



City of Emeryville

CALIFORNIA

MEMORANDUM

DATE: May 19, 2020
TO: Mayor and City Council Members
FROM: Michael Guina, City Attorney
SUBJECT: **Resolution Of The City Council Of The City Of Emeryville Approving A Master License Agreement Between The City Of Emeryville And New Cingular Wireless PCS, LLC, a Delaware Limited Liability Company, (AT&T) And Authorizing The City Manager To Execute The Agreement**

RECOMMENDATION

Staff recommends that the City Council adopt the above-referenced resolution to approve a master license agreement with New Cingular Wireless PCS, LLC, (AT&T).

BACKGROUND

On September 26, 2018, the FCC adopted the Declaratory Ruling and Third Report and Order in the *Matter of Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment* (FCC 18-133, WT Docket No. 17-79, 85 FR 51867) (the "Ruling"). The Ruling impacts the City's ability to regulate wireless facilities in several ways. First, the Ruling limits local government's authority to impose local aesthetic standards. Under the Ruling, local aesthetic standards must be reasonable, no more burdensome than those standards applied to other infrastructure and published in advance. Second, the Ruling shortens the "shot clock," the time by which the local government has to approve or deny an application for installation of a wireless facility. Previously, local governments had between 90 and 150 calendar days to take action on applications for small wireless devices on existing structures. However, under the Ruling, the shot clock has been reduced to 60 calendar days for this action. Furthermore, the shot clock is not expanded, even if the application is for multiple small wireless devices at multiple locations. Finally, the Ruling provides that presumptively reasonable fees are fees that do not exceed \$270 per year per site for an access fee, unless the public agency can establish that its costs exceed \$270 per year per site.

To be in compliance with the Ruling, the City Council took action to amend the Planning Regulations. On January 15, 2019, the City Council adopted both an urgency ordinance, Ordinance No. 19-001, and a regular ordinance, Ordinance No. 19-002 (effective March 7, 2019), both of which amended the Planning Regulations to ensure that the City could comply with the Ruling.

For owners of wireless communications facilities seeking to place such structure on City infrastructure on City property in the right of way (e.g., light poles), Emeryville Municipal Code section 9-5.1704(c)(7) requires the applicant to sign the applicable encroachment agreement to indicate their willingness and ability to comply with the City's terms and

conditions for operating in the public right of way. For small cells, the City developed a new type of encroachment agreement, referred to as the Master License Agreement (MLA). Per the Ruling and the City's Master Fee schedule, the City charges \$270 per pole in the MLA. Like other encroachment agreements, the MLA normally has a one-year term that is renewed automatically, unless one of the parties provide notice of termination. In addition, the one-year term allows the City to increase the fee either if the City's documented costs exceed \$270 per pole during the next term or if the Ruling is stayed, overruled or voided.

DISCUSSION

AT&T indicated that an MLA with a one-year term was problematic from its perspective because it needs the certainty of a longer term to ensure that it had a return on its investment. The proposed MLA has a term of ten years, with no options for renewal. In addition, it sets the per pole fee at \$270, which will be increased annually based on the increase in the San Francisco-Oakland-Hayward consumer price index ("SF CPI"), provided the increase shall be a minimum of 3% and not exceed 5%. There is litigation pending challenging the validity of the Ruling, and therefore, in event that the Ruling is declared void, or otherwise is no longer in effect, then the per pole fee increases to \$1,250 per pole, which will be increased annually based on the SF CPI, with the same minimum and maximum as the current pole fee. All other terms and conditions are similar to the terms and conditions encompassed in the City's standard MLA.

FISCAL IMPACT

It is unclear whether the proposed MLA will have any fiscal impact. The proposed MLA does not require AT&T to install any poles, and therefore, if they do not install any poles, then there is no revenue to receive under the MLA. However, with the per pole fee to be increased annually by the SF CPI, and the fees charged to obtain the applicable permits, such as an encroachment permit, it is anticipated that the implementation of the proposed MLA will not have an adverse fiscal impact.

STAFF COMMUNICATION WITH THE PUBLIC

The City Attorney's Office has communicated both with AT&T, as well as other wireless communications carriers interested in an MLA with the City.

CONCLUSION

Staff recommends that the City Council adopt the proposed resolution.

PREPARED BY: Andrea Visveshwara, Assistant City Attorney

**APPROVED AND FORWARDED TO THE
CITY COUNCIL OF THE CITY OF EMERYVILLE:**



Christine Daniel, City Manager

ATTACHMENTS

- Draft Resolution
- Master License Agreement