I. INTRODUCTION.

Appellants 2298 Pacific, Inc., and Property Management One, on behalf of 2298 Pacific, Inc. and every Officer, Shareholder and resident of 2298 Pacific[1] and Barbara Blumenfeld, Greg Worthington, Suzanne Donlon, James H. Greene, Jr., and Jonathan Hershberg respectfully submit this Appeal of 18WR-0296.[2]

The Department of Public Works ("DPW") was legally barred from approving Verizon's Application for a Personal Wireless Service Facility ("PWSF" or "cell tower") Site Permit. Verizon failed to meet the legal requirements for obtaining the permit, the Department of Public Health ("DPH") and the Planning Department ("Planning) made incorrect determinations and the evidence is that Verizon intends to modify the PWSF after the permit is issued in a non-complying manner. This Board cannot uphold the permit unless it is willing to ignore Article 25, FCC guidelines, the mandatory General Plan, binding contracts and other relevant law.

Those who pursue and enable this cell tower's installation do so **knowing** that they will cause harm and prevent a California landlord (2298 Pacific, Inc.) from fulfilling its legal obligations, including those to maintain and repair an 8-story exterior. They will be responsible for injuries to not just residents and their children, but to the drivers, bicyclists, tourists and other pedestrians below, including the **children and their families from seven different schools**.[3] They

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[1] This includes the Shareholders and residents of Apartments 1-N, 1-S, and 2-8.
[2] In lieu of filing seven separate 12-page briefs (or 84 pages), Appellants have combined arguments and evidence into one brief.
[3] Within about one block and a half of the proposed cell tower are Stuart Hall for Boys, Convent of the Sacred Heart, The Hamlin School, Stuart Hall High School, Covent High School, the SF Public Montessori School and Calvary Nursery School.

will be liable for millions of dollars of damage, including punitive damages. According to the General Plan, this cell tower, which is Adjacent to Landmark #38, will destroy, not just "detract from" aesthetic attributes and unique characteristics. It will also violate approval conditions, including the condition that views and light not be blocked. Fraud should also vitiate this permit.

II. BECAUSE OF VIOLATIONS OF THE LAW AND BREACHES OF CONTRACT, PERMIT REQUIREMENTS ARE NOT MET.

Applicants must comply with Article 25, a Utility Conditions Permit ("UCP"), a Master License[4] and all other Federal, State and City law.[5] See e.g. UCP §3.5 (failure to comply with Applicable Law is breach of a material condition) and §4.5 ("Permittee Shall Comply with Applicable Law"). See also Master License, §5.1 (use is "subject to all applicable Laws"), §13 (Compliance with Laws), §13.5 (Licensee must cause the License Area to be used and occupied in accordance with all applicable Laws) and §13.9 (Compliance with Other City Requirements). Verizon specifically agreed that its obligation to comply with all Laws is a "material part of the bargained-for consideration," "irrespective of the degree to which such compliance may interfere with its use or enjoyment of the License Area..." §13.1.2.

Section 4.2 of the UCP provides: "Permittee may not place Facilities in the Public Rights-of-Way in a manner or in any locations that are inconsistent with...Applicable Law or in such a way as to interfere with or incommode public use of the Public

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[4] §1500(b)(2)(A) of Article 25 requires a UCP. The UCP that Verizon submitted as part of its Application is Ex. 1. Verizon also submitted "Exhibit A FORM OF POLE LICENSE" with its Application (Ex. 2 hereto), referencing a Master License. 2298 Pacific asked the SFPUC to provide the entire Master License. It provided Ex. 3.

[5] DPW Order No. 184504 ("Order"), §2B2 defines "Applicable Law" to include all federal, state, and City laws and all requirements in the UCP.

Rights-Of-Way."[6] Public Utilities Code §7901 also prohibits a PWSF that "incommodes."[7] In its April 2019 decision, *T-Mobile West LLC v. City and County of San Francisco, 5238001,* upholding the City's right to deny permits for cell towers, the California Supreme Court recognized that "incommode" means to give inconvenience, or trouble, or to disturb or molest in the quiet enjoyment of something. It stated: "For example, lines or equipment might generate noise, cause negative health consequences or create safety concerns. All these impacts could disturb public road use, or disturb its quiet enjoyment."

Similarly, the Master License, §5.2, bars use or occupancy of the area in any unlawful manner or for any illegal purpose or in any manner that constitutes a nuisance and requires that all precautions to eliminate nuisances or hazards be taken. A nuisance includes an obstruction to the use of property so as to interfere with the comfortable enjoyment of life or property. Civil Code § 3479. Virtually any disturbance of the enjoyment of property may amount to a nuisance. **Mere apprehension of injury from a dangerous condition may constitute a nuisance where it interferes with the comfortable enjoyment of property.** See e.g. *McIvor v. Mercer-Fraser Co.* (1946) 76 Cal.App.2d 247, 254. See also Master License §6.7 (right to disapprove where equipment would create a hazardous or unsafe condition) and §27.3.1 (right to terminate where use adversely affects or poses a threat to public health and safety or constitutes a public nuisance).

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[6] "Public Rights-Of-Way" includes "the area in, on, upon, above, beneath, within, along, across, under and over..." UCP §1.1.22. (Ex. 1).

[7] Pub. Util. Code §2902 protects the City's right to supervise and regulate the relationship between a utility and the general public in matters affecting health, convenience and safety. Pub. Util. Code §7901.1 gives the City the right to exercise reasonable control as to the time, place, and manner in which roads are accessed.

The Appellants are third party beneficiaries of these contracts, which are "to protect and benefit the public health, safety and welfare." See e.g. SF Admin. Code §11.9. The Applicant violates these permit requirements and breaches these agreements because its cell tower will incommode and, at a minimum, constitute a nuisance, trespass and tortuous interference, if not an inverse condemnation.[8]

2298 Pacific, Inc. operates a community apartment house at 2298 Pacific Avenue. It has numerous legal obligations as a California landlord who runs an 8-story Class A building worth tens of millions of dollars. See e.g. Civil Code § 1941 and §1941.1(a)(1) (duty to waterproof and weather protect exterior and windows). The pole selected by Modus' Agatha is on the Northeast corner of the intersection of Webster and Pacific but about 8 feet from the Southwest corner of the building, an unprotected area that experiences maximum wind, rain and heat. This microclimate[9] requires extensive maintenance and repairs of the exterior to assure structural integrity and to protect against water intrusion, mold and other damage. Over the years, at a cost likely in excess of $1 million, 2298 Pacific has undertaken various exterior maintenance and repair projects. Such work requires access to the exterior of all 8 stories. Last year, 2298 Pacific commenced another

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[8] 2298 Pacific Inc., its shareholders, officers and residents have already incurred thousands of dollars of damages as a result of this improper Application. They hereby reserve all of their rights and remedies against all potential defendants in this matter, including, but not limited to, Modus, Agatha Kehayas ("Agatha"), Hammett & Edison ("H&E"), Rajat Mathur, Neil Olij, MacKenzie & Albritton, Borges Architectural Group, Advance Sim, Verizon, all Verizon-related entities and agents and all other responsible individuals and entities.

[9] Verizon submitted specifications for equipment advising against its use in microclimates. Ex. 4, p. 8. If Verizon had honored Order §4 encouraging meetings with residents in advance of filing Applications, it could have learned why this is a bad location for a PWSF.

important and expensive waterproofing project on all four sides of the building. Because of a pole also about 8 feet from the West side of the building, 2298 Pacific was prevented from completing the project that it finished as to the other three sides because it put workers too close to power lines. For aesthetic reasons, 2298 Pacific has been trying to underground these wires for some time. The undergrounding became essential last year given the need to finish this important project and all other maintenance and repairs on the West exterior. 2298 Pacific has given PG&E an engineering advance payment for the undergrounding.

The proposed PWSF would also be about 8 feet from the wall of 2298 Pacific where elementary school children sit. It would of course be significantly closer to workers on scaffolding. Verizon's expert, EBI Consulting, has found that FCC guidelines are exceeded at 9 feet for the antenna Verizon says it will use. See e.g. Ex. 5. If this permit is upheld, residents and school children will suffer exposure in excess of FCC guidelines,[10] as will workers who need to access the exterior of all 8 stories. Workers will again be unable to complete the waterproofing project and other essential maintenance and repairs on the Western exterior. When Verizon activates the third direction of its tri-directional antenna, this problem will then extend to the Southern exterior of the building. Putting the distressing issue of physical injuries to residents and school children aside, 2298 Pacific and its residents will suffer millions of dollars of damages, including water and structural damage, as well as mold and damage to personal effects. Preventing 2298 Pacific

[10] Appellants reserve all rights to claim that exposure standards should be more stringent than FCC guidelines. As discussed below, 47 U.S.C. §332(c)(7)(B)(iv) is inapplicable in this case. There is no federal preemption.

from maintaining and repairing its exterior will endanger drivers, bicyclists, tourists and other pedestrians below, including **schoolchildren from 7 schools.** It will also degrade neighborhood aesthetics.

Verizon, Modus, H&E, and their lawyers have taken and continue to take action to install this PWSF with full knowledge of the danger and damage they will cause. They intend to breach agreements to which Appellants are third party beneficiaries. They will intentionally and illegally prevent a landlord from fulfilling its legal obligations. They will intentionally and illegally cause: injuries from exposure in excess of FCC guidelines; a nuisance; emotional distress; trespass and interference with contractual relations, prospective business and economic relations. Punitive damages will be appropriate. The City risks liability for an inverse condemnation.[11]

Verizon, Modus, H&E and their lawyers understand these risks and the damage that will ensue and thus refuse to provide written assurances or to indemnify 2298 Pacific, its residents and officers. Ex. 6[12] # 5-6, 8-9; Ex. 8, #104, 105. Also, as discussed herein, Verizon's agents have engaged in fraudulent conduct. This too is a breach of a material condition under UCP §3.5(g) and should vitiate this permit. See e.g. *U.S. v. Throckmorton,* 98 U.S. 61 (1878) (fraud vitiates). Because of its violations

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[11] See also Government Code § 835 (liability of public entities) and §815.6 (public entity liability for failure to perform mandatory duty).

[12] At the 1/28/19 hearing, Verizon, Modus, the City and H&E were ordered to answer questions and provide documents. Verizon's responses to questions are Ex. 6 and referenced as "VR". Verizon's responses to document requests are Ex. 7 and referenced as "VD." H&E's responses to questions are Ex. 8 and referenced herein as "HR." H&E's responses to document requests are Ex. 9 and referenced herein as "HD". Modus simply ignored requests for documents and information. Agatha, a self-described "agent" of Verizon, did not provide required information even when DPW asked her to do so. Exs. 11 and 10. This may constitute another breach of a material condition of the UCP. Ex. 1, §3.5(i).

of the law and breaches of contracts, Verizon cannot meet its burden to show compliance with all permit requirements.

III. DPH'S DETERMINATION WAS IMPROPER AND INCORRECT.

As set forth below, Verizon's Application was not Complete and DPW had no ability to refer it to DPH. See Order §6A4 and 6E. Also, DPH's improper and premature determination appears in a short 10/29/18 memo by Arthur Duque ("Arthur") which approves an antenna that was declared "OBSOLETE" and discontinued about a year earlier and which was for a steel, not concrete pole. Exs. 12-13. On these grounds alone, DPH's determination was incorrect.

Putting these important issues aside, DPH's determination was also incorrect because it relied entirely on unsupported presumptions in a 9/11/18 "report" by conflicted H&E that is, at least, unreliable, if not fraudulent. Ex. 14. There is no evidence that H&E is trustworthy. Its finding emissions exposure below FCC standards for another facility near a school is being investigated. Multiple children and teachers in that Ripon school community now have cancer. Ex. 15. Moreover, as discussed below, Arthur's determination is inherently unreliable because **for years he has failed to verify the representations in H&E's reports, including what emissions these cell towers actually produce once installed, despite for years making that a condition of his approvals.**

Verizon's agents repeatedly misrepresent that H&E is "an independent third party" and that the City conducts an "independent review" to assure compliance with FCC guidelines. The truth, however, is that H&E is paid by and works for

Verizon and is represented by Verizon's lawyers.[13] It is not "independent." It has a conflict of interest.[14] Nor does the City conduct an "independent review." Asked to identify all work that the City, including DPH, did to verify its results and conclusions, H&E could identify nothing. Ex. 8, #32. See also Ex. 9, p. 10, #q and p. 11, #u. Arthur's memo itself reflects absolutely no independent analysis or verification of H&E's measurements, calculations or assumptions. It nowhere answers obvious questions about H&E's methodology or conclusions. It appears to be just a form that quotes H&E. Asked to provide all documents to support the conclusions in his determination, Arthur merely produced identical copies of the H&E "report." Ex. 18. Asked to provide all documents proving the reliability of H&E reports, he could produce nothing. Ex. 19.

H&E, who must "protect and safeguard the health, safety, welfare and property of the public", is obligated not to misrepresent data and/or its relative significance in any report and is prohibited from knowingly permitting its work from being used for an unlawful purpose and from falsely injuring others. California Code of Regulations Title 16, Division 5 §475 and §475(c). It has violated these obligations.

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[13] Agatha misrepresented both that H&E would answer questions before and at the hearing. She then refused to make an engineer available before the hearing. Ex. 16. At the hearing, H&E's Rajat Mathur refused to answer even a basic question as to who did the work in the H&E report and demanded that all questions be addressed to Verizon's lawyers instead. Notably, H&E's written responses to questions and document requests came from Verizon's attorneys, not H&E. Ex. 17.

[14] H&E would not answer questions about its relationship with Verizon or how it is compensated. Ex. 8 #2-10. Verizon would not provide its contract with H&E, any information about its communications with H&E, how it compensates H&E or what directions, documents or information it gave H&E for the "report" on which DPH relied. Ex. 7 #27-29; Ex. 6 #29.

H&E's "report" is intentionally misleading. **H&E admits that no one from H&E actually measured human exposure to radio frequency at 2298 Pacific.** Ex. - #18. Thus, H&E cannot answer basic questions as to when, by whom, how, with what devices, under what conditions, and at what locations the alleged measurements were made. Ex. 8 # 18, 64, 70, 76, 83.[15]

Despite its representations (and in apparent violation of the Master License[16]), **H&E also failed to consider the exposure results from the cumulative effect of Verizon's equipment added to all other sources of RF or EMF** on or near 2298 Pacific. In fact, **H&E admits that it did not actually consider "any sources of radio frequency emissions exposure at 2298 Pacific."** Ex. 8, #23. H&E admits it did not consider nearby antenna or any sources of radio frequency emissions within 2298 Pacific. Ex. 8 #24-25, 29.[17] H&E admits that it merely "**presumes**" that the current cumulative radio frequency emissions exposure is "well below the FCC public limit." Ex. #21. Asked to describe the "existing radio frequency energy," H&E merely repeats its **presumption.** Ex. #59. Asked to identify all current sources of radio frequency emissions exposure at 2298 Pacific, an intentionally evasive H&E says "there are presently no known **licensed** sources." Ex. #22. Asked to list all existing and proposed antennas and all other sources of radio frequency emissions

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[15] This is contrary to Planning's assurances that, among other things, such RF reports consider exposure at the upper stories of residences closer to the antenna. Ex. 20, p. 11.

[16] The Master License, § 13.7 requires compliance with all Laws related to RFs and EMFs "on or off the License Area, including all applicable FCC standards, whether such RF or EMF presence or exposure results from Licensee's Equipment alone or from the cumulative effect of Licensee's Equipment added to all other sources on or near the License Area." Ex. 2. H&E's report does not even purport to address EMFs.

[17] H&E admits it did not interview anyone from 2298 Pacific for its "report" or consider output from all proposed, but not yet installed PWSFs. Ex. #27 and 25.

that H&E considered in determining cumulative radio frequency energy at 2298 Pacific, H&E admits **it considered nothing**, simply repeating "there are presently no known **licensed** sources." Ex. #52.

H&E must know that measuring cumulative exposure includes measuring exposure from **all** sources, licensed or not and both within and beyond 100 feet. Planning admits that PWSFs have a range up to 500 feet and that macro facilities can have a range up to a mile. Ex. 20, p. 8. The 100 foot limit in the report makes no sense. Asked whether questions other than those posed in the report need to be answered "to truly know the cumulative exposure to radio frequency emissions at 2298 Pacific" and if so, what those questions are, H&E evaded the inquiry, dodging: the "questions were posed by the DPH." H&E cannot legally, professionally or ethically hide behind this excuse. See e.g. Cal. Code of Regulations Title 16, Division 5 §475 (c)(7), (c)(9) and (c)(11).

Nor is it credible that H&E believed there were no licensed sources. According to Planning, by just 2015, there were already "approximately 700 existing micro or macro...sites in San Francisco, each with between 1 to 16 panel antennas...[and] approximately 383 existing wireless facilities..." Ex. 20, p. 8. H&E no doubt did the reports for many of these facilities. For example, Planning specifically mentions a macro facility at nearby 2001 Sacramento. Ex. 20 p. 9 (8/15 version). H&E did the report for that facility. Ex. 21. Moreover, there are facilities at 2288 Broadway, a little over a block away, which have a combined power output of over 17,000 watts. Ex. 22. H&E did the report for 2288 Broadway. Ex. 23. An incomplete map also reflects macro facilities on nearby Union and Buchanan at 16,650 watts, on

Broadway and Gough for another 16,650 and two on Union at Fillmore and Octavia each at 7182. Ex. 24. There are likely others. H&E obviously was aware of these facilities but intentionally ignored them. **No reasonable person would conclude that H&E proved compliance with FCC guidelines when it admits it ignored all sources of radio frequency energy.**

In addition, work by one of Verizon's other engineering firms undermines H&E's "report." For the same antenna at nearby locations, EBI Consulting warns that **FCC limits are exceeded at 9 feet** not the mere 3.5 feet that H&E claims. Ex. 5.

Even H&E's own reports undermine its conclusions. Its other reports warn of exposure exceedance at 7 feet for this antenna, double the 3.5 it claims for 2298 Pacific. Ex. 26. H&E claims that "power density levels decrease rapidly with distance" Ex. HR #24. However, in a report for the **same antenna** measured at a distance of 65 feet (**5 times further away** than the alleged 13 feet at 2298 Pacific) H&E concludes that no one should be within **7 feet** from it, **double the distance** it recommends for the same antenna at 2298 Pacific.[18] Ex. Similarly, H&E admits in its other reports that the same antenna produces at least **double** the wattage, while the specifications for the antenna indicate that the maximum power output could be several times greater. Exs. 26 and 12. Not surprisingly, neither H&E nor Verizon has provided any documents supporting the conclusions that it is safe to be 3.5 feet away from this antenna or that the maximum effective radiated power is only 110

[18] Even Planning admits that the general public should remain between 4-8 feet away with this 4 foot range apparently assuming a system of only 66 watts when reports show that this antenna is capable of producing at least 220 watts. Ex. 20, p. 11 and Ex. 26.

watts or that it will only transmit in AWS and PCS or that it will not be aimed directly at 2298 Pacific or schoolchildren. Ex. 9 p. 6 # f and p 5# e, pp.6-7 #h.[19]

Moreover, other evidence exists that H&E drastically underreports wattage to get approvals. For example, for 2288 Broadway, H&E claimed the maximum effective radiated power was 13,840. The City's map says the wattage is closer to 17,000. Exs. 22-23. The Ripon students and teachers with cancer no doubt also believe that H&E drastically underreports exposure. See Ex. 15.

H&E's representations about the equipment to be used will likely also prove fraudulent. Its report is for a CommScope Model 3X-V65S-G-3XR for a steel, not concrete pole. Exs. 12 and 14. In its 2018 Application, Verizon provided the City with **2014** specifications for this antenna warning that they were "for illustrative purposes only" and would be "updated prior to publication." However, the manufacturer had already declared the antenna "OBSOLETE" and "discontinued" in 2017, at least 9 months before H&E did its "report". Ex. 12.[20]

DPH also relied on this untrustworthy "report" when it ignores emissions exposure under what any reasonable person can see are going to be the real conditions if this "OBSOLETE" antenna is installed. The antenna is tri-directional

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[19] Planning states "the maximum ERP wattage assumes the antenna is operating at maximum capacity..." Ex. 20, p. 12. H&E's own reports undermine its representation that it considered the maximum capacity since its own reports show the same antenna producing twice the ERP. Ex. 8 #103, 71.

[20] H&E represents that "the antenna is the only element that emits RF energy." Ex. 8 #43. Verizon's specifications for the transmitting equipment, however, warn that this equipment "emits RF EMF during operation." Ex. 27. The specifications also warn "installing the MRRUs close to other electronic equipment can cause interference." Ex. 27. Residents near installed facilities have complained about interference. Such interference also incommodes and is a nuisance.

and capable of producing many times the wattage reflected in the H&E "report." Ex. 26. H&E merely represented, with no reliable support for its representations, that only two directions would be activated, that the antenna would only be operated at a fraction of the possible wattage and that it would only transmit in two frequency bands and in certain "principal" orientations. Ex. 14. Neither it nor Verizon produced a single, reliable document to prove that any of these crucial presumptions are correct. See e.g. Ex. 9, p. 4#c, p. 5#e and Ex. 7, #27-29. When the third antenna is activated or the antenna is operated at full capacity or in different frequency bands or aimed at 2298 Pacific or school children, it will produce many times the exposure assumed. Although Verizon's agents orally represented both that the antenna would never be operated in a tri-directional manner and that Verizon would never increase emissions from the facility, Verizon's lawyers notably refused to confirm those oral representations in writing. Ex. 6, #7, 14. Similarly, asked to provide a declaration "that there will never be an increase in the effective radiated power from the PWSF that is the subject of the Application," Verizon refused. Ex. 6, #12. Asked to provide assurances that 2298 Pacific would be given meaningful notice and an opportunity to prevent an increase in advance and to explain when and how such notice would be given, Verizon refused. Ex. 6, #12-13. Asked why it would install a tri-directional antenna if it only wants the antenna to operate bi-directionally, Verizon evaded the question. Ex. 6, #18. Common sense impels one to conclude that Verizon would not install a tri-directional antenna that powerful only to operate it bi-directionally and at a fraction of the wattage possible and that it is using at other locations. Verizon can merely activate a direction aimed right at 2298

Pacific and school children or otherwise increase emissions or transmit in other bands, including those for which FCC guidelines are more stringent. No one will know unless Verizon volunteers that it is doing so. Given the misrepresentations and intentional concealments of information that have occurred, it is not reasonable to rely on Verizon to self-police. Nor should one expect conflicted, untrustworthy H&E to undermine its important client or to declare that its previous representations were false. It is concerning that the City could ever be content to rely on the conflicted H&E to merely confirm its previous representations.

Nor should anyone expect the City to police Verizon. **Although Verizon's lawyers repeatedly represent to hearing officers, this Board and to others that DPH conditions requiring post-installation RF measurements "ensure that the Facility will not exceed FCC limits on RF emissions," the truth is that Verizon does not give DPH post-installation RF measurements showing compliance with FCC guidelines and the City does not even track what happens to a PWSF after it is installed.[21] DPH hasn't verified an installed PWSF's compliance with FCC guidelines as required by its approval condition for years, if ever.** Consider these disturbing admissions:

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[21] Planning answers the question "What about safety from radio-frequency emissions?" by falsely assuring the public that DPH reviews "field testing from the antenna during operations, if approved and installed." Ex. 20, p. 11. H&E similarly misleads. Asked what would happen if 2298 Pacific had concerns about exposure after the PWSF was installed, H&E falsely assured it: "DPH has attached a condition to the tentative approval that states 'once the antenna is installed, Verizon Wireless must take RF power density measurements with the antenna operating at full power to verify the level reported in the [H&E] report and to ensure that the FCC public exposure level is not exceeded in any publicly accessible area.'" Ex. 8, p. 21, #92.

1) In 2017, DPW complained that it was lacking Statements of Compliance with the Public Health Compliance Standard ("PHCS") and other required notices and photographs for about 80% of installed Verizon facilities. Verizon was told to put such information into a spreadsheet. Ex. 28.

2) Over two years later, (March 2019), the City confirmed there still was "no spreadsheet or other document with post-installation data, including a spreadsheet or other document with any information concerning post-installation compliance with the PHCS." Ex. 29.

3) DPW admitted as recently as March of 2019 that, despite the **mandatory** obligations under Article 25[22], **it does not track when an actual installation takes place or what happens after a PWSF is installed (i.e. the installed PWSFs RF emissions). DPW can't even tell which Application actually resulted in an installed PWSF.** DPW further admitted "there is no information kept about the cumulative impact of the currently installed and operating PWSFs" and that "there are no documents that compare pre-installation with post-installations RF reports." Ex. 29.

4) DPH could not provide post-installation reports. DPH concealed from Appellants, who had an outstanding public records request for reports, that **Arthur (and thus DPH) had never received a single, required post-installation test result confirming compliance with FCC**

[22] DPW is required to track what happens to a PWSF after it is installed and among other things, assure compliance with the permit. See e.g. §1516 (Notice of Completion and Inspection) and §1517 (Compliance) and Order, § 16 (Installation) and §18 (Inspection).

guidelines in his entire 2 year tenure in this program at DPH![23] Ex. 31. Shockingly, it appears that DPH never cared about this or mentioned it until Appellants' public records request caused concern that citizens might uncover this fraud. Ex. 31.[24] Arthur's ignoring required post-installation testing to confirm compliance with FCC guidelines for two years speaks volumes as to the reliability of his determinations. It only confirms that DPH merely accepts H&E's representations without questioning anything, including whether its mere presumptions actually bear out in real world conditions and whether H&E's representations, including about the equipment Verizon is going to use and how it is going to use it, ever prove truthful.

5) Six minutes after a public records request for his emails with Agatha closed on March 21, 2019, Arthur sent Agatha an email with a subject line referencing the prior two years entitled, **"2017 and 2018 Post reports for all approved DPW sites after installation." In this email, he admitted that although DPH's approval conditions required post-**

[23] Arthur is the only person in the radio-frequency program at DPH. Ex. 30.

[24] Despite Govt. Code §6253(d) and the Sunshine Ordinance, DPH did what it could to obstruct and delay in response to this request. First, it indicated that it couldn't answer the request because "PWSF" and "FCC" were acronyms when DPH certainly should have understood these references. When Appellants jumped over that hurdle and spelled out the terms for DPH, DPH then claimed that there were so many responsive documents (when in fact, it had none) that Appellants needed to furnish specific addresses and a time frame. Of course, DPH knew it was DPH, not the Appellants, who are supposed to know where the installed PWSFs are located and when they were installed. When Appellants persevered, DPH then misleadingly claimed that there are "no records that I can give you that are different from DPW," without disclosing that DPH in fact had **no** post-installation records. DPH then closed the request without providing a single document. Ex. 33.

installation tests showing FCC compliance, "DPH has not been getting them to see if they do comply with the FCC public standard." Ex. 34.

6) In a March 21, 2019 email to DPW's Leo Palacios ("Leo"), Arthur admitted: **"DPH has not been getting any of the post-test results since I've been in this program**...There is no notification process to inform DPH ...that a review is needed...I would like to streamline this process so that DPH knows when these sites 'go active' and if they are in compliance with the FCC Public Standard." Ex. 31. Leo registered no surprise. Ex. 32. He had to have known that DPH was not getting these reports.[25]

7) In an improper ex parte communication to the Hearing Officer, Verizon's attorney admitted "DPW could revoke the permits for Proposed Facilities if [post-installation testing] conditions are violated." Ex. 38.

This situation is extremely distressing, to say the least.[26] This Board cannot risk further endangering SF residents and in this case, thousands of **children from 7 different schools**, given this record, including H&E's role in blessing a facility near a school where children and teachers now have cancer. And this Board should be very

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[25] Leo met with Verizon's attorney, Melanie Sengupta ("Melanie") that same day, March 21, 2019. Ex. 35. Appellants filed a public records request for all emails between them for Immediate Disclosure. DPW invoked an extension "because of the voluminous nature of the request." It then said the request was closed because there are "no documents responsive to your request." This false representation violative of the Public Records Act and Sunshine Ordinance was no doubt made to further prejudice Appellants. Not surprisingly, DPW refused to state what search it allegedly conducted to conclude there was not a single email. Ex. 36. DPW also withheld Leo's emails with Arthur, Agatha and the hearing officer on attorney-client/work product grounds. None of them are attorneys. DPW won't furnish information, even dates, so that claims of privilege/work product can be validated. Ex. 37.

[26] Mere apprehension of injury from a dangerous condition may constitute a nuisance where it interferes with the comfortable enjoyment of property, as here.

troubled by the many misrepresentations that have been made to it and continue to be made to it. See e.g. Ex. 39, p. 4 ("This condition ensures that the Facility will not exceed FCC limits on RF emissions.") The truth is that Verizon and H&E have known that they can make any representation they want. They know that DPH will not assure post-installation compliance with FCC requirements or verify H&E's claims as required by DPH's condition of approval. See e.g. Exs. 28-29, 31-32 and 34.

Although H&E represented in its "report" that its findings for this antenna are "consistent with measurements of actual exposure conditions taken at other operating nodes," it failed to provide any documents to support this representation or even the addresses of these alleged nodes so that information could be requested of DPW.[27] Ex. 9 p. 9#n and p. 8 #L and Ex. 8, #91b. Its representation may of course be fraudulent given the evidence that Verizon doesn't actually do the required post-installation testing and DPH doesn't confirm post-installation compliance with FCC guidelines. Exs. 28-29, 31-32 and 34. It is also on its face suspect given that Verizon stated in its 2018 Application that it was using this antenna "for the first time" while the antenna had already been declared "OBSOLETE" and discontinued the previous year. Exs. 12 and 40. Asked to provide all documents to support **any** of the conclusions on which DPH relied, H&E did not produce a single document. Ex. 9.

H&E's work has also been discredited in other jurisdictions, in addition to Ripon. Ex. 107. And, as discussed below, its "report" was not properly verified. Also troubling are H&E's efforts to conceal its methodology, refusing to explain its calculations on the grounds that they are "proprietary."

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[27] DPW needs addresses because it has no idea where the installed PWSFs are.

Like H&E and DPH, Verizon, Modus, Planning and DPW were all given opportunities to demonstrate this PWSF's compliance with FCC guidelines. None could. Planning and DPW admitted that they had no documents to support any of H&E's conclusions. Ex. 41. Similarly, Modus produced nothing. Exs. 10-11. Verizon, like H&E, refused to reveal "the amount of all radio frequency emissions to which the residents of 2298 Pacific are currently exposed." Ex. 6, #21. It would not state "the amount of all radio frequency emissions to which the residents of 2298 Pacific will be exposed if all of the proposed PWSFs in San Francisco are approved." Ex. 6 #22. It refused to say whether there "are there any base stations, and/or operational radiating antennas near 2298 Pacific that are already exposing the residents of 2298 Pacific to radio frequency electromagnetic fields." Ex. 6, #20. It refused to provide a reliable declaration under penalty of perjury that the proposed PWSF will never cause the residents of 2298 Pacific or any of its workers, agents, property managers or contractors to experience any exposure to radio frequency emissions that exceed FCC guidelines now or in the future or to explain why it will not do so Ex. 6 #5-6. It would not provide a single document: "showing the amount of radio frequency emissions to which the residents of 2298 Pacific are currently exposed" or "showing the amount of radio frequency emissions to which the residents of 2298 Pacific will be exposed given proposed and anticipated PWSFs in San Francisco." Ex. 7, #4. It refused to provide "a list by address of all existing facilities that produce radio frequency emissions to which the residents of 2298 Pacific are currently exposed and to identify by address the amount of emissions produced." Ex. 6, #1.

No one, not H&E, DPH, DPW, Planning, Modus or Verizon can provide any reliable information or documents that support the conclusion that exposure at 2298 Pacific will comply with FCC guidelines.

The pole at issue is about 8 feet from 2298 Pacific's brick wall where elementary school children sit. Verizon conceals the fact that it intends to install a pole that is wider than the existing pole, while the cell tower will extend out still further from that wider pole, bringing the pole and antenna closer to 2298 Pacific. EBI found that **FCC guidelines are exceeded at 9 feet** for this same antenna. Ex. 5. This PWSF will expose people, including young schoolchildren, to emissions in excess of FCC guidelines. Also, workers using scaffolding or swing stages to conduct required maintenance and repairs on the building will be even closer to the antenna and risk exposure in excess of FCC guidelines. Similarly, 2298 Pacific's arborists and others who work on its trees that are next to the proposed PWSF will risk exposure in excess of FCC guidelines. 2298 Pacific, Inc. will be prevented from conducting legally required maintenance and repairs. See Civil Code § 1941 and 1941.1(a)(1). Millions of dollars of damage will ensue.

For the many reasons detailed above, it is clear that Verizon did not meet its burden to prove compliance with FCC guidelines and that DPH's premature and improper determination incorrectly found compliance with the PHCS.[28] Indeed,

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[28] Verizon also failed to prove that "noise at any time of the day or night from the proposed" PWSF "is not greater than forty-five dBA as measured at a distance three (3) feet from any residential building facade." §1502. It provided an 8/13/18 "Environmental Noise Study" that states, "The observations in this report are valid on the date and time of the investigation..." Ex. 42. The report is not currently valid. Nor does it even claim to have measured noise at a distance three feet from 2298 Pacific. Its noise study assumed an antenna at 33.5 above ground level when H&E

DPH's determination is inherently untrustworthy in light of the revelation that **for years** it ignored the condition that it puts in its approvals, failing to assure compliance with FCC guidelines and to verify H&E's representations.

IV. PLANNING'S DETERMINATION WAS INCORRECT.

Planning had no ability to issue its determination because, as described below, Verizon's Application was not Complete, and included improper drawings and photo simulations with a cell tower for a steel pole that had been declared "OBSOLETE" and discontinued the prior year.[29] Exs. 12 and 44. DPW was prohibited from even referring this incomplete Application to Planning. See Order §6A4 and §6E. On those grounds alone, Planning's determination was incorrect. Putting those important issues aside, Planning's determination provided only boilerplate language, even concealing the actual location. For example, it misrepresented that the pole is on a street with "good views" when its own website shows it is on a street with "excellent" views." Ex. 45. It also concealed the crucial fact that the location is Adjacent to Landmark #38 listed in Article 10 of the Planning Code, which requires a Certificate of Appropriateness that has never been furnished. Ex. 46. It also utterly ignored **mandatory** provisions of Article 25 and the General Plan, including Urban Design Element, Policies[30] 2.8 and 2.9 that clearly prohibit this PWSF.[31]

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assumed a height of 30.5 feet. Moreover, Verizon provided not a single document or piece of information to show the reliability of this study. Ex. 7, #30-34. **Citizens have complained about noise from installed facilities and DPH has confirmed "humming".** See e.g. Ex. 43. **Verizon intends to put this noisy cell tower by master bedroom windows. Such noise "incommodes" and is a nuisance.**

[29] Verizon obviously has not met its burden to show that the unidentified equipment that Verizon will actually install meets the required compatibility standards.

[30] Unless otherwise stated, all Policy, Objective and Fundamental Principle references are within the Urban Design Element and attached as Ex. 47.

The California Supreme Court recently recognized that, in adopting Article 25, "the board of supervisors noted that the city 'is widely recognized to be one of the world's most beautiful cities,' which is vital to its tourist industry and an important reason that residents and businesses locate here... The board opined that the City needed to regulate the placement of cell towers to prevent installation in ways or locations that would diminish the City's beauty." Thus, certain parts of the City, such as historic areas and areas with excellent views, are designated for heightened aesthetic review. *T-Mobile v. SF, supra.*

Planning never even analyzed this location under the appropriate heightened standard.[32] Planning also ignored Policy 2.7 and the fact that this cell tower would be on Webster between Pacific and Broadway in the "heart of Pacific Heights"[33] which the Plan mandates should be "recognize[d] and protect[ed]" because it is an "outstanding and unique" area that contributes in an "extraordinary degree to San Francisco's visual form and character." This location has "unique characteristics for which the city is famous in the world at large" and it is to be "specifically recognized in urban design planning and protected, if the need arises, from inconsistent new development that might upset" th[e] unique character." Policy 2.7 commends Pacific Heights, for, among other things, "outstanding Bay views down streets" and "spacious and distinguished residences with richness of detail and materials,

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[31] The Introduction to the General Plan makes clear that it is "a mandatory document." Ex. 48. Planning's own determination and WTS Facilities Siting Guidelines also confirm the importance of compliance with the General Plan. See e.g. Ex. 44 and Ex. 49, p. 14.

[32] For example, it improperly ignored the standard for Adjacent historic buildings (§1502) and ignored the fact that a Certificate of Appropriateness was required.

[33] "San Francisco City Guide" p. 166. Ex. 50.

including works of outstanding architects...well-landscaped and well-proportioned street areas... interesting **setbacks**, cornices and bay windows, many of notable architectural quality." Ex. 47 (emphasis added).

The block sits atop a hill, and has beautiful North water, open space and historic building views. Such views are prized, provide an important orientation and are to be protected under the Plan.[34] Guidebooks on San Francisco recommend this block to visitors. The San Francisco City Guide, for example, states: "On the corner of Pacific and Webster is a gorgeous view of San Francisco Bay..." Ex. 50. People come to Webster to watch such Bay events as fireworks and the Blue Angels. The location also boasts views of historic and architecturally important buildings and famous trees. The block consists almost entirely of two architecturally significant buildings (2298 Pacific and Landmark #38, the Bourn Mansion), which the Plan greatly values.[35] Architectural tour groups visit this block because of its historic significance and beauty. See, e.g, "The Trees of San Francisco"; Fodor's Travel San Francisco and "Walking San Francisco." Exs. 50-52. Located about a block and ½ away from seven schools, most of which are to the North, many families walk this

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[34] See e.g. Ex 47: Introduction-Priority Policy; Ex. 52. Urban Design Element, Objective 1, Principles for City Pattern, Nos. 3, 12, 13, 14; Policy Nos. 1.1 (views, including those of open space from hilltops, must be protected from obstructions), 1.8 (orientation); Objective 2, Fundamental Principle for Conservation No. 16; Fundamental Principle for Neighborhood Environment No. 31.

[35] The General Plan makes clear the importance of protecting historic buildings and their surroundings. Ex. 47. See e.g.: "Priority Policy" No. 7 (preserve landmarks and historic buildings); Policy 2.4 (preserve notable landmarks and areas of historic, architectural or aesthetic value and promote the preservation of other buildings and features that provide continuity with past development... **Efforts for preservation of the character of these landmarks extend to their surroundings as well**); Objective 2, Fundamental Principle Nos. 8 and 9; See also Conservation (under Policy 1.12).

block every school day and on weekends for events, enjoying the beautiful views and historic architecture.

Planning ignored the fact that the site is "Adjacent"[36] to both a Landmark and an architecturally significant and locally significant building. 2298 Pacific was built in 1926 by famed architect, Edward E. Young, whose work has been recognized on the National Register of Historic Places. Ex. 53.[37] This Georgian Revival is architecturally and locally significant. The San Francisco Chronicle's Urban Design Critic, John King, profiled 2298 Pacific in his column, stating: "Today's 40-foot height limit wouldn't let this brick-clad outpost of good manners be built where it now stands, and that would be our loss. It's a tutorial in urbane density: tactile in materials and set slightly up and back from the sidewalk, an attractive back-drop rather than an imposing presence. The most distinctive twist is the entry, an arched corridor open to the street, lit by three oversized windows and concluding at a doorway framed in richly paneled wood. A decorous box gains intrigue and depth; you wonder what life might be like inside." Ex. 54.

Adjacent to 2298 Pacific is Landmark #38, the **1897** Bourn Mansion, designed by famous architect Willis Polk for well-known resident William Bourn. Mr. Bourn, said to be the richest man in San Francisco and one of the richest men in the world, could have had any location for his home. He chose this block. Bourn's

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[36] Under §1502, "Adjacent" means "on the same side of the street and in front of the building or the next building...when used in connection with a ...San Francisco landmark, structure of merit, architecturally significant building or locally significant building."

[37] According to the U.S. Department of Interior, "Young became a master at designing in any of the styles a client might request...and seemed to have a never-ending supply of ideas for making relatively similar apartment buildings original and exciting..."

other home, on which Polk also worked, is the magnificent Filoli. Polk, a leader of the nationwide City Beautiful movement, was asked to produce a San Francisco plan and he played a leading role in planning the 1915 Panama-Pacific International Exposition. The Bourn Mansion, a handsome manor in the Carolingian style, is regarded as "a masterpiece of the bricklayers' and stonemasons' arts, with beautifully carved decorations and fine fixtures...Nothing like it was being built in the city in 1897." Ex. 55. Tour groups admire it. It is a City treasure.

The Landmark Bourn Mansion is listed in Article 10 of the Planning Code. Ex. 46. **Planning requires an Administrative Certificate of Appropriateness for small cell wireless facilities on poles located Adjacent to a Landmark listed in Article 10 of the Planning Code.** Ex. 56. Only the property owner or owner's agent may apply for a Certificate and authorize Planning to conduct a site visit of the property. Also, CEQA and Chapter 31 of the SF Administrative Code implementing the act may require an Environmental Evaluation before the application can be considered. In addition, there are notice requirements and the possibility of a public hearing. Ex. 57. The required Certificate has never been furnished. **For this reason alone, the permit should be denied.**

The third building on the block is the beautiful Italian Embassy, which also brings foot traffic, including international visitors. About one block south of the pole is the Webster Street Historic District, which dates from 1878-1880 and consists almost entirely of houses in the Italianate architectural style. "The district has a common scale, with nearly uniform height, setback, vertical emphasis and dominant cornice line. The consistency of the Italianate architecture is remarkable. Most of

the houses still appear with their original or restored details." Ex. 58. Across from 2298 Pacific and between the Landmark and Historic District is beautiful 2301 Pacific with its famous trees, itself a lovely attraction for walking tours. Ex. 51.

Tourists from the Historic District and 2301 Pacific, schoolchildren and their families, bicyclists, architectural tour groups visiting the Landmark and international guests to the Italian Embassy all look north to the beautiful Bay as an important orientation point and also see refreshing open space and the historic and elegant 2298 Pacific. They enter the intersection of Pacific and Webster welcomed by four uniform, graceful, light poles which respect the architecture and history of the block by all matching in width, height, color and design. They keep the important pattern, continuity, uniformity, symmetry and harmony appropriate to the historic architecture and vaunted unique characteristics of the neighborhood. See Ex. 47. Policy 1.12. They reflect the aesthetic valued by Better Streets, which the Plan endorses. See e.g. Ex. 47, Policy 1.10. As Better Streets advises: "the rhythm of the light poles should be consistent...Ex. 59. They also honor the Plan, which recognizes the importance of street lighting and says: "In the intensely urban environment of San Francisco, there are things that have not changed. These features provide people with a feeling of continuity over time and with a sense of relief from the crowding and stress of city life in modern times...Certainly the old should not be replaced unless what is new is better." Ex. 47, Policy 1.12. The current matching pole respects prized architectural details.[38]

[38] See e.g. Ex. 47, Objective 2, Fundamental Principles for Conservation No. 3.

2298 Pacific, a good neighbor, invests significant sums to support the Plan's goals. It keeps its building and grounds in immaculate condition and has spent tens of thousands of dollars to landscape and maintain that landscaping, including most of the Webster block. Ex. 60; Ex. 47, Policy 1.1, 1.5, 1.11, 4.12; Neighborhood Environment. It constantly endeavors to improve neighborhood aesthetics, seeking to underground wires and to improve the trees it owns on Webster.[39] Unfortunately, PG&E and the City have delayed this work, but 2298 Pacific, who has paid PG&E an engineering advance payment, has approved these projects and hopes to have success soon. For aesthetic and health reasons, Verizon should also underground its equipment. Many, including the City of Palo Alto, do not believe that Verizon is being truthful when it claims it cannot do so. See e.g. Ex. 61.

This neighborhood, these historic buildings, aesthetics, street light and space,[40] excellent view, and tourists are precisely what the Plan values and demands must be protected. The PWSF would directly violate the Plan, including "critical" Fundamental Principles of Conservation.[41] For example, No. 15 provides, "traditional street patterns and spaces can often be essential to maintaining an appropriate setting for historical and architectural landmarks or areas... Development in the street space abutting historic buildings would **destroy** the

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[39] See e.g. Ex. 47, Policy 3.9 and Objective 4, Fundamental Principle 22 (undergrounding) and Ex. 49, p. 17 ("The undergrounding of overhead wires should continue at the most rapid pace possible, with the goal of the elimination of such wires within a foreseeable period of time.")

[40] Street lighting and street space are singled out in the General Plan for their importance. See e.g. Ex. 47. City Pattern before Objective 1; Policy 2.10.

[41] Objective 2 states, "Past development, as represented both by distinctive buildings and by areas of established character, must be preserved. Street space must be retained as valuable public open space in the tight-knit fabric of the city."

setting." (emphasis added). Planning's determination that this cell tower doesn't "detract" or "impair" is obviously incorrect when, according to the General Plan, it actually **destroys.**[42] Ex. 47.

Planning's boilerplate language about a "project" for a "facility to be attached to an **existing** light/utility pole" (see e.g. Ex. 44, p. 4, Objective 24) is irrelevant. Verizon intends to excavate and replace the **existing** pole. In doing so, it will ruin the symmetry, continuity, serenity, uniformity, harmony of the current light pole design and the aesthetics of this historic and treasured block. It will needlessly dig up the existing, desired pole that matches the other three in the intersection and replace it with one of a different design, width, height, shape and color. It will also have two large boxes on it and an imposing cell tower on top just in the line of the outstanding view on an "excellent view" street. Nor will it be in the exact location of the existing pole since it will be wider and taller. Verizon's own lawyers admit that a new pole has an undesirable "visual impact" and that using an existing pole is "ideal" to avoid such an impact. Ex. 39, p. 2. Appellants also recently paid to have the sidewalk fixed that Verizon now proposes to dig up. The excavation will be a needless inconvenience, endangering pedestrians, including school children, and will result in an eyesore. Ex. 62. This inexplicable waste of city resources is

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[42] Similarly, Fundamental Principle for Conservation No. 17 recognizes that "blocking...or other impairment of pleasing street views of the Bay or ocean, distant hills or other parts of the city can **destroy** an important characteristic of the unique setting and quality of the city." Ex. 47(emphasis added).

something that the Conservation-minded Plan and environment-conscious SF residents abhor.[43]

Thankfully, the Plan has guidelines that clearly prohibit this cell tower. Remarkably, Planning ignores them. Policy 2.8 mandates: "maintain a strong presumption against the giving up of street areas for private ownership or use...Street areas have a variety of public values...They are important, among other things, in the perception of the city pattern, in regulating the **scale** in organization of building development, in creating **views**, in affording neighborhood **open space and landscaping,** and in providing **access to properties**. Like other public resources, streets are irreplaceable, and they should not be easily given up. Short term gains and stimulating development, receipt of purchase money and additions to tax revenues will generally compare unfavorably with the long-term loss of public values. A strong presumption should be maintained...against the giving up of street areas, a presumption that can be overcome only by **extremely** positive and far-reaching justification.[44] Ex. 47. (emphasis added)

Policy 2.9, which Planning admits is relevant, but doesn't address, requires it to review **every** proposal for the giving up of street areas in terms of all the public values that streets afford. In a portion of the Policy that Planning fails to quote, the Plan states: "**Every** proposal for the giving up of public rights in Street areas, through vacation, sale or lease of air rights, revocable permit or other means, **shall**

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[43] Planning represents to the public that only existing steel and wood poles will be used and states that poles will not be replaced except in "limited" circumstances when a pole is worn or damaged. Ex. 20. This pole is concrete and in good condition.
[44] Fundamental Principle for Conservation 13 likewise notes, "street space provides light, air, space for utilities and **access to property...** "Ex. 47 (emphasis added).

be judged with the following criteria as **the minimum** basis for review: **No release of a Street area shall be recommended which would result in** (among other things): **detriment to vehicular or pedestrian circulation; interference with the rights of access to any private property; inhibiting of access** for fire protection or any other emergency purposes, or interference with utility lines or service without adequate reimbursement; obstruction or diminishing of a significant **view,** or elimination of a **viewpoint;** industrial operations; removal of significant natural features, or detriment to the **scale and character** of surrounding development; or adverse effect upon any element of the General Plan or in any situation where the further development or use of such street area and any property of which it would become a part is unknown.[45] (emphasis added).

Under the criteria mandated by the Plan, Verizon is prohibited from digging up and replacing this specific pole. The pole is about 8 feet from 2298 Pacific's wall where schoolchildren sit. EBI Consulting warns that no one should be within 9 feet of this antenna. Ex. 5. Workers using scaffolding or a swing stage to conduct maintenance and repairs on the building will be much closer to the antenna and also suffer exposure in excess of FCC guidelines. Similarly, 2298 Pacific's arborists and others who work on its landscaping, including its three trees, including one that is

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[45] Release of a Street area may be considered favorably when it would not violate **any** of the above criteria and when it would, among other things, be in furtherance of the public values and purposes of streets as expressed in the Urban Design Element and elsewhere in the General Plan. Ex. 47 (Policy 2.9b). Policy 2.10, also ignored, provides: "Permit release of street areas where such release is warranted, only in the least extensive and least permanent manner appropriate to each case." "[S]treet areas should be treated as precious assets..." Ex. 47.

next to the proposed PWSF site, will experience exposure in excess of FCC guidelines. 2298 Pacific, who has already had to stop an important waterproofing project on its West side because of workers' swing stage exposure to power lines, will be unable to maintain and repair its 8 story exterior. This will endanger pedestrians and drivers and thus certainly result in a "detriment to vehicular or pedestrian circulation" as the sidewalk and street will need to be closed. It will also constitute an impermissible "interference with the rights of access" to 2298 Pacific's property and impermissibly "inhibit...access." Moreover, if 2298 Pacific is prevented from maintaining and repairing its exterior, it will become a dilapidated eyesore, degrading the aesthetics of this neighborhood. Given this Northeast corner of the Pacific/Webster intersection, the PWSF will obstruct and diminish a significant view. It will be a detriment to the scale and character of the area and have an adverse effect upon elements of the Plan, as discussed above. In addition, this is a situation in which future development or use is unknown. For example, Verizon presumably will use some equipment that isn't "OBSOLETE" and discontinued. Such equipment and its use are unknown.

In addition, as Planning admits, a proposed PWSF "**shall** be consistent with the public health, safety, convenience and general welfare" and "not unreasonably affect, intrude upon or diminish any identified City resource." Ex. 44. Neither Planning nor Verizon has met the burden to show that these mandatory requirements will be met. Nor can they. What is proposed is a risk to health, safety, welfare and convenience given the exposure and given that it will prevent 2298 Pacific from maintaining and repairing the exterior of an 8-story building, to the

danger of its residents and to the pedestrians and drivers below, including schoolchildren, their families and tourists.

The cell tower will be more than an **unreasonable** "affect," "intrusion" or "diminishment." Verizon has not shown that its network is dependent on a PWSF at this location. Verizon has never claimed a significant coverage gap, nor can it given how excellent the Verizon coverage is. Not surprisingly, it has refused to provide any documents "concerning wireless coverage in and around 2298 Pacific" or documents "showing that the area...needed improvement in coverage." Ex. 7, #20, 49. Nor could it provide documents showing that this pole was selected "because of exhaustive network testing, customer feedback and data from third parties" (*id. at* 22) or "interest from property owners" (*id. at* 50) or as a result of meetings "with local residents, business owners and neighborhood groups." *id. at* 51.[46] Similarly, Agatha could not answer questions about why she selected this pole and not others or provide documents about this pole's selection, despite being ordered to provide such information and despite this being a breach of a material condition of the UCP. Ex. 1, §3.5(i) and Ex. 11. In addition, Verizon is installing a PWSF a mere block away. Ex. 63. Far from needing this pole, Verizon's own agent Modus has admitted, "When small cells are clustered too close together, then both sites perform at suboptimal levels because they interfere with each other's signals." Ex. 64. Similarly, Verizon's lawyer has rejected alternate locations for a different permit on the grounds that they "are too close to an existing facility about a block away." Ex. 65. Despite design

[46] A little over a block away, at 2288 Broadway, antennas pump out wattage of about 17,000. There are also macro facilities nearby at Union and Fillmore, Union and Buchanan, Union and Octavia and Broadway and Gough, all with a combined wattage of at least 54,000. Exs. 22 and 24. There is probably much more.

preferences to avoid pole locations close to residences (see e.g. Ex. 66), Verizon has chosen a pole about a mere 8 feet from a residential building (and a wall where elementary school children sit), when the General Plan specifically recognizes Pacific Heights for its large setbacks and there are nearby commercial properties. See e.g. Ex. 25. Commercial properties and properties with large setbacks would not experience the damage that Appellants and others, including the many school children, will suffer if this cell tower is installed. Verizon has explained that it liked this pole because of a tree and school sign. Ex. 7, #19. However, 2298 Pacific owns the tree and maintains it with regular tree trimming. Agatha has admitted: "Where tree trimming of any sort is required...such location is considered more intrusive to the surrounding area compared to a pole that does not require any tree trimming." Ex. 65. In selecting this pole, Verizon is deliberately putting 2298 Pacific's arborists in the path of an exposure in excess of FCC guidelines. It should also be noted that the tree in the 2017 photo that Verizon submitted with its Application does not resemble 2298 Pacific's tree. To the extent that Verizon selected this tree to screen equipment, it cannot rely on the tree to do so. Conversely, 2298 Pacific could choose to grow the tree and, as Modus admits: "if a tree abuts the pole and has branches in front of the antenna, the antenna's signal is obscured, which defeats the purpose of the facility." Ex. 64.

Verizon's demand for this particular pole is not reasonable especially when balanced against the danger and millions of dollars of injuries and damage that will result from 2298 Pacific being intentionally prevented from maintaining and repairing its exterior and from Verizon **intentionally exposing people, including**

school children, to harmful emissions. This PWSF will impermissibly "incommode" and constitute a nuisance.

Planning's approval also states that the PWSF may "not obstruct the view from or the light into any adjacent residential window."[47] Ex. 44. **As photos and simulations demonstrate, the PWSF will impermissibly obstruct the view and light.** Ex. 68. The master bedroom windows have beautiful views of the architecturally significant and gorgeously landscaped 2301 Pacific Ave with its famous canopy of London Plane trees. Guidebooks profile this house and its trees, which have been trained, or espaliered, until they fused together. It is the subject of walking tours. Ex. 51.[48] Indeed, many residents were attracted to 2298 Pacific because of the serene and unobstructed view of this masterpiece, renowned trees and open space.[49] If the PWSF is installed, residents will be looking at a stress-producing 5"4 1/2 cell tower instead of this gorgeous home, famous trees and open space and their light and valued views will be blocked.[50] Ex. 68.

Finally, Planning's 2018 approval required conformance with 2017 simulations. Ex. 44. Similarly, DPW's Final Determination ("FD") "is based on no variation" from those simulations. Ex. 70. Verizon thus lacks approval for what it intends to do.

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[47] Verizon's attorneys have argued that poles should not be selected when they "could obstruct views from a window of an abutting building." Ex. 75.
[48] "The Trees of San Francisco" by Michael Sullivan. Ex. 51. Trees are valued by the Plan. Ex. 47, (Fundamental Principles for Neighborhood Environment, Nos. 1 and 2).
[49] See e.g. Ex. 47, Principles for City Pattern No. 14: "Highly visible open space presents a refreshing contrast to extensive urban development." See also No. 12.
[50] By January 23, 2019 email, an unidentified individual erroneously concluded, without seeing the actual view or any photos from the actual windows (and apparently without knowing what equipment Verizon truly intends to install) that the PWSF would not obstruct views or block light. The boilerplate conclusion without regard to the actual view is on its face ridiculous and at best, a mere generalized opinion, not substantial evidence. Ex. 69.

Those intentionally misleading simulations sent with the 2018 Christmas Tentative Approval ("TA") Notice show an **existing** pole that Verizon will excavate, not the pole that it will install. They depict an "OBSOLETE" and "discontinued" cell tower for a steel pole and fail to depict bulky equipment boxes and the actual tree. Ex. 71.

Verizon did not meet its burdens to show compliance with the General Plan, Article 25 and the law. Nor has it met its burden to show that the required Certificate of Appropriateness has been issued. Planning's premature approval based on wrong assumptions and in violation of the General Plan was incorrect.

V. VERIZON HAS FRAUDULENTLY CONCEALED THAT IT INTENDS TO MODIFY THE PWSF.

Common sense compels one to suspect that Verizon never intended to install the antenna it and H&E represented it would given that the manufacturer had declared it "OBSOLETE" and discontinued it almost a year earlier, while it was for steel, not concrete poles. Ex. 12. Asked to provide a declaration that it would never seek a modification to increase emissions, Verizon refused. Ex. 6, #13; See also Ex. 6, #12, 14. Asked to provide documents concerning whether it intends to file for a modification, it refused. Ex. 7, #13. See also Ex. 7, #47. In addition to their other misrepresentations, Verizon and H&E may have committed fraud by misrepresenting the equipment that Verizon actually intends to install and by Verizon's claiming in the Christmas TA Notice and April School Vacation Notice of FD that it didn't know whether it would seek to modify the facility. Exs. 70-71. Fraud should, for many reasons, vitiate this Application. However, assuming Verizon really will install an "OBSOLETE", discontinued antenna for steel poles on the concrete pole, it seems unlikely it would install a tri-directional antenna or an

antenna capable of producing many times the wattage if it only intends to operate in a bi-directional manner and never increase emissions. Asked why it would install a tri-directional antenna to operate bi-directionally, Verizon gave a non-answer. Ex. 6, # 18. Its refusals to confirm in writing its oral representations that it would not operate the antenna in a tri-directional manner or increase emissions and its refusal to provide requested documents only confirm its intent to modify. Ex. 6, # 7, 12-14; Ex. 7, # 13, 47. The third direction likely aimed directly at the South of 2298 Pacific will also exceed FCC guidelines and prevent 2298 Pacific from accessing its building to maintain and repair its Southern landscaping and exterior, which like the West side, faces the most risks of water intrusion and damage.

Unfortunately, if its permit is upheld, Verizon can install or activate whatever it wants. The City does not police what happens to a PWSF after it is approved and for years hasn't even checked to see what equipment Verizon actually installs or activates or what RF emissions it produces. See e.g. Exs. 28-29, 31-32 and 34. For the many reasons detailed above, including in section IV above, the Plan (including Policies 2.8-2.10) and law clearly prohibit Verizon's anticipated modifications.

VI. SECTION 1505(d) REQUIRED DPW TO DENY THE APPLICATION.

DPW, DPH and Planning all imposed Conditions. Ex. 70. Section 1505(d) clearly prohibited DPW from approving Verizon's Application because Verizon failed to accept those Conditions within 5 days. Per §10C1 of the Order, DPW was **required** to treat the Conditions as rejected and to deny the Application.

Asked to provide all documents showing it accepted the Conditions, Verizon could provide nothing. Ex. 7, #9. See also #8. Similarly, the City could provide

nothing. Ex. 12. Asked to explain how it intends to comply with each of the Conditions, Verizon did not claim that it would do anything. It only falsely represented that DPW assures all requirements are met. Ex. 6, #31. Nor can it comply. For example, Planning Condition No, 10 is that the PWSF not block the view and light from any adjacent window. It clearly will do so. Ex. 68. Nor will Verizon comply with the DPH Conditions. The evidence is that it will simply ignore the DPH post-installation testing requirement. Exs. 28-29, 31-32, 34. Nor can it comply with DPW Conditions, which demand "no variation from the depicted drawings and/or photo simulation," which as described herein, are intentionally misleading and don't depict the actual circumstances and facts.

Under Order §10C1, DPW was legally required to deny the Application.[51]

VII. VERIZON'S FAILURES TO COMPLY WITH MANDATORY REQUIREMENTS PROHIBITED DPW FROM ISSUING THE PERMIT.

Section 1500(b)(1) entitled "**Minimum Permit Requirements" prohibited** DPW from issuing a permit to Verizon because it did not comply with most, let alone, **all** of Article 25's requirements:[52]

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[51] Planning Commission Resolution No. 16539 may also have barred the City from even processing Verizon's Application and from continuing to process its applications. The Resolution obligates Verizon to "submit 5-year Plans (an inventory of existing and proposed sites) semi-annually on April 1st and October 1st" and states "no applications are to be processed unless the applicant has the most recent Plan on file." Ex. 72. 2298 Pacific submitted a public records request for all such 5 year plans. The City responded that there are none. Ex. 73. The Resolution also prohibits the processing of new applications until a service provider is up-to-date with certifications by licensed engineers with expertise in RF emissions, that all facilities are and have been operated within the applicable FCC standards for RF emissions, periodic safety monitoring 10 days after installation and every two years thereafter. Ex. 72. DPH didn't appear to have the required certifications.

1) Order, §5B1 required Verizon to identify all equipment that it intends to install. In its September **2018** Application, Verizon provided the City with **2014** specifications for the CommScope antenna for a steel, not concrete pole, warning that they were "for illustrative purposes only" and would be "updated prior to publication." The manufacturer, however, had already declared the antenna "OBSOLETE" and "discontinued" in 2017. Ex. 12. It seems unlikely that Verizon identified all equipment that it truly intends to install;[53]

2) Section 1500(b)(2)(B) required Verizon to show that "the pole owner has authorized [Verizon] to use the pole identified in its Application." Verizon provided a "Form of Pole License" which is Exhibit A to a Master License. Recital §B1 of that License, however, warns that the pole license does not commit the SFPUC to authorize use of specific SFPUC poles. Ex. 3. **Verizon also agreed that the PUC would not license it a concrete pole for any purpose until 2027.** Ex. 3, §2.1.5. The pole at 2298 Pacific is concrete. The Application lacks the mandatory authorization;

3) Section 1500(b)(2)(C) required Verizon to provide proof that it had obtained approvals that may be required under CEQA.[54] Verizon provided only a "Categorical Exemption" for "**existing steel light and transit poles**..." Ex. 74. It

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[52] See also Order §5 ("An Application... **shall** not be Complete unless it contains all of the following information...") 2298 Pacific submitted a public records request to get the documents that Verizon submitted as part of its Application. Exs. 12.

[53] §1500(b)(2)(A) and Order §5D required the Applicant (Verizon) to show it had a valid and existing UCP. Verizon provided a document signed by Cellco's General Partner. Ex. 1. Appellants assume this entity is the same as Verizon. If it isn't, Verizon failed to meet yet another permit requirement.

[54] See Order §3C (No permit may issue until Planning has completed review of Application under CEQA) and §5E (Application shall contain proof of such review).

provided no proof that the unidentified concrete replacement pole is exempt under CEQA or that the required review was performed. Indeed, under CEQA Guidelines, §15300.2, a Class 3 exemption may not apply given the location, cumulative impact and unusual circumstances exceptions. Moreover, the historical resources and schools at issue likely triggered obligations under CEQA that were ignored. See also UCP §3.5(g) (compliance with CEQA is a material condition);

4) Verizon was required to provide Verified Statements from registered engineers to prove compliance with the PHCS. Order, §5F. The person who signed the H&E "report" lacks the requisite knowledge of the report's contents given that he admits that he lacks knowledge of the "data supplied by others" and indicates that such data is the entire "report" since he only claims that the work was done "under his direction" not that he personally did the work. Ex. 14. In violation of California Code of Regulations, Title 16, Division 5, §475,[55] H&E has gone to great lengths to hide the identity of the person who did the actual work and this "data."[56] An unlicensed, conflicted individual may have done the work. The "data" could be anything. The language of this "verification" is that of a person who cannot vouch for the "report's" accuracy and does not want to be held responsible for its contents.

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[55] An engineer shall not misrepresent his scope of responsibility in connection with projects or services §475(c)(3); shall attribute proper credit to others for their professional work or contribution §475(c)(8); and shall not misrepresent data and/or its relative significance in any report §475(c)(11).

[56] Although Agatha represented that H&E would answer questions before and during the January 28, 2019 hearing, H&E refused to even identify who did the work in the report and no one would provide that information in response to email inquiries even when asked by DPW. Ex. 75. H&E then refused to provide the information as ordered by the Hearing Officer. Ex. 9, p. 7 #j, p. 8#k; Ex. 8 # 35, 36, 18a, 64a, 70a, 76a, 83a. This may constitute another breach of a material condition of the UCP.

Consistent with this, H&E has refused to provide any documentary support for any of its conclusions or calculations or any of its representations that there will **only** be 110 wattage, AWS and PCS service, a bi-directional use and an orientation not aimed at 2298 Pacific. The report was not properly verified and is untrustworthy;

5) Order §5G required Verizon to provide drawings. Verizon's drawings conceal that the pole that Verizon intends to use will be wider than the existing pole, bringing the PWSF closer to 2298 Pacific. They also depict an antenna for a steel pole that its manufacturer declared "OBSOLETE" and "discontinued" in 2017[57]. Exs. 12 and 76;

6) Order §5H required Verizon to provide a photographic simulation of the proposed PWSF. Verizon's materials do not show the proposed PWSF. Instead, they mislead one to believe that Verizon will use the existing pole. Ex. 71. Verizon conceals that the existing pole and sidewalk are going to be excavated and that an unmatching pole of a different design, width and color will be installed. It also misleadingly fails to depict the two equipment boxes that it intends to install on an unidentified new pole while it depicts an antenna for a steel pole that is "OBSOLETE" and was discontinued in 2017. These dated, 2017 misleading photos provided to residents around Christmas of 2018 also show a tree that does not resemble the tree that is there. Verizon also chose a misleading angle to minimize the PWSF and to avoid revealing the obstruction of view and degradation of aesthetics;

[57] The drawings do not even accurately depict the existing pole.

7) Order §5J required Verizon to pay various fees. The Application file lacks any evidence, such as cancelled checks, that Verizon did so. Ex. 12. Moreover, the evidence is that these fees go unpaid.[58] Ex. 77. The failure to pay these fees is also a breach of a material condition of the UCP. Ex. 1, §3.5(j);

8) Section 1526 contains mandatory insurance requirements that Verizon did not meet. For example, the certificate Verizon provided shows a policy that expires in June of this year, does not have the requisite pollution insurance or meet other requirements.[59] Ex. 78;

9) The Application also lacked the required Certificate of Appropriateness. "The Department requires an Administrative Certificate of Appropriateness...for small cell wireless facilities on poles located...adjacent to a Landmark ...listed in Article 10 of the Planning Code." Ex. 56. The pole is Adjacent to Landmark #38 listed in Article 10. Ex. 46. There is no Certificate of Appropriateness as required;

10) Order, §5L required a Verified Statement from a registered engineer stating that the installation of the PWSF would not compromise the structural integrity of the pole. Verizon provided only **unverified** "Structural Calculations" for the "**existing**" pole, not the pole it intends to use. Ex. 79;

11) Order, §5M required Verizon to provide "a list of all permitted and installed" PWSFs. Verizon never provided this list.

Given Verizon's failure to provide the above information, Article 25 legally barred DPW from issuing the permit. §1500(b)(1).

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[58] To the extent fees are ever paid, it appears that the City can't determine if a particular application has paid or unpaid fees. Ex. 77.

[59] Verizon was advised of this lack of coverage in 2017 but continued to ignore the requirements Ex. 80.

VIII. ARTICLE 25 PROHIBITED 1) DPW FROM PROCESSING VERIZON'S APPLICATION; 2) DPH AND PLANNING FROM ISSUING THEIR DETERMINATIONS AND 3) DPW FROM ISSUING ITS TA AND NOTICE OF TA.

Under Article 25, §1504(a) and Order §6, DPW was required to do a Completeness Review to assure that Verizon had provided **ALL of the information required in Section 5 of the Order.** As shown above, Verizon failed to provide the required information. Under Order §6A4 and §6E, DPW was **prohibited** from processing the Application and from referring it to DPH and Planning. Thus, DPW's referrals were improper, as were DPH and Planning's premature determinations.

DPW was likewise prohibited from issuing its Christmas time TA. Under Order §6F, DPW could not issue a TA until 5 business days after the occurrence of the **last** of three events: DPH's determination, Planning's determination or receipt of a notice from Verizon that it accepts all Conditions. See e.g. Ex. 81. The determinations were all premature and invalid and **there was no notice that Verizon accepted the Conditions, thus the last of the three events never occurred and DPW had no ability to issue the TA.** Order, §6F.

Nor could DPW notify Verizon of a TA. Under Order §11A2, it could not notify Verizon of a TA until it had "receipt of notice that the Applicant has accepted any and all Condition imposed by any City department." The Application should not have been processed and the TA and Notice of TA should never have been issued.

IX. VERIZON FAILED TO COMPLY WITH NOTICE REQUIRMENTS.

DPW was legally barred from issuing a TA and Notice of a TA. Thus, there should never have been Notice to the Public of a TA. Assuming however, that Verizon and DPW can simply violate clear legal mandates without any of the enumerated

consequences, the next question is whether Verizon gave proper notice to the public. As described below, it did not. As a result, DPW was, for yet another reason, prohibited from processing this Application. Order §11E.

Section 1512 required Verizon to notify the public of the TA. Verizon cannot meet its burden to prove that it mailed the notice as legally required. Verizon's sole evidence that it mailed Notice of the TA on December 5, 2018 is a Declaration of Mailing that is unsigned and lacks even a line for a signature. Ex. 82. An unexecuted declaration is proof of nothing. It is invalid. See e.g. CCP § 2015.5. That should end the inquiry, but there is more. The Declaration Of Mailing swears compliance with §1512(b)(2), which concerns posting, not mailing.[60] Ex. 82. It is not even a "Declaration of Mailing." In addition, its "evidence" of a December 5, 2018 mailing to residents of 2298 Pacific is a photo of an envelope addressed to 2280 Pacific Apt. 402. Ex. 82. Verizon also violated the mandatory requirement in Order §11B1 that it "include Public Works on the mailing list to enable Public Works to verify the mailing date." Ex. 82.

The evidence suggests that Verizon may have received the TA earlier than its November 27, 2018 date and that it waited until December 10 to mail it. Agatha carefully and regularly tracks each Application and sends DPW emails telling **them** what to do next, including when to issue TAs and FDs. See e.g. Ex. 83. On November 19, 2018, Agatha reminded DPW that she was "looking for" a TA for this Application. Ex. 83. She may have received the TA sometime after her November 19 email and before November 27. In any event, she was expecting it, demanding it and should

[60] This also violated Order §11B4 which has a **mandatory** requirement for proof that the list complies with §1512(b)(1).

have been ready to mail and post it immediately. 2298 Pacific's property manager never received any notice. The earliest 2298 Pacific's Board President received any information was December 11, 2018, suggesting that the notice was not mailed until December 10. Consistent with this, Agatha didn't provide the Declaration to Leo until December 10. Ex. 84.[61] If Verizon had truly mailed the notice on December 5, as represented, it should have been received by December 6. It does not take 6 days to receive a piece of mail within California.

Appellants believe that fraud was committed in connection with the mailing, but even if the invalid Declaration is to be believed, Verizon's notice was, at best, intentionally prejudicial, in bad faith and obviously calculated to distress residents and to assure that no one would have a meaningful, if any, opportunity to protest. Its claimed mailing of December 5 advised that anyone wanting to protest had 20 days from the later of the notice bearing an 11/27 date or the purported 12/5 postmark (i.e. Christmas!!). Thus, Verizon intentionally timed the notice to hit during a time it knew residents were traveling, had long-planned obligations and were busy and enjoying the holiday season and precious time with their families, including children on vacation. As Verizon cynically intended, many residents either didn't receive notice or were unable to respond. Protests were not filed as a result. Verizon intentionally caused emotional distress and damage. Those who received notice on December 11 were advised that they had only until Christmas to respond. It was extremely stressful and ruined the holidays and vacation for some.

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[61] Order §11B4 requires that the "Applicant **shall promptly** notify Public Works of its compliance with" §1512(b) (emphasis added). Verizon complied with this mandatory requirement only if in fact the Notice of TA was mailed on December 10. Otherwise, Verizon violated yet another permit requirement.

Of course, Verizon violated Order §11B2 which required it to use its best efforts to ensure that the dates on the posted and mailed notices (i.e. November 27) were the actual dates of posting and mailing. As discussed above, Appellants believe that notice was not mailed until December 10, almost a month after Agatha announced she was awaiting the TA. Similarly, Agatha, who was "looking for" a TA on November 19, submitted a declaration swearing that she waited until 12/4 to post an "11/27" notice. Ex. 85. Even if she is believed, she clearly did not use her best efforts to assure that the date on the notice was the same as the date she posted. Order §11B2. Agatha's waiting until 12/4 to post a November notice advising of a 20 day protest window given Christmas was also deliberately prejudicial. Under Order §11B2, DPW should have found that Verizon failed to provide proper notice because the dates on the mailed and posted notices were more than three Days before the dates that Verizon actually mailed and posted the notices.

Verizon did not fully comply with the requirements of §1512 or Order §11B. Thus, for yet another reason, DPW should have ceased processing the Application. Order §11E. Proper notice has never been given to all who should have received it. The notice that was given was fraudulent, prejudicial and injurious, causing thousands of dollars of damages. And it matters. The bad faith notice was to intentionally deprive citizens of information and their rights and to avoid scrutiny of Verizon's Application and the department determinations, which as shown herein,

did not comply with the law. Evidence exists of a scheme to defraud.[62] See e.g. 18 U.S.C. §1341 (mail fraud) and 18 U.S.C. §371(conspiracy to defraud).[63]

X. VERIZON ALSO VIOLATED CONTENT OF NOTICE REQUIREMENTS.

Section 1512(c) states that the notice **shall contain such information to inform the general public as to the nature of the Application and it provides mandatory minimum requirements** for the contents of a TA notice. Even if DPW could have issued the TA, which it couldn't and even if Verizon had mailed and posted the TA notice as required, which it didn't, Verizon would still be in violation of §1512 and DPW would still be barred from processing the Application because the contents of the notice were inadequate and misleading. Order, §11E.

Under §1512(c)(1), Verizon was required to "provide a description and a photo-simulation of the proposed" PWSF. As noted above, the simulation was intentionally misleading. Ex. 71. The notice concealed that the existing pole and sidewalk are going to be excavated and that a new pole with different dimensions, color and design is going to be installed with two large equipment boxes. It also misrepresents 2298 Pacific's tree and employs a misleading angle to minimize the PWSF and avoid revealing the obstruction of view and degradation of aesthetics. It depicts a cell tower for a steel pole that was declared "OBSOLETE" and discontinued.

Verizon also violated §1512(c)(2) that required it to summarize determinations. Nowhere does the notice state what DPH or Planning determined.[64]

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[62] Schemes to defraud include deviations from moral uprightness, fundamental honesty, fair play and right dealing, such as here.
[63] To the extent email was used, see also 18 U.S.C. § 1343 (wire fraud).

Nor was the H&E "report," the basis for DPH's determination, given or summarized. As one hearing officer confirmed: "In order to determine whether DPH incorrectly determined the application complies with Compliance Standards protesters would first need time to review the report that was the basis for DPH's decision." Ex. 86, p. 4. Instead, H&E's name wasn't even mentioned, preventing protestors from getting any information about them and learning about their being investigated for finding exposure below FCC guidelines for a facility alleged to have caused cancer in school children and teachers. Ex. 15.

Verizon also violated §1512(c)(6), which requires Verizon to specify the grounds for a protest. The notice gives certain grounds, none of which the average resident can possibly understand and won't have time to understand, especially when notice is given days before Christmas. It also fails to explain that certain contracts and other federal, state and city law apply as well.[65] Most glaringly, it nowhere mentions the existence of Order 184504, the Regulations Implementing Article 25, that are crucial for advising protestors of the grounds for a protest.[66]

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[64] Verizon knows that protestors can't even hope to understand the language in the TA without seeing the actual determinations and the H&E report. See Ex.16. As stated by the Hearing Officer who presided over the January 14, 2019 hearing: "Verizon...forwarding [DPH's determination and the H&E report] to the protesters was a tacit acknowledgment that the information contained therein was relevant to the hearing proceedings..." Ex. 86, p. 4.

[65] As this brief demonstrates, a protestor needs to become an expert in a myriad of areas and have a great deal of time and the concealed documents to truly understand just some of the grounds for a protest.

[66] DPW knew that protestors need Article 25 and the Order, but didn't provide them until **after** the hearing. Ex. 87. This was also a tacit admission that protestors needed this information. See Ex. 86, p. 4.

Verizon also violated §1512(c)(7) by not advising residents of the California Public Records Act or Sunshine Ordinance, how to request documents or the need for 10 days to get documents. Ex. 71.

Verizon also violated §1512(c)(8) by concealing that it will modify the permit. Again, it seems unlikely that it intended to install equipment for a steel pole that had been declared "OBSOLETE" and "discontinued" the previous year or that it would not operate equipment in a tri-directional manner, at higher wattage and/or in other bands and directions. Ex. 71.

With its violations of both notice and content of notice requirements, Verizon intentionally prevented protestors from having time to study the many factual and legal issues involved with a PWSF application and to get information and evidence so that they could be prepared for a hearing and have an opportunity to resolve the matter at that stage, obviating the need to spend time and thousands of dollars for this Appeal.[67] The inadequate notice discouraged protests and assured that those who did protest would be uninformed and lose at the hearing. The notice was prejudicial, and injurious. Order, §11E prevented DPW from completing the processing of the Application given Verizon's failures to fully comply with §1512.

XI. TO DEPRIVE PROTESTORS OF INFORMATION AND RIGHTS, DPW ISSUED IMPROPER NOTICES OF PROTEST, HEARING AND FD AND AN FD AND VIOLATED THE PUBLIC RECORDS ACT AND SUNSHINE ORDINANCE, WHILE VERIZON ALSO VIOLATED THE ORDER AND ETHICAL OBLIGATIONS. NO PERMIT SHOULD HAVE ISSUED.

Order §12A states that DPW "**shall promptly** give notice of any protest..." DPW violated this mandatory requirement. Although 2298 Pacific (and its Board

[67] Appellants reserve their right to seek recovery of their attorney's fees and costs.

President and others) filed protests in December of 2018, DPW admits that it waited until January 17, 2019 to give Verizon "protest comments for 18-WR-0296 (2298 Pacific Ave)" with the understanding that Verizon would not have to respond for 7 business days (i.e. not until January 28). Ex. 88 (Leo's 2/26 email). That same day (January 17), believing that Verizon did not have to give the protestors any information until January 28, DPW noticed the hearing for January 28! Ex. 89. Thus, **DPW deliberately timed the two notices on January 17 so that Verizon would not be required to give the protestors any information before the January 28 hearing.** Under §1513(b), DPW had 45 days after it received the protest to hold the hearing. It could have (and should have) given "prompt" notice of the protest and notice of the hearing such that Appellants had 45 days to get information, understand the grounds for a protest and prepare for the hearing. Instead, DPW gave notice in a manner that, like the Christmas TA, was obviously intended to prejudice, injure and cause stress and damages and it did. Consistent with a scheme to defraud, Agatha (who carefully tracks the timing of every step in the process) strategically waited until after the close of business on January 24 (leaving only one business day before the 9:00 am hearing on Monday, January 28) to respond to the December protest. Ex. 16.

Such "notice," carefully calculated to prevent protestors from having any information before a hearing, rendering them unable to scrutinize/challenge the Application and departmental actions, appears to also be part of a deliberate scheme to defraud. Indeed, the evidence is that Agatha and Leo secretly work together to

schedule hearings and the flow of information (or lack thereof) to maximize the advantages to Verizon and to harm protestors.[68]

They **intentionally** deprived Appellants of information and their rights and caused damage even **after** being put on notice that such conduct is wrongful. Earlier that very week, on January 14, 2019, DPW and Verizon (in fact, likely Leo, Agatha and Verizon's attorneys) had heard complaints about the very same conduct. At that time, protestors at a hearing involving 7 different Verizon Applications complained that they hadn't received anything from Verizon until after 4 p.m. on a Friday prior to a Monday morning hearing and that this did not provide them with sufficient time to review and consider the documents prior to the hearing. Ex. 86. The Hearing Officer recommended that the permits be denied and stated that it was "important to incorporate elements of basic fairness...so that all parties can have an equal and fair chance to present evidence." He also noted "the interest of all San Francisco resident protestors to have information, along with adequate time to review such information, that will enable them to consider and to present positional evidence is a foundational part of fairness and is consistent with our City Charter providing 'equal opportunity for every resident'" Ex. 86. To intentionally prejudice and harm protestors, DPW issued the two conflicting January 17 notices and Agatha

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[68] **For example, Agatha has Leo postpone hearings so that she has time to replace unfavorable RF reports with favorable ones by H&E!** Ex. 90. She also has him not schedule hearings at times inconvenient for her, including April vacation. Ex. 91. Of course, Agatha does not extend the same courtesies to protestors. When Appellants asked Agatha to postpone the hearing because they had no information, she refused. Ex. 16. Similarly, when they asked for extra time because of their needs during April school vacation, no such time was given. Ex. 92.

waited until the last minute to respond even after these concerns were voiced at the January 14 hearing.[69]

While conspiring with Verizon to assure that the protestors received no information before the hearing, Leo emailed the hearing officer "background information" on January 24. Needless to say, he did not copy the protestors. Ex. 93. Even worse, Verizon's attorneys (with Leo's help) served the hearing officer with a brief presenting Verizon's legal and factual arguments on January 25, 2019. In clear violation of Order §12B2 which requires that the Applicant "shall serve a copy of its response on the protestor...," (not to mention ethical rules prohibiting ex parte communications), Verizon's attorneys never served the protestors. The three page, single-spaced letter with multiple attachments addressed to the Hearing Officer was signed by Attorney Paul Albritton, quoted the Order that had been concealed from protestors and copied no one. Ex. 38. Melanie emailed these materials to Leo on January 25, asking that he forward them to the Hearing Officer. In violation of the Order and ethical rules, she copied 7 people but never served the protestors. Ex. 38.[70] Leo, who is certainly charged with knowledge of Order §12B2, immediately emailed the materials from Verizon's attorneys to the Hearing Officer without copying the protestors. He did, however, copy the Custodian of Records, David Steinberg, who knew the protestors were desperate for all documents concerning

[69] Agatha uses the same form to respond to protestors and the documents she sent were months old. She obviously could have responded sooner.

[70] Melanie also misrepresented to the Hearing Officer and protestors on February 8, 2019 that she had provided "All information/documents pertinent to the City's Article 25 review of this site..." However, she continued to conceal the improper ex parte communication. Ex. 17. Remarkably, DPW falsely claims that there are NO emails between Leo and Melanie. Ex. 36. The possibility that Verizon's attorneys are giving DPW legal advice (including advice not to provide emails) should be explored.

this Application and had submitted a records request for such information. Exs. 12 and 38. In violation of Admin. Code Chapter 67 and the California Public Records Act, DPW concealed these materials from the protestors, even misrepresenting that all documents concerning the Application had been produced.[71] The protestors had also emailed Agatha on January 25, 2019 at 3:21 asking for "all documents you have concerning this matter." Ex. 16. At 3:24, she received Mr. Albritton's brief, but she too deliberately concealed it from the protestors. Ex. 38. **As Attorneys Paul Albritton and Melanie Sengupta, Modus' Agatha and DPW's Leo and the Custodian of Records clearly intended and conspired to achieve, uninformed protestors were never given an opportunity to see or dispute Verizon's attorney's secret arguments and evidence at a hearing. Many of his representations were inaccurate and misleading.[72] On these grounds alone,**

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[71] In a January 29, 2019 email, Mr. Steinberg assured 2298 Pacific: "I spoke with our wireless point person in the Bureau of Street-use and Mapping, and he confirms that we have provided to you all of the records that are in our possession related to the wireless application..." Ex. 95. On January 30, 2019, 2298 Pacific also confirmed its understanding that "no one in the department has a single email or note or memo or similar document that in any way concerns this Application." Ex. 95.

[72] For example, it was not true, as he represented, that "the issues raised by protestors...do not fall within the scope of review under Article 25 and must be rejected for this reason." Nor, as shown above, did Verizon provide "uncontroverted evidence" showing compliance with FCC standards. **Mr. Albritton also misled the Hearing Officer that DPH would "require post-installation testing to confirm that the facilities' actual radio-frequency emissions remain below FCC limits"** when the evidence is that Verizon hadn't been complying with this condition and DPH admits it hadn't been given such testing for years. Exs. 28-29, 31-32, 34. Attorney Albritton wrongly told the Hearing Officer that the condition of post-installation testing was not part of her scope of review. Mr. Albritton also represented that Planning considered the planning protected standard that the cell tower would not "significantly degrade." Planning ignored that standard. Ex. 44. Nor is it true, as he suggested, that no cell tower can, "by definition" ever block view or light. The Order he cited only suggests what "would not typically be expected" from

the permit should be denied. See e.g. *Fremont Indemnity v. Workers Compensation Appeals Board,* (1984) 153 Cal. App. 3d 964 (improper ex parte communications deny due process and resulting order must be annulled).

Given the impending hearing on Monday morning, January 28, 2019, the protestors/Appellants, through 2298 Pacific's Board President, responded to Agatha on January 25, 2019 to not only ask for documents, but for an opportunity to talk to H&E and to otherwise investigate the matter and requested that the hearing be postponed given the prejudice and harm. Ex. 16. Consistent with a scheme to defraud, Agatha refused, requiring that the protestors go to City Hall.[73] Ex. 16. 2298 Pacific again objected at the hearing that the hearing should be postponed in light of what had transpired. The Hearing Officer agreed and ordered DPW, Verizon, Modus and H&E to answer questions and to provide documents by February 8. Consistent with the hearing being postponed, the protestors were not given either the 5 minutes or the rebuttals mandated under Order §12E1(c) and (d).[74] They understood that the hearing would be rescheduled, that they would be given an opportunity to present evidence at a later date, including that which the Hearing Officer had ordered produced, and that they would be given the time and rebuttals to which they were entitled. Order §12E1(c) and (d). Ex. 97 and 92. Indeed, the Hearing Officer could not issue a report until there was a close of evidence.

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certain equipment. It doesn't say that reality can be ignored and that the actual view from an actual window is irrelevant.

[73] Hearings are scheduled for 9:00 on Monday mornings, which maximizes the inconvenience to protestors and increases the chances they will be unable to attend.

[74] Hearing officers, including the one who presided over the hearing for this Application, have been expressly told they must give each protester "at least 5 minutes to present his or her case." Ex. 96.

§1513(f). Agatha and her colleague Scott Revard of Modus ignored all of the requests for information and documents and furnished nothing. Exs. 10-11. Verizon and H&E, who was also represented by Verizon's attorney, furnished mostly objections but did provide the responses attached as Exhibits 6-9. Leo provided objections that appeared to be drafted by Verizon's attorney. Ex. 87. On February 10, the Board President requested that Leo ask Verizon, Modus and H&E to provide the answers and documents they had not yet furnished. Ex. 106. There was no "close of evidence."

On February 12, 2019, in an email to the hearing officer on which she copied Leo, Agatha, Melanie and Paul Albrittton, 2298 Pacific's Board President confirmed her understanding that the hearing had been postponed, that there had not yet been a close of evidence and that any recommendation would be premature. She asked that, at a minimum, the protestors be given the required rebuttal and stated: "We will be extremely prejudiced if we are not, at a bare minimum, given that opportunity. We respectfully request that we at least be given a meaningful and reasonable opportunity to provide a rebuttal before you issue any report and recommendation. We are confident that if you give us a meaningful opportunity and a fair process, we can demonstrate that our protest should be granted." Ex. 97. When the hearing officer didn't respond, the Board President sent her, Leo, Agatha and Paul another email on February 20, 2019 at 10:24 asking that the hearing officer kindly respond. At 11:34, Leo secretly sent the hearing officer an email that did <u>not</u> copy the protestors even though there was an existing email trail, in which

he ignored the protestors' concerns and demanded: "Can you please send the hearing officer's recommendation...?" Ex. 98.

By email dated February 21, the Hearing Officer appeared to ask Leo to reschedule the hearing. Ex. 88. Instead, without copying or notifying the protestors, Leo (who knew that Verizon was delinquent in its payment of required fees and that work on its applications was therefore ceasing[75]) again surreptitiously emailed the Hearing Officer on March 1 asking her to send him her recommendation.[76] Ex. 88.

On March 12, 2019, Agatha again emailed Leo about this Application, demanding to know when it would "move forward." Ex. 35. On March 13, 2019 Agatha emailed Leo to tell him that she would be on vacation from April 4-15 and asked that hearings not be scheduled during that time. Ex. 91. Indeed, this was a time many people, including Appellants, had planned vacations as schools were out of session. DPW then served the surprise Notice of FD bearing the date "March 14" again in a prejudicial manner, consistent with a scheme to defraud and to deprive San Francisco residents of their rights. For example, although §1514 required DPW to "promptly" give notice and Leo well knew there was only a 15 day window for an appeal, DPW strategically waited at least 5 days to mail and email the notice to assure that Appellants would only be given at most 10 days to appeal. DPW obviously could have mailed and emailed the notice the same day it was issued. Also, DPW once again strategically timed the notice to hit during a week of school vacation to maximize the inconvenience to and emotional distress on protestors in

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[75] See e.g. Ex. 77 (February 28, 2019 email).

[76] Appellants did not learn about Leo's February 20 and March 1 ex parte emails to the Hearing Officer until April when the emails were produced in response to a public records request. Ex. 94.

an effort to deprive them of their rights and to otherwise prejudice and injure them. Indeed, both Leo and Agatha went on vacation. Ex. 91 and 99.

2298 Pacific asked that the FD be withdrawn in light of what had occurred, including the fact that DPW had intentionally deprived protestors of 5 of the 15 days for an appeal. Ex. 92. That request was refused. The protestors then asked for additional time given the school break, including the Board President's need to take care of her grandchildren during their vacation. That request was also refused. Ex. 92. These refusals caused further prejudice, injury and damages.[77]

Because there never was a close of evidence, the required 5 minutes of presentation time and rebuttals or a re-scheduled hearing after the hearing was postponed, Leo should never have demanded the recommendation, the Hearing Officer should never have issued it, the Director should never have issued a Decision and there should never have been a Notice of FD or permit. See e.g. §1513 and Order §12E1(c) and (d).

In addition, Section §1513(f) required the hearing officer to summarize the evidence. She never mentioned a single response that was submitted by H&E or Verizon on February 8. She wrongly declared "Applicants demonstrated the proper procedure for sending out notices were followed...The concerns raised by Protestors were addressed and resolved on the record...Public Works staff followed the necessary procedures under Public Works code Article 25..." Her report only proves that a re-noticed hearing with the required presentation time and rebuttal were necessary so that the protestors could direct her to admissions and other

[77] Civ. Code §3294 authorizes punitive damage for oppression, fraud and malice.

persuasive evidence, dispute the claims in Verizon's attorneys' improper ex parte brief and show her the many violations of Article 25. Instead, her uninformed report is not a serious document, concluding, for example, "Under California Bar Association, Telephone Companies have the right to install equipment...." Ex. 100.

XII. THE, CITY CHARTER, GOOD GOVERNMENT GUIDE, SUNSHINE ORDINANCE, PUBLIC RECORDS ACT, CALIFORNIA CONSTITUTION AND EMPLOYEE HANDBOOK HAVE ALL BEEN VIOLATED.

The Employee Handbook for the City declares, "City employment carries with it an obligation to adhere to the highest level of ethical standards." Ex. 101. Charter §15.103 provides that "[p]ublic office is a public trust and all...employees of the City ...shall exercise their public duties in a manner consistent with this trust." Ex. 102.[78] The City Attorney "work[s] to educate...[city employees] about laws requiring public employees and officials to perform their duties in a manner that is honest, open to scrutiny and responsive to those we serve." City employees are given training "to keep them informed about their responsibilities to conduct the public's business with transparency and ethical integrity." Ex. 103.

The City's Good Government Guide advises City employees: "**citizens share a fundamental right to access information** concerning the conduct of their government, and that governmental entities should make their policy decisions openly and with the full benefit of public **participation**. Cal. Govt. Code §§ 6250,

[78] "[A] public official owes an undivided duty of loyalty to the public." Ex. 102, p. 49. "Under the Charter, wrongful behavior by a public officer in relation to the duties of office, including conduct that 'falls below the standard of decency, good faith and right action...' is official misconduct, which may result in removal from office. Charter §15.105(e)." Ex. 102, p. 10. The Charter also defines "official misconduct" to include "any wrongful behavior by a public officer in relation to the duties of his or her office, willful in its character, including any failure, refusal or neglect...to perform any duty enjoined on him or her by law..." Ex. 102.

5490; Admin Code §67.1...we urge, too, that [employees] embrace these laws not grudgingly but in the spirit of openness, transparency, and accountability that animate the laws. **Public service means being ever mindful of the public's right to be informed** about and to **participate** in our democracy. **Citizens...deserve respect** and appreciation for fulfilling a civic duty no less important to San Francisco's government than our own **duty as public servants.**"[79] Ex. 102 (emphasis added).

The Sunshine Ordinance provides: "Government's duty is to serve the public, reaching its decisions in full view of the public..."No law is self-enforcing. Continued vigilance is essential...**The people of San Francisco...do not give their public servants the right to decide what they should know.** The public's right to know is as fundamental as its right to vote. To act on truth, the people must be free to learn the truth. The sun must shine on all the workings of government so the people may put their institutions right when they go wrong." SF Admin. Code Chapter 67. The California Constitution also contains a right of access to public records. "Willful failure...to discharge any duties imposed by the Sunshine Ordinance...or Public Records Act is official misconduct. Admin. Code §67.34." Ex. 102, pp. 85, 87-88, 176.

The Employee Handbook, City Charter, Good Government Guide, Sunshine Ordinance, Public Records Act and California Constitution have all been violated. At every juncture, DPW conspired with Verizon to intentionally, unethically and

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[79] The Good Government Guide also states that those who act in a quasi-judicial capacity "must take care to ensure that the parties appearing before them receive due process. Due process requires fair adjudicators." Ex. 102, p. 10.

prejudicially deprive SF citizens of the information, notice and opportunities that would allow them to meaningfully participate as entitled. DPW and Verizon's attorneys routinely dismiss protestors' claims about a lack of information and notice as unimportant (while they secretly furnish hearing officers with one-sided, ex parte arguments and evidence in advance of hearings) but the Employee Handbook, Good Government Guide, City Charter, Sunshine Ordinance, Public Records Act and California Constitution show these breaches of public trust are serious. Indeed, even the UCP §9.6 and Master Lease §13.9, Schedule 1, p. 5 contain provisions about the Sunshine Ordinance. Exs. 1 and 3. **Verizon and its agents are required to comply with all applicable authorities and contracts, not conspire with City employees to violate them.**

Verizon's attorneys routinely claim "The City Thoroughly Reviewed The Facility" and "the departmental decisions were all based on substantial evidence consistent with applicable law, including Article 25." See e.g. Ex. 39. **Don't believe it.** As the above demonstrates, DPW doesn't seriously review anything for an Applicant's compliance with Article 25, while DPW itself frequently violates Article 25. DPH merely recites whatever H&E says, without questioning anything, even approving a cell tower for a steel pole that was declared "OBSOLETE" and discontinued the prior year. Planning ignores the mandatory General Plan and merely rehashes boilerplate language that doesn't even address the actual location, including the fact that there is an Adjacent Landmark on an "excellent" view street requiring a Certificate of Appropriateness. DPW can't even tell which applications have resulted in installed PWSFs. **For years, DPH has not received the required post-installation testing**

to prove compliance with FCC guidelines and hasn't bothered to mention it. Verizon and DPW secretly conspire together on notice and to schedule hearings to **intentionally** deprive citizens of their rights and to cause them great stress, assuring they don't get proper notice, required information or a real hearing and can't meaningfully protest. Meanwhile, Verizon's lawyers secretly brief hearing officers without copying protestors. DPW, who forwards the attorney's brief to hearing officers, doesn't provide the brief to protestors despite legal obligations, including the Order and an outstanding public records request, even falsely representing in writing that they have provided all documents. The conduct has been oppressive, fraudulent and malicious.

After DPW conspired with Verizon to deliberately deprive protestors of information (and then breached the public trust by testifying **against** them) DPW's Gillian Gillett **repeatedly** barked the following at terrified protestors every time they sought information: "It's already been decided. There is nothing you can do. Have a nice day." She and Leo misled protestors by proclaiming that nothing could be done because of "federal preemption." To further discourage the protestors, she and Leo also smugly boasted that hearing officers never rule for protestors and the Board of Appeals always upholds the permits.[80] Under these circumstances and expectations, DPW and Verizon are empowered to deprive citizens of their rights and to bully them. They know (and assure) that the system is rigged so that SF residents don't get information in time, if ever, to effectively scrutinize what

[80] Appellants could find no evidence that the Board has ever overruled a Verizon PWSF permit or any PWSF permit since 2015. It appears that the Board may have only overruled a total of 5 Crown Castle permits in 2015.

Verizon, DPW, DPH and Planning did (or didn't do). Because no one ever rules against them, they are unaccountable and free to ignore the law, including mandatory provisions of Article 25. Many SF residents question whether DPW works for Verizon rather than the City and its residents.[81]

And why? The most charitable explanation is that some City employees wrongly assume that the Telecommunications Act ("TCA") preempts every other existing law and their obligations to SF citizens. It doesn't and as Article 25, the Master License and the UCP confirm, other laws and duties must also be respected.

The TCA "left in place local authority over 'the placement, construction and modification of personal wireless service facilities' (47 U.S.C. §332(c)(7)(A))..." *T-Mobile West LLC v. City and County of San Francisco*, supra. The TCA does not even preempt local authority to regulate RF emissions in this case since SFPUC is acting "in its capacity **as property owner with a proprietary interest in the License Area...**" (Master License, §13.5) and the TCA "does not address a municipality's property rights as a landowner." *Omnipoint Communications, Inc. v. City of Huntington Beach,* 738 F.3d, 192, 201 (9th Cir. 2013). Thus, a contract for publicly

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[81] It is surprising to SF citizens that DPW is legally adverse to them. Aside from their behind the scenes acts to deprive citizens of information and rights, DPW employees oppose protestors at hearings and, in this case, to avoid giving protestors information, DPW asserted objections that appear to have been drafted by Verizon's attorneys. Ex. 87. DPW employees submit appeal briefs to oppose citizens and to support Verizon and apparently also attend board hearings to defeat the citizens. Why does DPW do it? The answer may be that Verizon pays DPW for such work. Emails suggest that DPW at least gets paid for attending hearings to oppose SF citizens, perhaps $407 if one protestor and $84 for each additional protestor. Ex. 113. Exactly what the financial relationship between DPW and Verizon is needs to be further discovered, as does the relationship between DPW and Verizon's attorneys. The possibility of financial and ethical conflicts is troubling. Appellants note with some concern DPW's willingness to violate the Public Records Act and Sunshine Ordinance to conceal emails between Leo and Melanie. See Ex. 36.

owned property, such as is the case here, can contain provisions restricting RF emissions more stringent than FCC Guidelines. 47 U.S.C. §332 (c)(7)(B)(iv) does **not** prevent that. See e.g. *Sprint Spectrum v. Mills,* 283 F.3d 404, 417-20 (2d Cir 2002) and *Omnipoint Communications, Inc. v. City of Huntington Beach, supra.*[82] Also, to collect market-based fees for their poles, SFPUC and SFMTA **rely** on the fact that San Francisco acts in a proprietary capacity when licensing its poles to **prevent** federal preemption. If there were federal preemption, they would be prohibited from charging such fees and would have to refund them with interest. See e.g. *Williams Communications LLC v. City of Riverside,* 114 Cal.App. 4th 642 (2004).

In her zealotry to defeat the SF citizens she is obligated to serve, Ms. Gillett recently gave this Board her legal opinion that "Federal law preempts state and local authority to regulate RF emissions...," citing 47 U.S.C. §332 (c)(7)(B)(iv) as her legal authority. Ex. 105. In wrongly claiming federal preemption, Ms. Gillett renders herself and DPW legally adverse not just to SF citizens but to the City itself. Remarkably, she, and thus DPW, dispute the very rights that the City deliberately sought to secure for itself in drafting the Master License in the manner in which it did. They also undermine the legal basis upon which SFMTA and SFPUC rely to

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[82] The City can and should have more stringent requirements for RF emissions exposure. See e.g. *Sprint Spectrum v. Mills,* 283 F.3d 404, 417-20 (2d Cir 2002). This Board has already seen and heard much evidence from other Appellants that FCC guidelines are outdated and do not protect the health, safety and welfare of citizens. The most recent evidence are the multiple children and teachers with cancer who were exposed to emissions below FCC standards, if H&E is to be believed. Ex. 15. 2298 Pacific, its Officers, Shareholders and residents reserve all rights to claim that compliance with FCC guidelines is the wrong standard and to also seek damages on that basis.

charge market-based fees for use of their valuable assets. The logical extension of Ms. Gillett's/DPW's claims is that the City should have to refund fees, with interest.

Similarly, Verizon should not be making any arguments based on federal preemption. Having contractually "acknowledge[d] and agree[d] " that SFPUC is acting as "as a property owner with a proprietary interest," Verizon has waived all rights to argue federal preemption and breaches the contract when it does so.[83] Ex. 3, §13.5.

However, even if ALL state and local laws were preempted, which they aren't, the parties would still be subject to federal jurisprudence other than the TCA and Appellants would still have rights. For example, Federal law includes the U.S. Constitution and the Fifth Amendment (prohibiting the taking of private property without just compensation) and the Fourteenth Amendment (prohibiting the deprivation of life, liberty or property without due process), both of which will also be violated if this permit is upheld. See also 42 U.S.C. § 1983 (civil action for deprivation of rights[84]); 42 U.S.C. § 1985(3) (conspiracy to deprive persons of rights); 15 U.S.C. § 45 (Federal Trade Commission Act preventing unfair and deceptive acts); 18 U.S.C. 371, 1341 and 1343 (prohibiting mail and wire fraud and conspiracy) and 18 U.S.C. §1962 (treble damages and attorneys' fees possible for such fraud). Regardless of what Verizon and DPW may claim, the TCA does not preempt the U.S. Constitution and all other laws and it does not excuse the many illegal and unethical acts that have already occurred and will continue to occur if

[83] This includes, but is not limited to, its wrongful claims that protestors cannot complain about property value depreciation because of 47 U.S.C. §332 (c)(7)(B)(iv).
[84] There has already been a deprivation of rights.

this permit is upheld. Appellants respectfully request that for the many reasons presented above, this Board uphold Appellants' appeal and deny Verizon's permit.