

BOARD OF APPEALS, CITY & COUNTY OF SAN FRANCISCO

Appeal of
AT&T CALIFORNIA)
Appellant(s))
vs.)
DEPARTMENT OF PUBLIC WORKS)
BUREAU OF STREET-USE AND MAPPING)
Respondent

Appeal No. 14-111

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN THAT on June 09, 2014, the above named appellant(s) filed an appeal with the Board of Appeals of the City and County of San Francisco from the decision or order of the above named department(s), commission, or officer.

The substance or effect of the decision or order appealed from is the DENIAL on May 23, 2014, of UTILITY EXCAVATION PERMIT (excavation in public right-of-way related to installation of surface mounted facility) at 326 Craut Street.

APPLICATION NO. 14EXC-3134

FOR HEARING ON August 13, 2014

Address of Appellant(s):

Address of Other Parties:

AT&T California , Appellant c/o Foster Johnson, Attorney for Appellant 3000 El Camino Real, Two Palo Alto Square #300 Palo Alto, CA 94306	N/A
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BOARD OF APPEALS

Date Filed:

JUN 09 2014

APPEAL # 14-111

CITY & COUNTY OF SAN FRANCISCO
BOARD OF APPEALS

PRELIMINARY STATEMENT OF APPEAL

I / We, **AT&T California**, hereby appeal the following departmental action: **DENIAL** of **UTILITY EXCAVATION PERMIT 14EXC-3134** by the **Department of Public Works Bureau of Street Use and Mapping** which was issued or became effective on: **May 23, 2014**, for the property located at: **326 Craut Street**.

BRIEFING SCHEDULE:

The Appellant may, but is not required to, submit a one page (double-spaced) supplementary statement with this Preliminary Statement of Appeal. No exhibits or other submissions are allowed at this time.

Appellant's Brief is due on or before: **July 24, 2014, (no later than three (3) Thursdays prior to the hearing date)**, up to 12 pages in length, double-spaced, with unlimited exhibits, with an original and 10 copies delivered to the Board office by 4:30 p.m., and with additional copies delivered to the other parties the same day.

DPW
Respondent's and Other Parties' Briefs are due on or before: **August 07, 2014, (no later than one (1) Thursday prior to hearing date)**, up to 12 pages in length, doubled-spaced, with unlimited exhibits, with an original and 10 copies delivered to the Board office by 4:30 p.m., and with additional copies delivered to the other parties the same day.

Only photographs and drawings may be submitted by the parties at hearing.

Hearing Date: **Wednesday, August 13, 2014, 5:00 p.m., City Hall, Room 416**, One Dr. Carlton B. Goodlett Place.

All parties to this appeal must adhere to the briefing schedule above, however if the hearing date is changed, the briefing schedule MAY also be changed. Written notice will be provided of any change to the briefing schedule.

In order to have their documents sent to the Board members prior to hearing, **members of the public** should submit an original and 10 copies of all documents of support/opposition no later than one (1) Thursday prior to hearing date by 4:30 p.m. Please note that names and contact information included in submittals from members of the public will become part of the public record. Submittals from members of the public may be made anonymously.

Please note that in addition to the parties' briefs, any materials that the Board receives relevant to this appeal, including letters of support/opposition from members of the public, are distributed to Board members prior to hearing. All such materials are available for inspection at the Board's office. You may also request a copy of the packet of materials that are provided to Board members at a cost of 10 cents per page, per S.F. Admin. Code Ch. 67.28.

If you have any questions please call the Board of Appeals at 415-575-6880

The reasons for this appeal are as follows:

see attached.

Appellant or Agent (Circle One):

Signature: _____

Print Name: _____

Foster Jones

AT&T's Supplementary Statement Regarding Appeal From Denial of Permit Application
14EXC-3134

AT&T is in the process of upgrading its network within the City to enable the provision of high-speed communications services, including its U-verse video service. In 2005, the Department of Public Works ("DPW") issued its Order No. 175,566 (the "SMF Order"), which requires that, before AT&T can even apply for an excavation permit, it must obtain DPW approval of the proposed location through a "pre-application" process. In Order 182589, DPW denied such approval for placement of facilities near 326 Craut Street. DPW's action was improper because:

- (1) Order 182589 violates the SMF Order. Among other things, under the SMF Order, DPW is not permitted to disapprove AT&T's pre-application request, but may only (1) approve the proposed location, (2) approve a feasible alternative location identified through the specified notice and public hearing process, and/or (3) recommend reasonable changes to the installation at one of the locations. Order 182589, however, did none of these things. Instead, the Order found that an alternative location had been identified as potentially feasible by the community and AT&T, but did not approve any of the proposed locations as required by the SMF Order.
- (2) Order 182589 violates AT&T's rights under Sections 7901 and 5885 of the California Public Utilities Code, which grant AT&T, as a telephone company and as a franchised video provider, the right to construct its facilities in the public rights-of-way.
- (3) Order 182589 also violates Section 5885 because DPW has failed to act on requests to place facilities subject to that Section within 60 days.

AT&T subsequently filed an application for an excavation permit for 326 Craut Street numbered 14EXC-3134, which was denied because the site had not been approved pursuant to the SMF Order. AT&T requests that the denial of the excavation permit be reversed.

BOARD OF APPEALS
JUN 09 2014
APPEAL # 14-111

City and County of San Francisco



Edwin M. Lee, Mayor
Mohammed Nuru, Director

San Francisco Department of Public Works
Office of the Deputy Director for Capital Programs
Bureau of Street-Use and Mapping
875 Stevenson St., Rm. 460
San Francisco, CA 94103
(415) 554-5810 ■ www.sfdpw.org



Jerry Sanguinetti, Bureau Manager

May 23, 2014

AT&T California
795 Folsom Street, Suite 426
San Francisco, CA 94107

Subject: Denial of Utility Excavation Permit Application 14EXC-3134 – AT&T

Dear AT&T,

On May 22, 2014, Department of Public Works (DPW) received AT&T's permit application 14EXC-3134 for excavation in the public right-of-way related to installing a surface-mounted facility in the vicinity of 326 Craut Street (13SMF-0407).

DPW denies the excavation permit per Director's Decision disapproving the placement of a surface-mounted facility at this location (DPW Order 182,589).

If you have any questions, please email smf@sfdpw.org, or call me at (415) 554-5810.

Sincerely,

Gene Chan

Gene Chan
Department of Public Works
Bureau of Street-Use and Mapping

BOARD OF APPEALS

JUN 09 2014

APPEAL # 14-111





(415) 554-5810
FAX (415) 554-6161
http://www.sfdpw.org

Department of Public Works
Bureau of Street-Use and Mapping
1155 Market St, 3rd Floor
San Francisco, CA 94103

14EXC-3134

Utility Excavation Permit

**Address : CRAUT ST: MAYNARD
ST to SILVER AVE (300 - 399)**

Block: Lot: Zip:

Pursuant to Article 2.4 of the Public Works Code in conjunction to DPW Order 178,940 permission, revocable at the will of the Director of Public Works, to excavate and restore the public right-of-way is granted to Permittee.

Name: SBC - Pacific Bell Engineering
Address: 795 Folsom Street, Room 426 San Francisco, CA 94107-1243
Contact: Bob Pickard **Phone:** (415) 644-7057

Conditions	Denied per DPW Order 182589.
Emergency Confirmation Number	
24 Hour / 7 Day Contact:	Lynn Schussel (415) 644-7043
Service Address/Project:	326 Craut St at Silver Ave LSMF JU 9390985 70F (13SMF-0407)
Start Date	05/30/2014
Permit expires on:	7/13/2014
Purpose	Telephone
Excavation Reason	Install New Cabinet
Excavation Reason Description	
Method:	Open Cut: Sawcut
TrackingNumber1	9390985 R401 4C
TrackingNumber2	13SMF-0407 SF06-280301
Project Size	24
Inspection	This permit is invalid until the permittee contacts DPW at 554-5870 to activate the permit and schedule an inspection at least 72 hours prior to work. Failure to comply with the stated conditions will render this permit null and void.

The undersigned Permittee hereby agrees to comply with all requirements and conditions noted on this permit

****When drilling/excavating in sidewalk area, entire flag(s) must be replaced.****

Applicant/Permittee Date

Distribution:
Inside BSM: Utility Inspection

Printed : 5/23/2014 2:17:47 PM Plan Checker

STREET EXCAVATION REQUIREMENTS:

1. The permittee shall call Underground Service Alert (USA), telephone number 1-800-227-2600, 48 hours prior to any excavation.
2. All work including sidewalk and pavement cutting and removal, lagging, excavation, backfill, and sidewalk and pavement restoration shall be done by a licensed paving contractor and in accordance with the requirements of the Standard Specifications of the Bureau of Engineering, Department of Public Works, July 1986 Edition and Department of Public Works Order Nos. 176,707, copy attached.
3.
 - a. DPW Order 181,305, dated 6/17/13, Reinforced Concrete Bus pads, shall be constructed in accordance with SFPDW Standard Plan, File No. 96,607 and SFPDW Standard Specification Section 210 except that the concrete bus pad shall have a minimum compressive strength of 5,000 psi. Concrete bus pads shall be constructed at a minimum thickness of 10 to 12 inches and shall be approximately 10-feet wide.
 - b. DPW Order 181,306 dated 9/26/13, Reinforced concrete sidewalk, shall be constructed in accordance with the SFPDW Standard Plan File No. 96,608 and SFPDW Standard Specification Section 204 with #3 steel reinforced bars at mid-depth of the concrete sidewalk slab.
4. Sidewalk and pavement restoration shall include the replacement of traffic lane and crosswalk striping, parking stall markings, and curb painting that might have been obliterated during street excavation. The permittee shall perform their work under on the following options:
 - a. Have the City forces do the striping and painting work at the permittee's expense. The permittee shall make a deposit with the Department of Parking & Traffic for this purpose in an amount estimated by the Municipal Transportation Agency (MTA) 7th Floor 1 South Van Ness Ave telephone 701-4500, and notify the MTA at least 48 hours in advance of the time the work is to be done.
 - b. Perform the work themselves following instructions available at the Department of Parking & Traffic.
5. The permittee shall submit a non-refundable fee to Bureau of Street-Use and Mapping to pay for City Inspection of the backfill and pavement restoration. At least 48 hours in advance, the permittee shall make arrangements with the Street Improvement Section Inspectors, 554-7149, for an inspection schedule.
6. The permittee shall file and maintain an excavation bond in the sum of \$25,000.00 with the Department of Public Works, to guarantee the maintenance of the pavement in the excavation area for a period of 3 years following the completion of the backfill and pavement restoration pursuant to Article 2.4.40 of the Public Works Code.
7. The permittee shall conduct construction operations in accordance with the requirements of Article 11 of the Traffic Code. The permittee shall contact the MTA 7th Floor 1 South Van Ness Ave telephone 701-4500, for specific restrictions before starting work.
8. The permittee shall obtain the required permits, if any, from regulating agencies of the State of California.
9. The permittee shall verify the locations of any City or public service utility company facilities that may be affected by the work authorized by this permit and shall assume all responsibility for any damage to such facilities. The permittee shall make satisfactory arrangements and payments for any necessary temporary relocation of City or public utility company facilities.
10. The permittee shall pay the required fee for sewer installation permit at the Plumbing Inspection Division, Department of Building Inspection, 1660 Mission Street and arrange for inspection of this work, telephone 558-6054.
11. Concrete form work, planting of trees and pouring of sidewalk and/or curb shall not be performed prior to obtaining a permit from Bureau of Urban Forestry (BUF), telephone: 554-6700.
12. Per DPW Order 178,806, the recycling of Cobble Stones and Granit Curb shall follow as:
 - a. Cobblestones shall be clean of dirt prior to transporting. Extreme care shall be taken during the transporting the cobblestones to minimize damage before delivery to City. The cobblestones shall be neatly and securely placed on pallets so they can be moved about safely after the delivery. The Minimum size of cobblestone shall be 4 inches square (16 square inches). The cobblestones shall be delivered, including off loading, to the lower lot at the Cesar Chavez Street Yard located at 2323 Cesar Chavez Street or at alternative location directed by the Department within the City of San Francisco. Contact the Department forty-eight hours (48 hours) prior to delivery. The Department can be reached at (415) 641-2627.
 - b. Granite Curb shall be neatly and securely placed on pallets so they can be moved about safely after delivery. The Contractor shall exercise care in transporting the granite curb to minimize damage. The length limit of recyclable granite curbs shall be no less than four feet. The granite curb shall be delivered, including off loading, to the back lot at the Griffith Pump Station located at 1105 Thomas Street or at an alternative location directed by the Department within the City of San Francisco. Contact Bureau of Street and Sewer Repair (BSSR) at least forty-eight hours (48 hours) prior to delivery. BSSR can be reached at (415) 695-2087.
13. In consideration of this Permit being issued for the work described in the application, Permittee on its behalf and that of any successor or assign, and on behalf of any lessee, promises and agrees to perform all the terms of this Permit and to comply with all applicable laws, ordinances and regulations.
14. Permittee agrees on its behalf and that of any successor or assign to hold harmless, defend, and indemnify the City and County of San Francisco, including, without limitation, each of its commissions, departments, officers, agents and employees (hereinafter collectively referred to as the "City") from and against any and all losses, liabilities, expenses, claims, demands, injuries, damages, fines, penalties, costs or judgments including, without limitation, attorneys' fees and costs (collectively, "claims") of any kind allegedly arising directly or indirectly from (i) any act by, omission by, or negligence of, Permittee or its subcontractors, or the officers, agents, or employees of either, while engaged in the performance of the work authorized by this Permit, or while in or about the property subject to this Permit for any reason connected in any way whatsoever with the performance of the work authorized by this Permit, or allegedly resulting directly or indirectly from the maintenance or installation of any equipment, facilities or structures authorized under this Permit, (ii) any accident or injury to any contractor or subcontractor, or any officer, agent, or employee of either of them, while engaged in the performance of the work authorized by this Permit, or while in or about the property, for any reason connected with the performance of the work authorized by this Permit, or arising from liens or claims for services rendered or labor or materials furnished in or for the performance of the work authorized by this Permit, (iii) injuries or damages to real or personal property, good will, and persons in, upon or in any way allegedly connected with the work authorized by this Permit from any cause or claims arising at any time, and (iv) any release or discharge, or threatened release or discharge, of any hazardous material caused or allowed by Permittee in, under, on or about the property subject to this Permit or into the environment. As used herein, "hazardous material" means any substance, waste or material which, because of its quantity, concentration of physical or chemical characteristics is deemed by any federal, state, or local governmental authority to pose a present or potential hazard to human health or safety or to the environment.
15. Permittee must hold harmless, indemnify and defend the City regardless of the alleged negligence of the City or any other party, except only for claims resulting directly from the sole negligence or willful misconduct of the City. Permittee specifically acknowledges and agrees that it has an immediate and independent obligation to defend the City from any claim which actually or potentially falls within this indemnity provision, even if the allegations are or may be groundless, false or fraudulent, which obligation arises at the time such claim is tendered to Permittee by the City and continues at all times thereafter. Permittee agrees that the indemnification obligations assumed under this Permit shall survive expiration of the Permit or completion of work.
16. Permittee shall obtain and maintain through the terms of this Permit general liability, automobile liability or workers' compensation insurance as the City deems necessary to protect the City against claims for damages for personal injury, accidental death and property damage allegedly arising from any work done under this Permit. Such insurance shall in no way limit Permittee's indemnity hereunder. Certificates of insurance, in form and with insurers satisfactory to the City, evidencing all coverages above shall be furnished to the City before commencing any operations under this Permit, with complete copies of policies furnished promptly upon City request.
17. The permittee and any permitted successor or assign recognize and understand that this permit may create a possessory interest.

Permit Addresses

*RW = RockWheel, SMC = Surface Mounted Cabinets, S/W = Sidewalk Work, DB = Directional Boring, BP= Reinforced Concrete Bus Pad, UB = Reinforced Concrete for Utility Pull Boxes and Curb Ramps

Number of blocks: 1 Total repair size:24 sqft Total Streetspace: Total Sidewalk: sqft

ID	Street Name	From St	To St	Sides	*Other	Asphalt	Concrete	Street Space Feet	Sidewalk Feet
1	CRAUT ST	MAYNARD ST	SILVER AVE	West	RW : False SMC : True S/W Only : True DB: False BP: False UB: True	0	24		
Total						0	24		

This is NOT a Permit

Exceptions

14EXC-3134

Street Name	From St	To St	Message	Job	Contact	Dates
MAYNARD ST						
MAYNARD ST	MAYNARD ST	SILVER AVE -	Proposed Excavation.	AT&T - Construction and Engineering	Dana Neil -	Sep 9 2014-Dec 7 2014
MAYNARD ST	MAYNARD ST	SILVER AVE -	Prior to performing any construction, all CCSF survey monuments shall be referenced by a licensed Land Surveyor on a Corner Record or a Record of Survey, if any construction will take place within 10ft of the monument. For any questions, please call Mapping at #554-5827	Stone or Concrete Monument		

This is NOT a Permit

"IMPROVING THE QUALITY OF LIFE IN SAN FRANCISCO" We are dedicated individuals committed to teamwork, customer service and continuous improvement in partnership with the community.

Customer Service

Teamwork

Continuous Improvement

No Diagram submitted



Edwin M. Lee, Mayor
Mohammed Nuru, Director



Jerry Sanguinetti, Bureau Manager

DPW Order No: 182589

DIRECTOR'S DECISION REGARDING AT&T CALIFORNIA'S REQUEST TO INSTALL A SURFACE MOUNTED FACILITY IN THE VICINITY OF 326 Craut Street (13SMF-0407)

APPLICANT: AT&T CALIFORNIA
795 Folsom Street, #426
San Francisco, Ca 94107

DESCRIPTION OF REQUEST: Surface Mounted Facility Installation

BACKGROUND:

1. On **November 15, 2013**, the Applicant (AT&T California) filed an application with the Department of Public Works (DPW) to install a Surface-Mounted Facility (SMF) at **326 Craut Street**.
2. On **March 10, 2014**, the applicant mailed and posted Notices of Intent (NOI) to all businesses and residences within a 300-foot radius of the subject location.
3. DPW received **three (3)** objections to the application during the 20-day notification period. DPW subsequently scheduled a public hearing to consider testimony received for this site. The objections and comments included:
 - Additional cabinet would not be in best interest of neighborhood.
 - Existing cabinets attract garbage, urine, and used clothing.
 - It is an eyesore and would lower property values.
 - Small children may be harmed.
 - Attracts unruly people who drink alcohol and do drugs.
4. On **April 21, 2014**, DPW Hearing Officer **Frank Lee** conducted a hearing on the application to consider testimony regarding the subject SMF.
5. At the hearing, Arianna Urban of DPW presented a summary of the permit applications stating that the Applicant was in compliance with DPW's technical requirements and state and federal regulations.
6. At the hearing, **Ms. Tedi Vriheas** of AT&T stated a box walk was conducted on **April 10, 2014** and two (2) members of the community attended. During the box walk, community members and AT&T located the following potentially feasible alternate location(s):
 - 432 Silver Avenue: complies with AT&T's technical requirements.
 - 2 Lisbon Street: does not comply with AT&T's technical requirements.
 - 8 Lisbon Street: does not comply with AT&T's technical requirements.



7. At the hearing, no members of the community testified at the hearing in opposition to the proposed installation of the SMF cabinet in the vicinity of **326 Craut Street**.

RECOMMENDATION: DISAPPROVE the request by AT&T to locate Surface Mounted Facility **13SMF-0407**, in the vicinity of **326 Craut Street**.

FINDINGS:

1. The Hearing Officer reviewed the application, materials from DPW's files, the objections, additional materials submitted by the applicant and persons protesting the application, and the testimony at the hearing.
2. There is potential for the applicant, AT&T, to install the surface-mounted facility in other acceptable locations that may have less of an impact on the convenience and necessities of the property owners and occupants in the immediate vicinity of the surface-mounted facility.
3. It remains unclear if there may be other locations that may cause the least inconvenience to tenants, property owners, and users of the public right-of-way.
4. Applicant is suggested to submit an application for the alternate location(s) and any other acceptable locations for review by DPW and the community.
5. The Director of Public Works has reviewed the Hearing Officer's recommendation. The Director of Public Works hereby adopts the hearing officer's recommendation.

APPEAL PROCESS: This decision may then be appealed to the Board of Appeals within fifteen (15) calendar days of DPW's approval or denial of an Excavation Permit to install surface mounted facilities **13SMF-0407 in the vicinity of 326 Craut Street**. The Board of Appeals is located at 1650 Mission Street, Suite 304. To obtain further information regarding the appeal process, you can contact the Board of Appeals at 415-575-6880. You can also visit the Board of Appeals website at:

<http://www.sfgov.org/index.aspx?page=783>

5/21/2014

5/21/2014

X

Sanguinetti, Jerry
Bureau Manager

X

Sweiss, Fuad
Deputy Director and City Engineer

5/22/2014

X

Mohammed Nuru

Nuru, Mohammed
Director, DPW



San Francisco Department of Public Works

Making San Francisco a beautiful, livable, vibrant, and sustainable city.



Date Filed:

BOARD OF APPEALS

JUN 09 2014

APPEAL # 14-113

CITY & COUNTY OF SAN FRANCISCO
BOARD OF APPEALS

PRELIMINARY STATEMENT OF APPEAL

I / We, **AT&T California**, hereby appeal the following departmental action: **DENIAL** of **UTILITY EXCAVATION PERMIT 14EXC-3185** by the **Department of Public Works Bureau of Street Use and Mapping** which was issued or became effective on: **May 28, 2014**, for the property located at: **996 Cayuga Avenue**.

BRIEFING SCHEDULE:

The Appellant may, but is not required to, submit a one page (double-spaced) supplementary statement with this Preliminary Statement of Appeal. No exhibits or other submissions are allowed at this time.

Appellant's Brief is due on or before: **July 24, 2014, (no later than three (3) Thursdays prior to the hearing date)**, up to 12 pages in length, double-spaced, with unlimited exhibits, with an original and 10 copies delivered to the Board office by 4:30 p.m., and with additional copies delivered to the other parties the same day.

O-DPW
Respondent's and Other Parties' Briefs are due on or before: **August 07, 2014, (no later than one (1) Thursday prior to hearing date)**, up to 12 pages in length, doubled-spaced, with unlimited exhibits, with an original and 10 copies delivered to the Board office by 4:30 p.m., and with additional copies delivered to the other parties the same day.

Only photographs and drawings may be submitted by the parties at hearing.

Hearing Date: **Wednesday, August 13, 2014, 5:00 p.m., City Hall, Room 416, One Dr. Carlton B. Goodlett Place.**

All parties to this appeal must adhere to the briefing schedule above, however if the hearing date is changed, the briefing schedule MAY also be changed. Written notice will be provided of any change to the briefing schedule.

In order to have their documents sent to the Board members prior to hearing, **members of the public** should submit an original and 10 copies of all documents of support/opposition no later than one (1) Thursday prior to hearing date by 4:30 p.m. Please note that names and contact information included in submittals from members of the public will become part of the public record. Submittals from members of the public may be made anonymously.

Please note that in addition to the parties' briefs, any materials that the Board receives relevant to this appeal, including letters of support/opposition from members of the public, are distributed to Board members prior to hearing. All such materials are available for inspection at the Board's office. You may also request a copy of the packet of materials that are provided to Board members at a cost of 10 cents per page, per S.F. Admin. Code Ch. 67.28.

If you have any questions please call the Board of Appeals at 415-575-6880

The reasons for this appeal are as follows:

see attached.

Appellant or Agent (Circle One):

Signature: _____

Print Name: _____

[Handwritten signature and name: F. S. ...]

AT&T's Supplementary Statement Regarding Appeal From Denial of Permit Application
14EXC-3185

AT&T is in the process of upgrading its network within the City to enable the provision of high-speed communications services, including its U-verse video service. In 2005, the Department of Public Works ("DPW") issued its Order No. 175,566 (the "SMF Order"), which requires that, before AT&T can even apply for an excavation permit, it must obtain DPW approval of the proposed location through a "pre-application" process. In Order 182608, DPW denied such approval for placement of facilities near 996 Cayuga Avenue. DPW's action was improper because:

- (1) Order 182608 violates the SMF Order. Among other things, under the SMF Order, DPW is not permitted to disapprove AT&T's pre-application request, but may only (1) approve the proposed location, (2) approve a feasible alternative location identified through the specified notice and public hearing process, and/or (3) recommend reasonable changes to the installation at one of the locations. Order 182458, however, did none of these things. Instead, the Order found that an alternative location had been identified as potentially feasible by the community and AT&T, but did not approve any of the proposed locations as required by the SMF Order.
- (2) Order 182608 violates AT&T's rights under Sections 7901 and 5885 of the California Public Utilities Code, which grant AT&T, as a telephone company and as a franchised video provider, the right to construct its facilities in the public rights-of-way.
- (3) Order 182608 also violates Section 5885 because DPW has failed to act on requests to place facilities subject to that Section within 60 days.

AT&T subsequently filed an application for an excavation permit for 996 Cayuga Avenue numbered 14EXC-3185, which was denied because the site had not been approved pursuant to the SMF Order. AT&T requests that the denial of the excavation permit be reversed.

BOARD OF APPEALS

JUN 09 2014
APPEAL # 14-113

City and County of San Francisco



Edwin M. Lee, Mayor
Mohammed Nuru, Director

San Francisco Department of Public Works
Office of the Deputy Director for Capital Programs
Bureau of Street-Use and Mapping
875 Stevenson St., Rm. 460
San Francisco, CA 94103
(415) 554-5810 ■ www.sfdpw.org



Jerry Sanguinetti, Bureau Manager

May 28, 2014

AT&T California
795 Folsom Street, Suite 426
San Francisco, CA 94107

Subject: Denial of Utility Excavation Permit Application 14EXC-3185 – AT&T

Dear AT&T,

On May 28, 2014, Department of Public Works (DPW) received AT&T's permit application 14EXC-3185 for excavation in the public right-of-way related to installing a surface-mounted facility in the vicinity of 996 Cayuga Avenue (13SMF-0376).

DPW denies the excavation permit per Director's Decision disapproving the placement of a surface-mounted facility at this location (DPW Order 182,608).

If you have any questions, please email smf@sfdpw.org, or call me at (415) 554-5810.

Sincerely,

Gene Chan

Gene Chan
Department of Public Works
Bureau of Street-Use and Mapping

BOARD OF APPEALS

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APPEAL # 14-113



San Francisco Department of Public Works
Making San Francisco a beautiful, livable, vibrant, and sustainable city.



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http://www.sfdpw.org

Department of Public Works
Bureau of Street-Use and Mapping
1155 Market St, 3rd Floor
San Francisco, CA 94103

14EXC-3185

Utility Excavation Permit

Address : CAYUGA AVE:
VALERTON CT to ONONDAGA
AVE (952 - 999)

Block: Lot: Zip:

Pursuant to Article 2.4 of the Public Works Code in conjunction to DPW Order 178,940 permission, revocable at the will of the Director of Public Works, to excavate and restore the public right-of-way is granted to Permittee.

Name: SBC - Pacific Bell Engineering
Address: 795 Folsom Street, Room 426 San Francisco, CA 94107-1243
Contact: Bob Rickard Phone: (415) 644-7057

Conditions	Denied per DPW Order 182608
Emergency Confirmation Number	
24 Hour / 7 Day Contact:	Lynn Schussel (415) 644-7057
Service Address/Project:	996 Cayuga Ave at Onondaga Ave LSMF JU 9354808 65G (13SMF-0376)
Start Date	06/02/2014
Permit expires on:	7/16/2014
Purpose	Telephone
Excavation Reason	Install New Cabinet
Excavation Reason Description	
Method:	Open Cut: Sawcut
TrackingNumber1	9354808 R401 4C
TrackingNumber2	13SMF-0376 SF06-410202
Project Size	24
Inspection	

The undersigned Permittee hereby agrees to comply with all requirements and conditions noted on this permit

****When drilling/excavating in sidewalk area, entire flag(s) must be replaced.****

Applicant/Permittee

Date

Distribution:
Inside BSM: Utility Inspection

Printed : 5/28/2014 1:40:16 PM

Plan Checker

Geoffrey Schneider

STREET EXCAVATION REQUIREMENTS:

1. The permittee shall call Underground Service Alert (U.S.A.): telephone number 1-800-227-2600, 48 hours prior to any excavation.
2. All work including sidewalk and pavement cutting and removal, lagging, excavation, backfill, and sidewalk and pavement restoration shall be done by a licensed paving contractor and in accordance with the requirements of the Standard Specifications of the Bureau of Engineering, Department of Public Works, July 1986 Edition and Department of Public Works Order Nos. 176,707, copy attached.
3.
 - a. DPW Order 181,305, dated 6/17/13, Reinforced Concrete Bus pads, shall be constructed in accordance with SFPDW Standard Plan, File No. 96,607 and SFPDW Standard Specification Section 210 except that the concrete bus pad shall have a minimum compressive strength of 5,000 psi. Concrete bus pads shall be constructed at a minimum thickness of 10 to 12 inches and shall be approximately 10-feet wide.
 - b. DPW Order 181,306 dated 9/26/13, Reinforced concrete sidewalk, shall be constructed in accordance with the SFPDW Standard Plan File No. 96,608 and SFPDW Standard Specification Section 204 with #3 steel reinforced bars at mid-depth of the concrete sidewalk slab.
4. Sidewalk and pavement restoration shall include the replacement of traffic lane and crosswalk striping, parking stall markings, and curb painting that might have been obliterated during street excavation. The permittee shall perform their work under on the following options:
 - a. Have the City forces do the striping and painting work at the permittee's expense. The permittee shall make a deposit with the Department of Parking & Traffic for this purpose in an amount estimated by the Municipal Transportation Agency (MTA) 7th Floor 1 South Van Ness Ave telephone 701-4500, and notify the MTA at least 48 hours in advance of the time the work is to be done.
 - b. Perform the work themselves following instructions available at the Department of Parking & Traffic.
5. The permittee shall submit a non-refundable fee to Bureau of Street-Use and Mapping to pay for City Inspection of the backfill and pavement restoration. At least 48 hours in advance, the permittee shall make arrangements with the Street Improvement Section Inspectors, 554-7149, for an inspection schedule.
6. The permittee shall file and maintain an excavation bond in the sum of \$25,000.00 with the Department of Public Works, to guarantee the maintenance of the pavement in the excavation area for a period of 3 years following the completion of the backfill and pavement restoration pursuant to Article 2.4.40 of the Public Works Code.
7. The permittee shall conduct construction operations in accordance with the requirements of Article 11 of the Traffic Code. The permittee shall contact the MTA 7th Floor 1 South Van Ness Ave telephone 701-4500, for specific restrictions before starting work.
8. The permittee shall obtain the required permits, if any, from regulating agencies of the State of California.
9. The permittee shall verify the locations of any City or public service utility company facilities that may be affected by the work authorized by this permit and shall assume all responsibility for any damage to such facilities. The permittee shall make satisfactory arrangements and payments for any necessary temporary relocation of City or public utility company facilities.
10. The permittee shall pay the required fee for sewer installation permit at the Plumbing Inspection Division, Department of Building Inspection, 1660 Mission Street and arrange for inspection of this work, telephone 558-6054.
11. Concrete form work, planting of trees and pouring of sidewalk and/or curb shall not be performed prior to obtaining a permit from Bureau of Urban Forestry (BUF), telephone: 554-6700.
12. Per DPW Order 178,806, the recycling of Cobble Stones and Granite Curb shall follow as:
 - a. Cobblestones shall be clean of dirt prior to transporting. Extreme care shall be taken during the transporting the cobblestones to minimize damage before delivery to City. The cobblestones shall be neatly and securely placed on pallets so they can be moved about safely after the delivery. The Minimum size of cobblestone shall be 4 inches square (16 square inches). The cobblestones shall be delivered, including off loading, to the lower lot at the Cesar Chavez Street Yard located at 2323 Cesar Chavez Street or at alternative location directed by the Department within the City of San Francisco. Contact the Department forty-eight hours (48 hours) prior to delivery. The Department can be reached at (415) 641-2627.
 - b. Granite Curb shall be neatly and securely placed on pallets so they can be moved about safely after delivery. The Contractor shall exercise care in transporting the granite curb to minimize damage. The length limit of recyclable granite curbs shall be no less than four feet. The granite curb shall be delivered, including off loading, to the back lot at the Griffith Pump Station located at 1105 Thomas Street or at an alternative location directed by the Department within the City of San Francisco. Contact Bureau of Street and Sewer Repair (BSSR) at least forty-eight hours (48 hours) prior to delivery. BSSR can be reached at (415) 695-2087.
13. In consideration of this Permit being issued for the work described in the application, Permittee on its behalf and that of any successor or assign, and on behalf of any lessee, promises and agrees to perform all the terms of this Permit and to comply with all applicable laws, ordinances and regulations.
14. Permittee agrees on its behalf and that of any successor or assign to hold harmless, defend, and indemnify the City and County of San Francisco, including, without limitation, each of its commissions, departments, officers, agents and employees (hereinafter collectively referred to as the "City") from and against any and all losses, liabilities, expenses, claims, demands, injuries, damages, fines, penalties, costs or judgments including, without limitation, attorneys' fees and costs (collectively, "claims") of any kind allegedly arising directly or indirectly from (i) any act by, omission by, or negligence of, Permittee or its subcontractors, or the officers, agents, or employees of either, while engaged in the performance of the work authorized by this Permit, or while in or about the property subject to this Permit for any reason connected in any way whatsoever with the performance of the work authorized by this Permit, or allegedly resulting directly or indirectly from the maintenance or installation of any equipment, facilities or structures authorized under this Permit, (ii) any accident or injury to any contractor or subcontractor, or any officer, agent, or employee of either of them, while engaged in the performance of the work authorized by this Permit, or while in or about the property, for any reason connected with the performance of the work authorized by this Permit, or arising from liens or claims for services rendered or labor or materials furnished in or for the performance of the work authorized by this Permit, (iii) injuries or damages to real or personal property, good will, and persons in, upon or in any way allegedly connected with the work authorized by this Permit from any cause or claims arising at any time, and (iv) any release or discharge, or threatened release or discharge, of any hazardous material caused or allowed by Permittee in, under, on or about the property subject to this Permit or into the environment. As used herein, "hazardous material" means any substance, waste or material which, because of its quantity, concentration of physical or chemical characteristics is deemed by any federal, state, or local governmental authority to pose a present or potential hazard to human health or safety or to the environment.
15. Permittee must hold harmless, indemnify and defend the City regardless of the alleged negligence of the City or any other party, except only for claims resulting directly from the sole negligence or willful misconduct of the City. Permittee specifically acknowledges and agrees that it has an immediate and independent obligation to defend the City from any claim which actually or potentially falls within this indemnity provision, even if the allegations are or may be groundless, false or fraudulent, which obligation arises at the time such claim is tendered to Permittee by the City and continues at all times thereafter. Permittee agrees that the indemnification obligations assumed under this Permit shall survive expiration of the Permit or completion of work.
16. Permittee shall obtain and maintain through the terms of this Permit general liability, automobile liability or workers' compensation insurance as the City deems necessary to protect the City against claims for damages for personal injury, accidental death and property damage allegedly arising from any work done under this Permit. Such insurance shall in no way limit Permittee's indemnity hereunder. Certificates of insurance, in form and with insurers satisfactory to the City, evidencing all coverages above shall be furnished to the City before commencing any operations under the Permit, with complete copies of policies furnished promptly upon City request.
17. The permittee and any permitted successor or assign recognize and understand that this permit may create a possessory interest.

Permit Addresses

*RW = RockWheel, SMC = Surface Mounted Cabinets, S/W = Sidewalk Work, DB = Directional Boring, BP= Reinforced Concrete Bus Pad, UB = Reinforced Concrete for Utility Pull Boxes and Curb Ramps

Number of blocks: 1 Total repair size:24 sqft Total Streetspace: Total Sidewalk: sqft

ID	Street Name	From St	To St	Sides	*Other	Asphalt	Concrete	Street Space Feet	Sidewalk Feet
1	CAYUGA AVE	VALERTON CT	ONONDAGA AVE	West	RW : False SMC : True S/W Only : True DB: False BP: False UB: True	0	24		
Total						0	24		

This is NOT a Permit

Exceptions

14EXC-3185

Street Name	From St	To St	Message	Job	Contact	Dates
CAHUA ST						
	VALERTON CT	ONONDAGA AVE -	Proposed Excavation.	AT&T - Construction and Engineering	Paul Lucq -	Oct 14 2014-Jan 11 2015

Permitted

No Diagram submitted



Edwin M. Lee, Mayor
Mohammed Nuru, Director

Jerry Sanguinetti, Bureau Manager

DPW Order No: 182608

DIRECTOR'S DECISION REGARDING AT&T CALIFORNIA'S REQUEST TO INSTALL A SURFACE MOUNTED FACILITY IN THE VICINITY OF 996 Cayuga Avenue (13SMF-0376)

APPLICANT: AT&T CALIFORNIA
795 Folsom Street, #426
San Francisco, Ca 94107

DESCRIPTION OF REQUEST: Surface Mounted Facility Installation

BACKGROUND:

1. On **October 18, 2013**, the Applicant (AT&T California) filed an application with the Department of Public Works (DPW) to install a Surface-Mounted Facility (SMF) at **996 Cayuga Avenue**.
2. On **March 13, 2014**, the applicant mailed and posted Notices of Intent (NOI) to all businesses and residences within a 300-foot radius of the subject location.
3. DPW received **one (1)** objection to the application during the 20-day notification period. DPW subsequently scheduled a public hearing to consider testimony received for this site. The objections and comments included:
 - Cabinet will lower property values.
 - There is already a cabinet across the street.
 - Cabinet will be visible and an eyesore.
 - Neighbors are trying to plant trees in the area.
4. On **April 28, 2014**, DPW Hearing Officer **Janet Ng** conducted a hearing on the application to consider testimony regarding the subject SMF.
5. At the hearing, Arianna Urban of DPW presented a summary of the permit applications stating that the Applicant was in compliance with DPW's technical requirements and state and federal regulations.
6. At the hearing, **Ms. Tedi Vriheas** of AT&T stated a box walk was conducted on **April 16, 2014** and two (2) members of the community attended. During the box walk, community members and AT&T located the following potentially feasible alternate location(s):
 - Adjacent to Balboa High School: not feasible due to school's historic status.
 - 97 Onondaga St.: ~114 feet from SAI; complies with AT&T's technical requirements.



7. At the hearing, two members of the community testified at the hearing in opposition to the proposed installation of the SMF cabinet in the vicinity of **996 Cayuga Avenue**. Testimony included:

- Alternate location at 97 Onondaga Street is preferred.

RECOMMENDATION: DISAPPROVE the request by AT&T to locate Surface Mounted Facility **13SMF-0376**, in the vicinity of **996 Cayuga Avenue**.

FINDINGS:

1. The Hearing Officer reviewed the application, materials from DPW's files, the objections, additional materials submitted by the applicant and persons protesting the application, and the testimony at the hearing.
2. There is potential for the applicant, AT&T, to install the surface-mounted facility in other acceptable locations that may have less of an impact on the convenience and necessities of the property owners and occupants in the immediate vicinity of the surface-mounted facility.
3. It remains unclear if there may be other locations that may cause the least inconvenience to tenants, property owners, and users of the public right-of-way.
4. Applicant is suggested to submit an application for the alternate location(s) and any other acceptable locations for review by DPW and the community.
5. The Director of Public Works has reviewed the Hearing Officer's recommendation. The Director of Public Works hereby adopts the hearing officer's recommendation.

APPEAL PROCESS: This decision may then be appealed to the Board of Appeals within fifteen (15) calendar days of DPW's approval or denial of an Excavation Permit to install surface mounted facilities **13SMF-0376 in the vicinity of 996 Cayuga Avenue**. The Board of Appeals is located at 1650 Mission Street, Suite 304. To obtain further information regarding the appeal process, you can contact the Board of Appeals at 415-575-6880. You can also visit the Board of Appeals website at: <http://www.sfgov.org/index.aspx?page=788>.

5/27/2014

5/27/2014

X

Sanguinetti, Jerry
Bureau Manager

X

Sweiss, Fuad
Deputy Director and City Engineer

5/27/2014

X

Mohammed Nuru
Nuru, Mohammed
Director, DPW



**CITY AND COUNTY OF SAN FRANCISCO
BOARD OF APPEAL**

AT&T	(Appeal Nos.	Appeal Nos.
CALIFORNIA,	(14-111	14-113
Appellant	(326 Craut	996 Cayuga Avenue

**APPELLANT'S
BRIEF**

EXHIBITS

June 9, 2014 14EXC-3185 Preliminary Statement of Appeal (996 Cayuga Avenue)..... Exhibit A

June 9, 2014 14EXC-3134 Preliminary Statement of Appeal (326 Craut Street) Exhibit B

996 Cayuga Avenue SMF Application Package..... Exhibit C

326 Craut Street SMF Application Package Exhibit D

SMF Application Packages and Permit Approvals for Non-AT&T Entities..... Exhibit E

Chart: Non-AT&T Approved Excavation PermitsExhibit F

AT&T California (“AT&T”) submits its brief in support of its appeals from the denial of Surface Mounted Facilities Applications Nos. 13SMF-0376 and 13SMF-0407.

I. INTRODUCTION

AT&T is upgrading its network within the City of San Francisco by installing certain equipment, enclosed in cabinets, to enable the provision of high-speed communications services, including its U-verse video service. In 2005, the Department of Public Works (“DPW”) issued its Order No. 175,566 (the “SMF Order”) (Ex. 1), which establishes certain requirements and procedures for the placement of “surface mounted facilities” (“SMF”), which include AT&T’s equipment cabinets, in the public rights-of-way. Under the SMF Order, before AT&T can even apply for an excavation permit, it must obtain DPW approval of the proposed location through a “pre-application” process. On May 28, 2014, the San Francisco Board of Supervisors passed a Ordinance No. 76-14 (the “New Ordinance”), which institutes additional regulations governing SMFs. That legislation became effective on June 27, 2014.

In the fall of 2013, AT&T filed applications with the Department of Public Works (“DPW”) to install its facilities in the vicinity of 326 Craut Street (13SMF-0407) and 996 Cayuga (13SMF-0376). In May 2014, more than six months after AT&T filed its applications, DPW denied AT&T’s request for approval of facilities near these locations.¹

AT&T appeals from each of these orders on the following grounds:

Violations of Public Utility Code §§ 7901, 7901.1 and 5885: These orders violate AT&T’s rights under Sections 7901, 7901.1 and 5885 of the California Public Utilities Code, which grant AT&T, as a telephone company and as a franchised video provider, the right to construct its facilities in the public rights-of-way.

Failure to timely act on applications: These orders also violate Section 5885 because DPW has failed to act on requests to place facilities subject to that Section within 60 days.

¹ See Exs. A & B.

Accordingly, AT&T requests that DPW Orders 182589 and 182608 (the “Challenged DPW Orders”) be reversed, and that AT&T’s proposed locations be approved such that AT&T may apply for excavation permits at these locations.

II. The Challenged DPW Orders Violate California Public Utilities Code §§7901, 7901.1, and 5885

A. AT&T Has Statutory Rights To Install Its Facilities In The Public Rights-Of-Way

Under California law, AT&T has statutory rights to deploy its facilities in the public rights-of-way. The City’s discretion in limiting the placement of utilities is limited. *See* Pub. Util. Code § 7901.1. By denying AT&T’s applications to place its facilities in the rights-of-way without a proper legal basis, the City has violated AT&T’s statutory rights, and hence the Challenged DPW Orders should be reversed.

Section 7901 of the Public Utilities Code provides:

Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.

This section “has been judicially construed by many decisions of [the California courts], and it has been uniformly held that the statute is a continuing offer extended to telephone and telegraph companies to use the highways’ Thus, telephone companies have the right to use the public highways to install their facilities.” *Williams Comms., LLC v. City of Riverside*, 114 Cal.App.4th 642, 648 (Cal. Ct. App. 2003) (quoting *County of L.A. v. Southern Cal. Tel. Co.*, 32 Cal.2d 378, 384 (Cal. 1948)).

AT&T's telephone and video services franchises constitute contractual relationships between AT&T and the State of California. The offer made by these franchises contains no conditions other than that that AT&T's use shall not incommode the public right-of-way. AT&T's franchise rights "are vested rights which the Constitutions, both state and federal, protect." *County of Los Angeles v. S. Cal. Tel. Co.* (1948) 32 Cal.2d 378, 385.

This same right to use the public rights-of-way was subsequently extended to all state-franchised video providers. In particular, the legislature added Section 5885(a) to the Public Utilities Code, which provides:

The local entity shall allow the holder of a state franchise under this division to install, construct, and maintain a network within public rights-of-way under the same time, place, and manner as the provisions governing telephone corporations under applicable state and federal law, including, but not limited to, the provisions of Section 7901.1.

AT&T is both a "telephone corporation" within the meaning of Section 7901, and a holder of a state franchise under Section 5885. AT&T is certificated by the California Public Utilities Commission ("CPUC"), under utility identification number U-1001-C, to provide telecommunications services in California, and it owns, controls, operates, and manages millions of telephone lines in California. Indeed, the Supreme Court of California has previously recognized that AT&T is a "telephone corporation" within the meaning of Section 7901. *See Pacific Tel. & Tel. Co. v. City of Los Angeles*, 44 Cal.2d 272, 276, 282 P.2d 36, 38 (1955) ("The Pacific Telephone and Telegraph Company has been engaged in operating a telephone and telegraph system since January 2, 1907, and its lines are used in rendering a local, statewide and interstate communication service."). AT&T also holds a state video franchise from the CPUC, which authorizes AT&T to provide video service within the City, among other places. *See*

ftp://ftp.cpuc.ca.gov/VideoFranchiseTemplate/AT%26T/ATT%20Certificate%20initial%20033007.pdf.

Moreover, the facilities that AT&T seeks to place within the rights-of-way are part of both AT&T's telephone network and its video network. Those facilities consists of equipment cabinets containing electronic equipment that enable AT&T to expand its fiber-optic network within the City, pushing high-capacity fiber facilities closer to customers' homes and businesses. This network upgrade allows AT&T to provide faster broadband speeds, to increase network reliability, and to offer new services such as voice-over-Internet-protocol telephone service, and AT&T's "U-verse" video service.

B. The Administrative Record Establishes That The City Had No Legal Basis For Denying The Permits

The franchise rights afforded by section 7901 allow telephone corporations to construct their facilities in the public rights-of-way, subject only to the requirement that construction activities do not "incommode" (i.e., "unreasonably obstruct and interfere with ordinary travel" in) the public rights-of-way. *Pac. Tel. & Tel. Co. v. City & County of S.F.*, 197 Cal.App.2d 133, 146 (1961). There is no evidence that AT&T's planned facilities would "incommode the public use of the road or highway." Cal. Pub. Util. Code § 7901.

Similarly, while municipalities have "the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are *accessed*" (Cal. Pub. Util. Code § 7901.1) (emphasis added), the Challenged DPW Orders do not purport to be exercising reasonable control as to the time, place, and manner of AT&T's *access* to the public rights-of-way.² Instead, they simply deny AT&T such access.

² The reference in section 7901.1 to "time, place and manner" is to the regulation of "time, place, and manner" of construction activities, and was intended as a limitation on municipal authority. As the plain language of the statute makes clear, the "time, place, and manner" triad was intended to govern only utilities' "access" to city streets and

Indeed, the administrative record explicitly confirms that the City had no legal basis for denying AT&T's permit requests pursuant to its limited authority under Section 7901.1. The City's "time, place, and manner" guidelines are set forth in Exhibit B of the SMF Order. At the hearings on the permit applications for 996 Cayuga Avenue and 326 Craut Street, representatives of DPW testified under oath that AT&T "was in compliance with DPW's technical requirements and state and federal regulations."³

Further, the City's exercise of its limited "time, place, and manner" discretion in denying AT&T the Challenged Permits also violates Section 7901.1(b) of the Public Utilities Code. That section requires that the City's exercise of its discretion "shall, at a minimum, be applied to all entities in an equivalent manner." The record, however, establishes that AT&T's permit applications are not being treated in an "equivalent manner" as other entities by DPW.

In late 2013, DPW began routinely denying many of AT&T's permit applications on grounds not permitted by the Public Utilities Code, the Public Works Code, or the SMF Order. AT&T was subsequently informed by DPW that its SMF applications were being denied because

does not affect the basic right to install facilities in the public rights-of-way. Indeed, the legislative history confirms that "access," in the context of Section 7901.1, means access to the public-rights-of-way for the purpose of installing facilities. See Sen. Rules Comm., Office of Senate Floor Analyses, S. 1994-95 Reg. Sess. (Cal. 1995); *see also* Sen. Com. on Energy, Utilities and Communications, SB 621, S. 1994-95 Legs. Sess. (Cal. 1995) (finding purpose of section 7901.1 is to permit cities to regulate "traffic disruptions" arising from installation of utilities in the public rights-of-way). Time, place and manner regulation therefore extends only to maintaining flow of vehicular and pedestrian traffic during the period that utilities are being installed in the public rights-of-way. By wording the law in such a manner, the legislature was careful to focus the controls on construction, thereby avoiding any curtailment of the rights afforded by the time-honored Section 7901 statewide franchise rights. Section 7901.1 cannot—and does not—authorize city agencies to prohibit public utilities from exercising their franchise right to install utilities in the public rights-of-way. Moreover, the Legislature clarified in Section 7901.1 that local governments retain their authority to impose regulations with regard to the time, place, and manner of construction of telephone lines in public rights of way *only* so long as such regulations are "reasonable." Pub. Util. Code § 7901.1. As discussed below, the City's interpretation of the SMF Order is not reasonable, and is thus inconsistent with state law.

³ *See* Exs. A-B. The City has previously argued that it may also restrict the placement of facilities to protect the aesthetic character of the streetscape. While AT&T disputes that this manner of restriction was contemplated by the Legislature in passing Section 7901.1, the City has no basis for asserting that argument here. DPW expressly represented at the hearings that AT&T's permit application was in full compliance with Exhibit B of the SMF Order. Those guidelines provide in relevant part that "Surface-Mounted Facilities shall not unreasonably affect the aesthetic character of neighborhoods or the natural character of regional open spaces in accordance with the City and County of San Francisco General Plan." *See* SMF Order Ex. B (21). The Hearing Officer made no findings to the contrary.

AT&T was not submitting potential alternate locations with its initial SMF applications. Although the specific wording used to explain the denials varied from ruling to ruling, the thrust of the rulings was that other potentially feasible locations might exist for the installation of each cabinet and should be explored before any permit application is approved. AT&T, however, is the only entity whose SMF applications or Excavation Permits have been denied by DPW on the basis that it did not apply for multiple alternative locations in its initial permit application. *See* Exs. E-F. Indeed, DPW regularly approves SMF and Excavation permit applications by applicants who did not apply for multiple alternative locations in their initial applications. *See Id.*⁵ Because the record establishes that DPW has not exercised its discretion in an “equivalent manner” in denying AT&T’s permit applications, DPW’s actions are per se un-“reasonable” in violation of Section 7901.1(b).

In short, the Challenged DPW Orders prevent AT&T from using the public rights-of-way at the ten locations at issue in violation of Sections 7901, 7901.1, and 5885 of the Public Utilities Code. As a result, those Orders are unlawful and should be reversed.

III. The Challenged DPW Orders Violate Public Utilities Code §§ 7901 & 7901.1

The SMF Order gives DPW discretion only to approve AT&T’s proposed location for its facilities, approve a feasible alternate location identified through the specified notice and public hearing process, and/or recommend reasonable changes to the installation at one of the locations. Because DPW failed to approve any location for the placement of AT&T’s facilities or to recommend reasonable changes to the installations, both of the Challenged Orders violates the SMF Order and must be overturned.

⁵ Indeed, DPW has approved at least 125 SMF applications from such non-AT&T entities. None of these applicants applied for multiple alternative locations in their initial SMF permit applications. Exs. E-F.

A. DPW denied SMF permits without making any finding that the proposed locations would incommode the public right-of-way.

AT&T filed an application on October 18, 2013 to install its facilities in the vicinity of 996 Cayuga Avenue. Ex. A. Only one objection was received to the application was received by DPW. *Id.* At the hearing on the application on April 28, 2014, Arianna Urban of DPW stated that AT&T's application was in compliance with DPW's technical requirements and state and federal regulations. *Id.* At the hearing, only two people testified in opposition to the proposed location. *Id.* The objectors presented no evidence that the proposed SMF would incommode the public right-of-way. Instead, the objectors testified that an "[a]lternate location at 97 Onodaga Street is preferred." *Id.* AT&T requested that the Hearing Officer approve either the proposed location at 996 Cayuga Avenue or the alternate location identified by the objectors.

The SMF Order required that the Hearing Officer either (1) approve the original proposed location at 996 Cayuga Avenue, (2) approve the alternative location identified in the vicinity of 97 Onodaga, and/or (3) recommend reasonable changes to the installation at one the proposed locations. SMF Order § 3.E.3.b. Instead, despite DPW specifically testifying that AT&T's "application was in compliance with DPW's technical requirements," the Hearing Officer recommended disapproval of AT&T's application to locate an SMF at 996 Cayuga Avenue on the grounds that "[t]here is potential for the applicant, AT&T, to install the surface-mounted facility in other acceptable locations that may have less of an impact on the convenience and necessities of the property owners and occupants in the immediate vicinity of the surface-mounted facility" and because "[i]t remains unclear if there may be other locations that may cause the least inconvenience to tenants, property owners, and users of the public right-of-way.

The Hearing Officer further violated both SMF Order § 3.E.6 and Public Utilities Code sections 7901 and 7901.1 by failing to make any finding that either of the proposed locations

would incommode or otherwise obstruct the public right-of-way. Without such a finding, DPW had no legal basis for denying the SMF permit, and the Hearing Officer's recommendation therefore constitutes an abuse of discretion as a matter of law. *See Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 522 (holding that city agency abuses its discretion when findings do not justify administrative decision); *see also Prentiss v. City of South Pasadena* (1993) 15 Cal.App.4th 85, 97 (holding city abused its discretion by failing to grant building permit that met all requirements of the uniform building code).

Consistent with the requirement imposed by the SMF Order on the Hearing Officer, the SMF Order requires that, following the recommendation by the Hearing Officer, DPW approve a proposed location or inform AT&T that it will be required to make reasonable changes to the installation of its facilities. Instead, on May 27, 2014, DPW adopted the Hearing Officer's recommendation—refusing to approve either location in violation of the SMF Order.⁶ That decision violated the express provisions of the SMF Order and California law.⁷

Similarly, on November 15, 2013, AT&T filed an application to install an SMF in the vicinity of 326 Craut Street. Ex. B. At each of the subsequent hearings, Arianna Urban of DPW testified under oath that AT&T's application "application was in compliance with DPW's technical requirements and state and federal regulations." Likewise, AT&T reported that at least

⁶ In denying AT&T's permit applications, DPW has asserted that AT&T has not complied with the SMF Order because it failed to include in its initial permit applications to DPW alternative sites that were later identified as acceptable. DPW did not assert this as grounds for denying the permits in connection with any of the applications now on appeal, and has thus waived any such argument. Further, the SMF Order provides multiple mechanisms for identifying and evaluating alternate sites after a permit application has been submitted. For example, the SMF Order contemplates that additional locations may be identified at the Department hearing, and provides a specific procedure for addressing sites identified during the hearing. (Section 3.E.4. and 5.) This procedure allows the hearing officer to keep the hearing open for up to 20 days "to consider additional evidence concerning other locations identified during the hearing," requires DPW and AT&T to evaluate whether a newly proposed site(s) is acceptable within three business days after the hearing, and, if acceptable to DPW and AT&T, provides additional time for persons to object to the newly identified site(s). (*Id.*) Additionally, in connection with each of these appeals, DPW represented at the hearings that AT&T's application was in compliance with Article 2.4 of the Public Works Act and the SMF Order.

⁷ Prior to November 2013, DPW routinely approved SMF applications even when alternate sites were suggested during box walks or at hearings.

one alternative acceptable location had been identified by AT&T and the community, and requested that the Hearing Officer approve one of the proposed sites. *Id.* No members of the community testified at the hearing, and no evidence was submitted that AT&T's SMF would incommode the public right-of-way.

Rather than approve the proposed location at 326 Craut Street, the Hearing Officer recommended denial of all this application on the grounds that it was feasible that AT&T "could install the surface-mounted facility in other acceptable locations that might have less of an impact on the convenience and necessities of property owners and occupants in the immediate vicinity of the surface-mounted facility" and that "[i]t remains unclear if there may be other locations that may cause the least inconvenience to tenants, property owners, and users of the public right-of-way." *Id.* The DPW Director subsequently adopted the Hearing Officer's recommendation, and DPW denied AT&T's request for an excavation permit at 326 Craut Street. *Id.*

Nothing in the SMF Order gives DPW the authority, following a hearing, to deny an application on the basis that "other potentially feasible locations" might also be acceptable. Nor is such an interpretation of the SMF Order "reasonable." Such an interpretation would effectively permit DPW to deny every permit application on the grounds that other "feasible" locations might exist, a standardless truism that would apply in every instance. The practical result of such an interpretation would be an endless series of applications, hearings, denials, and instructions for the utility to file more applications with no end in sight.

Pursuant to the SMF Order, both DPW and the public had already received notice of AT&T's proposed installation and had the opportunity to identify and propose potential alternative sites. Alternative locations were identified that met all requirements and criteria.

See, Ex. A-B. After the hearing, the Hearing Officer was required by the SMF Order to “recommend that the Director either Approve one of the proposed locations . . . or Approve one of the proposed locations provided that the Applicant makes reasonable changes” SMF Order § 3.E.3.b. DPW was required, within 30 days after the hearing, to “notify the Applicant in writing which one of the proposed locations for the Surface-Mounted Facility the Director has Approved and whether the Director will require the Applicant to make reasonable changes to the installation of the Surface-Mounted Facility.” SMF Order § 3.E.7. Requiring AT&T to submit additional applications for alternative locations “for review by DPW and the Community” was not an option under the SMF Order or the Public Utilities Code. Because DPW failed to follow its own written rules and regulations in denying the Challenged Permits, DPW’s denials are invalid and must be reversed. *See Pacifica Corp. v. City of Camarillo* (1983) 149 Cal.App.3d 168, 181 (holding city abused its discretion by failing to proceed in the manner required by municipal code); *see also Amluxen v. Regents of University of California* (1975) 53 Cal.App.3d 27, 36 (administrative agencies must comply with their own regulations).

Further, because neither the Hearing Officer nor the Director made written findings that any of the proposed locations would incommode or otherwise obstruct the public right-of-way (the only lawful basis for denial), DPW’s denial of AT&T’s permit applications constitutes an abuse of discretion. *See Topanga Assn.*, 11 Cal.3d at 522; *see also Prentiss*, 15 Cal.App.4th at 97. As a result, DPW Orders 182458, 182456, 182398, and 182453 must be reversed and one of the locations proposed by AT&T approved for each application.⁸

⁸ To the extent DPW suggests that the Permit denials should be upheld on the basis that AT&T did not comply with procedural requirements of the new Ordinance that were not in effect at the time that AT&T submitted its applications, that argument must be rejected. The franchise offer made in section 7901 contains no conditions other than that the use shall not incommode the public right-of-way. It is not within the province of a municipality where such right is sought to be exercised to impose additional burdens or terms as a condition of its exercise. *In re Johnston* (1902) 137 Cal. 115, 120 (citing Cal. Const. Art. XI, sec. 19).

2. No evidence supported DPW's denials of AT&T's SMF applications.

A city agency abuses its discretion as a matter of law when its written findings denying a permit application are not supported by the evidence. *See Topanga Assn.* 11 Cal.3d at 515 (citing Code Civ. Proc., § 1094.5(b)). Because DPW's denials of AT&T's SMF applications for 996 Cayuga Avenue and 326 Craut Street are not supported by the evidence, these denials must be reversed and the permits granted.

DPW received only one objection to the proposed SMF in the vicinity of 996 Cayuga Avenue. The objection did not suggest that AT&T's proposed installation would obstruct the public right-of-way. The comments included concerns only that (1) the cabinet will lower property values, (2) there is already a cabinet across the street, and (3) the cabinet will be visible and will be an eyesore. At the hearing, the only testimony offered by protestors was that they preferred that the cabinet be located at an alternate location at 97 Onodaga Street. Ex. A. Similarly, DPW's representative confirmed at the hearing that AT&T's application to locate a SMF at 996 Cayuga met all of DPW's technical requirements. The only grounds under state law for which a telecommunications excavation permit can be denied are that a facility would incommode the public right-of-way. The hearing officer made no such finding regarding the proposed location at 996 Cayuga. Because DPW's denial of AT&T's permit is entirely unsupported by the evidence, DPW Order No. 182608 must thus be reversed.

DPW's denial of AT&T's application to install a SMF at 326 Craut Street is similarly flawed. DPW received only three objections to the application. The comments and objections included (1) an additional cabinet would not be in the best interest of the neighborhood, (2) the cabinet is an eyesore, and (3) the cabinet "[a]tracts unruly people who drink alcohol and do drugs." Ex. B. No one testified in opposition to the proposed SMF at the hearing. Instead,

Arianna Urban of DPW testified that AT&T's application was in compliance with DPW's technical requirements and state and federal regulations. *Id.* Accordingly, whether considered under the SMF Order or the New Ordinance, the lack of any evidence in the record supporting DPW's decision requires that DPW Orders No. 182598 be reversed.

IV. DPW's Extensive Delays Also Violate The Public Utilities Code

California law provides that applications by a franchised video provider like AT&T for a permit to place its network facilities in the public rights-of-way must be acted upon within 60 days. Pub. Utils. Code § 5885(c)(2). Instead, it took DPW approximately 221 days to act upon AT&T's installation to install facilities in the vicinity of 996 Cayuga Avenue and approximately 187 days to act upon AT&T's application to install facilities in the vicinity of 326 Craut Street. Such delays are not a reasonable exercise of the City's time, place, and manner control under Public Utilities Code section 7901.1, nor do they comply with section 5885. Because DPW did not act upon the applications within the statutorily prescribed time, the Challenged DPW Orders must be reversed, and AT&T's applications approved.¹⁰

CONCLUSION

DPW's failure to adhere to the SMF Order as well as requirements of the California Public Utilities Code frustrates AT&T's well-settled rights to place its facilities in the public rights-of-way, and obstructs the ability of the City's residents to receive new, cutting-edge communications services. The Challenged DPW Orders should be reversed and AT&T's proposed locations approved such that AT&T may apply for excavation permits at these locations.

¹⁰ Contrary to DPW's suggestion at prior hearings, AT&T has never agreed to waive its rights under Public Utilities Code § 5885(c)(2).