Wire California

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June 30, 2023

Honorable Senator Anna Caballero, Chair
Mr. Colin Grinnell, Staff Director
Senate Governance and Finance Committee
State Capitol, Room 407
Sacramento, CA 95814

Dear Senator Caballero,

Wire California respectfully recognizes that as the Chair of the Senate Governance and Finance (SGF) Committee, every day you play a key role in shaping legislation for state and local government pertaining to local governance, land use and development. Therefore, you are in a position to defend and protect the interests of the counties and localities of California and their need to preserve federally-mandated local control over the placement, construction, modification, and especially the operations of Wireless Telecommunications Facilities (WTFs). I passed this letter by a team advising Wire California and we, as a team, jointly edited the opening of this letter.

The lawyers to whom you and your Committee have access, have a lot more power than the home office lawyer who has advised me to 'exhaust the administrative record' in this letter and the Committee's lawyers can easily confirm that federal law preserves the rights of state and local governmental entities to regulate the use of wireless telecommunications infrastructure, so as to provide actual public safety to the residents of a locality. In particular, U.S. Supreme Court Justice Breyer explained the Congressional decision to change from an originally contemplated total federal preemption over the placement, construction, modification, and operations of Wireless Telecommunications Facilities (WTFs), so as to allow reasonable local control over the placement construction, modification, and operations of WTFs, in his concurring decision in CITY OF RANCHO PALOS VERDES, CALIFORNIA, et al., Petitioners, v. Mark J. ABRAMS, (2005), 125 S.Ct. 1453, in which local reasonable local control was preserved, still of course subject to federal Court review:

> *"Congress saw a national problem, namely, an "inconsistent and, at times, *128 conflicting patchwork" of state and local siting requirements, which threatened "the deployment" of a national wireless communication system. H.R.Rep. No. 104–204, pt. 1, p. 94 (1995). Congress initially considered a single national solution, namely, a Federal Communications Commission wireless tower siting policy that would pre-empt state and local authority. Ibid.; see also H.R. Conf. Rep. No. 104–458, p. 207 (1996), U.S.Code Cong. & Admin.News 1996, pp. 124, 221. But Congress ultimately rejected the national approach and substituted a system based on cooperative federalism. Id., at 207–208. State and local authorities would remain free to make siting decisions. They would do so, however, subject to minimum federal standards—both substantive and procedural—as well as federal judicial review."*

This letter will advise of industry positions backing AB-965 which, respectfully, should be examined in the light of the FCC's failure to properly establish a definition of "Small Wireless Facilities", but we hope that you will also take into account two major areas of Constitutional concern about the way that AB-965 and many other bills continue to move through the Legislature in a manner inconsistent with the California Constitutional role of the Assembly and Senate. First, such as was the case in all hearings before major Committees in 2017 in the hearings on SB-649, and every other bill since about 1871, public hearings on

bills have typically always allowed any member of the public or public interest organization to give a substantive comment about the organization's position on the involved bill. This has always involved sculpting the number of minutes allowed, such that, as we recall it in example, the hearing before Assembly Local Government on SB-649, on or about June 28, 2017, Chair Aguiar-Curry shortened each speaker's remarks to two minutes, due to the size of the crowd, but allowed 30 minutes of testimony for each side: 30 minutes for opponents, 30 minutes for proponents, along with a "Special Order of Business" as a reasonable accommodation to those with Electromagnetic Sensitivity, a group that would have been significantly adversely affected by SB-649.

In 2023, in contrast, Committee staff decides, on always and inevitably incomplete data, what persons the Committee deems to be leaders in supporting or opposing a bill, and then directs that those Committee-appointed 'leaders' select two, and only two, advocates from those citizens and residents who have appeared, to serve, for example, as the two 'opponents,' to the involved bill, thereby effectively limited in number and those selected governed in advance by the Committee before whom they will speak. This isn't a problem when, as is common, a bill is supported, for example, by industry, since the 'pro' bill forces are ready and well financed. But this leads to the following related observation which also affects all bills before the current Legislature.

One of the reasons that neither the Committee staff nor the Committee can appropriately select who is a 'leader,' of an opposition is that the comments for and against pending legislation are received by the Legislature, but despite being obvious public records, those positions letters are unlawfully kept secret from the public, absent a California Public Records Act request. The combination of the inability to recognize, study, or contact fellow and opposing advocates in a timely manner quite seriously shows the flaw in the current process wherein those who 'oppose' and 'support,' each bill are indirectly chosen by legislative Committees.

The same lawyer who told us to 'exhaust administrative remedies' in this letter, sees this as an equally important issue as the fate of AB-965. We hope that you will take these Constitutional issues into account when considering the following data, which as I have promised, show that there isn't even a clear working legal definition of what constitutes a so-called "Small Wireless Facility".

Since the 2019 U.S. Court of Appeals ruling in *Keetoowah et al. v FCC*, the very definition of "small wireless facility" was vacated and never properly re-established by the FCC. By vacating portions of FCC Order 18-30, t**he DC Cir. judges mandated that the FCC must treat every WTF of any size or any Generation ("G") the same**. The FCC is doing exactly that, as you can see in this Oct 19, 2020 comment by Ms. Garnet Hanly, Division Chief of the Competition & Infrastructure Policy Division, FCC WTB:

> *"The FCC when it modified its rules [Title 47, C.F.R. § 1.1312(e) by its October 2019 Order that became effective on Dec 5, 2019], after the DC Circuit issued its mandate [in its Ruling of Case No. 18-1129 Keetoowah v FCC] we* ***[the FCC] took the position that we were reviewing Small Wireless Facilities as [Federal] undertakings and major Federal actions****, pursuant to the DC Circuit decision and that is what we've been doing."*

This means, that federal law requires that every single WTF must undergo National Environmental Policy Act (NEPA) review and National Historic Preservation Act (NHPA) review and also follow the federally-mandated principle of case-by-case review for WTF applications, as established in the 1996 Telecommunications Act (1996-TCA), U.S. Courts of Appeals rulings in the Ninth and DC Circuits and U.S. Supreme Court rulings — all of which bind the State of California. The very legislative intent of the 1996-TCA is clear on these points. **AB-965 forcing California counties and localities into WTF Application batching is antithetical to federally-required case-by-case decision-making.**

Case-by-case decisions for WTF applications — **NOT BATCHING** — is the federal standard.

> *It is* ***the intent*** *of this section that . . .****decisions be made on a case-by-case basis.***

AB-965, in many ways, is just another repeat of 2017's SB-649 and 2021's SB-556 — two Wireless Telecommunications Facilities (WTFs) bills that were **vetoed** by Gov. Brown and Gov. Newsom, respectively, because each bill was not in the best interests of California. AB-965 is yet another wireless industry-sponsored bill designed to grant *"preferential treatment for the personal wireless service industry,"* which would violate the legislative intent of the 1996-TCA, which says:

> *"It is **not the intent** of this provision **to give preferential treatment to the personal wireless service industry** in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decisions."*

The following table places AB-965 in context. The table shows that new bills attempting to give **"preferential treatment for the personal wireless service industry"** have been proposed every few years — actions that **violate the legislative intent of the 1996-TCA**.

Year	Bill	Bill Title	Status	2023-2024 Next Steps
2015	AB-57	Telecommunications: wireless telecommunication facilities	Chaptered	***Correct error:*** **repeal in 2023-2024** to remove "deemed approved" ratchet and restore local control, as intended by 1996-TCA's cooperative federalism
2017	SB-649	Wireless telecommunication facilities	***Vetoed***	For all California localities, Gov. Brown preserved local control over the placement, construction, modification, and operations of WTFs
2018	SB-822	California Internet Consumer Protection and Net Neutrality	Chaptered	*Note:* The Jan 28, 2022 ruling in the U.S. Court of Appeals (Ninth Cir.) upheld SB-822 based on the Oct 1, 2019 DC Cir. ruling, **affirming that states can regulate information services (broadband), since the FCC retreated from the field**. SB-822 prohibits Internet service providers from engaging in specified actions concerning the treatment of Internet traffic.
2021	SB-556	Streetlight poles, traffic signal poles: small wireless facilities attachments	***Vetoed***	For all California localities, Gov. Newsom preserved local control over the placement, construction, modification, and operations of WTFs
2021	AB-537	Communications: wireless telecommunications and broadband facilities.	Chaptered	***Correct error:*** **repeal in 2023-2024** to remove "deemed approved" ratchet and restore local control, as intended by 1996-TCA's cooperative federalism
2021	SB-378	Local government: microtrenching permit processing ordinance	Chaptered	*Note:* 2023's AB-965 started as a companion to SB-378, a micro-trenching bill; SGF can return AB-965 to its original purpose
2023	AB-965	Broadband Permit Efficiency and Local Government Staff Solution Best Practices Act	***TBD***	***Correct error:*** **vote to consider in 2024** once batching requirements and "deemed approved" ratchets are removed

In addition, these three recent U.S. Courts of Appeals rulings crumbled the foundation of the FCC's so-called "Small" Wireless Telecommunications Facilities (sWTFs) streamline deployment effort:

1. Link to the U.S. Courts of Appeals ruling in Case No. 18-1129: United Keetoowah Band of Cherokee Indians v. Fed. Commc'ns Comm'n, 933 F.3d 728 (D.C. Cir. 2019)
2. Link to the U.S. Courts of Appeals ruling in Case No. 18-1051: Mozilla Corp. v. Fed. Commc'ns Comm'n, 940 F.3d 1 (D.C. Cir. 2019)
3. Link to the U.S. Courts of Appeals ruling in Case N0. 20-1025: Envtl. Health Tr. v. Fed. Communications Comm'n, 9 F.4th 893 (D.C. Cir. 2021)
4. Link to 2021-1130-EHT-Filing-Re-FCC-Ignoring-20-1025-Ruling.pdf
5. Link to 2023-0424-CHD-Filing-Re-FCC-Ignoring-20-1025-Ruling.pdf

Case	**Vacated Portions of**	**Result**
Case No. 18-1129: Keetoowah v FCC	FCC Order 18-30	The court vacated the National Environmental Policy Act and National Historic Preservation Act exemptions and vacated the very definition of "Small Wireless Facilities" — a definition that was never subsequently re-established by the FCC. As a result, every single WTF of any size must undergo NEPA and NHPA review and must be considered one-at-a-time, on a case-by-case basis.
Case No. 18-1051: Mozilla v FCC	FCC Order 17-166	The court upheld the FCC's decision to re-classify broadband Internet as an "information service," and mobile broadband as a "private mobile service," making neither subject to common carrier status or Title II regulation. The Court also concluded that the FCC did not show legal authority to issue its Preemption Directive, which would have barred states from imposing any rule or requirement to regulate broadband internet. The court vacated that portion of the order, freeing the states to regulate broadband as they wish.
Case N0. 20-1025: Envt. Health Tr. v FCC	FCC Order 19-126	The court vacated the extension of the FCC RF microwave radiation exposure guideline to frequencies above 6,000 MHz and mandated the FCC to evaluate the 27 volumes of scientific evidence in the court's record (see links in **Appendix B**) and then explain how the FCC RF microwave radiation exposure guideline adequately protects against harmful effects of exposure to RF microwave radiation, focusing on impacts on children, biological harms of long-term exposures, and adverse impacts on the environment. **The FCC has ignored this U.S. Courts of Appeals-mandate for two years — and counting.**

*Note:*These three U.S. Courts of Appeals rulings and two FCC filings are included by reference into the public legislative record of AB-965. California is bound by each of these rulings.

Any county or locality can set the following WTF application requirement: the application will remain incomplete until the applicant submits substantial written evidence in the public record proving that the FCC has completed the U.S. Courts of Appeals-mandated work in Cases 18-1129, 18-1051 and 20-1025.

Regardless of any "presumptive guidance" written in FCC Order 18-133, counties and localities can stick to the Ninth Circuit standard of "significant gap" in wireless telecommunications service (an inability to place an outdoor wireless phone call) as the test for the need for any WTF. The wireless industry only has very narrow preemption of local authority for placement, construction, and modification of WTFs for wireless telecommunications service (phone calls). In any locality, once people can make outdoor wireless phone calls along the locality's major roadways, all wireless industry preemption ends.

Importantly, the wireless industry has no preemption of local authority for wireless information service (broadband) infrastructure. Therefore, any county or locality can set a preference for wireline broadband over wireless broadband because wireline broadband is far superior and the only broadband service that

can reliably deliver 100-200 Mbps symmetric service at scale. Wireless broadband, which has only delivered 40-50 Mpbs down/10-12 Mbps up at scale, is an unnecessary, hazardous, energy-inefficient, fire prone, slower and less secure means of delivering broadband.

Crown Castle WTF applications (and nearly all others) are for wireless broadband and are, therefore, unnecessary. That is one reason why Gov. Newsom wrote in his SB-556 veto letter in October, 2021 (See Newsom's full letter here).

> *"There is a role for local government in advancing broadband efforts. Part of our achievements laid out in the Broadband budget bill SB 156 (Chapter 112. Statutes of 2020) enables and encourages local governments to take an active role in the last mile deployment and, in doing so, drive competition and increase access."*

The decision to choose wired broadband via FTTP or coaxial cables or to choose wireless broadband via densified deployment of many WTFs **is a local one and NOT a statewide matter**. Such a decision is fundamental to local zoning discretion and local residential values and a reason to either remove that language from AB-965 or **VOTE NO on AB-965**.

Placing a WTF in Front of One's Home is a Life-Changing Event

As one can see in the evidence of Sacramento residents adversely impacted by a WTF installed in front of their home in 2019, **batching of WTF applications is neither just nor reasonable**. Wire California placed substantial written evidence of such verified wireless harms in the public legislative record of AB-965: two children in that home were sickened by the operations of the sWTF and diagnosed with microwave radiation illness by a licensed physician.

The Digital Divide affects about **3% to 10% of Californians**, based on a conservative reading of the latest FCC data and maps. A similar proportion of the state — **3% to 10% of Californians** — have already been injured by excessive radio signal strength from wireless infrastructure and are enduring an environmentally-induced-condition called **Electromagnetic Sensitivity** (EMS), an ADA-recognized disabling characteristic that affects one or more life activities of those with EMS. In this letter, EMS Californians are requesting a reasonable ADA accommodation from the SGF Committee and the Senate ADA Coordinator — an ADA accommodation **similar to the precedent set in 2017** by the CA Senate and Assembly in the deliberations of SB-649. See evidence of this 2017 ADA reasonable accommodation in **Appendix I**.

In the most recent California Senate Daily file, Americans With Disabilities Act notices which have been in force continually from 2017-2023, enabled Californians with the disabling characteristic of Electromagnetic Sensitivity (EMS) to successfully request and be granted a reasonable accommodation, giving them an equal opportunity to participate in California Senate and Assembly hearings. Specifically, up to six EMS Californians were offered a "time certain" start for testimony at two minutes each (for a total of 12 minutes of testimony) at each of the following hearings:

1. May 15, 2017 Senate Appropriations Committee
2. June 28, 2017 Assembly Local Government Committee
3. July 12, 2017 Assembly Communications and Conveyance Committee

Consistent with this precedent from 2017, Wire California, on behalf of EMS Californians (which comprise up to 10% of all Californians, about 4 million people) is requesting the Senate Governance and Finance Committee Chair and the Senate ADA Coordinator to grant a similar reasonable accommodation — *a Special Order of Business* — for the July 12, 2023 Senate Governance and Finance committee hearing, at which AB-965 will be heard. **EMS Californians are seeking a similar time-certain start for six speakers for a total of 12 minutes of testimony at the July 12, 2023 SGF hearing.**

The SGF Committee also could address and fix shortcomings in the deliberations process of AB-965. On June 26, 2023 Wire California asked the SGF Committee to be a primary opposition witness against AB-965 for the SGF Hearing on July 12, 2023, but heard the following back from the SGF Committee Staff Director, Colin Grinnell:

> *"Committees no longer identify primary witnesses. The author selects their two witnesses, and opponents should work with each other to select whichever two people will speak as primary opposition witnesses."*

Current Senate Committee procedures creates a bit of a Catch 22 for the public. Despite this directive — "opponents should work with each other" — other than AB-965's fairly brief bill analyses, there is no way for the public to discover who are the current AB-965 opponents or what are their current positions/arguments because, **that information is being hidden from the public** by the California Legislature.

The contents in the current CA legislative portal is unnecessarily restrictive, significantly shortchanging the public. A person only has access to read what he or she uploaded to support or oppose a bill. **Members of the public do not have the ability to search for and then read/rebut what other parties have submitted to the legislative portal** for a particular bill in a timely manner (CA Public Records Act requests are far too slow for this purpose). ***Such hiding of information from the public is inconsistent with CA Govt. Code Code §§11120-111321, (the Bagley-Keene Open Meeting Act), is unnecessary and is wrong***.

For an example of a more open electronic comment filing system, I refer you to the FCC's Electronic Comment Filing System (ECFS). The problem of blocking timely access to the full evidence of deliberations on any bill was raised back in 2021 by Wire California, but the CA Legislature has made no progress in fixing this problem. Instead, the CA Legislature is willfully acting to hide this very relevant information from the public.

Sen. Caballero, as SGF Chair, you can immediately fix this problem for the SGF Committee by directing the SGF Committee staff to publish on the SGF Committee web page every submission to the legislative portal for the bills that the SGF Committee chooses to hear. Will you please do so? Thank you.

AB-965, As Currently Written, Deserves Your *NO VOTE*

Over 90% of the state is already served with wireline broadband symmetric service (with 100-200 Mbps download/upload speeds) and wireless telecommunications service (the ability to place outdoor wireless phone calls along major roadways) — as shown in the evidence here: https://wirecalifornia.org/spectrum. Therefore, in 90% of California localities, no additional WTFs are needed because there is no evidence proving a significant gap in wireless telecommunications service. That is why AB-965 will not bridge the Digital Divide, as it claims to do.

The result of voting for AB-965 would be to perpetuate the Digital Divide and saddle knowledgeable counties and localities with burdensome and costly lawsuits to defend their communities against irresponsible WTF applications that were encouraged by such a short-sighted bill. The less-sophisticated counties and localities with favorable market conditions will get overrun by hazardous, energy-inefficient, wireless broadband infrastructure. Finally, the most rural and lowest income counties and localities will, once again – via incumbent Big Telecom illegal redlining practices — get nothing of substance, because **AB-965 forces no entity to actually provide broadband service. AB-965, as currently written, would be a massive failure for California, which is why it demands your attention right now**.

Those of us who are citizen-advocates respectfully recognize that our Senators, and especially those who chair major Committees, are the people in charge of major legislative decisions. This is a necessary element of representative government. The reality that we rely on our Senators and Assembly Members for representative governance, in turn, illustrates the core reason why our team respectfully herein objects to the now-circumscribed access of the public to substantively express their views to Legislative Committees face-to-face.

This unavoidable reliance on our Senators is also why we respectfully believe and here assert that the current practice, affecting AB-965 and apparently many other bills, such that public record comments on bills, including AB-965, are being held secret from the public is both unlawful and in violation of the California Constitution. That last concern severely handicaps advocacy by preventing communication between advocates of similar views.

In summary, we believe, and as submitted above, and especially as illustrated in the Appendices to this letter, that AB-965's "required batching" of multiple clusters of Wireless Telecommunications Facilities is, as currently written, the proper subject of veto, as was the case in 2017 for SB-649 and in 2021 for SB-556.

We therefore plea, the better approach, not only for AB-965, but for other bills this year. AB-965 should at the very least be postponed forward until the second year of this legislative session — postponed to 2024. We believe and assert that this is, first, due to the limitations on public access to deliberations which affect all bills in 2023. These issues should be ironed out before AB-965 or similar bills are brought back to the Legislature. AB-965, as currently composed, is inherently flawed due to the "required batching and deemed approved provisions", which are in current form divorced from the reality that site variance is very substantial based on location, geography, topography, and density of nearby residential use.

What Could the SGF Committee Do With AB-965? Not hear the Bill at all *OR* return the bill to its Fiber-Optic roots.

The SGF Committee can change AB-965 and then use it as a vehicle to finally address and correct the decades of illegal actions that Big Telecom incumbents and their wireless subsidiaries/agents perpetrated against the people of California as part of the Trillion Dollar Broadband Scandal. Fixing AB-965 would require reverting AB-965 back to its Feb 2023 version and then adding in important amendments and definitions, listed in **Appendix A** of this letter.

Once one separates arguments based on opinion from arguments based on substantial written evidence in the legislative record for AB-965, one can see that the substantial evidence extinguishes the false statements and propaganda put forth by the bill sponsor, Crown Castle, and even the bill author, Assemblymember Juan Carrillo.

AB-965 represents a great opportunity to contribute to Gov. Newsom's plan as detailed in 2021's SB-156 **IF** the SGF Committee significantly amends it. AB-965 **could take full advantage of an Open Access fiber optic network** to bring the only last-mile broadband service that qualifies for federal funds — fiber optics to the home (FTTH) service — to everyone on the other side of the Digital Divide in California.

AB-965, as currently written, **violates federal law** and is contrary to SB-156, for little to no benefit to Californians.The CPUC's decisions are also aligned with SB-156 because the CPUC understands that fiber-optics is fast, future proof and **virtually non-polluting** while wireless broadband is slow, constrained by spectrum and **pollutes massively**. In May 2023, California PUC's Caleb Jones, defined why Fiber-Optic Broadband is *future-proof:*

> *"On a single strand of fiber, you can carry more information than you can send over the entire spectrum of wireless frequencies. Those fiber-optic strands are then bundled together into fiber-optic cables, which can carry dozens, hundreds or even thousands of strands."*

Finally, please note the **accurate** cost estimates from Dane Jasper, CEO of Sonic LLC regarding the various ways his firm installs fiber optics to homes: Sonic uses A, B and C, but **not D**.

- **A. $100,000 per mile** to lash fiber optics onto existing electric lines on wooden utility poles (which is how I get 1000 Mbps upload/1000 Mbps download and a phone for $50/month).
- B. **$200,000 per mile** to micro-trench (cutting up and somewhat repairing streets).

- C. **$300,000 per mile** to laterally bore underground (burying fiber and conduit under dirt/grass without disturbing the top layer of soil).
- D. **Prohibitively expensive** to dig traditional trenches.

The wireless industry falsely claims that fiber installs require D. Sonic's business practices prove otherwise. Which properties are already near wooden electric utility poles? Rural properties. For those properties, companies can deploy **Option A**.

Doing the math: **10,000 miles x $100,000 per mile = $1 Billion** (just 1/6 of the SB-156 budget). CA has far less than 10,000 miles of last-mile fiber optics to reach the unserved/underserved homes in the **5-10% of California** that is not already receiving wireless broadband at 100-200 Mbps, symmetric service.

Therefore, there is no need to require batching of WTF applications **in 100% of California** to bridge the Digital Divide in **10% of California**.

That is the key reason to either fix AB-956 at the SGF Committee (by removing batching requirements and deemed approved ratchets) or decide not to hear AB-965 in 2023, allowing more time for study. **There is no urgency for AB-965**.

This Wire California AB-965 opposition letter includes the following appendices that cite substantial written evidence that Wire California has placed in the bill's public legislative record, a key step in exhaustion of remedies for AB-965. **Appendix A**, is a link to the appendix at https://wirecalifornia.org/ab965-letter-sgf. Alternatively, one can find the Appendices in a separate pdf at the CA Legislative portal.

- **Appendix A.** AB-965 Amendments
- **Appendix B.** AB-965 Opposition Evidence Uploaded to the Legislative Portal
- **Appendix C.** AB-965 Problems and Solutions
- **Appendix D.** AB-965 is a Large Step Backward — Adds to Trillion Dollar Broadband Scandal
- **Appendix E.** AB-965 Next Steps Forward
- **Appendix F.** To Bridge the Digital Divide, in AB-965, Direct the CPUC to Regulate and the Attorney General to Enforce Existing Laws
- **Appendix G.** AB-965 is a Deceptive 90%–10% Bill
- **Appendix H.** Verified Wireless Harms Throughout California
- **Appendix I.** ADA Accommodation Precedent from 2017 Applies Equally in 2023
- **Appendix J.** AB-965's Likely Fate: Veto by Gov. Newsom
- **Appendix K.** Helpful Telecommunications Background
- **Appendix L.** California Wireline Broadband Usage & FCC Wireless Spectrum License

Regards,

Paul McGavin Founder,
Wire California https://wirecalifornia.org/