CITY AND COUNTY OF SAN FRANCISCO'S SUBMISSION TO #SOLUTIONS2020 CALL TO ACTION PLAN

I. INTRODUCTION

The City and County of San Francisco ("San Francisco") submits these comments on Commissioner Mignon Clyburn's #Solutions2020 Call to Action Plan. San Francisco appreciates Commissioner Clyburn's efforts to address issues facing the communications sector over the next few years. Many of the issues addressed in the Plan are important to San Francisco and other local governments. Ensuring affordable communications, particularly for lower income residents and the country's inmate population, empowering communities to develop their own broadband infrastructure, expediting the deployment of 5G technology, enhancing consumer protection, and using broadband to improve the delivery of health services are all issues that are important to San Francisco.

These comments explain how San Francisco has worked with telecommunications carriers to enable the deployment of personal wireless facilities throughout San Francisco, particularly the deployment of Distributed Antenna Systems ("DAS") and other small-cell technology in the public right-of-way. Since 2007, San Francisco has been issuing permits for wireless facilities on utility and other poles in the public right-of-way. Since 2015, San Francisco has made poles that it owns in the public right-of-way available for the installation of wireless facilities.

Recently, San Francisco has seen an explosion in the number of wireless facilities being installed in the public right-of-way and expects that growth to continue as the carriers move forward with their 5G deployment. San Francisco intends to support that growth through an efficient permitting process and by making its own assets available for such use. However, San Francisco believes that such growth should not be at the expense of local aesthetic concerns. Cities should not be required to allow wireless carriers to install facilities that impair public vistas, detract from scenic and historic resources, or blight neighborhoods. Nor should cities be required to make municipal assets available for use by wireless carriers. Cities that choose to

make their street light and other poles available to wireless carriers are entitled to fair and reasonable compensation for use of those assets by private entities.

II. SAN FRANCISCO's PERMITTING OF DAS AND SMALL CELLS ON UTILITY POLES

In the Telecommunications Act of 1996, Congress focused on zoning regulations as a potential impediment to the deployment of wireless facilities.[1] The state of the art for wireless facilities was to install large base stations on towers or tall buildings to cover large areas.[2] At that time, even in major cities, wireless carriers had significant coverage gaps. Congress could not have contemplated that a few years later wireless carriers would need to address capacity issues and would seek access to the public right-of-way for the types of facilities that were necessary to increase capacity. In 1996, Congress's concerns about use of the public right-of-way was to eliminate barriers to competition among the incumbent local exchange providers and the new competitive local exchange providers.[3]

This binary system no longer exists. In 2002, the first DAS provider approached San Francisco about installing its facilities on existing utility poles in the public right-of-way. At that time, San Francisco had no mechanism in place for approving the use of its public right-of-ways for this purpose.

In 2007, San Francisco enacted S.F. Administrative Code § 11.9, which authorized its Department of Public Works to issue permits to allow telephone corporations[4] to install wireless facilities on existing utility poles.[5] Section 11.9 also ensured that any permitted wireless

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[1] *See* 47 U.S.C. § 332(c)(7); *Omnipoint Communications, Inc. v. City of Huntington Beach,* 738 F.3d 192 (9th Cir. 2013).
[2] San Francisco has issued more than 1,000 permits for wireless facilities on private property. Verizon Wireless alone has been issued 428 permits.
[3] *See* 47 U.S.C. § 253; *Cablevision of Boston, Inc. v. Public Improvement Commission of City of Boston*, 184 F.3d 88 (1st Cir. 1999).
[4] To be an eligible telephone corporation, an entity could either be certificated by the California Public Utilities Commission to provide telecommunications services in California or be licensed by the FCC to use spectrum in San Francisco to provide wireless services.
[5] See generally, *NextG Networks of California, Inc. v. City and County of San Francisco*, 2006 WL 1529990 (N.D.Cal. June 2, 2006); *NextG Networks of California, Inc. v. City and County of*

facilities would meet San Francisco's aesthetic criteria. In particular, San Francisco was concerned about the installation of wireless facilities in public right-of-ways that are in scenic corridors, in front of parks or historic buildings, and in historic districts. As with all San Francisco permits, members of the public may participate in the permitting process. They could protest the issuance of the permit in the first place, or appeal the permit once it was issued.

In 2011, San Francisco improved the permitting process for wireless facilities by repealing Administrative Code § 11.9 and replacing it with Public Works Code Article 25.[6] Like its predecessor, Article 25 authorized the Department of Public Works to issue permits for wireless facilities on utility poles. Article 25 also authorized the Department of Public Works to issue permits for wireless facilities on streetlight poles and transit poles. It also ensured that all permitted wireless facilities would comply with certain aesthetic criteria.

San Francisco's permitting program for wireless facilities on utility poles has been quite successful. Since 2007, San Francisco has received 966 applications for such permits. San Francisco granted 899 of those applications and denied only 67.

San Francisco's permitting process for wireless facilities on utility poles has also been expeditious. The average number of days it took San Francisco to process those applications was 75. San Francisco also worked with carriers when special circumstances required them to install a large number of new facilities in a short period of time. For the 2016 Super Bowl, for which Verizon Wireless was a major sponsor, Verizon Wireless wanted to make sure that its customers enjoying Super Bowl week festivities in San Francisco had the coverage they needed. To meet that demand, between June 2014 and September 2015 San Francisco granted 67 wireless permits for Verizon Wireless facilities.[7]

San Francisco, 2008 WL 2563213 (N.D.Cal. June 23, 2008*), on reconsideration, NextG Networks of California, Inc. v. City and County of San Francisco*, 2009 WL 5469914 (N.D.Cal. September 25, 2009).

[6] See generally, *T-Mobile West LLC v. City and County of San Francisco*, 3 Cal.App.5th 334 (2016), *review granted*, 2016 WL 7436414 (December 21, 2016).

[7] *See* "Verizon is building for the Super Bowl and staying for the boom", Computer World (Jan. 28. 2016) [http://www.computerworld.com/article/3027107/mobile-wireless/verizon-is-building-for-the-super-bowl-and-staying-for-the-boom.html].

Wireless carriers, however, do not immediately deploy their permitted facilities. San Francisco requires a permittee to provide notice when a permitted facility has been installed so that inspectors can verify that the installed facilities comply with all permitting requirements. It takes the permittees an average of 210 days to notify San Francisco that installation is complete.

San Francisco's permitting process for wireless facilities on utility poles has also ensured reasonable costs for the permittees. Permit fees for wireless facilities do not generate revenues that can be used for other purposes. Nor does San Francisco impose right-of-way use or access fees.[8] San Francisco's wireless permit fees only allow San Francisco to recover its costs for reviewing the permit applications and inspecting the facilities after installation.

III. SAN FRANCISCO HAS MADE MORE THAN 26,000 POLES THAT IT OWNS IN THE PUBLIC RIGHT-OF-WAY AVAILABLE FOR USE TO INSTALL DAS AND SMALL CELLS

In addition to the tens of thousands utility poles in San Francisco, which are owned by the utility companies, San Francisco owns more than 26,000 poles in the public right-of-way. In the last few years, San Francisco has made a concerted effort to make those poles available for the installation of DAS and small cells.

The San Francisco Public Utilities Commission ("SFPUC") is San Francisco's water, sewer, and power utility. One the SFPUC's responsibilities is to own, operate, and maintain nearly 17,000 streetlight poles throughout San Francisco. These streetlight poles are critical to protecting the public safety both on the roads and sidewalks.

The San Francisco Municipal Transportation Agency ("SFMTA") manages San Francisco's public transportation system. Part of its transit fleet consists of electric buses and trolley cars. SFMTA owns over 9,500 poles to support its overhead traction cables that are used

[8] Like many states, for over 100 years California has prohibited local governments from charging franchise or other fees to telephone corporations for the privilege of using the public right-of-way. See *Williams Communications, LLC v. City of Riverside*, 114 Cal.App.4th 642 (2004).

to power the electric buses and trolley cars. These poles support SFMTA's provision of public transportation services throughout San Francisco to thousands of riders on a daily basis.

In 2015, both the SFPUC and SFMTA agreed to make their poles available for the installation of DAS and small-cell facilities. After extensive meetings with the carriers, the SFPUC and SFMTA approved form license agreements to use for this purpose. Both agencies offered any certificated or licensed telecommunications carrier the opportunity to enter into a license agreement. Once a carrier signed the license agreement with one or both of the agencies, the licensee could choose among the thousands of poles owned by that agency to install their facilities.

In less than two years, the SFPUC has granted licenses to five carriers and issued pole licenses for 364 poles. It is processing an additional 126 applications. The SFMTA has granted licenses to four carriers and issued licenses for 120 poles. It is processing an additional 68 applications. San Francisco's pole licensing program has been so successful that between April 2015 and June 2016 71% of San Francisco's wireless permits were for poles owned by San Francisco and only 29% were for utility poles.

As pole owners, SFPUC and SFMTA made business decisions to make those poles available for wireless facilities.[9] Both agencies saw the benefits to San Franciscans from better wireless services, and with tightening municipal budgets they also saw these programs as a way to obtain needed revenues to fund their core programs and to protect, maintain, and further develop these critical municipal assets.[10] Unlike the cost-based fees charged for wireless permits

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[9] Because San Francisco is acting in a proprietary capacity when licensing its poles, federal preemption principles do not apply. The FCC cannot require local governments to allow carriers to use their poles or limit the fees local governments can charge for such use. See *Sprint Spectrum L.P. v. Mills,* 283 F.3d 404, 418-19 (2d Cir. 2002), citing *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 224 (1993); and *Wisconsin Department of Industry, Labor and Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986).

[10] Under San Francisco's Charter, revenues received by the SFMTA and SFPUC can only be used to fund each agency's own programs. *See* S.F. Charter, § 8A.102(b) (SFMTA); and § 8B.121(a) (SFPUC). Those revenues cannot be used to fund other San Francisco programs.

discussed above, the SFMTA and SFPUC as property owners were able to impose market-based fees for use of these valuable assets.[11] Requiring telecommunications carriers to pay fair compensation for use of these assets is not only just and reasonable it is required by law.[12]

IV. CONCLUSION

San Francisco hopes that Commissioner Clyburn will find this information helpful as the Commissioner proceeds with the Plan for 2020. San Francisco has worked hard to make sure that wireless carriers are able to install in the public right-of-way the infrastructure they need to meet the ever-increasing demands of their customers.

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[11] The SFPUC's and SFMTA's license fees start at $4,000 per pole per year. The SFMTA's per pole rates are reduced if a licensee licenses more than 50 poles. Both agencies' license fees are subject to annual increases. Both agencies also require cost-based fees for processing the initial license and each application for a pole license.

[12] Under the California Constitution, neither the State government nor local governments may "make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever." Cal. Const., art. XVI, § 6.