|  | <!DOCTYPE html> |
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|  | <html> |
|  | <head> |
|  | <meta charset="UTF-8"> |
|  | <title>Huntington Beach</title> |
|  | <link rel="stylesheet" type="text/css" href="[CommentsStylesheet.css](http://k-band.us/CommentsStylesheet.css)"> |
|  | </head> |
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|  | <body> |
|  | <header></header> |
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|  | <main> |
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|  | <article> |
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|  | <h3 id="title">Huntington Beach v NextG: Who Controls the Poles?</h3> |
|  | <p id="author">Lauren Saine, March 11, 2015</p> |
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|  | <p>On February 6, 2015, Huntington Beach and Crown Castle, formerly NextG Networks, filed a settlement agreement with the California Public Utilities Commission (CPUC) on a dispute over a DAS project going back to 2007. But the agreement leaves open the possibility of further litigation!</p> |
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|  | <p>With the explosion of wireless connectivity, wireless facilities siting is an urgent issue at the federal, state, and local levels, where there is a confluence of often conflicting interests. In California, telephone companies, as public utilities, have a <a href="<http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PUC&sectionNum=7901>">right</a> to build facilities in public rights-of-way--but only after obtaining <a href="<http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PUC&sectionNum=1001>">certification</a> from the state commission.</p> |
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|  | <p>The state commission has <a href="<http://www.leginfo.ca.gov/.const/.article_12>">constitutional authority </a>to establish rules for the location and design of cellular facilities. It delegates this authority to local governments, but if there is a conflict with statewide interests, it reserves the right to preempt local jurisdiction. Indeed, the commission issued a decision preempting Huntington Beach’s undergrounding ordinance because “utility regulation is a statewide concern, and the Commission has the authority to preempt local ordinances that are inconsistent with its regulation.”\*\*</p> |
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|  | <p>At the same time, local governments have constitutional authority to grant franchises to public utilities, including establishing rules governing the <a href="<http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PUC&sectionNum=7901.1>">time, place and manner</a> of access to public rights-of-way. Under the public utilities code, local governments <a href="<http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PUC&sectionNum=2902>">may not surrender</a> to the CPUC their control over the location of poles, wires, or conduit in rights-of-way.</p> |
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|  | <p class="heading">Case Study: Huntington Beach Undergrounding Ordinance</p> |
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|  | <li>November 2007 - NextG applies with the CPUC to install a DAS Network in Huntington Beach and then files a complaint in federal court for injunctions against Huntington Beach. Huntington Beach issues the permits but appeals the injunctions.</li><br> |
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|  | <li>September 2008 - the Ninth Circuit vacates the injunctions and remands. The District Court grants the City’s motion but does not order removal of the portion of the project already installed. It directs NextG to apply for approval or file a complaint in state court.</li><br> |
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|  | <li>March 2008 – The CPUC approves the project. The City files a complaint challenging the approval.</li><br> |
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|  | <li>March 2009 – NextG files a complaint in state court and applies to the CPUC for approval of its environmental assessment of the project.</li><br> |
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|  | <li>October 2010 - The commission denies the City’s complaint and approves the project.\* The City applies for rehearing and appellate review. </li><br> |
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|  | <li>January 2011 – The Commission denies rehearing and again approves the project,\*\* preempting Huntington Beach’s undergrounding ordinance to the extent it was inconsistent with CPUC authorization.</li><br> |
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|  | <li>October 2013 - NextG (now Crown Castle) petitions the commission to reopen its application, and the matter is referred to alternative dispute resolution.</li><br> |
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|  | <li>September 2015 – Crown Castle and Huntington Beach file a settlement agreement:</li> |
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|  | <li class="subheading"> |
|  | <p>-- Three proposed new poles and lines are withdrawn.<br>-- The City consents to seven nodes and lines already installed—but they must be painted dark brown.<br>-- The City consents to adding connecting fiber to an already-installed pole-–but an aerial fiber line must be re-routed and undergrounded, and two other lines must be undergrounded, and the already-installed pole must be painted.<br>-- Crown Castle may install aerial lines to connect four existing nodes.<br>-- Crown Castle must apply for permits for four other poles, and incorporate several modifications.<br>-- The City consents to Crown Castle appealing a City Council decision to the CPUC. Both parties agree to be bound by a CPUC decision.</p> |
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|  | <p>\*CPUC Decsision 10-10-007 Denying Complaint, Adopting Negative Declaration [CEQA}, and Approving Application<br> |
|  | Huntington Beach's challenges are all legally flawed. In granting the expanded authority [under its CPCN] we noted that NextG's intended projects would take place in existing rights-of-way and in utility easements, and that associated construction would include "a limited number of new poles, ... small-scale trenching and underground conduit installation of up to five miles, and ... micro-trenching and installation of laterals of up to 25 feet." Huntington Beach then filed a formal complaint asserting that NextG's Huntington Beach construction, including three new utility poles and an additional 19 miles of fiber optic cable, would necessitate hundreds of street closings and temporary lane closures. Also, the project would require the routing of aerial cables through mature street trees, so that either the trees would have to be removed or wires run into the street.</p> |
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|  | <p>\*\*CPUC Decision 11-01-027 modifying D.10-10-007 Application of NextG Networks of California, Inc. (U6745C) for Authority to Engage in Ground-Disturbing Outside Plant Construction And Related Matter <br>Huntington Beach’s undergrounding ordinance is preempted to the extent it is inconsistent with the Commission's authorization. The literal wording of the ordinance does not permit NextG's installation. At the same time, because utilities may need to construct above-ground poles to house antennas, the statewide interest in public utility service preempts this ordinance in the event of a conflict, as is the case here. Although there is indeed a conflict with the ordinance, this does not impact the viability of the project because utility regulation is a statewide concern, and the Commission has the authority to preempt local ordinances that are inconsistent with its regulation. (Cal. Const:, art. XII, § 8.)</p> |
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|  | <p id="update">Updated March 26, 1015: The CPUC approved the settlement agreement on March 26.</p> |
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