Court of Appeal Case No. A136714

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

PACIFIC BELL TEL. CO., DBA AT&T CALIFORNIA,
Plaintiff and Appellant,
v.
CITY OF LIVERMORE
and the CITY COUNCIL OF THE CITY OF LIVERMORE,
Defendants and Respondents.

Appeal from the Superior Court of California, County of Alameda
Hon. Evelio Grillo (Case No. RG11607409)

APPLICATION OF LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND STATES OF CALIFORNIA AND NEVADA CHAPTER OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENTS CITY OF LIVERMORE AND CITY COUNCIL OF THE CITY OF LIVERMORE; PROPOSED *AMICUS CURIAE* BRIEF

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TO BE FILED IN THE COURT OF APPEAL APP-008

COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION THREE	Court of Appeal Case Number: A136714
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): MICHELE BEAL BAGNERIS, CITY ATTORNEY (SBN 115423) JAVAN N. RAD, ASST. CITY ATTORNEY (SBN 209722) 100 N. GARFIELD AVENUE, SUITE N-210 PASADENA, CA 91109-7215 TELEPHONE NO.: 626-744-4141 FAX NO. (Optional): 626-744-4190 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): LEAGUE OF CA CITIES, CSAC, AND SCAN NATOA	Superior Court Case Number: RG11607409 FOR COURT USE ONLY
APPELLANT/PETITIONER: PACIFIC BELL TEL. CO. DBA AT&T CALIFORNIA RESPONDENT/REAL PARTY IN INTEREST: CITY OF LIVERMORE AND THE CITY COUNCIL OF THE CITY OF LIVERMORE	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): League of California Cities, California State Assn. of Counties & SCAN NATOA

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [X] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain*):
(1) League of California Cities	Amicus Curiae
(2) Cal. State Assn. of Counties	Amicus Curiae
(3) SCAN NATOA	Amicus Curiae
(4) Pacific Bell Tel. Co.	Plaintiff and Appellant
(5) City of Livermore	Defendant and Respondent

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: May 7, 2013

JAVAN N. RAD
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

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TO THE HON. PRESIDING JUSTICE:

Pursuant to California Rules of Court, Rule 8.200(c), the League of California Cities (the League) the California State Association of Counties (CSAC), and the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors (SCAN) (collectively, Local Governments) submit this application to file an *amicus curiae* brief in support of defendants and respondents City of Livermore and City Council of the City of Livermore (collectively, the City).

This application is timely made within 14 days after the filing of the reply brief on the merits.

The League is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

SCAN has a history spanning over 20 years representing the interests of over 300 members consisting primarily of local government telecommunications officials and advisors located in California.

Amici and its counsel are familiar with the issues in this case, and have reviewed the challenged order of the Superior Court and the briefs on the merits filed with this Court. As statewide organizations with considerable experience in this field, Local Governments believe they can provide important perspective on the issue before the Court. Many cities and counties in California have ordinances requiring electric, telephone, and cable companies to underground their facilities within certain districts or throughout the municipality.

Counsel in this case for *amici* has represented both public agencies and municipal leagues in matters involving local authority to regulate telecommunications facilities.

If permission to file the accompanying brief is granted, Local Governments will address the issue of local authority to regulate the location and appearance of telephone lines through Public Utilities Code sections 7901 and 7901.1, by way of, for example, adopting and enforcing an ordinance establishing a preference for the undergrounding of new telephone lines.

Local Governments will urge the Court to affirm the decision of the Alameda County Superior Court, and respectfully request that the Court grant this application to file the accompanying brief *amicus curiae*.

No party or counsel for a party in this appeal authored any part of the accompanying *amicus curiae* brief or made any monetary contribution to fund the preparation of the brief.

Dated: May 7, 2013

Respectfully Submitted,

MICHELE BEAL BAGNERIS,
City Attorney
JAVAN N. RAD
Acting Chief Asst. City Attorney

By: _____
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AMICUS CURIAE BRIEF

Pursuant to California Rules of Court, Rule 8.200(c), the League of California Cities (the League), the California State Association of Counties (CSAC), and the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors (SCAN) submit this *amicus curiae* brief in support of defendants and respondents City of Livermore and City Council of the City of Livermore (collectively, the City).

I.

IDENTITY OF *AMICI CURIAE* AND STATEMENT OF INTEREST

The League is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

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SCAN has a history spanning over 20 years representing the interests of over 300 members consisting primarily of local government telecommunications officials and advisors located in California.

II.

POINTS TO BE ARGUED BY *AMICI*

The Court should confirm that local governments have the authority to regulate the location and appearance of telephone lines through Public Utilities Code section 7901 and 7901.1, including by adopting and enforcing an ordinance establishing a preference for the undergrounding of new telephone lines.

III.

STATEMENT OF FACTS

Amici adopt the statement of facts in the opening brief of the City. The following statement of facts is limited to those facts material to the argument presented in this brief.

This is not a case about local government authority requiring existing utilities to be undergrounded. The City did not require Pacific Bell to move its existing telephone lines underground. Rather, this is a case about local government authority to protect communities from the installation of new overhead lines.

Pacific Bell applied for a permit to install new overhead fiber optic lines to facilitate its high-bandwidth U-Verse video service package. The City denied that request and, instead, pursuant to a local ordinance, the City has required Pacific Bell to underground those new fiber optic lines.

Though Pacific Bell complains of the City's undergrounding requirement, Pacific Bell has not shown that it was unreasonable for the City to require Pacific Bell to underground the disputed 320 feet of fiber optic lines, or that it was either technologically infeasible or cost-prohibitive for Pacific Bell to do so. In fact, on February 3, 2010, Pacific Bell applied for and obtained a permit to install the exact same lines underground. However, after Pacific Bell let that permit expire, Pacific Bell then sought a permit to install these facilities above-ground. The City denied that application.

The City's denial of Pacific Bell's application to install new overhead facilities would not prevent Pacific Bell from providing services to its Livermore

customers. Pacific Bell still could provide U-Verse – video service through underground lines – which the City has already permitted, at Pacific Bells' request. As such, this lawsuit appears to be one of a telephone corporation, in some sort of cost-saving measure, erroneously claiming that its limited franchise right to lay telephone lines is somehow superior to a local government's police power to regulate the use of its streets for the installation and maintenance of telephone lines in the public rights-of-way, pursuant to Public Utilities Code sections 7901 and 7901.1.

IV.

LOCAL UTILITY UNDERGROUNDING REQUIREMENTS ARE CONSISTENT WITH PUBLIC UTILITIES CODE SECTION 7901

1. The State of California has Long Recognized that Utility Undergrounding Furthers Important Public Policy Goals

The Legislature, the California Public Utilities Commission, and cities and counties have long expressed a public policy interest in favor of undergrounding utilities. Undergrounding requirements are not a new or an unusual exercise of local authority. In fact, "[w]ith very few exceptions, the public favors undergrounding for safety, reliability, aesthetic benefits, and property value increases." *In re Order Instituting Rulemaking into Implementation of Assembly Bill 1149, Regarding Underground Electric and Communications Facilities*,

(2001) 2001 WL 1719239 (Decision ("D") 01-12-009); *Town of Tiburon v. Bonander*, (2009) 180 Cal.App.4th 1057, 1079 ("placing overhead utility wires underground will reduce the risk of weather-related power outages as well as the safety risk posed by downed utility poles and lines").

Cities and counties have embraced undergrounding to create and maintain residential and commercial areas that are well-served by utilities, safe for vehicular and pedestrian traffic, and visually appealing. Many local undergrounding programs date back to the 1960's. *See, e.g.*, Fresno Municipal Code, Chapter 13, Article 6 (established in 1968); Pasadena Municipal Code, Chapter 13.14 (same); San Diego Municipal Code, Chapter 6, Article 1, Division 5 (same); Santa Monica Municipal Code, Chapter 7.52 (same).

In 1967, the California Public Utilities Commission (CPUC) ordered certain electric and telephone utilities to implement practices with respect to undergrounding utilities. *See* 67 C.P.U.C. 490 (1967) (D.73078). In that decision, the CPUC "accepted a commitment by all California . . . telephone utilities to convert part of their overhead distributions each year, using their own funds." *In re Undergrounding Conversion Program*, (1982) 7 C.P.U.C.2d 757. In adopting D.73078, the CPUC noted that

> . . . the time had long since passed when we could continue to ignore the need for more emphasis on aesthetic values in those new areas

> where natural beauty has remained relatively unspoiled or in established areas which have been victimized by man's handiwork.

67 C.P.U.C. at 490.

In 1969, the CPUC adopted rules and regulations requiring utility undergrounding. *See In re Electric Util.*, (1969) 70 C.P.U.C. 339 (adopting D.76394). These regulations required all new subdivisions to have undergrounded utilities and established procedures for processing and undergrounding existing overhead utility lines at the expense of a utility's ratepayers. *See id.*

In 1971, the Legislature adopted a policy favoring "the undergrounding of all future electric and communication distribution facilities" along scenic highways. *See* Pub.Util.Code § 320; *Re: Rules Governing Undergrounding of Electric and Comm. Dist. Systems*, (1983) 97 P.U.R.3d 383 (implementing section 320 through D.80864); 20 Cal.Code Regs. § 3.12 (establishing a detailed process for a utility to obtain an exemption from undergrounding requirements). In 1999, the Legislature adopted a requirement that the CPUC study the ways to amend, revise, and improve the rules for the replacement of overhead electric and communications facilities with underground facilities and to report the results of that study to the Legislature. *See* Stats. 1999, ch. 844 (Assembly Bill 1149); 2001 WL 1719239 (D.01-12-009, CPUC study in response to AB 1149).

In sum, the State of California has long recognized that utility facilities should be undergrounded both for public safety and aesthetic reasons.

2. Local Governments Have the Authority to Exercise Their Police Power to Regulate the Location and Appearance of Telephone Lines in the Public Right-of-Way

Given the public preference for undergrounding, combined with the authority of cities and counties to regulate the installation and maintenance of telephone lines in the public rights-of-way, the Court should affirm the trial court's determination that Public Utilities Code sections 7901 and 7901.1 do not preempt Livermore Development Code section 4.02.090.

A. Public Utilities Code Sections 7901 and 7901.1

Public Utilities Code section 7901 provides that telephone corporations may install telephone lines "in such manner and at such points as not to incommode" the public rights-of-way. Public Utilities Code has been part of California law in one form or another since 1850. *See Pacific Tel & Tel. Co. v. City & County of San Francisco*, (1959) 51 Cal.2d 766, 769.

> The predecessor of Public Utilities Code section 7901, Civil Code section 536, was first enacted in 1872 as part of the original Civil Code. The language was identical to the current section except that there was no reference to telephone corporations . . . The reason for this omission was that the telephone was completely unknown in 1872, not having been invented until 1875.

> In 1905, Civil Code section 536 was re-enacted to add telephone corporations and telephone lines to the statute. In 1951, Civil Code section 536 became Public Utilities Code section 7901. The language of section 7901 remains as it was in 1905.

Anderson v. Time Warner Telecom of California, (2005) 129 Cal.App.4th 411, 419 (citations omitted); *see also City & County of San Francisco*, 51 Cal.2d at 769 (discussing history dating back to 1850).

In 1995, the Legislature adopted Public Utilities Code section 7901.1. Subdivision (a) of section 7901.1 provides that it is "the intent of the Legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." The Legislature intended section 7901.1 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." *Sprint PCS Assets, LLC v. City of Palos Verdes Estates*, (9th Cir. 2009) 583 F.3d 716, 724 (quoting S. Comm. on Energy, Utilities, and Commerce, Analysis of S.B. 621, Reg. Sess., at 5728 (Cal. 1995)).

B. Public Utilities Code Section 7901 Authorizes Local Regulation of the Location and Appearance of Telephone Lines in the Right-of-Way

The City's decision to require undergrounding of Pacific Bell's new telephone lines in the public rights-of-way was a reasonable exercise of the City's police power under section 7901. Cities and counties "may legitimately exercise [their] police powers" to advance aesthetic purposes alone. *City Council v. Taxpayers for Vincent*, (1984) 466 U.S. 789, 805; *Metromedia, Inc. v. City of San Diego*, (1980) 26 Cal.3d 848, 860-861 (reversed on other grounds, 453 U.S. 490).

Courts have confirmed local authority to regulate the location and appearance of telephone lines dating back to an 1892 ordinance adopted by the City of Visalia, which provided as follows:

> [A]ll poles . . . shall be of the uniform height of twenty-six feet above the surface of the ground, and shall be maintained at such height, without any splicing, relative to the sidewalks of said city as the common council may designate.

Western Union Telegraph Co. v. City of Visalia, (1906) 149 Cal. 744, 751. In *City of Visalia*, the California Supreme Court upheld the city's authority to regulate the location and appearance of the poles and wires pursuant to the former Civil Code section 536:

> [T]he city had the authority, under its police power, to so regulate the manner of plaintiff's placing and maintaining its poles and wires as to prevent unreasonable obstruction of travel. And we think the ordinance was

> not intended to be anything more, and is nothing more, than the exercise of this authority to regulate.

Id. at 750-751; *see also Western Union Telegraph Co. v. Hopkins*, (1911) 160 Cal. 106, 121 (holding, under former Civil Code section 536, that "the liability of [the carrier] to all such reasonable regulations as is warranted in the proper exercise of the police power cannot be disputed"); *City & County of San Francisco*, 51 Cal.2d at 773-774 (telephone company/plaintiff conceded the city's authority to "control the particular location of and manner in which all public utility facilities, including telephone lines, are constructed in the streets and other places under the city's jurisdiction"); *see also* Pub.Util.Code §§ 2902 & 2906 (confirming local authority to supervise and regulate the location of facilities within the public rights-of-way).

The Supreme Court's approval of the city's 1892 ordinance establishing a 26-foot pole height requirement in *City of Visalia* is a perfect example of a reasonable exercise of local authority to declare that poles higher than 26 feet would "incommode" the public right-of-way. Surely, the Visalia ordinance did not mandate the 26-foot height requirement to avoid interference with air traffic, as the Wright brothers did not conduct their first airplane flight until 1903 – eleven years after the adoption of that ordinance. *See* 28 New Encyclopedia Britannica (15th ed. 1988).

The only plausible reason for the mandatory height requirement in *City of Visalia* is that the city sought to regulate the location and appearance of the poles consistent with its legitimate exercise of the police power, as granted by the former Civil Code section 536.[1]

This local authority was recently confirmed in a March 2013 decision by the Fourth District Court of Appeal, where it noted that "[t]he right of telephone corporations to construct telephone lines in public rights of way is not absolute." *City of Huntington Beach v. Public Utilities Commission*, (2013) 214 Cal.App.4th 566, 590. In that case, the court opined that

> . . . the Public Utilities Code specifically contemplates potential conflicts between the rights of telephone corporations to install telephone lines in the public right of way and the rights of cities to regulate local matters such as the location of poles and wires. Some arbiter must resolve these conflicts (when they arise) between telephone corporations and local governments. For instance, a court might adjudicate the dispute. *See, e.g., Sprint PCS Assets, LLC v. City of Palos Verdes Estates*, (9th Cir. 2009) 583 F.3d 716, 725 ("California law does not prohibit local governments from taking into

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[1] Pacific Bell's reply brief (page 13, footnote 10) erroneously, and without any basis, speculates that the City of Visalia 26-foot height requirement was to prevent lines from "being subsequently disturbed," not for aesthetic purposes. In fact, Pacific Bell is only quoting from a Western Union superintendent's trial testimony that, not California Supreme Court's actual legal discussion of the trial testimony. The superintendent testified that Western Union applied to install its telegraph lines and to "settle the question as to the location of our poles, the height of wires . . . in order to prevent the lines . . . from being subsequently disturbed by some whim of a street official." *City of Visalia*, 149 Cal. 749-750.

> account aesthetic considerations in deciding whether to permit the development of" wireless telecommunications facilities pursuant to §§ 7901 & 7901.1); *GTE Mobilnet v. City and County of San Francisco*, (N.D. Cal. 2006) 440 F.Supp.2d 1097, 1102-1106 (rejecting claim that § 7901 preempts local regulations as a matter of law).

Id., 214 Cal.App.4th at 591.

Public Utilities Code section 7901 therefore simply cannot be read as narrowly as Pacific Bell asserts. If the Court were to adopt Pacific Bell's restrictive view of section 7901, it would run afoul of a long line of California appellate cases that have confirmed that the term "incommode" is not limited to the obstruction of travel. The only reasonable interpretation of section 7901 is that the term "incommode" merely explains, in 1850's parlance, that cities and counties have the authority to regulate the location and appearance of telephone lines.

C. The Court Should Reject Pacific Bell's Interpretation of Public Utilities Code of 7901.1

The Legislature did not intend Public Utilities Code section 7901.1 to limit existing local regulation of the location and appearance of telephone lines that is already authorized by the more-comprehensive section 7901. Rather, the Legislature enacted section 7901.1 to establish local authority over the actual construction of telephone lines. *See* S. Comm. on Energy, Utilities, and

Commerce, Analysis of S.B. 621, Reg. Sess., at 5728 (1995) ("Telephone corporations . . . sometimes tak[e] the extreme position that cities have absolutely no ability to control construction.").

Had the Legislature intended to change the legal effect and the meaning of the term "incommode" in section 7901, it could have amended the statute itself to prohibit cities and counties from regulating the location and appearance of telephone lines. It did not do so.

Instead, when the Legislature adopted section 7901.1 in 1995, it noted in subdivision (a) that this section was to be construed in a manner that it is "consistent with Section 7901. . ."

On page 23 of its opening brief, Pacific Bell appears to argue that section 7901.1(a) prevents municipalities from denying "access to existing poles on the basis of aesthetics." However, neither the plain text of the statute nor the legislative history supports this interpretation. Pacific Bell's "local authority-lite" treatment of section 7901.1 would ignore decisions confirming local police power to regulate the location and appearance of telephone lines in the public right-of-way through former Civil Code section 536 and Public Utilities Code section 7901. *City of Visalia*, 149 Cal. at 750-751; *Hopkins*, 160 Cal. at 121; *City & County of San Francisco*, 51 Cal.2d at 773. Thus, Pacific Bell would have this

Court rely on section 7901.1 to limit local authority, despite the clear intention of the Legislature to do the opposite.

The Court should conclude that local authority to regulate the location and appearance of telephone lines through section 7901 (which has existed in one form or another since 1850) is not limited by section 7901.1.

D. The Ninth Circuit Has Confirmed Local Authority to Regulate the Location and Appearance of Telephone Lines under Sections 7901 and 7901.1

In *Palos Verdes Estates*, the Ninth Circuit affirmed local government authority to regulate the use of the public rights-of-way to install and maintain telephone lines for aesthetics. In that case, the city denied two applications for permits for wireless facilities in residential areas because the city had found that the facilities would "disrupt the residential ambiance of the neighborhood and . . . would detract from the natural beauty that was valued at the main entrance to the City." *Id.*, 583 F.3d at 720.

The Ninth Circuit utilized a dictionary definition of "incommode," as well as basic urban planning principles, to find the city's denials were consistent with a determination that the facilities "would incommode the public use of the rights-of-way." *Id.* at 723; *see also Wasatch Property Mgmt. v. Degrate*, (2005) 35 Cal.4th

1111, 1121-1122 ("When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of the word.").

The court went on to find that the city's denials were also consistent with Public Utilities Code section 7901.1. As the court stated, "[i]f the preexisting language of PUC section 7901 did not divest cities of the authority to consider aesthetics in denying . . . permits, then a fortiori, neither does the language of PUC section 7901.1, which only 'bolsters' cities control." *Palos Verdes Estates*, 583 F.3d at 724.

Pacific Bell lobs a red herring on page 17 of their reply, erroneously downplaying the Ninth Circuit's analysis of sections 7901 and 7901.1 in *Palos Verdes Estates*. Pacific Bell suggests that the case "should be read to mean that specific, aesthetic impacts may be considered with respect to whether the wireless facilities are the 'least intrusive means" of filling a gap under the TCA." The Ninth Circuit did not even rely on sections 7901 and 7901.1 in its "least intrusive means" analysis.

In fact, in *Palos Verdes Estates*, the court analyzed sections 7901 and 7901.1 as a predicate to reviewing "whether the City's decision was authorized by local law." *Palos Verdes Estates*, 583 F.3d at 721. This informed the court's analysis of whether the record was supported by "substantial evidence" to support

the City's decision, as required by a provision pertaining to wireless facilities in the Telecommunications Act of 1996. *See id.* at 721-727 (citing 47 U.S.C. § 332(c)(7)(B)(iii).

The Ninth Circuit also looked at whether the city's denial of the wireless carrier's applications "effectively prohibited" the carrier from providing wireless coverage, as required by the Telecommunications Act of 1996. *Id.* at 726-728 (citing 47 U.S.C. § 332(c)(7)(B)(i)(II)). This requires a wireless carrier to "show that the manner in which it proposes to fill the significant gap in services is the least intrusive on the values that the denial sought to serve." *MetroPCS v. City & County of San Francisco*, (9th Cir. 2005) 400 F.3d 715, 734 (emphasis added). In *Palos Verdes Estates*, the Ninth Circuit did not even cite sections 7901 and 7901.1 in deciding the "effective prohibition" issue.

Amici are mindful that "decisions of the federal courts interpreting California law are persuasive but not binding." *Mesler v. Bragg Mgmt. Co.*, (1985) 39 Cal.3d 290, 299. However, the Court should not ignore the Ninth Circuit's persuasive, well-reasoned, and on-point analysis in *Palos Verdes Estates* of Public Utilities Code section s 7901 and 7901.1. *See Adams v. Pacific Bell Directory*, (2003) 111 Cal.App.4th 93, 97 ("although not binding, we give great

weight to federal appellate court decisions"). Instead, the Court should carefully consider the Ninth Circuit's analysis of issues that are identical to this case.

E. The CPUC Has Approved of the Ninth Circuit's Decision in *Palos Verdes Estates*

The CPUC has indicated it concurs with the Ninth Circuit's analysis in the *Palos Verdes Estates* decision. *See Order Instituting Rulemaking on the Commission's own motion into the application of CEQA to applications of jurisdictional telecommunications utilities for authority to offer service and construct facilities*, (2011) 2011 WL 6880748 (adopting D.11-12-054). The PUC's interpretation of the Public Utilities Code "should not be disturbed unless it fails to bear a reasonable relation to statutory purpose and language." *City of Huntington Beach*, 214 Cal.App.4th at 584 (citations).

In D.11-12-054, the CPUC rejected an argument asserted by Pacific Bell and other carriers that the CPUC lacked the authority to review the environmental impacts of certain wireless facility projects, stating it "concur[s] with the Ninth Circuit's recent discussion of the limited nature of the [carriers'] section 7901 property right, in the context of Sprint's challenge to the City of Palos Verdes' assertion of jurisdiction to review its facilities." *Id.*

F. The Court Should Confirm Local Government Authority to Regulate the Location and Appearance of Telephone Lines by Requiring Utilities to Underground Their Facilities

As discussed above, local government authority to regulate the location and appearance of telephone lines in the public right-of-way through Public Utilities Code section 7901 has been confirmed by court and regulatory decisions. The Court should therefore confirm that the City's ordinance establishing a preference for the undergrounding of new telephone lines is not preempted by a carrier's limited franchise right under section 7901.

The City's undergrounding ordinance is neither duplicative of any state law, nor inimical to state law, because the undergrounding preference in the ordinance "does not prohibit what [section 7901] commands or command what it prohibits." *Sherwin-Williams Co. v. City of Los Angeles*, (1993) 4 Cal.4th 893, 897; *see also Palos Verdes Estates*, 583 F.3d at 723 (confirming the "City's consideration of aesthetics . . . comports with Public Utilities Code section 7901"); *GTE Mobilnet*, 440 F.Supp.2d at 1105 (concluding that "section 7901 does not preclude municipalities from regulating in the field"). In other words, section 7901 does not preempt the City's undergrounding ordinance.

V.

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to affirm the decision of the trial court.

Dated: May 7, 2013

Respectfully Submitted,

MICHELE BEAL BAGNERIS,
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League of California Cities, California State Association of Counties, and States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed *amicus curiae* brief is produced using 14-point Times New Roman type including footnotes and contains approximately 3,846 words, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: May 7, 2013

Respectfully Submitted,

MICHELE BEAL BAGNERIS,
City Attorney
JAVAN N. RAD
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By: _____
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Attorneys for *Amici Curiae*
League of California Cities, California State Association of Counties, and States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors

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         (b) Person served:
            (i) Name: John di Bene, AT&T Services, Inc.
            (ii) Address: 2600 Camino Ramon, Room 2W901
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         (c) Person served:
            (i) Name: Douglas W. Sullivan, Joel D. Smith, Crowell & Moring , LLP
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CASE NAME: PACIFIC BELL TEL. CO., DBA AT&T CALIFORNIA vs CITY OF LIVERMORE AND THE CITY COUNCIL OF THE CITY OF LIVERMORE	CASE NUMBER: A136714

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Court of Appeal of the State of California, First Appellate District, Division Three, Case No.: A136714, City Attorney File No. 7039

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