Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Acceleration of Broadband Deployment:	)	
Expanding the Reach and Reducing the Cost of	)	WC Docket No. 11-59
Broadband Deployment by Improving Policies	)	
Regarding Public Rights of Way and Wireless	)	
Facilities Siting	)	

To: The Commission

COMMENTS OF THE CALFORNIA WIRELESS ASSOCIATION IN REPLY

Jon Dohm, President
Crown Castle USA
510 Castillo Street, Suite 302
Santa Barbara, CA 93101
(805) 957-1629
Jon.Dohm@crowncastle.com

Julian Quattlebaum
Co-Chair, Regulatory Committee
Channel Law Group, LLP
207 East Broadway
Suite 201
Long Beach, CA 90802-8824
Telephone: (310) 480-7441
Email: jq@channellawgroup.com

September 30, 2011

SUMMARY

Wireless siting in California has been subjected to extremes of local regulation that are often the result of a misunderstanding of the new technological advances that underlie current wireless service offerings and unfounded fears based on such lack of understanding. The result has been a extensive litigation aginst local jurisdictions, with relatively ineffective results.

The lack of technical understanding at the local level, coupled with political pressures based on unfounded fear of RF emissions and impacts on property values, as well as a failure to appreciate wireless telephony as a true telephone utility have led to discriminatory and at times intentionally prohibitive local regulations and decisions. Because of the subjective nature of land use regulation, local processes are particularly susceptible to abuse. Judicial deference to local land use processes and a lack of judicial understanding of the relevant technological constraints and a lack of judicial appreciation of the benefits of these advanced technologies have resulted in a climate in California that has encouraged misguided opposition.

CalWA encourages the Commission to engage in educational efforts, dissemination of guidelines and illustrative rulings as well as promulgation of regulations on specific subjects as suggested by PCIA – The Wireless Infrastructure Association in its comments.

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To: The Commission

COMMENTS OF THE CALFORNIA WIRELESS ASSOCIATION IN REPLY TO COMMENTS ON THE NOTICE OF INQUIRY

Julian Quattlebaum
Co-Chair, Regulatory

CHANNEL LAW GROUP, LLP
207 EAST BROADWAY
SUITE 201
LONG BEACH, CA 90802-8824
Telephone: (310) 982-7197
Email: jq@channellawgroup.com

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I. INTRODUCTION

The California Wireless Association ("CalWA") appreciates the federal government's renewed interested in accelerating the deployment of wireless telecommunications infrastructure and the Federal Communication Commission's commitment to developing rules and regulations that facilitate that effort through the Notice of Inquiry ("NOI") and in other proceedings and its recognition of the numerous benefits such deployment have generated and will continue to generate for the citizens of the United States.

Unfortunately, the miracles of modern technology that have made these benefits possible have proven, at times, to be difficult for the public to understand and, in far too many cases, have given rise to fears based on that incomplete understanding that have resulted in counterproductive movements intended to block deployment of wireless facilities in certain locations. CalWA encourages the Commission to continue to pursue its efforts to remove impediments to the rapid deployment of new communications technologies and to address the misunderstandings that are the root cause of many of these impediments.

CalWA, loosely affiliated with PCIA – The Wireless Infrastructure Association, is an all-volunteer, non-profit state-level trade association with over 1500 member companies and individuals and represents the wireless infrastructure and wireless services industries in California. CalWA's members develop, own, manage, and operate towers, rooftop wireless sites, and other facilities for the provision of all types of wireless, broadcasting and telecommunications services. Advocating for sensible deployment of wireless infrastructure, the CalWA trade association engages at the local level to counsel jurisdictions as they enact regulations on the siting of wireless infrastructure. A key function of this interaction is to educate localities on all of the public safety, economic and social benefits that wireless communications provide to their citizens. Accordingly, CalWA advise jurisdictions to take these benefits into account and provide balanced regulations that protect the integrity of a community but also provide for the infrastructure that produces the full range of wireless services. Many of CalWA's members operate around the nation within the parameters of thousands of different jurisdictional regulations and are faced with inconsistent methods of challenging those regulations based upon their location in the United States.

CalWA acknowledges the important role that local zoning and right of way management play in today's world and respects the decision of Congress to preserve the appropriate use of such local authority. However, the fears and misunderstanding referenced above have placed political pressures on local officials that have often been very difficult to resist, and action by the Commission is needed to help insure that local authority is exercised in the manner intended by Congress.

In addition, the current application of land use regulations in ways that require the permit applicant to bear the often substantial costs of aesthetic improvement results in an inequitable

imposition of costs on customers across the state or country who receive none of the benefit of those expenditures as it inures only to the local community issuing the permit. This is particularly inequitable in that it is usually the more affluent communities that impose such requirements, while numerous studies have shown that it is the less affluent segments of society that actually rely on wireless telephony the most.

CalWA and its members are directly impacted by burdensome and discriminatory regulations, and CalWA's member infrastructure companies and wireless carriers have brought multiple challenges against jurisdictions throughout the State of California and across the country. These challenges have been directed at unreasonable delays and unsupported denials that have restricted deployment efforts. Unfortunately, Ninth Circuit jurisprudence has eviscerated many of the federal rights on which CalWA's members rely in order to reduce local impediments to permitting and construction. CalWA seeks the FCC's assistance in addressing local opposition to wireless infrastructure that, whatever its stated cause, is usually driven primarily by fear and irrational concern with the impact of radio frequency emissions and imagined negative impacts on property values arising therefrom.

II. THE CALIFORNIA WIRELESS EXPERIENCE

In 2008, CalWA's Regulatory Committee began tracking regulatory developments throughout the state, developments that impacted wireless deployment efforts. The Committee has held conference calls twice a month to update the "tracker." The Committee followed litigation, moratoria, development of new wireless ordinances and other wireless policies adopted by local jurisdictions and at the state level, and, when possible, CalWA sent representatives to meetings to offer an industry perspective. The charts assembled by PCIA in its comments identify several of the jurisdictions that CalWA has been tracking.

California has been a hot bed of wireless litigation for many of the reasons that gave rise to the NOI. Cases have been filed against almost every major jurisdiction, including San Francisco, the City of Los Angeles, Los Angeles County, San Diego County and the City of San Diego, as well as multiple smaller jurisdictions including Carlsbad, Rancho Mirage, San Marcos, La Canada-Flintridge, Palos Verdes Estates, Agoura Hills, Santa Monica, Huntington Beach, Newport Beach, Davis, Irvine and more recently Burlingame, among others. Multiple lawsuits have been filed against two jurisdictions, the City and County of San Francisco and the City of San Diego, including separate suits by Bay Area Cellular (predecessor to AT&T Wireless), GTE Mobilnet, MetroPCS, NextG Networks, ExteNet Systems, Verizon Wireless, AT&T, T-Mobile, Crown Castle, and American Tower Corporation. In one of these cases, the Southern District concluded a case that involved eight separate towers, two tower companies, three wireless carriers and six independent lawsuits all consolidated under a single case name – *In re Cell Tower Litigation* (Case No. 07cv0399-BEN (WVG).

The results in these cases are decidedly mixed. Although the Ninth Circuit initially offered some support to efforts to curtail local abuses with its holding in *City of Auburn et al. v. Quest Corp.,* 360 F. 3d 1160 (9th Cir. 2001), that preemption of local authority over telecommunications under 47 U.S.C. § 253 was "virtually absolute," the Court has since reversed poles and held that § 253 challenges to local ordinances will not succeed unless they can show that there are "no set of circumstances" in which the ordinance might be validly applied. *Sprint Telephony PCS, L.P. v. County of San Diego,* 543 F.3d 571, 579 (9th Cir. 2008). On top of that decision, the Ninth Circuit also held that denial of permits to place antennas on existing utility poles may be valid on the grounds that the antennas "incommode" the public rights-of-way due to their appearance. *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates,* 583 F.3d 716 (9th Cir. 2009). Thus, notwithstanding federal laws adopted to ensure that local decisions were not arbitrary and did not impede reasonable efforts at deployment, California cities now appear to have unlimited authority to deny permits – whatever the reason.

In addition to litigation, CalWA has followed numerous moratoria adopted, in many instances, whenever there is local opposition to a cell site and the jurisdiction believes there is reason to modify their local codes to address the concerns raised by the cell site permit application. The City of Burlingame, for instance, adopted regulations for placement of wireless facilities in public rights-of-way in late 2010 and, in response to local opposition to the first set of applications to follow the new regulatory process, applications for the placement of antennas on existing utility poles, on September 6, 2011, the City adopted a moratorium in order to study a new zoning ordinance for wireless facility in public rights-of-way. Moratoria have been adopted in numerous instances throughout the state for similar reasons.

On January 7, 2009, the City of Glendale adopted a moratorium on the placement of all wireless facilities, including collocations, in all areas of the city zoned residential and in all public rights-of-way. The moratorium was proposed after residents objected to the City's approval of several T-Mobile applications for encroachment permits to place their facilities in public rights-of-way because of concerns about health impacts due to radiofrequency emissions. The purpose of the moratorium was to terminate permit approvals until the City adopts a new ordinance governing these placements. In its report to the Council, city staff made the following assertion about the effects of Ninth Circuit decisions in that it "…create[s] … an opportunity to review and analyze existing ordinances and the current state of the law so that…the City may safeguard Residential Areas from the intrusion of incompatible and potentially disruptive uses through the development of a new ordinance relating to…Wireless Facilities." City of Glendale Report to City Council (Jan. 7, 2009), p. 2. The Glendale Report notes that "many cities have become engaged in comprehensive reviews of their zoning and right-of-way ordinances *in order to consider stricter requirements for placements of wireless antennas*." *Id.* at p. 9 (emphasis added). It then identifies pending or ongoing actions in the cities of Pasadena, Walnut Creek, Burbank, Huntington Beach, Irvine, Los Angeles, Ventura County, San Francisco, San Diego, La Canada-Flintridge, and Orange County. *Id.* at 9-11.

The district court that enjoined Los Angeles County's Zoning Ordinance wrote: "The Court has little trouble concluding that this process is so burdensome and Byzantine as to erect a barrier to providing telecommunications services." *NextG Networks of Cal.* v. *County of L.A.,* 522 F. Supp. 2d 1240, *26 (C.D. Cal. 2007). The County thereafter drafted extensive revisions to its zoning code, adding administrative approvals for certain types of facilities in specified locations, and relocated provisions concerning placement of wireless facilities in the public rights-of-way from the zoning code to the public works code. The revisions were near adoption but, following *Sprint II*, no further action has been taken.

The City and County of San Francisco recently adopted a moratorium on construction of wireless facilities and was involved in extensive revisions to its zoning code which would have included adoption of standards for administrative approval of right-of-way facilities. At a recent meeting with industry, city staff communicated that the Board of Supervisors would not support the proposed standards.

The City of San Diego was subject to multiple lawsuits that raise Section 253 as a challenge to its wireless telecommunications regulations, policies and guidelines. The City refused to alter its tremendously difficult permitting requirements and refuses to renew any existing wireless facilities unless those facilities are brought into conformance with its rigorous camouflaging requirements. The City stated that it has no concerns regarding cost of compliance and no concern regarding impact to the network. Notwithstanding these onerous conditions, the City refuses to modify its own monopoles and towers, even as it requires removal and replacement of monopoles directly adjacent to its own facilities.

Similarly in March 2005, Verizon applied for a conditional use permit in the City of Berkeley but was not granted its first hearing until May 2006. This was followed by a city council hearing in September 2006 where the City recommended an independent review of Verizon's need for its proposed site. After the independent consultant determined there was need for the site and recommended approval, additional city council hearings were held in January and May 2007, ultimately culminating in project denial. This too resulted in costly litigation that was only recently resolved by stipulations requiring City action within a set timeframe. FCC-established benchmarks would have saved years and thousands of dollars in this instance.

In January of 2007, Sprint filed an application with the City of Carlsbad to renew a Conditional Use Permit, which was deemed "complete" two months later. Even though the project was a simple one, the City did not reach a decision on the application until May 2008, a full sixteen months after the application was initially submitted and fourteen months after the applicants answered all questions posed by the city.

Unreasonable permitting delays are not the only problems faced by wireless applicants in California. Jurisdictions commonly discriminate between carriers, especially at collocation sites

where two or three carriers are present but the jurisdiction determines that the site is already saturated and that no additional carriers are permitted. Such discrimination is exemplified by ordinances requiring no more than three carriers per collocation site unless a variance is obtained. The practice of requiring variances for telecommunications sites should also be preempted as an onerous permit application process within section 253(a) of the Telecommunications Act because variances are often used as a mechanism to delay and deny wireless applications. Wireless applicants should not have to incur additional fees and procedures imposed by jurisdictions wielding variance requirements unintended for the wireless industry.

Approximately 2 years ago, Verizon applied to the City of Albany, California to replace 4 panel antennas with 6 panel antennas as part of Verizon's ongoing LTE upgrades. The City Planning Commission, at the first hearing, indicated that this approval would be difficult because the site was "non-conforming" due to height of the pole exceeding the height limits in an enacted after the placement of the original facilities. (The original permit, which remains in effect, was issued by the CPUC. Crown has been forced to seek intervention on the part of the CPUC.) In response to the Planning Commission's input,, Verizon changed antennas so that the 4 existing antennas would simply be replaced by 4 like for like antennas—essentially maintenance work of replacing antennas.

Verizon started work and the City of Albany issued a stop work order. After lengthy discussions, Crown Castle, the site manager, was forced to go before the Planning Commission for a determination as to whether this was really maintenance. The Planning Commission agreed that it was, and preparations for the replacement recommenced. Unfortunately, the project was called up on appeal by one of Albany's City Council members. The Council, at a noticed public hearing, disagreed that it was maintenance and instructed Verizon to file a Conditional Use Permit to replace its antennas. The Conditional Use Permit was denied by the Planning Commission. The denial has been appealed to the City Counsel and one hearing has been held. The City has now demanded an alternative site analysis (see attached letter to Joe Parker from Gregory Stepanicich dated September 22, 2011). Verizon's RF engineer has estimated that to comply with the city's request would require 45 separate RF plot maps.

The instances referenced above highlight only a few of the many obstacles and situations in which wireless applicants have been confronted with unreasonable barriers to entry in the California market. We agree with PCIA that these obstacles present a major challenge to the effective wireless deployment, and should be addressed by the FCC immediately.

III. OPPOSITION BY CALIFORNIA MUNICIPALITIES IS MISGUIDED

Local zoning is based largely on aesthetic considerations that by nature militate against predictability or accountability. The ancient Latin maxim de gustibus non est disputandum (there is no disputing matters of taste) is a recognition that where aesthetics are involved, rational

processes are of limited use. While many of the municipal commenters point to the local expertise and familiarity they alone possess, the task of arriving at appropriate siting solutions for technologically advanced communications systems requires expertise and familiarity not only with local conditions, but also with the technological requirements of the communications systems, something that the vast majority of local jurisdictions do not have.

This absence has unfortunately in many cases created opportunities for parties claiming to be able to provide outside expertise to create major additional costs of deployment through a system that has no inherent safeguards to prevent abuse. By imposing all of the costs of these so-called outside consultants on the applicant, without any opportunity on the part of the applicant to control the extent to which such consultant may go in requiring information and performing analyses, the applicant is totally at the mercy of the consultant and the local jurisdiction that often has no basis on which to even determine whether the activities and requirements of the consultant are necessary or reasonable.

The FCC, as the administrative agency entrusted with dealing with, and the sole repository of sufficient expertise necessary to be able to deal with, issues related to some of the most advanced technology available to the public today, especially given the incredibly rapid pace of advancement in the area, must become far more active in insuring that the use of local zoning does not provide a veneer for allowing decisions that appear to be based on substantial evidence, but which are, in fact, based either on a misunderstanding of the underlying technological requirements for adequate service or disingenuous misuses of the process to violate the prohibitions adopted by Congress in Section 332.

It is apparent from the public testimony in numerous local zoning cases that the opposition is based largely on either concerns over the health effects of RF emissions, notwithstanding the scientific evidence, and concerns over the impacts of infrastructure deployment on property values. Both of these concerns are unfounded. Particularly with respect to DAS deployments, there is a tremendous need to educate the public about the miniscule level of emissions. With respect to property values, there is also a need to educate the public. The available studies have clearly shown that wireless deployment, absent something like a large lattice tower immediately in front of a residence, does not have a negative impact on property values. To the contrary, anecdotal evidence is beginning to appear that lack of adequate wireless service can have a negative impact on residential values. Although additional strengthening of the regulatory constraints on local actions that impede deployment is definitely needed, especially clear examples to guide the courts in applying the TCA, such regulatory constraints are likely to continue to be largely ineffective until the root causes of local opposition, the fears referred to above, are addressed through effective educational efforts. Any such efforts, however, must utilize modern methods of communication such as the educational efforts undertaken in connection with anti-smoking campaigns. Mere governmentally issued whitepapers are unlikely to have significant effect on public perceptions...

The comments of the North San Rafael Coalition of Residents ("NSRCR") are a good example of the misinformation that so often generates local opposition to siting efforts. NSRCR expresses a preference for WiMAX service, which it calls "high speed over the air broadcast service" and objects to "[g]round based solutions—such as fiber-optic cabling and distributed network systems of cell towers" without any apparent awareness that while distributed antenna systems may employ a greater number of nodes, they do not utilize what is commonly understood by the term "tower" and that WiMax utilizes the same types of support structures and backhaul solutions as other CMRS deployments. It is also ironic that NSRCR concluded that "[o]ne infrastructure provider (and only one) must accommodate various carriers," when one of the primary advantages of neutral host distributed antenna systems is the ability to accommodate multiple carriers through a single antenna.

As indicated below, in the State of California, distributed antenna systems are not subject to local zoning under state law. While the California Public Utilities Commission has delegated certain environmental review authority with respect to cellular service providers to local jurisdictions under its General Order 159A, distributed antenna system providers are not covered by this order and thus it is the CPUC, rather than the local jurisdiction which authorizes construction of distributed antenna systems. Actually, under the California Constitution, but for General Order 159A, local jurisdiction would have no authority over any wireless construction beyond ministerial building and encroachment permits. Even those are subject to preemption by the CPUC if abused. Unfortunately, the CPUC does not have the resources to address every single instance of abuse. However, it has finally begun to appreciate the problem and become involved in some of the litigation on the subject. It even promulgated a new General Order 170 that clarified its preemptive authority over DAS, but this has unfortunately now been stayed. NSRCR's comments clearly establish what happened to the deployment in that case. Unified community action was able to stop the . . . infrastructure." This is, unfortunately, an all too common occurrence in California. Similar community opposition to distributed antenna system deployments has significantly delayed DAS projects throughout the state of California. As of this date, DAS projects proposed in Davis, Irvine, Newport Beach, Huntington Beach, Burlingame, Oakland and Los Angeles County, California remain blocked due to local opposition.

In response to the Comments of SCAN, an initial item to note is that carriers pick and choose those areas they intend to serve based on customer demand. What many of the municipal comments seem to ignore, as do much of the rhetoric heard at a typical zoning hearing in California is that broadband deployment and indeed the provisions of the Telecommunications Act that constrain local authority, such as Sections 253 and 332, were intended to provide benefits to the public. That is why, for example, Section 332 provides standing to any party adversely affected.

It is interesting to note that SCAN fails to include wireless telephone among the lifeline service providers it lists on page 5 of its comments. This is but another example of the bias evidenced by far too many California jurisdictions that have continued to resist the inevitable changes in the technology of the nation's telephone system. At a po9int in time where over 70% of all 911 calls originate from wireless telephones and one in every four households no longer has a land line, it is simply unacceptable to continue to treat wireless telephony as a second class utility. While the broad purposes recited in Santa Monica's ordinance refer to all the right policies, as do many other municipal ordinances, in practice, they are not honored.

Santa Monica's Right-of-Way regulations, for example, separate out only one kind of utility for special treatment, namely wireless infrastructure. Despite the general definition of a "utility" in § 7.06.020(k), the section also includes a separate definition, in subsection (l) for "wireless". No other type of right of way user is separately defined. This separate definition of wireless finds service in a number of places in the City's code that impose discriminatory requirements on only the wireless right of way users. For example, § 7.06.090 delineates three types of right of way permits, excavation permits, Wireless Facility Minor Permits and Wireless Facility Major Permits. While Wireless Facility Minor Permits are subject to the same required findings as Excavation Permits, Wireless Facility Major Permits require special findings, including that "[t]he proposed facility can be mitigated so that its impacts do not result in a material change to the character of the location and the facility relates harmoniously with the surrounding neighborhood," (S>m> Mun. Code § 7.06.130(a)(4) that are not required for any other use of the public right of way. Furthermore, even Wireless Facility Minor Permits are subject to numerous special design standards under § 7.06.230 that no other uses of the right of way are subject to. Attached are numerous examples of similar local ordinances that adopt specific discriminatory requirements applicable only to wireless users of the right of way.

One issue that has come up on occasion in California are the attempts, some more blatant than others, to steer siting efforts toward municipally owned properties in an attempt to generate revenue for the local municipality. While the need for revenue is understandable, especially in the current economic climate, it is not appropriate for local jurisdictions to utilize land use authority to hinder competition. One example, which the Commission can investigate further in the pleadings filed in *American Tower Corporation v. The City of San Diego*, Case No. _____, S.D. Cal. was attempting to require the removal of existing monopoles and lattice towers within the city with the exception of those owned by the City. The City was leasing space on its structures to commercial and governmental antenna users in direct competition with both Crown Castle and American Tower Corporation. The City of Burlingame, California has also attempted to prevent ExteNet Systems from utilizing joint poles in which ExteNet already has an ownership interest located in the public right of way where ExteNet is already entitled, under state law to a franchise for placement of telephone facilities, suggesting instead that ExteNet could lease space on City owned structures and use City-owned easements for a charge. As cited in the comments of NextG Networks, Inc. the Cities of Riverside and Newport Beach use their

municipal permit processes to eliminate all available alternatives other than municipally-owned light structures for which they then demand monopolistic fees.

Similarly, NextG is not alone in being subjected to discriminatory practices with respect to the local permits required for attachment of facilities to utility poles in the right of way. ExteNet Systems recently brought litigation against the City of Burlingame, California for the same sort of practices referred to in NextG's comments. Attached are copies of the complaint and motion filed by ExteNet in the Superior Court of California for the County of San Mateo, as well as supporting declarations that describe in detail the events leading up to the lawsuit. In another suit by what was then NewPath Networks, LLC (now Crown Castle), U.S. District Judge James V. Selna granted the City of Irvine, California's motion for summary judgment on NewPath's Equal Protection Claim (which alleged precisely the sort of discrimination with respect to placement of facilities in the right of way) on the sole grounds that NewPath utilized antennas. It should be apparent that the types of antennas typically utilized in DAS deployments are indistinguishable, on aesthetic grounds, from other equipment that is allowed on existing support structures in the right of way without being subjected to similar requirements. That leaves no other distinction except RF emissions.

IV. CALIFORNIA NEEDS THE FCC TO CLARIFY FEDERAL LAW

As indicated above, and as noted in the Comments of PCIA – The Wireless Infrastructure Association, Commission action is needed to provide education to the public, guidance to the courts and local jurisdictions as to the other half of the formula for achieving successful siting solutions, namely the technical side, and in some instances specific regulatory directives to insure that local zoning processes are not abused and do not succumb to improper political pressures.

Rather than repeat the discussion of the specific measures needed, CalWA refers, instead to the suggested measures set forth in PCIA's comments, the entirety of which CalWA joins in and wholeheartedly supports.

Respectfully submitted,

THE CALIFORNIA WIRELESS ASSOCIATION

By: /s/ Jon Dohm_____

Jon Dohm, President

Julian Quattlebaum,
Co-Chair, Regulatory Committee