Date of Hearing: May 13, 2015

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT
Brian Maienschein, Chair
AB 57 (Quirk) – As Amended April 6, 2015

SUBJECT: Telecommunications: wireless telecommunication facilities.

SUMMARY: Requires a colocation or siting application for a wireless telecommunications facility to be deemed approved, if specified conditions are met, and applies these provisions to all counties and cities, including charter cities. Specifically, **this bill**:

1) Requires a colocation or siting application for a wireless telecommunications facility to be deemed approved, if both of the following occur:

    a) The city or county fails to approve or disapprove the application within the time periods established by the Federal Communications Commission in In re Petition for Declaratory Ruling, 24 FCC Rcd. 13994 (2009); and,

    b) All public notices regarding the application have been provided consistent with the public notice requirements for the application.

2) States that the Legislature finds and declares that a wireless telecommunications facility has a significant economic impact in California and is not a municipal affair as that term is used in Section 5 of Article XI of the California Constitution, but is a matter of statewide concern.

EXISTING LAW:

1) Defines the following terms:

    a) "Collocation facility" to mean the placement or installation of wireless facilities, including antennas, and related equipment, on, or immediately adjacent to, a wireless telecommunications collocation facility.

    b) "Wireless telecommunications facility" to mean equipment and network components, such as towers, utility poles, transmitters, base stations, and emergency power systems that are integral to providing wireless telecommunications services.

    c) "Wireless telecommunications collocation facility" to mean a wireless telecommunications facility that includes collocation facilities.

2) Provides that a collocation facility shall be a permitted use not subject to a city or county discretionary permit, if it satisfies the following requirements:

    a) The collocation of facility is consistent with requirements for the wireless telecommunications collocation facility pursuant to 3), below, on which the collocation facility is proposed;

    b) The wireless telecommunications collocation facility on which the collocation facility is proposed was subject to a discretionary permit by the city or county and an environmental impact report (EIR) was certified, or a negative declaration or mitigated

negative declaration was adopted for the wireless telecommunications collocation facility in compliance with the California Environmental Quality Act (CEQA), the requirements of Section 21166 do not apply, and the collocation facility incorporates required mitigation measures specified in that EIR, negative declaration, or mitigated negative declaration.

3) Provides that a wireless telecommunications collocation facility, where a subsequent collocation facility is a permitted use not subject to a city or county discretionary permit pursuant to 2), above, shall be subject to a city or county discretionary permit issued on or after January 1, 2007, and shall comply with all of the following:

   a) City or county requirements for a wireless telecommunications collocation facility that specifies types of wireless telecommunications facilities that are allowed to include a collocation facility, or types of wireless telecommunications facilities that are allowed to include certain types of collocation facilities; height, location, bulk, and size of the wireless telecommunications collocation facility; percentage of the wireless telecommunications collocation facility that may be occupied by collocation facilities; and, aesthetic or design requirements for the wireless telecommunications collocation facility;

   b) City or county requirements for a proposed collocation facility, including any types of collocation facilities that may be allowed on a wireless telecommunications collocation facility; height, location, bulk, and size of allowed collocation facilities; and, aesthetic or design requirements for a collocation facility;

   c) State and local requirements, including the general plan, any applicable community plan or specific plan, and zoning ordinance; and,

   d) CEQA through certification of an EIR, or adoption of a negative declaration or mitigated negative declaration.

4) Requires the city or county to hold at least one public hearing on the discretionary permit required pursuant to 3), above, and requires notice to be given as specified, unless otherwise required.

5) States that the Legislature finds and declares that a collocation facility has a significant economic impact in California and is not a municipal affair, but is a matter of statewide concern.

6) Limits the consideration of the environmental effects of radio frequency emissions by the city or county to that authorized by Section 332(c)(7) of Title 47 of the United States Code, as specified.

FISCAL EFFECT: None

COMMENTS:

1) **Bill Summary.** This bill requires a colocation or siting application for a wireless telecommunications facility to be deemed approve, if both of the following occur: (1) The city or county fails to approve or disapprove the application within the time periods

established by the FCC 2009 Declaratory Ruling; and, (2) All public notices regarding the application have been provided consistent with the public notice requirements for the application. The bill declares that a wireless telecommunications facility has a significant economic impact in California and is not a municipal affair, but is a matter of statewide concern, thus applying the requirements of the bill to all cities, including charter cities.

This bill is sponsored by the author.

2) **Author's Statement.** According to the author, "In order to encourage the expansion of wireless networks, Congress passed the Telecommunications Act of 1996, which requires a local jurisdiction to act on a wireless facility colocation or siting application within a "reasonable period of time." As the entity charged with implementing the Act, the Federal Communications Commission (FCC), issued a declaratory ruling that a "reasonable period of time" is presumptively 90 days to process collocation applications and 150 days to process all other applications.

"While the FCC's regulations were promulgated pursuant to the agency's rulemaking and adjudicatory authority, thus carrying the force of law, local jurisdictions charged with acting on these wireless facility applications often ignore the FCC's timeline. If the FCC deadlines are not met, the only remedy currently available to the provider seeking the permit is to sue the local jurisdiction in court.

"Instead of requiring the provider to seek a judicial remedy to enforce the FCC's timeline, AB 57 would provide that a wireless facility colocation or siting application that is not acted on by the local jurisdiction within the timeline shall be "deemed approved." Consistent with the FCC's finding that "wireless service providers have faced lengthy and unreasonable delays in the consideration of their facility siting applications, and that the persistence of such delays is impeding the deployment of advanced and emergency services," this bill would close a loophole that allows a local jurisdiction to effectively extend the timeline beyond that established by the FCC.

"Nothing in AB 57 limits or affects the authority of a local jurisdiction over siting decisions, as they still retain all existing rights to deny applications that do not meet the jurisdiction's lawful siting requirements. AB 57 simply provides a workable remedy for a local jurisdiction's failure to abide by existing federal deadlines."

3) **Background on Siting of Wireless Facilities.** In the Telecommunications Act of 1996, Congress imposed specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of [towers and antennas], and incorporated those limitations into the federal Communications Act of 1934. Section 201 (b) of that Act empowers the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions." The Act imposed five substantive limitations codified in 47 U.S. C Section 332(c)(7)(B). One of those limitations, Section 332 (c)(7)(B)(ii), required state or local governments to act on wireless siting applications "within a reasonable period of time after the request is duly filed."

On November 18, 2009, the FCC released a Declaratory Ruling (In re Petition for Declaratory Ruling, 24 FCC Rcd. 13994 (2009)) in response to a July 11, 2008, petition filed by CTIA – The Wireless Association, asking the FCC to clarify provisions in Section 253 and 332(c)(7) of the Communications Act of 1934, as amended, regarding state and local

review of wireless facility siting applications. That Declaratory Ruling found that a "reasonable period of time" for a state or local government to act on a personal wireless service facility siting application is presumptively 90 days for collocation applications and presumptively 150 days for siting applications other than collocations, and that the lack of a decision within this timeframes constitutes a "failure to act" based on which a service provider may commence an action in court under Section 332(c)(7)(B)(v). The 2009 Declaratory Ruling noted that "by clarifying the statute in this manner, we recognize Congress' dual interests in promoting the rapid and ubiquitous deployment of advanced, innovative, and competitive services, and in preserving the substantial area of authority that Congress reserved to State and local governments to ensure that personal wireless service facility siting occurs in a manner consistent with each community's values."

The cities of Arlington and San Antonio, Texas, sought review of the 2009 Declaratory Ruling in the Fifth Circuit. They argued that the FCC lacked authority to interpret Section 332(c)(7)(B)'s limitations. Relying on Circuit precedent, the Court upheld the presumptive 90- and 150- deadlines and entitled to *Chevron* deference. The Supreme Court of the United States granted certiorari to look at whether a court should apply *Chevron* to an agency's determination of its own jurisdiction. On May 20, 2013, the judgment of the Court of Appeals was affirmed by the Supreme Court, thus confirming that Congress has vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication.

The Middle Class Tax Relief and Job Creation Act of 2012 (Spectrum Act) was signed into law by President Barack Obama on February 22, 2012, and included provisions regarding wireless facilities deployment. Section 6409 (a) of that Act states that "a state or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such a tower or base station."

In a report released by the FCC on October 21, 2014, the FCC interpreted and implemented the “collocation” provisions of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012. The report noted that Section 6409 (a) included a number of undefined terms, and the FCC adopted rules to clarify many of the terms and enforce their requirements. Among other measures, the FCC:

- Clarified that Section 6409 (a) applies to support structures and to transmission equipment used in connection with any Commission-licensed or authorized wireless transmission;

- Clarified that a modification "substantially changes" the physical dimensions of a tower or base station, as measured from the dimensions of the tower or base station inclusive of any modifications approved prior to the passage of the Spectrum Act, if it meets specified criteria;

- Provided that states and localities may continue to enforce and condition approval on compliance with generally applicable building, structural, electrical, and safety codes and with other laws codifying objective standards reasonable related to health and safety;

- Provided that a state or local government may only require applicants to provide documentation that is reasonably related to determining whether the eligible facilities request meets the requirements of 6409 (a);

- Required, within 60 days from the date of filing, accounting for tolling, a state or local government to approve an application covered by Section 6409 (a);

- Provided that an application filed under Section 6409 (a) is deemed granted, if a state or local government fails to act on it within the requisite time period.

The 2014 FCC report also clarified Section 332(c)(7) of the Communications Act and the FCC's 2009 Declaratory Ruling, as follows:

- Clarified, with regard to the FCC's determination in the 2009 Declaratory Ruling that a state or municipality may toll the running of the shot clock, if it notifies the applicant within 30 days of submission that its application is incomplete, that:

    - The timeframe begins to run when an application is first submitted, not when it is deemed complete by the reviewing government;

    - A determination of incompleteness tolls the shot clock only, if the state or local government provides notice to the applicant in writing within 30 days of the application's submission, specifically delineating all mission information, and specifying the code provision, ordinance, application instruction, or otherwise publically-stated procedures that require the information to be submitted;

    - Following an applicant's submission in response to a determination of incompleteness, the state or local government may reach a subsequent determination of incompleteness based solely on the applicant's failure to supply the specific information that was requested within the first 30 days;

    - The shot clock begins running again when the applicant makes its supplemental submission; however, the shot clock may again be tolled if the state or local government notifies the applicant within 10 days that the supplemental submission did not provide the specific information identified in the original notice delineating missing information.

- Clarified that the presumptively reasonable timeframes run regardless of any applicable moratoria;

- FCC declined to adopt an additional remedy for state or local government failures to act within the presumptively reasonable time limits.

On March 6, 2015, Montgomery County, Maryland filed a lawsuit in the United States Court of Appeals for the Fourth Circuit, petitioning for review of the 2014 FCC Report that made federal rules implementing Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, stating that the Report is inconsistent with the United States Constitution; an unlawful interpretation of Section 6409(a) and other statutory provisions; arbitrary and capricious and an abuse of discretion; and otherwise contrary to law.

4) **Previous Legislation.** AB 162 (Holden, 2013) would have prohibited a local government from denying an eligible facilities request, as defined, for a modification of an existing wireless telecommunications facility or structure that does not substantially change the physical dimensions of the wireless telecommunications facility or structure, and would have required a local government to act on eligible facilities request within 90 days of receipt.

   The measure was referred to the Local Government Committee but was never heard.

5) **Policy Considerations.** The Committee may wish to consider the following:

   a) **Specific Examples.** The author notes that local jurisdictions charged with acting on these wireless facility applications often ignore the FCC's timeline. The Committee may wish to ask the author for specific examples in which this has happened in California, and to determine whether this is a widespread practice that warrants a legislative fix.

   b) **"Deemed Approved."** According to the American Planning Association, California Chapter (APA), the California State Association of Counties (CSAC), and the Urban Counties Caucus (UCC), in opposition, "In 2014, the FCC determined that under a new federal law (47 U. S. C. 1455 (a)), applications for modifications to wireless facilities would be "deemed approved" in 60 days provided those modifications not substantially "change the physical dimensions" of the existing wireless facility. The FCC's "deemed approved" requirement doesn't apply to new wireless siting applications, which require more time for important environmental and esthetical review and permit processing, nor does it apply to colocations that involve substantial increases in the size of the permitted facility. In AB 57, however, the state would apply this remedy to both new applications and all colocation applications."

      The Committee may wish to ask the author why it is necessary to go beyond the requirements and regulations promulgated by the FCC.

   c) **Incentivizing Denial?** APA, CSAC, and UCC note that "adding a "deemed approved" rule to state law where none presently exists, as proposed under AB 57, could incentive local jurisdictions to deny new siting or colocation applications in order to avoid allowing the shot-clock to run out before the local agency has been able to effectively negotiate on environmental and aesthetic matters that are at the heart of community concerns. In this way, AB 57 could promote litigation rather than successful deployment of new or improved wireless infrastructure."

6) **Arguments in Support.** Supporters argue that the current remedy in which the wireless provider may sue the locality for unreasonable delay in any 'court of competent jurisdiction,' is not a meaningful remedy and that California's courts are already overburdened. Supporters note that the inherent delay in bringing a lawsuit over a single application, when a wireless provider may have hundreds of applications, make the FCC rule all but meaningless in this state, and that as a result, local governments can, and often do, get away with violating federal law.

7) **Arguments in Opposition.** Opposition argues that this bill goes beyond the requirements of federal law and regulations, and that this bill effectively eliminates the ability of local agencies to meet the needs and best interests of local communities and determining the siting

and collocation of wireless facilities. Opposition notes that federal law and regulations are sufficient on the matter and moreover that the state should not enact statute that expands the rights of wireless carriers beyond what is provided by federal law.

REGISTERED SUPPORT / OPPOSITION:

Support

AT & T
CalChamber
CALWA – The California Wireless Association
CTIA – The Wireless Association
California Manufacturers & Technology Association
PCIA – The Wireless Infrastructure Association
Silicon Valley Leadership Group
Sprint
Tech America
TechNet
T-Mobile
Valley Industry & Commerce Association
Verizon

Opposition

American Planning Association, California Chapter
California State Association of Counties
City of Burbank
Rural County Representatives of California
Urban Counties Caucus

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