



Office of the City Manager

CONSENT CALENDAR

April 12, 2022

To: Honorable Mayor and Members of the City Council

From: Dee Williams-Ridley, City Manager

Submitted by: Liam Garland, Director, Public Works

Subject: Master License Agreement Template for the Non-Exclusive Installation of Small Cell Telecommunications Facilities on City Owned and Maintained Streetlight Poles in the Public Right-of-Way

RECOMMENDATION

Adopt a Resolution directing staff to 1) prepare a draft Master License Agreement template for the non-exclusive installation of small cell telecommunication facilities on City-owned and maintained streetlight poles in the public right-of-way, and 2) return to City Council for review and consideration of template approval.

FISCAL IMPACTS OF RECOMMENDATION

There will be no fiscal impact to the General Fund since the attached resolution does not approve or adopt a master license agreement (MLA) template at this time. However, as part of the proposed MLA template, the City will be able to charge telecommunication companies for review fees and annual rent to cover reasonable costs related to small cell installations on City owned streetlight poles.

CURRENT SITUATION AND ITS EFFECTS

The California Public Utilities Commission (CPUC) has historically determined that wireless providers are a utility and, therefore, have all the rights of use of the public right-of-way (PROW) as any other telecommunications utility under the Public Utilities Code section 7901. The PROW contains existing overhead infrastructure, such as utility poles, traffic signal poles, and streetlight poles that can support wireless telecommunication facilities. As an example, small cell facilities can be and are being installed on wood poles owned by PG&E, and the City has exercised its limited discretion over such installations by adopting the City's Aesthetic Guidelines<sup>1</sup>.

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<sup>1</sup> Aesthetic Guidelines

[https://www.cityofberkeley.info/uploadedFiles/Public\\_Works/Level\\_3\\_-\\_Sidewalks,\\_Streets\\_-\\_Utility/PROW%20Aesthetic%20Guidelines%20\(FINAL\)\(1\).pdf](https://www.cityofberkeley.info/uploadedFiles/Public_Works/Level_3_-_Sidewalks,_Streets_-_Utility/PROW%20Aesthetic%20Guidelines%20(FINAL)(1).pdf)

Wireless equipment is attached to wooden utility poles in the PROW as part of an agreement between the telecommunication company and the utility that owns the pole. The usual instances where wireless telecommunication companies would request to attach their equipment to City-owned streetlights are in underground utility districts where the wooden utility poles have been removed or are not present. Rather than install a new pole specifically for mounting the small cell equipment, the wireless carrier would prefer to make use of existing streetlight poles. The Aesthetic Guidelines also require use of existing poles to the extent technically feasible.

Staff has been contacted by wireless telecommunication companies requesting that they be permitted to attach small cell equipment to City-owned streetlight poles. It is reasonable to expect that a wireless carrier will apply for multiple locations throughout the City. Given the short deadlines, known commonly as “shot clocks,” by which Federal law requires the City to act on each permit application for wireless facilities, it is not feasible to take a separate license agreement to the City Council for approval of each installation and remain in compliance with the law. The time period for the shot clock is 60 days for small cell installations on existing structures and 90 days on new or replacement structures.

By entering into an MLA, the basic terms and procedure for installation of small cell wireless facilities on City owned streetlight poles would be pre-established by City Council. This action removes the need for City Council authorization of each individual installation, and allows the review and authorization of individual pole requests and the permit approval process to meet the shot clock deadlines. Upon City Council’s approval of tonight’s item, staff will prepare a draft MLA template and return to the City Council to request approval of the draft template for use with future applications.

Entering into an MLA is a Strategic Plan Priority Project, by advancing our goal to provide state-of-the-art, well-maintained infrastructure, amenities, and facilities.

### BACKGROUND

Small cell wireless facilities (“Small Wireless Facilities”) are relatively low-power, short-range wireless communication systems that cover a more limited geographic range than traditional “macro” wireless facilities. Small Wireless Facilities are designed to accommodate emerging technologies, which transmit higher volumes of data at higher speed than existing networks. These facilities supplement (rather than replace) larger facilities. The word “small” in “small cell” refers to its service area and, because of the short range of these facilities, projected network buildouts require installation of Small Wireless Facilities at more locations and closer in proximity to each other than is the case with traditional wireless facilities.

On September 26, 2018, the FCC adopted its Declaratory Ruling and Third Report and Order (“Small Cell Order”)<sup>2,3</sup> relating to small cell wireless technology, and the placement of small wireless facilities in the PROW. The rules adopted in the Report and Order interpret the federal Telecommunications Act of 1996<sup>4</sup>.

Existing federal and state law grant wireless providers certain rights to deploy small wireless communication facilities within the City’s PROW and the Small Cell Order places certain limitations on local jurisdictions’ ability to deny, condition, or restrict small wireless installations. Among other things, the Small Cell Order: (1) adopted short “shot clocks” or timelines for action on these applications (60 days for collocation on existing structures or 90 days for new or replacement structures); (2) determined that fees for application review and for use of City facilities must be reasonable and cost-based; (3) established “safe harbor” fee amounts for non-recurring and recurring (rent) fees that are presumed to be reasonable. The non-recurring safe harbor amounts are \$500 for reviewing an application covering up to five small cells on existing poles; \$100 for each additional attachment; and \$1,000 for review of an application for a new or replacement pole containing small cell equipment. The recurring safe harbor amount is an annual fee of \$270 per unit placed on any City-owned pole. Implementing restrictions that would effectively prohibit the installation of small cell facilities in the PROW could result in a lawsuit against the City.

In response to the adoption of the Small Cell Order, on July 7, 2020, the City Council adopted Ordinance 7,726-N.S. amending the language of the City’s Wireless Telecommunications Ordinance and provisions applicable to telecommunications permits in the PROW (BMC Chapter 16.10 and the Aesthetic Guidelines for PROW Permits).

Amendments to the Aesthetic Guidelines for PROW Permits implemented the City’s authority to regulate the location and aesthetics of the wireless facilities installed in the PROW. The Guidelines set forth application requirements, a process for reviewing permit applications, and standards for the placement and design of wireless facilities for PROW permits. These guidelines are currently being applied to installation of telecommunication equipment on utility company-owned poles and will also apply to installations on City-owned streetlight poles as contemplated with the proposed MLA.

Finally, as of January 1, 2022, a new state law (AB 537) went into effect. This law expanded the reach of the “deemed granted” remedy in Government Code 65964.1 to now include applications for small cells facilities, heightening the risks for any non-compliance with the FCC shot clocks.

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<sup>2</sup> FCC Small Cell Order <https://docs.fcc.gov/public/attachments/FCC-18-133A1.pdf>

<sup>3</sup> FCC Fact Sheet <https://docs.fcc.gov/public/attachments/DOC-353962A1.pdf>

<sup>4</sup> Telecommunications Act of 1996 <https://transition.fcc.gov/Reports/tcom1996.pdf>

Directing Staff to Prepare a Master License Agreement  
Template for the Non-Exclusive Installation of Small Cell  
Telecommunications Facilities on City Owned and Maintained  
Streetlight Poles in the Public Right-of-Way

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### ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

Per the Telecommunications Act of 1996, "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." Furthermore, the attached resolution is not a project within the meaning of Section 15378 of the State of California Environmental Quality Act ("CEQA") Guidelines, because it has no potential for resulting in physical change in the environment, directly or indirectly. The resolution does not authorize any specific development or installation on any specific piece of property within the City's boundaries and does not approve or adopt an MLA template at this time.

### RATIONALE FOR RECOMMENDATION

Entering into an MLA with the telecommunication companies will have the benefit of allowing the City to have more control over the installation of small cells on City-owned streetlights through mutual agreement, allow for review fees and annual rent to cover reasonably incurred costs, allow the City to meet federally mandated deadlines for action, reduce the potential proliferation of new poles, and reduce the potential for a lawsuit.

### ALTERNATIVE ACTIONS CONSIDERED

Agreements can be negotiated with the utility companies for individual small cell installations on a case by case basis. However, due to the amount of applications that could potentially be submitted, there would be a risk that the parties involved could not come to terms in the FCC-required, shot-clock time for local approval, risking applications being deemed approved under state law.

Another alternative could include permitting the use of the poles without an agreement and solely relying on the BMC and the Aesthetic Guidelines. However, this would relinquish controls that the City could have over the installation, maintenance, and future removal of the equipment on the streetlight poles, and forego the collection of rent and other fees unrelated to permit reviews.

### CONTACT PERSON

Andrew Brozyna, Deputy Director of Public Works, (510) 981-6396  
Joe Enke, Manager of Engineering, Public Works, (510) 981-6411  
Ronald Nevels, Supervising Civil Engineer, Public Works, 510-981-6439

Attachments: Resolution

RESOLUTION NO. ##,###-N.S.

MASTER LICENSE AGREEMENT TEMPLATE FOR THE NON-EXCLUSIVE INSTALLATION OF SMALL CELL TELECOMMUNICATIONS FACILITIES ON CITY OWNED AND MAINTAINED STREETLIGHT POLES IN THE PUBLIC RIGHT-OF-WAY

WHEREAS, existing federal and state law grant wireless providers certain rights to deploy small wireless communication facilities within the City's right-of-way (PROW) and the Small Cell Order places limitations on local jurisdictions' ability to deny, condition, or restrict small wireless installations; and

WHEREAS, on July 7, 2020, the City Council adopted Ordinance 7,726-N.S. amending the language of the City's Wireless Telecommunications Ordinance and provisions applicable to telecommunications permits in the public PROW (BMC Chapter 16.10 and the Aesthetic Guidelines for PROW Permits); and

WHEREAS, the Aesthetic Guidelines for PROW Permits exercise the City's limited control over the location and aesthetics of the wireless facilities installed in the PROW, consistent with applicable state and federal law. These guidelines have been applied to installation of telecommunication equipment on utility company owned poles and can also be used for installations on City owned streetlight poles; and

WHEREAS, Staff has been contacted by wireless telecommunication companies requesting that they be permitted to attach small cell equipment to City owned streetlight poles in the PROW; and

WHEREAS, Staff proposes to draft a Master License Agreement (MLA) template that will benefit the City by giving it more control over the installation of small cells on City owned streetlights through mutual agreement; allow for review fees and annual rent to cover reasonably incurred costs; allow the City to meet federally mandated deadlines; reduce the potential proliferation of new poles and reduce the potential for lawsuit; and

WHEREAS, at the direction of the City Council, Staff shall return to the City Council to request approval of the proposed MLA template and delegation of authority.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that Staff is hereby directed to draft a Master License Agreement template for mounting of wireless telecommunication equipment on City owned streetlight poles in the PROW.

BE IT FURTHER RESOLVED that Staff shall return to the City Council at a future date to request approval of the agreement template and delegation of authority.

