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Article

WHOSE STREETS? CALIFORNIA PUBLIC UTILITIES CODE SECTION 7901 IN THE WIRELESS AGE

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I. Introduction

When the fledgling California State Legislature convened for its first session in the old State Capital of San Jose in the year 1850, it enacted legislation to open the roads of the state to a new form of communications *372 technology: the telegraph.¹ The new law was titled “an Act concerning Corporations.”² Among other things, it conferred on telegraph corporations “the right to construct lines of telegraph along the public roads” throughout the width and breadth of the new state.³

It was the era of top hats and frock coats; the ink had just dried on the Treaty of Guadalupe Hildalgo; slavery was still thriving south of the Mason-Dixon Line; and the Civil War was yet eleven years off. But then, as now, the nation (such as it was in its incomplete form) was at the threshold of a new era of game-changing communications technology.⁴ In 1850, cutting-edge communications infrastructure took the form of telegraph poles and wires.⁵ The first Transcontinental Railroad would not be completed until the Golden Spike joined the rail lines at Promontory Point on May 10, 1869. The railroad right of way afforded an important avenue, allowing the new nation to be linked from coast to coast by the miracle of the telegraph's new technology. Today, 162 years later, the new technology is wireless broadband. An important avenue for its expansion and goal of universal coverage are the roads and highways of the state of California.

Wireless broadband is proving transformative on a global scale. As smartphones and tablets proliferate, however, data demand is leading to a critical deficit in network capacity, requiring more wireless antennas and related infrastructure. According to a 2011 report, wireless data traffic was 110 percent higher than in the last half of 2010.⁶ Similarly, AT&T reports *373 that its wireless data volumes have increased thirty-fold since the introduction of the iPhone.⁷ Adding to the mix, 25 percent of all American homes are now wireless only,⁸ and wireless data traffic is expected to grow by a factor of twenty between 2010 and 2015.⁹ By the time the reader lays eyes on this article, these numbers already will be outdated.

To meet exponential demand, wireless infrastructure developers are taking to the streets, much as their nineteenth century predecessors did. They are invoking the current version of the law enacted by the first state legislature 162 years ago, which allows a free access to the state's public ways under a statewide franchise granted to telegraph companies.¹⁰ The direct descendant of that law exists today as [California Public Utilities Code section 7901](#).¹¹ Unfortunately, recent judicial precedent emanating from the Ninth Circuit has misinterpreted the ancient law in its original intent and modern application, obscured its meaning, and muted its intended effects. The results have had untold effects on the ability of wireless service providers to deploy a competitive wireless broadband network in the state of California.

II. The Early Case Law: a Statewide Franchise for Telegraph and Telephone Corporations

In 1872, the state legislature re-codified the old Corporations Law of 1850 as [section 536 of the California Civil Code](#).¹² But the world of ***374** communications technology would not stand still. As Graham Bell's telephone moved from a mere novelty to the sine qua non for communications in the late nineteenth and early twentieth centuries, telephone corporations sought to invoke the same rights as those enjoyed by their telegraph counterparts.¹³ After all, their need to deploy telephone wires to thousands of businesses and residences was even more urgent than that of the telegraph corporations, which typically delivered messages to a central office. By March 20, 1905, the Legislature repealed and immediately reenacted [section 536](#) to provide the same scope of rights for the emergence of the telephone.¹⁴

A steady progression of jurisprudence in the decades that followed affirmed the expansion of the statewide franchise to telephone corporations.¹⁵ Streets sometimes became choked with a thicket of wires and poles as new telephone lines were continually added to the state's network, and the tendency of newly incorporated cities was to try to prohibit new lines. The courts often had to grapple with municipalities that contended they alone had the authority to impose local franchises for the use of their streets.¹⁶ It was around those obstacles that the California courts shaped the contours of the [section 536](#) statewide franchise right. The courts had to affirm that [section 536](#) was superior to any municipal franchise, because, as a direct grant from the legislature, it arose from the sovereign capacity of the state of California to grant the franchise power in the first place.¹⁷

A. 1905-1912: Setting the Parameters of the Right

By 1912, the courts had defined the metes and bounds of the [section 536](#) franchise right. The guideposts established by the early jurisprudence are as follows:

***375** [Section 536](#) Creates a Statewide Franchise that Supersedes Local Franchises: In 1906, the California Supreme Court determined that [section 536](#) constitutes a state-granted franchise to operate lines of telegraph in the public ways of the state of California (including municipal streets and city and county highways), and that the right was superior to a putative local franchise granted by the City of Visalia.¹⁸ The court observed that the city had only the authority to “regulate the manner of the . . . placing and maintaining [the] poles and wires as to prevent unreasonable obstruction of travel” and that any purported grant of a franchise by the city to use its streets “would be merely an empty form of granting what the plaintiff already had and of which the city could not deprive it.”¹⁹

[Section 536](#) Creates a Vested Right, Protected by the Constitution from Impairment: Three years later, in 1909, the Ninth Circuit Court of Appeals weighed in on the law, noting that the erection of telephone and telegraph poles in city streets “became a contract between the company and the state, secured by the Constitution of the United States against impairment by any subsequent state legislation.”²⁰ In 1911, the California Supreme Court echoed and endorsed the Ninth Circuit's interpretation of [section 536](#), holding that the statute created “vested rights that cannot be taken away by state or city without compensation.”²¹

The vested right afforded by [section 536](#) matures once the company “plac[es] and maintain[s] its poles and wires in, along, and over said streets.”²²

By Enacting [Section 536](#), the State Withheld Its “Original Right” over All Public Streets from the Municipalities: The California Supreme Court, in its 1911 opinion, *Western Union Telegraph Co. v. Hopkins*, further developed the doctrine concerning the source of the [section 536](#) franchise, observing “that the state in its sovereign capacity has the original right to *376 control all public streets and highways.”²³ In granting the [section 536](#) franchise, the state exercises that sovereign capacity to withhold certain powers of control from local governments and instead confers those controls on telegraph and telephone companies, “leaving nothing in that behalf to be granted by the municipality.”²⁴

Municipalities May Not Charge Telegraph and Telephone Corporations for Use of Their Streets: In *City of Visalia*, the California Supreme Court, reviewed an ordinance of the City of Visalia, repudiated any construction of the ordinance purporting to either grant or assess a fee on a right to enter the city's streets.²⁵ In *Hopkins*, the California Supreme Court further developed the prohibition on imposing fees for use of the public rights of way, determining that the [section 536](#) franchise right authorized exclusive occupation of the streets “free of charge by the city.”²⁶

B. 1920s: Further Refinements

The 1920s saw further refinements to the rights arising under [section 536](#). In 1921, the California Court of Appeal affirmed the superiority of [section 536](#) over another early franchise statute, the Broughton Act,²⁷ which addressed grants of franchise over the public roads by county boards of supervisors.²⁸ The court held that the Broughton Act did not affect the grant of a statewide franchise right to telephone corporations.²⁹ According to the court, [section 536](#) gave rise to a superior right, allowing telephone corporations to use the public highways “free of any grant made by subordinate legislative bodies, and unrestricted by the provisions of the Broughton Act.”³⁰ Later, in 1927, the California Supreme Court reaffirmed the sacrosanct character of the vested right obtained through [section 536](#), noting that the vested right is protected by both the *377 state and federal constitutions against even a subsequent constitutional provision by the people:

The rights acquired by the Telegraph Company, by accepting and availing itself of the provisions of the section, are vested rights which the constitutions, both state and federal, protect. They cannot be taken away by the state, even though the legislature should repeal the section, or by the people through a constitutional provision.³¹

The court did not stop there. It affirmed, against opposition by the California Railroad Commission (the predecessor of the Public Utilities Commission),³² that the [section 536](#) vested right matures on a statewide basis upon a telephone corporation's first installation of a telegraph line and extends to every new line of service thereafter. As the court noted:

As we have seen, the right of the corporations to use the highways existed independently of the Hess franchise, and under the assignment thereof they took nothing other than what they already had, namely, the right to occupy the highways with poles and lines of wire constructed by them. This right, in our opinion, implies the right to use the highways for the lines constructed by Hess and which they acquired by purchase. While the accepted meaning of the word “construct” is to assemble or build, it should, as used in [section 536](#), be construed to apply to lines in place and purchased by such corporations. The operation of the lines by the corporations was not under the Hess franchise, but under an existing and superior right granted the corporations by [section 536](#).³³

In other words, the franchise rights afforded by [section 536](#) vest on a statewide basis upon construction of the first line of a network.³⁴

***378 C. 1940s to the 1960s: A Matter of Statewide Concern**

By the late 1940s, [section 536](#) was accompanied by a long and venerable line of unbroken case law, mostly from California's high court. As the California Supreme Court stated in 1948, [i]ts provisions relating to telegraph companies have been in existence since 1872, and those applying to telephone companies have been in effect since 1905. The constitutionality of the section has been impliedly upheld by many decisions of this court, and in the few instances where a direct challenge has been made it has withstood the attack. These decisions have been acquiesced in and acted upon for more than 40 years and have become something akin to a rule of property which should not be disturbed in the absence of the most compelling and cogent reasons.³⁵

The court's vote of confidence on the old law would come in handy in the 1950s and 1960s. By those decades, the national telephone network was exploding on an exponential basis.³⁶ In 1959, the California Supreme Court addressed the matter of whether the City of San Francisco could require the removal of telephone lines and poles based on the failure to obtain a city franchise.³⁷ The court noted that the concept of municipal concerns versus statewide concerns had morphed significantly since the court's earlier opinions on [section 536](#)--by now recodified as [Public Utilities Code section 7901](#).³⁸ In the light of such growth, the court mused on the implications of allowing a city such as San Francisco, to control access to its streets:

if the telephone lines were removed from the streets in the city, the people throughout the state, the United States, and most parts of the world who can now communicate directly by telephone with residents in the city could no longer do so. In addition, the more ***379** than 300,000 residents of San Mateo County would be cut off from all long distance telephone communication with the people throughout the state, the nation, and other parts of the world. Without lines in the streets of the city, the telephone company could not provide private line services for agencies of the federal government, such as the Civil Aeronautics Administration, the Federal Communications Commission, the Army, the Navy, and the Air Force.³⁹

The court concluded that telephone service “is not at the present time a municipal affair but is a matter of statewide concern.”⁴⁰

D. 1990s: Telephone Deregulation and the Addition of [Public Utilities Code Section 7901.1](#)

The 1990s saw the deregulation of telephone companies, opening both the telecom markets--and the municipal streets--to a flurry of new activity. New entrants into the telecom market rushed to get their networks built, increasing construction work in the public roads and raising new tensions between local government and the industry.⁴¹ Cities wrung their hands over a seeming inability to coordinate trenching and roadcuts for companies attempting to install their networks.⁴²

In part to address the rise of local concerns about construction in the streets, the legislature enacted SB621, now codified as [Public Utilities Code section 7901.1](#) in 1994.⁴³ [Section 7901.1](#) provides, in relevant part, ***380** “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.”⁴⁴ As the words of the new statute made clear, the “time, place, and manner” triad was intended to govern only the accidents of “access” to the city streets and did not affect the basic right of access itself. By wording the law in such a manner, the legislature was careful to focus the controls on construction, thereby avoiding any curtailment of the rights afforded by the time-honored [section 7901](#) statewide franchise rights.

While respecting the continuing state interest in the widespread deployment of advanced communications networks, the author sees room for local government to exercise reasonable management of its streets and waterways. The author claims 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, without jeopardizing the telephone corporations' statewide franchise.⁴⁵

III. Enter the Wireless Age

At the dawn of the new millennium, the number of wireless telecommunications subscribers nationwide had exploded from 5,203,000 in 1990 to over 100,000,000 in the year 2000.⁴⁶ The industry predicted exponential growth in the years to come, but limits on the existing network foretold a plodding pace toward innovations such as text messaging, streaming video, and mobile internet service.⁴⁷ At the same time, local sentiment against cell towers often complicated city permitting processes, *381 thereby exacerbating a bottleneck in network capacity.⁴⁸ In response to growing concerns among their constituents, many cities and counties imposed moratoria on cell tower applications, while working up new code provisions designed to discourage cell-site proliferation.⁴⁹

In response to the new restrictions on wireless zoning, wireless developers and carriers began to look to streets again, invoking the old law once used by their predecessors during the telegraph age. A bit of statutory activity in 1951 helped their case. The 1951 legislation that changed former Civil Code section 536 into the Public Utilities Code and renumbered it as [section 7901](#) also imported the definition of a “telephone line” formerly contained in a 1915 piece of legislation called the “Public Utilities Act.” The legislation also amended the definition to add the clause “whether such communication is had with or without the use of transmission wires.”⁵⁰ A number of cities bristled at the prospect of relinquishing their planning prerogatives over their local streets and declined to acknowledge [section 7901](#) in the context of wireless networks. The battle lines were drawn for a new generation of [section 7901](#) court cases. Because many carriers also sought to invoke their rights under the new Telecommunications Act of 1996,⁵¹ the cases invariably ended up before federal tribunals.⁵² The federal courts, noting the dearth of state law precedent applying [section 7901](#) to wireless telecommunications, frequently declined to exercise jurisdiction over the [section 7901](#) claims.⁵³ In the meantime, local governments all over California continued to require *382 discretionary permits as a precondition of entry into the public rights of way.⁵⁴

A. The Costs of Confusion: The Ninth Circuit Steps In, Then Flip-Flops

Frustrated with the industry's inability to obtain a federal forum to interpret [section 7901](#), Sprint PCS filed two lawsuits in the United States District Court for the Central District of California. The first action challenged a permit denial by the City of La Cañada Flintridge, based on a provision of the city's code purporting to allow the city to deny access to its streets on the basis of the “negative aesthetic impact[s]” of the proposed telecommunications facility.⁵⁵ The second lawsuit brought claims against the City of Palos Verdes Estates on similar facts.⁵⁶

To force the federal court to hear the [section 7901](#) claim, Sprint employed a Trojan Horse strategy, folding its [section 7901](#) claim into a federal law, namely a provision of the Telecommunications Act of 1996 requiring cities to base their denials on substantial evidence pursuant to standards set by applicable state law.⁵⁷ Sprint argued that the city violated the substantial evidence standard of the Telecommunications Act of 1996 because a finding of aesthetics cannot constitute substantial evidence for denying access to the rights of way under the statewide franchise rights afforded by [section 7901](#).⁵⁸

B. Sprint v. La Cañada Flintridge: Cities Cannot Bar Entry Based on Aesthetics

Sprint's Trojan Horse strategy worked. In *La Cañada Flintridge*, the Ninth Circuit took up the [section 7901](#) issue on appeal from the lower court's judgment in favor of the City.⁵⁹ In determining whether aesthetics ***383** can constitute a valid ground for denial of access to public rights of way, the court observed that the “only substantive restriction” imposed by [section 7901](#) on telephone companies is not to “incommode the public use” of roads.⁶⁰ While the court took note of the city's argument that aesthetic blight could render a street unpleasant, thereby affecting the public use, the court observed that the restriction of the statute was focused more “on the function of the road--its ‘use,’ not its enjoyment.”⁶¹

The court then looked to the language of the later-adopted [section 7901.1](#) to search for guidance in the legislature's addition of the “time, place, and manner” categories of local control. The court noted that “manner” might be interpreted broadly enough to allow for aesthetic regulation, but not in the context of the statutory language.⁶² [Section 7901.1](#) constrained the three areas of municipal control only as to “the manner in which roads, highways, and waterways are accessed.”⁶³ As the court said, [a] regulation of appearance could conceivably be considered a regulation of the “manner” in which telephone companies use public roads. However, this seems to stretch the word “manner,” which, coupled with “time” and “place,” cannot be read so broadly. More importantly, the City's reading is illogical when coupled with the “are accessed” language that follows. [Section 7901.1](#) only gives cities the authority to regulate the manner in which roads “are accessed,” not the authority to regulate the manner in which telephone companies affect the road's appearance.⁶⁴

The court went on to conclude that “[t]he better reading of ‘time, place, and manner’ does not expand the City's authority far enough to include aesthetic regulation.”⁶⁵

***384 C. Sprint v. City of Palos Verdes Estates: Cities Can Bar Entry Based on Aesthetics**

Meanwhile, in Sprint's companion case, *City of Palos Verdes Estates*, the District Court granted summary judgment in Sprint's favor, thereby finding aesthetics to be an improper basis for denial of a permit application under [section 7901](#).⁶⁶ The City of Palos Verdes Estates appealed.

While the Palos Verdes Estates appeal was pending, new developments began to cast a cloud over the *La Cañada Flintridge* decision. As if overcome by a sudden wave of self-doubt, on May 23, 2006, the Ninth Circuit issued an amendment to the *La Cañada Flintridge* opinion, gutting it of its extensive analysis of [section 7901](#).⁶⁷ The Ninth Circuit also sought input from the California Supreme Court on the aesthetics question in the context of [section 7901](#).⁶⁸ The California Supreme Court declined the Ninth Circuit's request, finding that “a decision on that issue may not be determinative”⁶⁹

Devoid of guidance from the State's high court and any published precedent on the issue of aesthetics, the Ninth Circuit set about to “predict how the California Supreme Court would resolve the issue.”⁷⁰ In so doing, the court did a dramatic about-face from its reasoning and conclusions in *City of La Cañada Flintridge*. The court abandoned its earlier “functionality” limitation on the term “incommode” in [section 7901](#), and opened the term up to a vastly wider interpretation, noting that “travel is often as much about the journey as it is about the destination.”⁷¹ Thus free of constraints on its own exegesis (not to mention the binding authority of the California Supreme Court), the court declared that enjoyment of a road is as valid a consideration for barring access to the city streets as is the physical obstruction of travel.⁷²

The court also took a new stab at interpreting the “time, place, and manner” controls of [section 7901.1](#). In *La Cañada Flintridge*, the court observed that, on its face, [section 7901.1](#) limits a city's “time, place, and manner” regulatory parameters only to access of the public rights of way (i.e., construction activities). This time, however, the court dodged the ***385** question of whether the section addressed only construction by ballooning the concept of “access” beyond construction management. It noted in a

somewhat mystifying gloss on [section 7901.1](#) that “a company can ‘access’ a city’s rights of way in both aesthetically benign and aesthetically offensive ways.”⁷³

The court derived its bold new interpretation of [sections 7901](#) and [7901.1](#) without reference to the unbroken, one-hundred-year-old line of case law from the California Supreme Court which carefully fleshed out the metes and bounds of the statewide franchise. Nor did it consider the legislative history materials of [section 7901.1](#), which provide evidence that the “time, place and manner” rubric was intended only for “construction management.”⁷⁴ The court would have benefitted from an inquiry into such cases as *City of Visalia*,⁷⁵ in which the California Supreme Court decisively propounded a restrictive interpretation of “incommode” to mean “unreasonably obstruct and interfere with ordinary travel.”⁷⁶ The California Court of Appeal had already determined that

[w]here a corporation has a state franchise to use a city’s streets, the city derives its rights to regulate the particular location and manner of installation of the franchise holder’s facilities from the narrower sense of the police power. 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 the manner of installation.⁷⁷

Instead of consulting the existing authoritative California law for clues (as it was legally bound to do), the Ninth Circuit pinned its conclusions to such meager sources as the Oxford English Dictionary and a series of city planning treatises.⁷⁸ To the extent that it ignored the clear binding precedent of the California Supreme Court in *Palos Verdes Estates* with its *386 novel interpretation of [section 7901](#), the Ninth Circuit holding is invalid without authority to bind the courts of the State of California.

IV. History Repeated: The Revival of the Local Franchise

As the *Palos Verdes Estates* decision began to make the rounds, city and county staffs, emboldened by the Ninth Circuit’s change of heart, began to reexamine their wireless ordinances and look for ways to codify their newly endorsed regulatory powers over the public rights of way.⁷⁹ Cities throughout the state interpreted the Ninth Circuit’s approbation of local control as a blank check to draft lengthy and onerous wireless site requirements or to mandate fully discretionary zoning approvals, usually in the form of a conditional use permit (a “CUP”), as a precondition to entry into the public rights of way.⁸⁰ In other cases, wireless telecommunications companies, even those expressly authorized by the California Public Utilities Commission to invoke their [section 7901](#) rights, found themselves unable to enter the public rights of way as public utilities.⁸¹ The industry began to wonder if [section 7901](#) was becoming a dead letter.

The Ninth Circuit’s marked departure from the age-old line of jurisprudence defining the perimeters of the [section 7901](#) right has made discretionary land-use entitlements (such as CUPs) de rigueur as the portal of entry into the majority of California cities’ streets.⁸² In the hornbook parlance of California land-use law:

[t]he conditional use permit is a permit issued to a landowner by an administrative agency (board of zoning adjustment, planning commission or legislative body on appeal) allowing a particular use *387 or activity not allowed as a matter of right within a zoning district.⁸³

Put another way, a CUP confers a right to use where no such right existed before.⁸⁴ Because a CUP application precedes the existence of a use right, the agency with approval authority is vested with full discretion to deny the application or determine whether and under what conditions to authorize the use within the city’s jurisdictional boundaries.⁸⁵ Conversely, an agency is prohibited from imposing a requirement to obtain a CUP where a landowner already enjoys a vested right to use.⁸⁶

A discretionary threshold for telephone corporations' entry into the public rights of way--such as a CUP or other discretionary use permit--is therefore blind to the existence of the [section 7901](#) statewide franchise.⁸⁷ The discretion vested in a city through its CUP power extends to whether or not a company can even do business in a municipality's streets, not just how, when and where it can place its poles.⁸⁸ In short, a CUP, or its equivalent, represents a new and definitive form of local franchise for entry into a municipality's public rights of way.

As early as 1906, in one of the first reported opinions on [section 536](#), the immediate predecessor to [section 7901](#), the California Supreme Court sketched out the difference between proper regulation of city streets under the local police powers and local regulation that extended beyond those powers *388 by purporting to grant the "right" to use the public ways.⁸⁹ Before the court was an ordinance of the City of Visalia that purported to grant--and assess a fee on--a right for a telegraph company to use the city streets. The court endorsed the ordinance only to the extent that it "regulate[s] the manner as not to unreasonably obstruct and interfere with ordinary travel."⁹⁰ The court otherwise repudiated any interpretation of the ordinance that would purport to grant a franchise (i.e., authorize entry into the city streets) and assess a franchise fee. In his concurring opinion, Judge Lucien Shaw noted that to the extent the ordinance purported to grant a right to enter the streets, it was a void attempt to impose a city franchise requirement.

I think, however, that the ordinance in question was intended to grant a certain right to use a portion of the public streets, and that, as it purports to be a grant by public authority of a right to the use of public property, it does purport to grant a franchise. The fact that it also regulates the manner of the use does not change its character in this respect. But in so far as it purports to grant such right, it merely attempts to give the plaintiff that which it already had, and was of no legal effect whatever. The assessment, being specifically upon that so-called franchise, was upon a thing which had no real existence and which could not have any value. It was, therefore, necessarily void, and its collection in the manner here attempted should be enjoined.⁹¹

The court's sentiments, though over one hundred years old, are still applicable and binding over any contrary opinion by the federal courts.⁹² Indeed, the same principles have been carried forward and reaffirmed as recently as 2003, in *Williams Communication, LLC v. City of Riverside*,⁹³ where the Court of Appeal struck down an attempt by a local government to assess a fee on the use of the public right of way and reaffirmed that "[w]hen a telephone corporation obtains a franchise under [former Civil Code] § 536, it need not obtain a franchise from local authorities."⁹⁴

***389 V. Conclusion: A Call for Clarity from the California Supreme Court**

Unfortunately for the industry, the silence of the state's high court has led to a babel of local franchise regimes that continues to impede the deployment of the state's wireless infrastructure. The return of the local franchise requirement means the wireless industry now must slog its way, city-by-city, through the state to establish its lines, sometimes being forced to steer clear of jurisdictions that have raised barriers too high to justify the delay and expense. The risk of such variable local treatment is a patch-work quilt, not a cohesive network capable of handling the deluge of demand the twenty-first century surely will bring and the new economies that will arise from the Information Age. It is time for the court to reaffirm the parameters of the [section 7901](#) statewide franchise right for the Wireless Age and clear the air of the confusion that now pervades in what once was an area of long-settled jurisprudence.

Footnotes

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- 1 Act concerning Corporations, Stats. 1850, ch. 128, 347-69, amended by Stats. 1857, ch. 147, 171; [Los Angeles Cnty. v. S. Cal. Tel. Co.](#), 32 Cal.2d 378, 381 (1948); [Cal. State Tel. Co. v. Alta Tel. Co.](#), 22 Cal. 398, 426-27 (1863), overruled on other ground by [City and Cnty. of San Francisco v. Spring Valley Water Works](#), 48 Cal. 493, 515 (1874).
- 2 Act concerning Corporations, supra note 1 at 347; see [Alta Tel.Co.](#), 22 Cal. at 427.
- 3 [Alta Tel. Co.](#), 22 Cal. at 427.
- 4 The stakes were high for California. Communication with the state in the mid-1800s was challenging, requiring mail vessels to sail around the Horn. The Legislature enacted the law, in part, “as an inducement” to companies to do business in California. See [Cnty. of Los Angeles v. Gen. Tel. Co.](#), 249 Cal. App. 2d 903, 906-07 (1967) (discussing importance of telegraphic communications to nineteenth century California).
- 5 The United States Congress, recognizing the importance of telegraph networks, adopted a federal franchise to “aid in the construction of telegraph lines.” Act of Congress, ch. 230, 14 Stat. 221 (1866). The Act granted to telegraph companies a similar right to “construct, maintain, and operate lines of telegraph ... over and along the military or post roads of the United States ... provided, that such lines of telegraph shall be so constructed and maintained as not to obstruct ... or interfere with the ordinary travel on such military or post roads.” Id.
- 6 Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2011-2016, http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-520862.html (last visited Apr. 16, 2013).
- 7 See Executive Office of the President Council of Economic Advisors, The Economic Benefits of New Spectrum for Wireless Broadband (Feb. 2012), http://www.whitehouse.gov/sites/default/files/cea_spectrum_report_2-21-2012.pdf.
- 8 U.S. Department of Health and Human Services, Wireless Substitution: State-level Estimates From the National Health Interview Survey, January 2007-June 2010 (National Health Statistics Reports, No. 39) by Stephen J. Blumberg, et al. (Apr. 20, 2011).
- 9 Id.
- 10 See, e.g., [Sprint PCS Assets, LLC v. City of La Cañada Flintridge](#), 435 F.3d 993 (9th Cir. 2005).
- 11 Cal. Pub. Utils. Code, § 7901 (1997). The statute reads:
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. Id.
- 12 See [Sunset Tel. & Tel. Co. v. Pasadena](#), 161 Cal. 265 (1911). The 1872 version of Civil Code section 536 states: “Telegraph corporations may construct lines of telegraph 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.” Cal. Civ. Code § 536 (1872).
- 13 See [Los Angeles Cnty. v. S. Cal. Tel. Co.](#), 32 Cal. 2d 378, 381 (1948).
- 14 See [Postal Tel. Cable Co. v. Cnty. of Los Angeles](#), 160 Cal. 129 (1911); [Pomona v. Sunset Tel. & Tel. Co.](#), 224 U.S. 330 (1912); [L.A. Cnty. v. S. Cal. Tel. Co.](#), 32 Cal. 2d at 382; [Sunset Tel. & Tel. Co. v. Pasadena](#), 161 Cal. at 272-73; [Cnty. of Los Angeles v. Gen. Tel. Co.](#), 249 Cal. App. 2d at 905.
- 15 See [Cnty. of Los Angeles v. S. Cal. Tel. Co.](#), 32 Cal. 2d at 393.
- 16 See e.g., [W. Union Tel. Co. v. City of Visalia](#), 149 Cal. 744, 750.
- 17 See, e.g., [Sunset Tel. & Tel. Co. v. City of Pomona](#), 172 F. 829, 833-37 (9th Cir. 1909), rev'd on other grounds, [Pomona v. Sunset Tel. & Tel. Co.](#), 224 U.S. 330 (1912).

- 18 [W. Union Tel. Co. v. City of Visalia](#), 149 Cal. 744, 750-51 (1906).
- 19 *Id.* Five years later, in [Sunset Tel. and Tel. Co. v. City of Pasadena](#), 161 Cal. 265, the California Supreme Court carved out an exception for the City of Pasadena, because it was a charter city. [Sunset Tel. and Tel. Co.](#), 161 Cal. at 284-85. In 1951, the California Supreme Court later corrected its earlier holding, observing that the “case is not controlling now because, as hereinabove stated, the concept of a ‘municipal affair’ is not a fixed quantity but may fluctuate with changing conditions. Accordingly, what may have been a ‘municipal affair’ a half century ago is not necessarily one today.” [Pac. Tel. & Tel. Co. v. City & Cnty. of San Francisco](#), 51 Cal. 2d. 766, 775 (1959).
- 20 [Sunset Tel. & Tel. Co. v. City of Pomona](#), 172 F. 829, 837 (1909).
- 21 [Postal Tel. Cable Co. v. Cnty. of Los Angeles](#), 160 Cal. 129 (1911).
- 22 [Postal Tel. Cable Co. v. City of Los Angeles](#), 164 Cal. 156, 159-60 (1912); see also [Postal Tel. Cable Co. v. Cnty. of L.A.](#), 160 Cal. at 130 (citing same proposition).
- 23 [W. Union Tel. Co. v. Hopkins](#), 160 Cal. 106, 118 (1911). Elaborating further on the reasons the state withheld public streets and highways from the local governments, the California Court of Appeal wrote in 1967: “[t]he very purpose of the grant for the use of State easements was to spare the companies the expense of acquiring easements over privately owned lands; to cause them wasteful expense would have been contrary to the State’s purpose and the expectation of the companies.” [Cnty. of Los Angeles v. Gen. Tel. Co.](#), 249 Cal. App. 2d at 907-08.
- 24 [Hopkins](#), 160 Cal. at 118-19.
- 25 [W. Union Tel. Co. v. City of Visalia](#), 149 Cal. 744, 750-51 (1906).
- 26 [Hopkins](#), 160 Cal. at 123.
- 27 Stats. 1905, ch. 578, 777.
- 28 [Cnty. of Inyo v. Hess](#), 53 Cal. App. 415, 419 (1921).
- 29 *Id.* at 422-23.
- 30 *Id.* at 424-25; the holding in [Cnty. of Inyo](#) was confirmed by the California Supreme Court in [Cnty. of Los Angeles v. S. Cal. Tel. Co.](#), 32 Cal.2d 378 (1948).
- 31 [Postal Tel. Cable Co. v. R.R. Comm’n](#), 200 Cal. 463, 424 (1927).
- 32 On June 16, 1945, the state legislature proposed a constitutional amendment to rename the Railroad Commission the “California Public Utilities Commission.” California Public Utilities Commission: CPUC History & Structure, <http://www.cpuc.ca.gov/PUC/aboutus/puhistory.htm> (last visited March 29, 2013).
- 33 [Hess](#), 53 Cal. App. at 473.
- 34 See also [W. Union Tel. Co. v. Hopkins](#), 160 Cal. 106, 118 (1911) (noting that section 536 “always purported to apply to all public highways in the state”).
- 35 [Cnty. of Los Angeles v. S. Cal. Tel. Co.](#), 32 Cal. 2d at 393.
- 36 See [Pac. Tel. & Tel. Co. v. San Francisco](#), 51 Cal. 2d 766, 775 (1959) (describing growth of telephone network since 1909).
- 37 *Id.* at 766
- 38 See Stats. 1951, ch. 764, 2194. The importation of section 536 into California Public Utilities Code section 7901 was part of the creation of the new California Public Utilities Code in 1951. See *id.* at 769 n.2 (California Supreme Court recognizing that Civil Code section 536 now appears as Public Utilities Code section 7901); see also [City of San Diego v. S. Cal. Tel. Co.](#) 42 Cal. 2d 110 (1954).
- 39 [Pac. Tel. & Tel. Co. v. City and Cnty. of San Francisco](#), 51 Cal. 2d at 773.

- 40 *Id.* at 776.
- 41 See, e.g., Patricia Horn, Phone Hangups: Cities Find Themselves Blindsided by Effects of Deregulation, *Sun Sentinel*, Oct. 13, 1996, at 1G (noting that “[w]ireless-phone companies want permits to erect antennas. Cable and phone companies need permits to dig up streets and sidewalks to lay cable. All are seeking to beat their competitors”); Amy Harmon, PacBell Pulls Plug on Vaunted High-Tech Plan, *L.A. Times*, Jan. 26, 1996, at 1 (reporting that Los Angeles officials admitted that, along with aesthetic concerns, negotiations over franchise fees inspired the city's refusal to issue more than 100 construction permits necessary for Pacific Bell's project to install an interactive television system).
- 42 See analysis of SB 621, Cal. Sen. Rules Comm., Office of Senate Floor Analyses (S. 1994-95 Reg. Sess.). As the analysis of the bill notes: “Among the complaints of the cities are a lack of ability to plan maintenance programs, protect public safety, minimize public inconvenience, and ensure adherence to sound construction practices. Cities are further concerned that multiple street cuts caused by uncoordinated construction shortens the life of the streets, causing increased taxpayer costs, as described in a recently commissioned study.” *Id.*
- 43 [Cal. Pub. Util. Code § 7901.1 \(1997\)](#); see Analysis of SB 621, Cal. Sen. Rules Comm., Office of Senate Floor Analyses (S. 1994-95 Reg. Sess.)
- 44 [Pub. Util. § 7901.1](#).
- 45 Analysis of SB 621, Cal. Sen. Rules Comm., Office of Senate Floor Analyses (S. 1994-95 Reg. Sess.) Indeed, the legislative history of section 7901.1 reveals that the new statute was intended only to clarify, not add to, existing law. See Sen. Com. on Energy, Utilities and Communications, Analysis of Sen. Bill No. 621; Governor's Off. of Planning and Research, Enrolled Bill Rep. on Sen. Bill No. 621 (1995-1996 Reg. Sess.) (“[T]his bill would not change current law, but would simply clarify existing municipality rights”).
- 46 Annualized Wireless Industry Survey Results--December 1985 to December 2011, CTIA, (2012), [http:// www.ctia.org/advocacy/research/index.cfm/aid/10316](http://www.ctia.org/advocacy/research/index.cfm/aid/10316).
- 47 Simon Romero, Coming to Grips with the Web Wireless Access Mobile Web Remains a Promise, *N.Y. Times*, Dec. 11, 2000, at 6; Katie Hafner, U.S. is Lagging Behind Europe in Short Messaging, *N.Y. Times*, Dec. 7, 2000, at 9; Bridge News, Bloomberg News, Markets; Nokia Raises Forecasts for Cell Phone Growth, *L.A. Times*, Dec. 6, 2000, at 4.
- 48 Mike Musgrove, The Great Cell-Phone Disconnect, *The Washington Post*, September 29, 2000, at E1; Martin E. Comas & Jason Garcia, Residents Stand Pat Against Towers; Cellular Companies Try to Make the Structures Blend in with their Surroundings--or at Least Be Less Noticeable, *Orlando Sentinel*, Sept. 11, 2000 at B1.
- 49 Alfonso A. Castillo, The Talk of Smithtown/Smithtown's Solution to Tower Proliferation, *Newsday*, Dec. 22, 2000, at A43.
- 50 *Stats.* 1951, c. 764, p. 2032, codified as [Cal. Pub. Util. Code § 233](#). By the 1950s, when the state legislature had enacted section 233 and its “with or without the use of transmission wires” qualification, mobile radio telephone systems were gaining some level of ascendancy. See, e.g., [Commercial Commc'ns, Inc. v. Public Utils. Com.](#), 50 *Cal. 2d* 512, 522-23 (discussing mobile radio communications in context of section 233).
- 51 [Pub. L. No. 104-104](#), 110 *Stat.* 56 (2012) (codified as amended in scattered § 15, 18, & 47 U.S.C.) (hereinafter, “Telecom Act”).
- 52 See, e.g., [Cox Commc'ns v. City of San Marcos](#), 204 *F. Supp. 2d* 1272 (S.D. Cal. 2002); [Cox Commc'ns. PCS, LP v. City of San Marcos](#), 204 *F. Supp. 2d* 1260 (S.D. Cal. 2002); [Qwest Commc'ns v. City of Berkeley](#), 146 *F. Supp. 2d* 1081 (N.D. Cal. 2001).
- 53 See, e.g., [Pacific Bell Tel. Co. v. City of Walnut Creek](#), 428 *F. Supp. 2d* 1037, 1049 (N.D. Ca. 2006); [Cox Commc'ns](#), 204 *F. Supp. 2d* at 1284; [Qwest Commc'ns](#), 146 *F. Supp. 2d* at 1101-02.
- 54 See, e.g., [Sprint Tel. PCS v. Cnty. of San Diego](#), 140 *Cal. App. 4th* 748, 759 (2006), [dismissed by 71 *Cal. Rptr. 3d* 251], [Sprint Tel. PCS v. Cnty. of San Diego](#), 49 *Cal. Rptr. 3d* 653, 143 *P.3d* 654, 2006 *Cal. LEXIS* 10886 (Cal., 2006).
- 55 [Sprint PCS Assets, LLC v. City of La Cañada Flintridge](#), 435 *F.3d* 993, 994 (9th Cir. 2006), amended by [Sprint PCS Assets, LLC v. City of La Cañada Flintridge](#), 448 *F.3d* 1067 (9th Cir. 2006).

- 56 [Sprint PCS Assets, LLC v. City of Palos Verdes Estates](#), 583 F.3d 716 (9th Cir. 2009).
- 57 The substantial evidence requirement of the Telecom Act is found at [47 U.S.C. § 332\(c\)\(7\)\(B\)\(iii\)](#) (2012). See [Metro PCS, Inc. v. City & Cnty. of S.F.](#), 400 F.3d 715, 725 (9th Cir. 2005) (holding that courts should consider whether the denial is based on “substantial evidence in the context of applicable state and local law”).
- 58 [City of La Cañada Flintridge](#), 435 F.3d at 994.
- 59 *Id.* at 995.
- 60 *Id.* at 997.
- 61 *Id.*
- 62 *Id.* at 998.
- 63 [Cal. Pub. Util. Code § 7901.1](#) (West 2012) (emphasis added).
- 64 [Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge](#), 435 F.3d 993, 998 (9th Cir. 2005), Amended by [Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge](#), 2006 U.S. App. LEXIS 12614 (9th Cir. 2006).
- 65 [City of La Cañada Flintridge](#), 435 F.3d at 998.
- 66 [City of Palos Verdes Estates](#), 583 F.3d 716.
- 67 [City of La Cañada Flintridge](#), 448 F.3d 1067.
- 68 *Id.* at 1068.
- 69 [City of Palos Verdes Estates](#), 583 F.3d 716.
- 70 *Id.* at 717.
- 71 *Id.* at 723.
- 72 *Id.*
- 73 *Id.* at 725.
- 74 Analysis of SB 621, Cal. Sen. Rules Comm., Office of Senate Floor Analyses (S. 1994-95 Reg. Sess.)
- 75 [W. Union Tel. Co. v. City of Visalia](#), 149 Cal. 744 (1906).
- 76 See also [Pac. Tel. & Tel. Co. v. City and Cnty. of San Francisco](#), 197 Cal. App. 2d 133, 152 (1961). On this point, it is a fixture in statutory construction that interpretation of a state statute by the highest court of the state fixes its meaning for the purpose of determination of its constitutionality by the United States Supreme Court, as definitely as if it had been amended by the legislature. [Cramp v. Bd. of Pub. Instruction](#), 368 U.S. 278 (1961).
- 77 [Pac. Tel. & Tel. Co.](#), 197 Cal. App. 2d at 152.
- 78 [City of Palos Verdes Estates](#), 583 F.3d at 723-24.
- 79 Around the same time, the Ninth Circuit handed down another setback for the wireless industry and concluded that industry plaintiffs could not rely on federal law to mount facial challenges of onerous wireless telecommunications siting ordinances. [[Sprint Tel. PCS, v. Cnty. of San Diego](#), 543 F.3d at, 578].
- 80 See [Newpath Networks LLC v. City of Irvine](#), 2009 U.S. Dist. LEXIS 126178 (reviewing local ordinance requiring telephone corporations to obtain a CUP prior to entry into the public rights of way).

- 81 See, e.g., *NewPath Networks, LLC v. City of Davis*, No. 2:10-cv-00236-GEB-KJM, 2010 U.S. Dist. LEXIS 40043, at * 1 (E.D. Cal., Mar. 18, 2010) (denying summary judgment after a city's denial of a CUP for a licensed wireless telecommunications infrastructure company).
- 82 See, e.g., *id.* (requirement by City of Irvine to obtain a CUP); see also, *Sprint Tel. PCS*, 140 Cal. App. 4th at 767.
- 83 James Longtin, *California Land Use* 371 (2d ed. 1987).
- 84 *Malibu Mts. Rec. v. Cnty. of Los Angeles*, 67 Cal. App. 4th 359, 367 (1998) (“A CUP creates a property right which may not be revoked without constitutional rights of due process.”).
- 85 *Breakzone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1224 (2000); *Paris v. Cnty. Redev. Agency*, 167 Cal. App. 3d 489, 497 (1985).
- 86 *Goat Hill Tavern v. City of Costa Mesa*, 6 Cal. App. 4th 1519, 1530-31 (1992) (independent standard of review applies where city improperly imposed discretionary CUP authority in vested right context); *Bauer v. City of San Diego* 75 Cal. App. 4th 1281, 1292-93 (1999); *Hansen Brothers Enters., Inc. v. Bd. of Supervisors*, 12 Cal. 4th 533, 552 (1996) (city CUP requirement improper where use was already vested).
- 87 Notably, in a 2006 opinion, the California Court of Appeal (Fourth District, Division 1) upheld a wireless telecommunications ordinance requiring a discretionary use permit for wireless telecommunications facilities in the public rights of way. Wielding a lengthy disquisition on preemption principles, the court determined that “a discretionary section permitting ordinance for wireless providers does not offend section 7901.” *Sprint Tel. PCS v. Cnty. of San Diego*, 140 Cal. App. 4th 748, 767, review granted, unpublished, *Sprint Telephony PCS v. County of San Diego*, 49 Cal. Rptr. 3d 653, 143 P.3d 654, 2006 Cal. LEXIS 10886 (2006). The California Supreme Court granted review and ordered the opinion unpublished. A flurry of amicus briefs on both sides ensued, but the California Supreme Court ultimately dismissed review, leaving the issues unsettled. *Sprint Telephony PCS v. Cnty of San Diego*, 175 P.3d 1; 71 Cal. Rptr. 3d 251; 2008 Cal. LEXIS 201 (January 3, 2008, filed).
- 88 See, e.g., *W. Union Tel. Co. v. City of Visalia*, 149 Cal. at 750 (Shaw, J. concurring).
- 89 *Id.*
- 90 *Id.*
- 91 *Id.* at 751.
- 92 See *Sunset Tel. & Tel. Co. v. Pomona*, 172 F. 829, 835 (1909) (“That a construction of a state statute by the highest court of the state, which establishes a rule of property within the state, will be adopted by the federal courts, is well-established law.”).
- 93 114 Cal. App. 4th 642 (2003).
- 94 *Williams Commc'n, LLC v. City of Riverside*, 114 Cal. App. 4th 642, 652 (2003).

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