

**San Francisco Public Rights-of-Way (PROW) Legislation:
SNAFU's Recommended Changes and Amendments**

- **City and County of San Francisco (CCSF) has the authority to designate districts zoned Residential (R) and Neighborhood Commercial (NC) as disfavored sites for wireless facilities on light and utility poles in public rights-of-way (PROW).**
- **CCSF has the authority to require public notification and discretionary review hearings for all facilities (Tiers I, II & III) proposed for R and NC districts.**
- **CCSF has the authority to require proof of a significant gap in coverage for each FCC-licensed carrier whose network the wireless facility will serve and a least intrusive alternative analysis for each wireless facility proposed for PROW.**
- **CCSF has authority to require proof that non-R and NC districts have first been explored to address an alleged significant gap in coverage.**
- **CCSF has police powers to regulate non-Radio Frequency Radiation (RFR) public safety issues with regard to wireless facilities proposed for light and utility poles in PROW.**
- **CCSF has authority to levy fees on applicants seeking to install wireless facilities in PROW sufficient to obtain cost recovery for adequate staffing to process applications, retain experts, perform necessary inspections, notify the public, and conduct public hearings.**
- **CCSF has authority to limit the duration of permits for wireless facilities in PROW to 2 years and require permit renewal and fees for any upgrades, including minor structural modifications.**

Legal Background and Discussion

Previous federal district court orders and judgments against CCSF regarding its permitting process for wireless facilities in PROW have all been predicated upon the Ninth Circuit Court of Appeals decision *City of Auburn v. Qwest Corp.* (2001) and its progeny. The Ninth Circuit overruled *Auburn* in its 2008 decision *Sprint v. County of San Diego* and let stand San Diego's county-wide wireless ordinance that includes (1) detailed application requirements; (2) public notification and hearings; and (3) the establishment of specific 'preferred zones' or 'preferred locations' for wireless facilities.

In its 2009 decision *Sprint v. City of Palos Verdes Estates*, the Ninth Circuit further established that wireless facilities proposed for PROW may be regulated according to the aesthetic issues they raise.

Under California State law, the California Public Utilities Commission (CPUC) has ruled that “the Commission will generally defer to local governments to regulate the location and design of cell sites” (See CPUC General Order 159A, “Rules Relating to the Construction of Commercial Mobile Radio Service Facilities in California,” subsection B, “Deference to Local Government.”) Since the CPUC acknowledges that applicants seeking to install wireless facilities require differential treatment from other utilities due to the unique and flexible nature of wireless facilities siting, discretionary review permits and hearings unique to wireless facilities are also proper under State law.

CCSF’s own Wireless Telecommunications Services (WTS) Facilities Siting Guidelines, adopted in 1996, have established location preferences (ranging from Preference 1 ‘Preferred Location Sites’ to Preference 7 ‘Disfavored Sites’) that include consideration of underlying zoning designations as criteria to determine preferred locations for wireless facilities.

Finally, in the Ninth Circuit decision *MetroPCS v. City and County of San Francisco* (2005), the Court ruled that the burden of proof is on each FCC-licensed wireless carrier seeking to install a wireless facility to demonstrate a ‘significant gap’ in its network’s coverage and, if such a significant gap is proven to exist, the carrier must additionally prove the proposed wireless facility is the ‘least intrusive means’ for filling the significant gap. Pursuant to *MetroPCS*, CCSF may require such evidence for each application to place a wireless facility in PROW.

Why Make R and NC Districts Disfavored Locations?

Undergrounding of utility poles and related equipment in residential neighborhoods is CCSF policy. Installing wireless facilities in PROW undermines that policy and precludes it from being implemented. There are also aesthetic concerns unique to residential neighborhoods that argue in favor of preserving and enhancing the comfort of those neighborhoods (*see Sprint v. City of Palos Verdes Estates*). Visual clutter and blockage of views are among those aesthetic concerns.

There are significant noise issues raised by the placement of such equipment in close proximity to homes and apartments. One resident in the Outer Sunset reports that a T-Mobile utility pole-mounted facility may be heard “humming from across the street,” and residents in Portland, Oregon report high noise levels from Clearwire WiMAX equipment installed in that city’s PROW.

In addition, CCSF has an interest in preserving property valuation in residential neighborhoods to maintain its tax base for providing essential public services, particularly in these times of budgetary crisis. Public safety issues, including utility pole fires, explosions, and toxic releases from backup batteries, are issues that are particularly

critical in residential neighborhoods, especially in a city prone to earthquakes, high winds, and other conditions that can result in damage to utility poles and the equipment they support.

For all the above reasons, wireless facilities should be strongly disfavored on poles in residential neighborhoods.

CCSF's Police Power and Public Safety

CCSF has a duty and legal obligation to protect the public from fires, explosions, electrocution, and other hazards posed by utilities locating their equipment in PROW. This is especially important because San Francisco is located in earthquake country. Moreover, as recent winter storms have demonstrated, San Francisco is also susceptible to high winds and other conditions that can lead to downed utility poles and their attached equipment.

The CPUC regulates safety issues raised by the placement on utility poles of electrical and other utility equipment, including wireless facilities installed by Communication Infrastructure Providers (CIPs), in CPUC General Order 95. In addition, the CPUC has implemented inspection protocols with regard to electrical equipment installed on utility poles in CPUC General Order 165. **As of this writing, the CPUC has no such inspection protocols for wireless facilities installed on utility poles by CIPs.**

As mentioned above, CPUC GO 159A generally defers to local governments to regulate the location and design of cell sites, holding that “. . . in so doing, the Commission shall retain its right to preempt a local government determination on siting when there is a *clear conflict with the Commission's goals and/or statewide interests.*” (Emphasis added.) Since it is clear from CPUC GO 95 and GO 165 that ensuring public safety from electrical, fire and other hazards associated with utility pole-mounted equipment is one the “goals and/or statewide interests” of the CPUC, CCSF may utilize its police powers to implement and assure compliance with those goals.

This is necessary and proper because wireless facilities and backup batteries on utility poles pose electrical, fire and other safety hazards. Combining aging infrastructure with new technology without knowing what effects this new equipment may have on transformers, other HVAC (High Voltage Alternating Current) equipment, and utility poles themselves is not prudent policy. Including stringent public safety requirements for wireless facilities and their equipment cabinets proposed for utility poles is particularly crucial in light of the current absence of any CPUC inspection protocols for CIPs to ensure compliance with CPUC GO 95.

The following safety issues should be addressed in the permitting process for wireless facilities proposed for PROW:

- Utility pole fires pose a danger to pedestrians, adjacent property and first responders (who may encounter toxic emissions from backup battery enclosures, for example). International Association of Fire Fighters Local

798 President John Hanley estimates the number of utility pole fires in CCSF may be as high as 30 per year.

- Wireless facilities co-located with 3-phase HVAC must in no way create and/or increase the risk of a pole fire. Any material can become an electrical conductor should it come into direct contact with HVAC equipment. Nothing that has cabling of any kind attached to it that could potentially cross electrical utility wires, especially HVAC, should ever be mounted above such utilities on the same pole or structure.
- Backup batteries inside wireless facility equipment enclosures, whether lead-acid or Lithium-ion, must be made fire-proof and explosion-proof, due to any kind of failure on the pole. This includes internal salt air condensation through open-air cooling vents in wireless facility enclosures.
- The permitting process for wireless facilities in PROW should include inspections, approvals and periodic re-inspections for ongoing compliance with all CPUC and CCSF safety requirements paid for by fees on CIPs (*see* 'Fees' section below). If compliance is not maintained, fines should be levied for each day of non-compliance.
- The permitting process for wireless facilities in PROW should include both static and dynamic analyses of additional mass and force loads on the pole/structure, as well as whatever soil/etc. supports the pole on/in the ground. These analyses should be reviewed by a licensed Plan Examiner and Soils Engineer and then field inspected and tested before final approval.
- CCSF should explore additional legislation requiring preventative pressure washing maintenance of pole-mounted transformers and/or capacitors by PG&E to avoid electrical arcing caused by salt air condensation in neighborhoods in the Outer Richmond and Outer Sunset adjacent to the ocean that are particularly susceptible to this phenomenon.

Fees

In light of the FCC's November 18, 2009 'shot clock' ruling establishing a 5-month deadline (3 months for co-location) for a local government to reach a final determination on an application for a wireless facility, as well as the current budgetary crisis faced by CCSF, adequate staffing levels at the Planning Department and DPW must be maintained to ensure the timely processing of permits for wireless facilities proposed for PROW. As such, CCSF should raise the fees on applicants to recover the costs involved with (1) adding the equivalent of at least two full-time staff members at the Planning Department to process applications for wireless facilities proposed for PROW; (2) retaining inspectors to ensure compliance with CPUC and CCSF safety regulations; (3) retaining a licensed Plan Examiner and Soils Engineer; (4) notifying members of the

public for each facility proposed for an R and NC district; and (5) conducting public hearings for each facility proposed for R and NC districts. In addition, fees should be required for renewal of permits. Any upgrades, including minor structural modifications, should require new permitting and fees.

Duration of Permits

Gov. Code Section 65964(b) (*aka* the Permit Streamlining Act) establishes a presumption, not a prohibition, that a permit duration of less than 10 years is inappropriate. Periodic review for improved technologies and accounting for obsolescence of old facilities (including upgrades) in accordance with CPUC GO 159A both speak to a permit duration of 2 years as prudent CCSF policy for wireless facilities in PROW.