (see, e.g., *Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge* (9th Cir. 2006) 435 F.3d 993, 998 [dicta]; *APT Pittsburgh Ltd. v. Penn Township Butler County* (3d Cir. 1999) 196 F.3d 469 [upholding validity of zoning ordinance restricting towers to certain districts in Township]), concluded the WTO was invalid because it prohibited or had the effect of prohibiting the provision of wireless service. Accordingly, the district court enjoined County from enforcing the WTO. (*Sprint Telephony PCS, L.P. v. County of San Diego, supra,* at p. 900.) However, County has appealed the decision to the Ninth Circuit Court of Appeals, and we take judicial notice (*People v. $25,000 United States Currency* (2005) 131 Cal.App.4th 127, 131) that the Ninth Circuit has stayed the district court's decision pending the appeal. In the present action, we are not called on to decide the federal preemption issue for the WTO as a whole, but instead must decide the limited issue of whether the WTO is enforceable under California law insofar as it applies to equipment to be installed in the ROW.

The language of section 7901 has evolved to reflect some of the technological advances in communications. "The predecessor of [section 7901], Civil Code section 536, was first enacted in 1872 as part of the original Civil Code. [Citation.] The language was identical to the current section except that there was no reference to telephone corporations reading ' "Telegraph corporations may construct lines of telegraph along and upon," etc.' [Citation.] The reason for this omission was that the telephone was completely unknown in 1872, not having been invented until 1875. [Citation.] [¶] In 1905, Civil Code section 536 was re-enacted to add telephone corporations and telephone lines to the statute. [Citation.] In 1951, Civil Code section 536 became [section 7901]. The language of section 7901 remains as it was in 1905." (*Anderson v. Time Warner Telecom of California* (2005) 129 Cal.App.4th 411, 419.)

The Public Utilities Code, of which section 7901 is a part, has also undergone an evolutionary process. Shortly after telephone corporations and telephone lines were added to section 7901's predecessor statute, the California Constitution was amended to vest in the Public Utilities Commission (PUC) "the exclusive jurisdiction to supervise and regulate public utilities." (*Pacific Tel. & Tel. Co. v. City of Los Angeles* (1955) 44 Cal.2d 272, 280.) Thereafter, the Legislature in 1915 enacted the Public Utilities Act, which required among other things that (1) a telephone corporation that sought to construct telephone lines would first be required to obtain a "certificate [of] public convenience and necessity" (CPCN) from the PUC (Public Utilities Act § 50, subd. (a), (Stats. 1915, p. 148)(repealed)), and (2) a telephone corporation that sought to exercise

the right to a franchise would first be required to obtain a CPCN from the PUC (*id.* at subd. (b)). The Public Utilities Act, providing definitions for terms "when used in this act," defined a telephone corporation as every corporation owning or operating a telephone line within the state for compensation (*id.* at § 2, subds. (a), (t)), and defined a telephone line to include "all conduits, ducts, poles, wires, cables, instruments and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated or managed in connection with or to facilitate communication by telephone . . . ." (*Id.* at § 2, subds. (a), (s).) The absence of any reference to wireless communications from the initial definition of telephone corporations or telephone lines is understandable because wireless forms of communication were then in their infancy.[3]

In 1951, the Legislature repealed the Public Utilities Act and incorporated many of its provisions into Part 1 of the Public Utilities Code. (See Stats. 1951, ch. 764, § 201 et seq., p. 2027 et seq.) The Legislature continued the requirement that a telephone corporation seeking to embark on new service first obtain a CPCN from the PUC. (§ 1001.) The new law, which provided that many definitions imported from the former Public Utilities Act would "govern the construction of [Part 1 of Division 1 of the Public Utilities Code]" (§ 203), imported without change the definition of a telephone corporation formerly contained in the Public Utilities Act. (§ 234.) The Legislature also imported the definition of a telephone line formerly contained in the Public Utilities Act,

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3 See John Shea, "*Brief History of Wireless Communications*" (Jan. 12, 2000), http://www.wireless.ece.ufl.edu/~jshea/eel6509/misc/history (as of May 16, 2006).

but amended that definition to add the clause "whether such communication is had with or without the use of transmission wires."[4] (§ 233.)

As part of the same enactment, the Legislature also moved former Civil Code section 536 into Division 4 of the Public Utilities Code. Former section 536 became section 7901 without any change to the statutory language. (See Stats. 1951, ch. 764, p. 2194, § 7901.)

In 1995, the Legislature adopted section 7901.1, which specified it was "the intent of the Legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." (Stats. 1951, ch. 764, § 7901, subd. (a), p. 2194.)

B. The County's WTO

General Requirements

In 2003 County enacted the WTO, the stated purpose of which is "to establish comprehensive guidelines for the placement, design and processing of wireless telecommunications facilities in all zones within the County of San Diego." The WTO, which added sections 6980 through 6991 to County's Zoning Ordinance (ZO), establishes a four-tier structure for processing applications for the installation of wireless facilities. (ZO § 6985.) Tier 1 applies to applications for wireless facilities that are invisible or

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4 By 1949, the first interconnection of mobile users to a public switched telephone network had been accomplished and the FCC had recognized "mobile radio" as new class of service. (Shea, "*Brief History of Wireless Communications*," *supra*, http://www.wireless.ece.ufl.edu/~jshea/eel6509/misc/history (as of May 16, 2006).

have very low visual impacts. Tier 2 applies to applications for low visibility facilities in commercial, industrial or special purpose zones, or to facilities in any of the zones that are covered by a "Wireless Community Master Plan" (ZO §§ 6985, 6983). Tier 4 applies to noncamouflaged towers greater than 60 feet in height, or 15 feet above the maximum height limit in the zone, whichever is lower, and all facilities in residential and rural zones except those within Tiers 1 and 2. Tier 3 is a residual category that applies to all facilities other than those meeting the criteria of Tiers 1, 2, or 4. (ZO § 6985.) The WTO's permitting process applies to applications to install wireless facilities in a ROW.

The WTO requires all applicants to submit detailed information regarding the proposed wireless facility. Among other things, applicants are required to provide: (1) a map showing all the applicant's existing sites in the local service network associated with the gap the facility is meant to close (ZO § 6984(A)); (2) a visual impact analysis (including photographic simulations) showing the maximum silhouette, viewshed analysis, color and finish palette and proposed screening (*id.* at subd. (B)); (3) evidence that establishes the proposed facilities have been designed to the minimum height required from a technological standpoint for the proposed site (subd. (C)(1)); (4) the anticipated maintenance and monitoring program for the antennas, back-up equipment and landscaping (subd. (C)(2)); (5) noise and acoustical information (subd. (C)(3)); (6) a plan showing all proposed landscaping, screening and proposed irrigation (subd. (C)(5)); and (7) a letter stating the applicant's willingness to allow other carriers to co-locate on their facilities (subd. (C)(9)). Furthermore, County may "require additional information based upon specific project factors." (*Id.* at § 6984.)

The WTO also imposes general and design regulations, including the requirements that the facilities be "camouflaged" in residential and rural locations, and be designed to visually blend into the surrounding area in a manner "consistent with community character and existing development," to be "compatible with existing architectural elements, building materials and other site characteristics," and to have minimal "visual impact." (ZO §§ 6985(C)(1), 6987(B), (F), (O).) The WTO also articulates a setback requirement that, "Telecommunications towers located adjacent to a residential use shall be set back from the nearest residential lot line by a distance at least equal to its total height or 50 feet, whichever is greater."[5] (ZO § 6985(C)(4).)

Application Structure

Applications under Tier 1 are processed as administrative site plans, reviewed by the Director of the Department of Planning and Land Use (Director). (ZO § 6985(A).) Applications under Tier 2 are processed similarly to Tier 1 applications except they are also subject to review by the appropriate citizen's advisory board, which makes a nonbinding recommendation regarding the application. (ZO §§ 6985(A), 7157.) The Director's decisions on Tier 1 and 2 applications are appealable to the Planning Commission. (ZO § 7166.)

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[5] The setback requirement, if enforced, would effectively preclude siting of wireless facilities in the ROW within residential areas because the 50-foot setback is ordinarily wider than the ROW. In the proceedings below, however, County disavowed any intent to apply the setback requirement to the ROW.

Applications under Tiers 3 and 4 are processed as minor use permits and major use permits, respectively, and must comply with the generalized requirements of sections 7350 through 7388 of County's Zoning Ordinance, which govern all applications for use permits. Applications for minor or major use permits (e.g. Tiers 3 and 4 applications) require the applicant to submit documents including: a list of the names of all persons having an interest in the application (as well as the names of all persons having any ownership interest in the property involved); complete plans (including a plot plan); and a description of the property involved and the proposed use permit. (ZO § 7354(b)(1)-(2).) All applications for a use permit are subject to a public hearing requirement. (ZO § 7356.) In determining whether to grant a use permit, the Planning Commission (or the Director, in the case of a minor permit) is required to find that the "location, size, design, and operating characteristics of the proposed use will be compatible with adjacent uses, residents, buildings, or structures . . . ."[6] (ZO § 7358(a).)

Use permits may be granted or modified "subject to the performance of such conditions . . . and for such period of time as the Planning Commission, the Board of Supervisors . . . or the Director . . . shall deem to be reasonable and necessary or advisable under the circumstances so that the objectives of the Zoning Ordinance shall be

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6 The determination of compatibility must consider such factors as harmony in scale, bulk, coverage and density; the availability of public facilities, services and utilities; the harmful effect, if any, on desirable neighborhood character; the generation of traffic and the capacity and physical character of surrounding streets; the suitability of the site for the type and intensity of use or development proposed; and any other relevant impact of the proposed use. (ZO § 7358.)

achieved." (ZO § 7362.) A use permit may be revoked or modified if one or more of the conditions upon which such permit was granted have been violated. (ZO § 7382(a)(2).) A major use permit decision may be appealed to the Board of Supervisors. (ZO § 7366(a)(1)), and a minor use permit decision may be appealed to the Planning Commission. (ZO § 7366(a)(2).) Following the filing of an appeal, a public hearing shall be scheduled and noticed and all interested persons may appear and present evidence. (ZO § 7366(h).) The authority with appellate jurisdiction may grant or modify the use permit subject to specified conditions it may impose under section 7362 or it may revoke or deny the use permit "as is appropriate." (ZO § 7366(i).)

C. Additional Factual Background

In the 15 months between the time the WTO became effective and County filed its opposition to Sprint's summary judgment motion, 71 applications for placement of wireless facilities had been submitted, six of which sought to place wireless facilities in the ROW. All of the ROW applications have been subjected to tier 4 review, with none yet approved. Utility providers other than wireless telecommunication providers seeking County approval for permits to place above-ground equipment in the ROW are not subject to the WTO permitting processes.

II

THE PRESENT ACTION

Sprint filed this action asserting the WTO was invalid. Sprint moved for summary judgment asserting section 7901 granted it a franchise to install wireless telecommunications facilities in the ROW and the WTO was invalid because it infringed

on the rights conferred on Sprint by section 7901 and exceeded the limited authority reserved to local governments under sections 7901 and 7901.1. County's motion for summary judgment asserted (1) section 7901 does not apply to wireless telecommunication providers and equipment and (2) even if Sprint qualified as a provider under section 7901, the WTO was a permissible regulatory scheme under sections 7901 and 7901.1.

The trial court agreed with County's contentions, concluding the rights conferred by section 7901 were intended to inure only to those telephone corporations that construct and operate telephone landlines, and Sprint's wireless telecommunications facilities and equipment did not qualify as telephone lines within the ambit of section 7901. The court also concluded, although Sprint qualified as a "telephone corporation" (under section 234) for purposes of the provisions of Division 1 of the Public Utilities Code, section 234 did not thereby qualify Sprint as a "telephone corporation" for purposes of Division 4 (of which section 7901 was a part) of the Public Utilities Code. The court alternatively concluded that, even if Sprint qualified as a telephone corporation for purposes of section 7901, the WTO was valid because section 7901.1 recognizes the right of municipalities to exercise reasonable controls over the "time, place and manner" by which telephone corporations use the ROW to install and operate their facilities. Accordingly, the court concluded the WTO, which employs the permitting process to regulate the place (location of the equipment) and manner (the appearance and characteristics of the equipment) in which wireless providers use the ROW, was authorized by sections 7901 and 7901.1.

III

STANDARD OF REVIEW

Because we are called upon to construe a statutory scheme, we accord no deference to the trial court's determination. Instead, we apply de novo review to the issues posed by this action.[7] (*Radian Guaranty, Inc. v. Garamendi* (2005) 127 Cal.App.4th 1280, 1288.)

IV

ANALYSIS

This appeal requires resolution of two issues: do wireless telecommunications providers enjoy the privileges conferred by section 7901 to install necessary equipment in a ROW and, if so, does the scope of the privileges accorded by section 7901 preclude local governments from imposing design and siting restrictions when a wireless telecommunications provider exercises the privilege to place equipment in a ROW? Before addressing these issues, it is appropriate to examine briefly the scope of the privileges conferred by section 7901.

A. The Rights Conferred by Section 7901

The state has sovereign authority over public ROW's and retains the right to control those ROW's except insofar as constitutional or statutory provisions reserve or relinquish control to local authorities. (*Western Union Tel. Co. v. Hopkins* (1911) 160

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[7] County has filed two requests for judicial notice and, except insofar as we have noted the Ninth Circuit's stay of the order in *Sprint Telephony PCS, L.P. v. County of San Diego, supra*, 377 F.Supp.2d 886, the requests are denied as moot.

Cal. 106, 118-119.) In *Pacific Tel. & Tel. Co. v. City & County of San Francisco* (1959) 51 Cal.2d 766, 771 (*Pacific Tel. I*), the court construed Section 7901 as constituting " 'a continuing offer extended [by the state] to telephone and telegraph companies . . . which offer when accepted by the construction and maintenance of lines' [citation] gives a franchise from the state to use the public highways for the prescribed purposes without the necessity for any grant [of a franchise] by a subordinate legislative body." Accordingly, section 7901 confers on telephone companies the right to use public rights of way to install lines and equipment without the necessity of seeking a separate franchise from local governments for that purpose (See *City of Petaluma v Pacific Tel. & Tel. Co.* (1955) 44 Cal.2d 284, 289 [city cannot compel telephone company to obtain a municipal franchise to use the streets and other public places for its lines and equipment]), subject to the proviso that such equipment must be installed in a "manner and at such points as not to incommode the public use" of a ROW. By virtue of section 7901, a local government may neither entirely bar a telephone company from installing necessary equipment in a ROW (*Pacific Tel. I, supra,* at p. 774), nor make the installation of such equipment conditional on payment of a fee except insofar as the fee is reasonably necessary to pay for the costs of mitigating or defraying the cost of any alleged impacts on public improvements or facilities. (*Williams Communications v. City of Riverside* (2003) 114 Cal.App.4th 642, 654-656.)

The rights conferred by section 7901, although broad, are not unlimited. Section 7901 itself delimits ROW rights by declaring telephone companies may not install equipment in a location or in a manner that obstructs public use of a ROW. Additionally,

the Legislature's 1995 enactment of section 7901.1 confirmed that local governments were delegated the power to "exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." (§ 7901.1, subd. (a); *Pacific Tel. & Tel. Co. v. City & County of San Francisco* (1961) 197 Cal.App.2d 133, 152 (*Pacific Tel. II*) ["Thus, because of the state concern in communications, the state has retained to itself the broader police power of granting franchises, leaving to the municipalities the narrower police power of controlling location and manner of installation."].) Whether these qualifications on a telephone company's franchise to install equipment in a ROW are very narrow constraints, as contended by Sprint, or instead permit a local municipality to regulate installations in a ROW based on considerations beyond construction practices and possible interferences with travel along a ROW, as asserted by County, is addressed in part IV.C. of this opinion.

B. Section 7901 Confers Equivalent Privileges to Install Necessary Equipment in a ROW on All Telecommunications Providers

County asserts the WTO is valid because, even assuming the privileges conferred by section 7901 largely preempt local regulation of equipment placed in a ROW, Sprint is not eligible for those privileges because section 7901 is limited to "telephone corporations [that] construct . . . telephone lines" and Sprint does not install lines but instead builds wireless facilities in ROW's. Sprint counters that wireless equipment qualifies for the privileges bestowed by section 7901 because (1) statutes enacted concurrently with (and subsequent to) section 7901 confirm the Legislature intended wireless equipment qualified as a "line" under section 7901, (2) the courts have

interpreted section 7901 to encompass advances in telecommunications technologies, and (3) Sprint does (even within the narrowest meaning of section 7901) install and employ "lines" to effectuate telephonic communication.

We conclude that wireless equipment falls within the purview of section 7901. The 1951 legislation that moved former Civil Code section 536 into the Public Utilities Code and renumbered it as section 7901 (without any change to the statutory language) also imported the definition of a telephone line formerly contained in the Public Utilities Act and at the same time *amended* that definition to add the clause "whether such communication is had with or without the use of transmission wires." (§ 233.) Under ordinary rules of statutory construction the Legislature, when it enacts a law that uses a term defined in another statute, is aware of the statutory definition (*Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1030), and when "the same term or phrase is used in a similar manner in two related statutes concerning the same subject, the same meaning should be attributed to the term in both statutes" (*Diekmann v. Superior Court* (1985) 175 Cal.App.3d 345, 356) except for those circumstances where "the Legislature has indicated otherwise."[8] (*Hassan v. Mercy American River Hospital*

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8 County asserts the Legislature "has indicated otherwise" because section 203 provides that "[u]nless the context otherwise requires, the definitions and general provisions set forth in this chapter govern the construction of this part." County argues that because the definitional provisions of sections 233 and 234 are thus limited (by section 203) to construing Part 1 of Division 1 of the Public Utilities Code, while section 7901 is contained in Division 4 of the Public Utilities Code, the principles of *expressio unius est exclusio alterius* show the definitional provisions of sections 233 and 234 have no application to section 7901. However, section 203 merely states the definitions "govern the construction of this part," without excluding the definitions from governing

(2003) 31 Cal.4th 709, 716.) These principles support the conclusion that a telephone line, not separately defined for purposes of section 7901, should encompass the meaning incorporated in section 233, which defines a telephone line as any "[instrument] . . . operated . . . to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires." Under this definition, there appears to be no basis for excluding Sprint's wireless equipment from the privileges conferred by section 7901.

Subsequent legislative enactments confirm the Legislature intended equipment installed by wireless telecommunications to fall within the purview of section 7901. In 2003 the Legislature, seeking to promote the expanded availability of wireless services by blunting the impact of localized opposition to building new cellular facilities, enacted Government Code section 14666.8. That statute required the state to compile a list of state-owned property that would be made available to lease for purposes of cellular facilities. Section 14666.8 states the listed property would be "the state's sole inventory of state-owned real property available for this purpose. The term 'state-owned real property,' as used in this section, excludes . . . property subject to section 7901 of the Public Utilities Code." (§ 14666.8, subd. (a).) Moreover, the Legislature declared that "[n]othing in [section 14666.8] alters any existing rights of . . . telephone corporations

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other divisions of the Public Utilities Code. Moreover, section 203's limitation is qualified by the statement "[u]nless the context otherwise requires," suggesting the Legislature intended the definitions to apply when the context so requires. Because section 7901 contains no internal definition of a "telephone line," we apprehend the context does *require* application of the definition adopted by the Public Utilities Code.

pursuant to Section 7901 of the Public Utilities Code." (§ 14666.8, subd. (d).) The legislative recognition that the listed property would be the exclusive inventory *except* for property subject to section 7901 and the proviso preserving "any existing rights of . . . telephone corporations pursuant to section 7901" (*ibid.*), contained in an enactment limited to wireless providers, would be superfluous if the Legislature intended (as County asserts) that section 7901 wholly excluded wireless providers from the privileges to install wireless equipment in a ROW subject to section 7901.[9]

Although California decisional law has not directly held the privileges conferred by section 7901 are enjoyed by wireless providers,[10] there is no case law holding to the contrary, and dicta in numerous decisions and opinions suggests section 7901 does apply

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9 Other legislative enactments confirm the Legislature is cognizant of the distinctions between wireless providers and other types of telephone corporations and is able, when intended, to exclude wireless providers from a statute otherwise applicable to telephone corporations. (See § 2883 [requiring "[a]ll local telephone corporations, excluding wireless and cellular [providers]" to satisfy 911 access requirements].) These provisions buttress our conclusion that the Legislature did not intend to exclude wireless providers from the privileges accorded to telephone corporations by section 7901.

10 Similarly, the federal decisions offer little guidance. (See, e.g., *Qwest Communications Corp. v. City of Berkeley* (N.D. Cal. 2001) 146 F.Supp.2d 1081, 1101-1102 [court declines to decide whether section 7901 preempted local ordinance regulating telecommunications carriers providing telecommunications services using public rights of way for high speed internet services]; *Cox Communications PCS, L.P. v. City of San Marcos* (S.D. Cal. 2002) 204 F.Supp.2d 1260, 1271 [court concluded City's CUP process preempted by federal law but declined to decide "novel or complex issues of state law" of whether ordinance also violates rights conferred by section 7901].) The court in *Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge, supra,* ___ F.3d ___ apparently concluded in an unpublished opinion that a local government ordinance regulating wireless facilities in a ROW was preempted by state law, which we assume contained a subsidiary conclusion that wireless facilities qualified for the privileges accorded under section 7901, but the precise basis for either conclusion is opaque.

to wireless providers. (See, e.g., *Williams Communications v. City of Riverside, supra,* 114 Cal.App.4th at pp. 647-648 [employing definitional provisions of sections 233 and 234 to construe rights conferred by section 7901]; 46 Ops. Atty. Gen. 22, 24 (1965) ["Although we recognize that [section 233's] definition applies to the 'Public Utilities Act' (sections 201-2113) and not expressly to section 7901, we feel that no reason exists for a telephone line to have any different definition as used in section 7901"].) Although each of these decisions evaluated distinguishable issues, we are convinced the statutory scheme as a whole evinces a legislative intent that wireless telecommunications providers qualify for the privileges bestowed by section 7901 to install wireless communication equipment in ROW's.

C. California Authorizes Local Governments to Impose Limited Regulations on a Utility's Use of the ROW

The privileges conferred by section 7901, although significant, are not unlimited. Section 7901 precludes installing equipment in a location or in a manner that "incommodes" the public's "use" of the ROW. Additionally, the Legislature by its enactment of section 7901.1 has declared its intent that a telephone company's privileges under section 7901 be subject to a municipality's "right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." (*Id.* at subd. (a).) We must determine whether the regulatory authority over ROW installations preserved to local municipalities under California law is narrowly limited (as Sprint contends) or encompasses discretionary permitting ordinances like the WTO.

Both the courts and the PUC, whose construction of the statutory scheme is entitled to great weight (*Golden Gate Scenic Steamship Lines, Inc. v. Public Utilities Com.* (1962) 57 Cal.2d 373, 377-378), have suggested that local governments may regulate the location and appearance of telephone equipment without transgressing the franchise conferred by the state on telephone companies by section 7091. In *Western Union Tel. Co. v. City of Visalia* (1906) 149 Cal. 744, the city passed an ordinance, accepted by the utility, purporting to (1) grant the utility a franchise and (2) limiting the height and location of certain poles. When the city subsequently assessed and sought to collect a franchise fee from the utility, the utility challenged the fees. The court, holding the fee was improper, explained:

> "The real question, therefore, is, as before stated, Does the ordinance . . . create a 'franchise'?--and, in our opinion, it does not. If it can be construed as an attempted granting of an original franchise to operate a telegraph line through the streets of the city, it would be merely an empty form of granting what the plaintiff already had and of which the city could not deprive it. The plaintiff had that right not only from the act of Congress above referred to but also from section 536 of our Civil Code, which provides that 'telegraph corporations may construct lines of telegraph along and upon any public road or highway.' But we do not think that the ordinance purports to grant any 'franchise.' While the appellant had the right, of which the city could not deprive it, to construct and operate its lines along the streets of the city, nevertheless it could not maintain its poles and wires in such a manner as to unreasonably obstruct and interfere with ordinary travel; and the *city had the authority, under its police power, to so regulate the manner of plaintiff's placing and maintaining its poles and wires as to prevent unreasonable obstruction of travel. And we think that the ordinance in question was not intended to be anything more, and is nothing more, than the exercise of this authority to regulate. But such regulation is not the granting of a franchise; it is a restriction of and burden upon a franchise already existing; it is not an original and affirmative granting of anything in the nature of a franchise.* Indeed, the

> ordinance and its acceptance by plaintiff--which acceptance was necessary to give it any effect--was in the nature of a contract between the parties. The plaintiff's poles and wires were still in the same place in which they had been for many years; and by the ordinance the city agreed in writing that the poles and wires as they then stood were in a proper place and might remain there if plaintiff would agree to allow the city to use them for certain purposes, and plaintiff by accepting the ordinance so agreed. Such was evidently the purpose of the ordinance, and we do not see in it the creation of anything in the nature of a franchise. [¶] Therefore, the assessment was for an asserted franchise which had no existence." (*Id.* at pp. 750-751, italics added.)

Thus, the *Visalia* court apparently concluded an ordinance that is a valid exercise of a city's police power over the location and appearance of structures, although burdening and regulating the exercise of the franchise conferred by section 7901, was not itself an invalid arrogation of the power reserved to the state (and exercised by the predecessor to section 7091) to grant a franchise. (Cf. *Pacific Tel. I, supra*, 51 Cal.2d at pp. 773-774 [telephone company "concede[d] the . . . power in the city" to require utility to apply to city engineer for a permit "control[ling] the particular location of and manner in which all public utility facilities, including telephone lines, are constructed in the streets and other places under the city's jurisdiction"].)

The PUC appears to have similarly concluded that local municipalities are not barred from regulating the location and appearance of equipment eligible to be installed in a ROW under section 7901. In *Order Instituting Rulemaking re Competition for Local Exchange Service* (Cal. P.U.C., Oct. 22, 1998) No. 98-10-058 [1998 Cal. PUC Lexis 879 (Decision No. 98-10-058), the PUC extensively reviewed the statutory scheme to address a host of issues, including the rights of various utilities to place their equipment in a

ROW. The PUC noted the obligations of a local government to provide access to a ROW under its control is governed in part by section 2902, which provides a municipal corporation may retain the power to supervise and regulate the relationship between public utilities and the general public "in matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility, the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets . . . ." (§ 2902.) Moreover, the PUC noted section 7901.1, subdivision (a) contains the legislative declaration that local governmental bodies " 'shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed,' " provided the local governmental does not abuse its discretion or arbitrarily or unfairly deny requests for access, and Article XI, § 9 of the California Constitution expressly recognizes the authority of a city to prescribe regulations governing persons or corporations that provide public utility service. (Decision No. 98-10-058, *supra,* at pp. 57-58.)

The PUC, evaluating the rights of noncellular telecommunications carriers to obtain reasonable access to a ROW to engage in necessary construction under section 7901,[11] concluded the respective roles of the PUC and local governments with respect to

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11 Although the decision applies to other public utilities seeking ROW access, including cable providers (Decision No. 98-10-058, *supra,* 1998 Cal. PUC Lexis 879 at p. 37), the PUC expressly deferred whether to include cellular (or CMRS) providers within the rules, reasoning the "technological and market dynamics of the CMRS industry are distinct . . . . The rationale underlying the pole attachment rates and access requirements we adopt with respect to local exchange service may not necessarily apply in the case of CMRS service. The regulation of CMRS providers has been addressed in a

ROW access should incorporate the general approach adopted in the PUC's *Order Instituting Rulemaking re Radiotelephone Utility Facilities* (Cal. P.U.C.2d, May 8, 1990) No. 96-05-035, [1996 Cal. PUC Lexis 288] (GO 159-A), which revised the rules relating to the construction of cellular radiotelephone facilities in California. The PUC in Decision No. 98-10-058, *supra,* 1998 Cal. PUC Lexis 879, discussing the resolution reached in GO 159-A, stated:

> "Recognizing local government's interest in cell siting locations and land use policies as well as the [PUC's] interest in promoting development of wireless technologies and its duty to protect ratepayers, [in GO 159-A the PUC] ceded regulatory jurisdiction in circumstances where the local agency has a specific interest, yet recognized [the PUC's] obligation to protect the overriding state interests. [GO 159-A] acknowledges that primary authority regarding cell siting issues belongs to local authorities. Local authorities continue to issue permits, oversee the California Environmental Quality Act ("CEQA") compliance, and adopt and implement noticing and public comment requirements, if any. In like manner, local agencies have an interest in managing local ROW and requiring compensation for the use of public ROW. The [PUC], on the other hand, has an interest in removing barriers to open and competitive markets and in ensuring that there is recourse for actions which may violate state and federal laws regarding nondiscriminatory access and fair and reasonable compensation. Moreover, [Section 762] also authorizes [the PUC] to order the erection and to fix the site of facilities of a public utility where found

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separate docket . . . based upon specific characteristics peculiar to the CMRS industry. Likewise, CMRS carriers have different space requirements than do CLCs with respect to ROW access. For example, CMRS providers request access to the tops of existing utility poles to install communications devices. The work involved in pole-top access raises special safety concerns. While we do not minimize the importance of ROW access rights for CMRS carriers, we believe that a further record needs to be developed regarding safety, reliability and special access needs before we determine the applicability of our adopted ROW access rules to the CMRS industry. Accordingly, we shall defer consideration of the applicability of our rules to CMRS carriers to a later phase of the proceeding." (*Id.* at pp. 40-42.)

> necessary 'to promote the security or convenience of its employees or the public . . . to secure adequate service or facilities. . . .' [¶] The statewide interest in promoting competition and the removal of barriers to entry and nondiscrimination are equally important with respect to . . . municipally-owned ROW access rights. . . . Accordingly, the [PUC] shall intervene in disputes over municipal ROW access only when a party seeking ROW access contends that local action impedes statewide goals, or when local agencies contend that a carrier's actions are frustrating local interests. In this manner, the Commission reserves jurisdiction in those matters which are inconsistent with the overall statewide procompetitive objectives, and ensure that individual local government decisions do not adversely impact such statewide interests." (Decision No. 98-10-058, at pp. 59-61.)

Thus, the PUC has ceded to local authorities the primary authority on issues relating to the ROW access authorized by section 7901, including the power to process and issue discretionary permits (e.g. those required by local or California Environmental Quality Act (CEQA) statutes) and to adopt and implement appropriate noticing and public comment requirements. However, the PUC also concluded that section 762 protects the statewide interest (in the deployment of telecommunications services) from being frustrated by local parochialism by empowering the PUC to override local decisions through issuance of a CPCN for specific facilities upon a particularized showing the telecommunications carrier's "good-faith effort to obtain all necessary local permits and to negotiate mutually acceptable terms of access with the local governmental body" to a ROW has been unsuccessful. (Decision No. 98-10-058, *supra,* 1998 Cal. PUC Lexis 879, at pp. 61-62.)

The approach adopted by the PUC--ceding to local authorities the primary authority to issue discretionary permits for ROW installations while retaining the ability

to preempt local decisions where a superseding state interest is undermined by local obstructionism--is an appropriate resolution that balances the interests of local governments in managing and preserving local ROW's against indiscriminate use while ensuring the state-wide interest in the deployment of ubiquitous communications systems is protected. Because (under Decision No. 98-10-058, *supra*, 1998 Cal. PUC Lexis 879) the privileges accorded to traditional telephone companies by section 7901 to use a ROW to install equipment remains subject to local discretionary permitting ordinances, and we find no meaningful basis for concluding wireless providers are accorded any greater rights under section 7901 than are accorded to traditional telephone companies, a discretionary permitting ordinance for wireless providers does not offend section 7901.[12]

Sprint asserts that discretionary permitting by local authorities is inconsistent with the statutory scheme because the only limitation on ROW installations is that the equipment be installed "in such manner and at such points as not to incommode the public use of the road." (§ 7901.) Sprint asserts that, as long as the equipment is installed at a time and in a place that does unreasonably obstruct the public's ability to traverse the ROW, section 7901 otherwise creates a carte blanche for telephone

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12 Sprint argues Decision No. 98-10-058, *supra*, 1998 Cal. PUC Lexis 879 affirms that local regulatory authority is limited to controlling construction activities and does not address the validity of discretionary permitting activities. However, the PUC's approval of ceding to local agencies the issuance of permits, the oversight of CEQA compliance, and the adoption and implementation of notice and public comment requirements when necessary would appear relevant only in a discretionary permitting context, and Sprint cites nothing to suggest the procedures described by the PUC would be implicated when only excavation or other construction permits are sought to commence construction in a ROW.

companies to install any necessary fixtures free from oversight by local governments. Although we agree section 7901 expressly precludes installing equipment "in such a manner as to 'unreasonably obstruct and interfere with ordinary travel' " (*Pac Tel II, supra,* 197 Cal.App.2d at p. 146), we do not agree this language concomitantly preempts all *other* local regulation of ROW installations.[13]

Local governments may enact "all local, police, sanitary, and other ordinances and regulations not in conflict with general laws" (Cal. Const., art. XI, § 7), and a local law is invalidated by preemption only when it "conflicts with state law." (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897.) A conflict with state law will be found to exist when the local law (1) is duplicative of state law because it is "coextensive therewith," or (2) contradicts state law because it is "inimical thereto," or (3) it purports to regulate in an area fully occupied by state law. (*Id.* at pp. 897-898.) The WTO is neither duplicative of any state law, nor inimical to state law because the WTO "does not prohibit what [section 7901] commands or command what it prohibits." (*Sherwin-Williams,* at p. 902.) Accordingly, the WTO is invalid as preempted by state law only if it seeks to regulate in an area "fully occupied" by state law.

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13 It is here that we part company with the court's decision in *Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge, supra,* ___ F.3d ___. In that case, the court's published opinion peremptorily states that an analogous local ordinance regulating cellular tower installations in a ROW is preempted by state law (*id.* at p. ___, fn. 2), but the precise basis or rationale for this statement is shrouded. For the reasons articulated below, we believe the federal ipse dixit is wrong and should not be followed.

A local ordinance enters an area fully occupied by state statutes either when the Legislature has *expressed* its preemptive intent, an intent not declared in section 7901, or when its intent to fully occupy the field can be *implied*. When examining whether the WTO is invalid as impliedly preempted by section 7901, we remain mindful of the admonition that, "[i]n general, courts are cautious in applying the doctrine of implied preemption: '[I]n view of the long tradition of local regulation and the legislatively imposed duty to preserve and protect the public health, preemption may not be lightly found.' [Quoting *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 484.] Where local legislation clearly serves local purposes, and state legislation that appears to be in conflict actually serves different, statewide purposes, preemption will not be found." (*San Diego Gas & Electric Co. v. City of Carlsbad* (1998) 64 Cal.App.4th 785, 793.)

For purposes of this case, only two indicia of preemption by implication appear relevant: either "(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern [or] (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action . . . ." (*In re Hubbard* (1964) 62 Cal.2d 119, 128, disapproved on other grounds in *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 63, fn. 6.) Although state law fully and completely covers the exclusive right of the state to empower telephone companies to use ROW's (*Pacific Tel. I, supra*, 51 Cal.2d at p. 774; § 7901) and to disable local governments from extracting franchise fees from telephone companies for

the right to operate therein (Gov. Code, § 50030; *Williams Communications v. City of Riverside, supra*, 114 Cal.App.4th at pp. 654-656), there is no general state law regulating the siting or appearance of the equipment so authorized.[14]

We are also convinced the partial coverage of the subject matter under state law is not "couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action." To the contrary, the statutory scheme is couched in terms suggesting the state *contemplated and preserved* "further or additional local action" on placement of equipment in a ROW. When the Legislature enacted the Public Utilities Act in 1915, section 7901's predecessor was in existence and provided "partial coverage" of the subject matter by according to telephone corporations the state-conferred privilege to construct lines in a ROW. However, the Public Utilities Act expressly specified the statewide regulatory powers vested in the PUC over all utilities, including telephone companies, "shall not be construed to authorize any municipal corporation *to surrender to the [PUC] its powers of control to supervise and regulate* the relationship between a public utility and the general public in matters affecting the health, *convenience*, and safety of the general public, including matters such as *the use . . . of public streets by any public utility, [and] the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets . . . .*" (§ 2902, italics

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14 When the state *has* promulgated regulations concerning the design and construction of facilities for delivering utility services, local regulations are preempted. (Cf. *Southern Cal. Gas Co. v. City of Vernon* (1995) 41 Cal.App.4th 209, 215-218.)

added.)[15] Thus, the statutory scheme evinces a legislative intent that the state-conferred franchise to use the ROW would coexist with, rather than preempt, local regulation promoting the convenience of the general public in matters involving the use of the ROW for equipment.[16] (Accord, *Western Union Tel. Co. v. City of Visalia, supra,* 149 Cal. at

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15 Section 7901.1 is another statute that contemplates a local governmental role over installations in ROW's. That section authorizes local governments to "exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." (*Id.* at subd. (a).) Control over the place and manner that telephone companies gain access to a ROW necessitates the power to regulate *where* equipment is to be placed (as section 6984(A) of WTO's permitting process regulates) and connotes a power to regulate the *manner* in which the proposed equipment will be installed (the aesthetic controls of WTO's permitting process) in the ROW to be accessed. Sprint argues the legislative history accompanying section 7901.1, of which we take judicial notice (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31-37), shows the Legislature intended the statute to have a limited purpose: to affirm the ability of municipalities to regulate construction management issues for equipment to be installed in ROW's. In one senate analysis accompanying Senate Bill 621, the author stated the telephone company's franchises "provide the telephone corporations with the right to construct and maintain their facilities. Local government has limited authority to manage or control that construction. [¶] . . . [¶] This bill is intended to bolster the [cities'] abilities with regard to construction management and to send a message to telephone corporations that cities have authority to manage their construction . . . ." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 621 (1995-1996 Reg. Sess.), as amended May 3, 1995, pp. 1, 3.) While construction activities may have been the primary focus of section 7901.1, its enactment of place and manner authority is consistent with our conclusion that local enactments imposing place and manner restrictions are not preempted by state law.

16 Sprint, noting state and federal laws should be construed whenever possible to harmonize those laws and avoid having the state law invalidated by federal preemption (see, e.g., *California Arco Distributors, Inc. v. Atlantic Richfield Co.* (1984) 158 Cal.App.3d 349, 359), argues we should interpret section 7901 to preclude local siting and aesthetic regulations because a contrary interpretation would require the conclusion that the state statutory scheme is preempted by the TCA. However, considering the decisions holding federal law permits local governments to impose aesthetic requirements or placement restrictions in the exercise of their zoning authority (see fn. 2, *ante*), we are unpersuaded our construction of section 7901 renders it inconsistent with federal law.

pp. 750-751 [regulation of height and location of poles restricts and burdens existing franchise but is not a grant of a franchise].)

Sprint alternatively argues that, even assuming state law reserves to local governments some ability to regulate the location and appearance of wireless facilities, the WTO is nevertheless invalid because it far exceeds the permissible scope of regulation by granting unfettered discretion to grant or deny applications to build facilities in the ROW.[17] Sprint complains the WTO (1) requires "lengthy applications" calling for information irrelevant to legitimate local interests, (2) imposes extensive design criteria based on subjective and malleable concepts of community and neighborhood character, (3) provides for public hearings and appeals, and (4) purportedly confers carte blanche discretion on County to grant or deny an application "for any reason" (or subject to any condition) it chooses. However, zoning ordinances with even fewer guidelines and granting even broader discretion have been upheld in the face of similar attacks (see, e.g., *Stoddard v. Edelman* (1970) 4 Cal.App.3d 544, 548-549; cf. *Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130, 141), and Sprint does not articulate a rationale (apart from the state preemption issues) for

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17 Sprint also asserts the WTO is invalid because its 50-foot setback requirement, which wholly eliminates substantial portions of available ROW's (e.g. those located in residential areas) from eligibility for wireless facilities, creates de facto "no-build" zones in contravention of section 7901's state-conferred grant of a franchise for those ROW's. However, County averred below that it had informed wireless providers it did not interpret the setback requirement to apply to proposed ROW installations, and there is no evidence any proposed ROW installation was rejected based on the setback requirement. Until such time as a ROW application in a residential area is denied based on the setback requirement, this aspect of Sprint's challenge is not ripe for determination.

measuring the WTO's provisions against a standard stricter than that applied to similarly situated zoning ordinances. Furthermore, we are not presented with a case in which it is contended County's denial of the required WTO permit constitutes, in effect, a denial of the privileges of the franchise granted by the state in section 7901 by denial of a permit after the applicant's good faith efforts to negotiate reasonable conditions for issuance of the permit.

DISPOSITION

The judgment is affirmed. Each party shall bear its own costs on appeal.

CERTIFIED FOR PUBLICATION

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.