

**COMMUNICATIONS AGREEMENT**

**BETWEEN**

**THE CITY AND COUNTY OF SAN FRANCISCO AND**

**THE SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT**

## COMMUNICATIONS AGREEMENT

This Communications Agreement (the Agreement”) is made and entered into this \_\_\_ day of October 2016, between the City and County of San Francisco ("City"), a municipal corporation, acting by and through its Municipal Transportation Agency (“SFMTA”) and the San Francisco Bay Area Rapid Transit District (“BART”) a rapid transit district established pursuant to California Public Utilities Code section 28500 *et seq.* (collectively SFMTA and BART are the “Parties”).

### RECITALS

1. SFMTA and BART operate transit services in the City and County of San Francisco; and
2. SFMTA and BART control or use specified real property and several rights-of-way (collectively the “BART/SFMTA Real Property” and individually, the BART Real Property and the SFMTA Real Property) in the City and County of San Francisco, in the areas shown in Exhibit A; and
3. The Parties seek to improve communications services to riders and members of the public, and obtain “Revenues” (as defined herein) by making portions of the BART/SFMTA Real Property available to “Carriers” and other “Eligible Entities” (as defined herein) for facilities and equipment for wireless services and fiber optic capacity;
4. The Parties seek to establish a “Revenue Share Methodology” (as defined herein); and
5. SFMTA authorizes BART to negotiate with Carriers and Eligible Entities to a) establish funding to build and operate communications capacity on the BART/SFMTA Real Property; b) authorize BART to enter into Carrier License Agreements for wireless facilities and License Agreements for fiber optic capacity; and c) establish License Payments (as defined herein) for Carriers and Eligible Entities to pay to use designated portions of the BART/SFMTA Real Property;
6. SFMTA will grant utility easements to BART at designated locations within SFMTA Real Property for placement and operation of communications facilities; and
7. BART will make available a portion of BART Real Property for a data center known as a “Head End Room” (as defined herein) to license to Carriers for placement of Carrier Equipment (as defined herein).

**NOW, THEREFORE,** SFMTA AND BART, agree as follows:

### **SECTION 1: DEFINITIONS**

“BART Real Property and BART/SFMTA Real Property” are defined in the second recital of this Agreement. Use of the term BART/SFMTA Real Property can include real property controlled or used by BART or SFMTA, as specified in Exhibit A.

“Carrier” shall mean a company engaged in the business of providing telecommunications services to the public for compensation. For wireless services, such companies shall be licensed by the Federal Communications Commission (FCC) to provide commercial mobile radio services and adhere to all applicable FCC rules and regulations. For companies seeking access to fiber optic facilities, such entities shall be Eligible Entities, as defined herein.

“Carrier Equipment” shall mean Carrier-owned technology, such as radio frequency equipment, that is licensed to be placed in the Carrier’s designated space in the Head End Room and will connect the Carrier Equipment to communications facilities on the BART/SFMTA Real Property.

“Carrier License Agreements” shall mean license agreements entered into between BART and Carriers for use of the Real Property to install and operate for communications facilities and equipment.

“Days” shall mean the business days of Monday through Friday, weekend days excluded, unless otherwise specified by the Parties in writing.

“Eligible Entity” is a company, government entity, individual or other organization that demonstrates compliance with all applicable federal, state and municipal laws and regulatory requirements for the fiber optic or other communications service provided to the public and enters into the appropriate license agreements with BART to obtain fiber optic or other communications capacity on the BART/SFMTA Real Property.

“FCC” shall mean the United States Federal Communications Commission.

“Head End Room” shall mean the room located on the BART Real Property that has been designated to hold Carrier Equipment in Carrier-specific areas that have been allocated, by license agreement between BART and each Carrier for the Carrier to place Carrier Equipment as set forth in a Carrier License Agreement.

“License Agreements” shall mean agreements entered into between BART and Eligible Entities for use or placement of fiber optic and other communications capacity on the BART/SFMTA Real Property.

“License Payment” shall mean the payment that is payable by Carriers or Eligible Entities pursuant to a Carrier License Agreement or other License Agreement for communications capacity on the BART/SFMTA Real Property, to be shared by BART and SFMTA under the Revenue Share Methodology, as defined herein.

“Revenue(s)” shall mean the total amount of License Payments collected by BART from Carriers and Eligible Entities for the BART/SFMTA Real Property areas specified in this Agreement, as detailed in Exhibit A, less administrative costs and costs directly related to the construction, operation, environmental compliance and the emergency maintenance and management of the communications facilities and equipment in SFMTA Real Property, as shown in Exhibit A.

“Revenue Share Methodology” is set forth in Section 3 of this Agreement.

“SFMTA Real Property” is defined in the second recital.

## **SECTION 2: LICENSE AGREEMENTS**

- A. Negotiation: BART will negotiate on behalf of BART and SFMTA with Carriers and Eligible Entities ("Negotiations") and enter into Carrier License Agreements or License Agreements, as applicable, to expand the communications networks currently existing on BART's Real Property -to SFMTA service areas. Prior to Negotiations, the Parties will agree on standard provisions for indemnity, insurance and the handling of hazardous materials ("Standard Provisions"). The Standard Provisions will be included in all agreements and may only be revised by mutual agreement of the Parties. BART will have exclusive negotiating authority with Carriers and Eligible Entities, and will include the Standard Provisions, including requirements that SFMTA be named as an additional insured and indemnitee in agreements and will provide copies of the final agreements to SFMTA. Notwithstanding the foregoing, the negotiating authority conferred upon BART by this Agreement shall not alter or modify the terms and conditions of the Reciprocal Use Agreement, dated as of April 1, 2010, and any Annexes thereto executed between BART and City.
- B. Payments: The agreements with Carriers and other Eligible Entities will specify certain License Payments due BART on an annual basis. Carriers and Eligible Entities will be invoiced by BART, and the collective amount of the License Payments will be the Revenue subject to the Revenue Share Methodology set forth in Section 3 of this Agreement.
- C. Maintenance: The agreements with Carriers and Eligible Entities will specify that BART will work with Carriers and Eligible Entities to provide legal and administrative support and emergency maintenance and management of the communications facilities and equipment in SFMTA Real Property, and the costs associated with such activities will be included in the License Payment.
- D. Head End Room: BART will specify in the agreements with Carriers and, to the extent necessary, with Eligible Entities that it will supply specific space for equipment BART's Real Property that has been designated to hold Carrier Equipment in Carrier-specific areas that have been allocated, by license agreement between BART and each Carrier, for the Carrier to place Carrier Equipment as set forth in Carrier License Agreements, limited to equipment used to provide services to areas on the BART/SFMTA Real Property.
- E. Environmental Review: The Parties agree that BART shall be primarily responsible for any requisite environmental review under the California Environmental Quality Act (CEQA") and any other applicable environmental laws and regulations, in cooperation with the SFMTA. Costs incurred by the Parties for CEQA review and compliance will be fully recovered from collected License Payments, prior to distribution of Revenues, in accordance with the Revenue Share Methodology, as described in Section 3.

### **SECTION 3. REVENUES AND REVENUE SHARE METHODOLOGY**

- A. Calculation of Revenue: Revenue will be calculated on an annual basis, and will include the total amount of License Payments collected by BART from Carriers and Eligible Entities for the BART/SFMTA Real Property areas specified in this Agreement, as detailed in Exhibit A. An accounting of License Payments received, and associated administrative costs and costs directly related to construction, operation, environmental compliance and the emergency maintenance and management of the communications facilities and equipment in SFMTA Real Property, as shown in Exhibit A will be provided by BART to SFMTA annually, in accordance with the procedures specified in Section 6 of this Agreement.
- B. The Revenue Share Methodology will be as follows:
1. For areas owned, controlled or used by BART as of the date of this Agreement, as set forth in Exhibit A, the Revenue Share Methodology will split the annual Revenue into an 80% share of the total Revenue to BART, and a 20% of the total Revenue to SFMTA.
  2. For areas owned, controlled or used by SFMTA as of the date of this Agreement, as set forth in Exhibit A, the Revenue Share Methodology will be to split the Revenues into a 50% share for SFMTA and a 50% share for BART.
  3. Costs not paid by Carriers and Eligible Entities and incurred by either Party related to construction, operation, environmental compliance, maintenance and administrative costs will be deducted from collected License Payment amounts prior to calculating the Revenue to be shared under the Revenue Share Methodology. A process for collection or reimbursement of project-related costs will be developed by the Parties as operating procedures, as set forth in Section 6 below.

### **SECTION 4. EASEMENTS**

- A. BART and SFMTA will identify appropriate areas on the SFMTA Real Property for location of communications facilities and equipment, and once the appropriate locations have been identified, SFMTA will grant BART utility easements for purposes of BART working with Carriers and Eligible Entities to locate communications facilities within those easements.
- B. BART will work with SFMTA to map and record such utility easements prior to commencement of construction activities.

### **SECTION 5. COORDINATION REQUIREMENTS AND NOTICES**

- A. Cooperation: SFMTA and BART believe a cooperative relationship to be essential to faithful execution of this Agreement. Both Parties also agree that good relations are jeopardized by failure to act in concert on all matters affecting communications uses in

BART/SFMTA Real Property. Both Parties, in good faith, will work together to develop procedures for the Parties to coordinate access and permitting activities, to address issues of potential harmful radiofrequency interference (including, without limitation, to the radio communications of the City, SFMTA, BART, Carriers and other Eligible Entities, to address cost and reimbursement practices and to establish insurance and indemnity requirements, as set forth in Section 6 of this Agreement.

- B. Notices: All invoices, notices or other communications to either Party by the other will be deemed given when made in writing and delivered or mailed to such Party at their respective addresses as follows:

TO: BART

San Francisco Bay Area Rapid Transit District  
300 Lakeside Drive, 11<sup>th</sup> Floor  
Oakland, CA 94604-2688  
Invoices – Attention: General Accounting Manager  
Notices – Attention: Telecommunications Manager

With a copy to:

San Francisco Bay Area Rapid Transit District  
300 Lakeside Drive, 23rd Floor  
Oakland, CA 94604-2688  
Attention: Telecommunications Attorney

TO: SFMTA

San Francisco Municipal Transit Agency  
1 South Van Ness Avenue  
San Francisco, CA 94103  
Notices – Attention: Chief Technology Officer

With a copy to:

Office of the City Attorney  
City and County of San Francisco  
1390 Market Street, 7<sup>th</sup> Floor  
San Francisco, CA 94102  
Attention: Transportation Team

## **SECTION 6. PROCEDURES**

- A. Operating Procedures: SFMTA and BART, through the SFMTA Director of Transportation and the BART General Manager, will seek and obtain all necessary delegated authority to implement this Agreement and to discuss and enter into an agreement or agreements covering procedures for coordinating access and resolving

permitting issues, addressing and preventing any actual or potential harmful radiofrequency interference, setting forth requirements for insurance, indemnity, handling of hazardous materials, ensuring that there are not negative service impacts to SFMTA or BART transit or other operations and a process for payment of and reimbursement for project related costs.

- B. Records and Audit: SFMTA and BART each will bear its own internal administrative accounting and auditing costs associated with the Revenue Share Methodology. SFMTA will have the right to audit BART's Revenue records relevant to the Revenue Cost Share Methodology up to twelve (12) months after the Revenue report date of the period in question. BART's annual Revenue report to MUNI will show the total Revenue, the amount of each Party's share of the Revenue, and maintenance costs for communications facilities on the SFMTA Real Property.
- C. Invoices and Revenue Report: BART will invoice and collect from Carriers and Eligible Entities the License Payments on an annual basis, and provide SFMTA with an annual Revenues report for the revenue share amount due to SFMTA by BART and associated maintenance costs. The amount of such revenue share will be calculated according to the Revenue Share Methodology in Section 3 of this Agreement.
- D. Payment of Revenue Share: BART will pay SFMTA the Revenue Share amount within forty five (45) days of the annual Revenues report. If any payment or other disputes arise, SFMTA and BART agree to resolve such disputes in accordance with the terms set forth in Section 7, below.

## **SECTION 7. RESOLUTION OF DISPUTES**

If any dispute arises related to the terms of this Agreement the Parties agree that following notice by either Party, the Parties will meet and confer in good faith in an attempt to resolve the dispute. In the event that the matter cannot be resolved by the Parties, either Party may request mediation of the dispute. Such mediation shall be conducted before a mutually agreed upon mediator with the costs of such mediation borne equally by the Parties. Participation in mediation shall be a condition precedent to the initiation of any litigation commenced by either Party related to a dispute arising from this Agreement.

## **SECTION 8. GENERAL PROVISIONS**

- A. Term and Termination:
  - 1. The term of this Agreement is for fifteen (15) years from the effective date as set forth in Section 8, with two (2) five (5) year renewal periods. Renewal shall be automatic, unless either Party provides notice to the other one hundred eighty (180) days prior to expiration of the initial or renewal term.
  - 2. This Agreement is subject to termination as follows:
    - a. by mutual agreement of the Parties; or

- b. a determination by either Party that the services in this Agreement create an actual risk to public health, safety of the operations of SFMTA or BART transit service.
- B. Entire Agreement: This Agreement represents the full, complete and entire Agreement of the Parties with respect to the subject matter hereof, and supersedes any and all other communications, representations, proposals, understandings or agreements, whether written or oral, between the Parties hereto with respect to such subject matter. This Agreement may be modified or amended at any time by mutual consent of the Parties hereto. Alterations or variation of the terms of this Agreement shall not be valid unless made in writing and signed by the Parties thereto and no understanding or agreement not incorporated herein shall be binding on any of the Parties hereto.
- C. Severability: If any term, provision, covenant or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions shall continue in full force and effect unless the rights and obligations of the Parties have been materially altered or abridged by such invalidation, voiding or unenforceability.
- D. Governing Law and Jurisdiction: This Agreement shall be interpreted under and pursuant to the laws of the State of California. The Parties agree that the jurisdiction and venue of any dispute between the Parties to this Agreement shall be the Superior Court of San Francisco County.
- E. Binding Upon Successors: This Agreement shall be binding upon and inure to the benefit of the transferees, successors and assigns of each of the Parties to it, except that there shall be no transfer of any interest by either of the Parties to this Agreement without the prior written consent of the other Party, and the transferee, successor or assign shall be public entity qualified to carry out the duties and responsibilities of this Agreement.
- F. Remedies Not Exclusive: No right or remedy conferred upon or reserved to BART or SFMTA under this Agreement is intended to be exclusive of any other right or remedy, except as expressly stated in this Agreement, and each and every right and remedy shall be cumulative and in addition to any other right or remedy given under this Agreement or now or hereafter existing at law or in equity or by statute, except such rights or remedies as are expressly limited in this Agreement.



**SECTION 9. EFFECTIVE DATE**

The effective date of this Agreement shall be October , 2016.

**SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT**, a rapid transit district established pursuant to California Public Utilities Code section 28500, *et seq.*

**CITY AND COUNTY OF SAN FRANCISCO**, acting by and through its Municipal Transportation Agency

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

APPROVED AS TO FORM:

Office of General Counsel

Office of the City Attorney

By: \_\_\_\_\_  
Phyllis A. Whitten,  
Attorney

By: \_\_\_\_\_  
Stephanie Stuart,  
Deputy City Attorney

**EXHIBIT A**  
**AREAS COVERED**

[See attached map]

**COMMUNICATIONS AGREEMENT BETWEEN:**  
 The City and County of San Francisco and  
 The San Francisco Bay Area Rapid Transit District

**EXHIBIT A**  
 Date: 6/2/2010

