COUNCIL AGENDA: 6/13/23
FILE: 23-863
ITEM: 2.7

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: Nanci Klein

SUBJECT: SEE BELOW

DATE: May 22, 2023

Approved | Date 6/1/23

SUBJECT: UPDATE TO MACRO CELL FEE SCHEDULE AND LEASE AGREEMENT FOR CITY-OWNED PROPERTIES

RECOMMENDATION

a) Approve a template for Non-Exclusive Installation and Property Use Agreement for Telecommunication Facilities on City-Owned Property (Telecommunication Agreement) for a 10-year term with a one-time five-year option to extend the term;

b) Approve a standard market rate fee schedule based on a site's equipment space requirements, number of antennas, and location within the City of San José with an annual escalation of four percent;

c) Adopt a resolution directing staff to transfer 10 percent of the revenue collected from the new Telecommunication Agreements to the Digital Inclusion Fund; and

d) Adopt a resolution authorizing the City Manager, or their designee, to negotiate and execute Telecommunication Agreements and all other documents necessary to complete a transaction.

SUMMARY AND OUTCOME

The approval of these recommendations will align the City's telecommunication lease rate schedule with current market rates and update the City's standardized template lease Telecommunication Agreement to meet current market leasing conditions. City Council approval of the standard market rate fee schedule will reduce the annual escalation of rates from the higher of either four percent or Consumer Price Index to a flat rate of four percent, adjust rates based on the telecommunication facilities' geographic location within the City, set rates based on the amount of equipment ground space and/or number of antennas required, and resolve Recommendation #5 in Audit #21-03. Additionally, 10 percent of the revenue generated from new Telecommunication Agreements will be redirected to the Digital Inclusion Fund, which will help bridge the Digital Divide and foster equitable growth in our communities.

This memorandum's recommendations will better align the City's telecommunication lease rate schedule with prevailing market rates for leases outside the urban core. This will encourage greater telecommunication infrastructure investment in areas of the City that are currently underserved. The proposed changes to the template Non-Exclusive Installation and Property Use Agreement for Telecommunication Facilities on City-Owned Property (Telecommunication Agreement) will better enable staff to enter into new telecommunication leases by addressing terms that are inconsistent with market norms and have historically challenged lease negotiations. Over time, it is anticipated that this will result in increased revenue to the General Fund and the Digital Inclusion Program Fund.

BACKGROUND

In 1996, City Council approved City Council Policy 7-10 establishing a policy and criteria which represents the minimum standards for the lease or use of City-owned land, buildings, light poles, streetlights, or other City-owned facilities for the placement and maintenance of telecommunication facilities by private telecommunication operators. In August 2001, City Council approved a single-site Non-Exclusive Property Use Agreement and a set of usage fees for City-owned properties, including a specific agreement for City-owned properties located at San José Mineta International Airport (Airport), in response to an expanding telecommunications industry.

In the years following, 2001 to 2006, the City executed a separate agreement for each individual site leased by a telecommunications provider. To streamline the process and ensure fairness and consistency across agreements, in 2006, City Council approved a standardized multi-site Non-Exclusive Installation Property Use Agreement for use as a lease template. This agreement provided a multi-site discount for providers leasing five or more sites under one contract. This allowed the City to lease multiple sites at the same time to a telecommunications provider and help meet the increasing demand from the telecommunication industry. The standardization of leases and usage fees, which aligned with market and industry trends, led to many of the City's existing contracts being executed in the years following 2006.

In 2015, City Council approved Resolution No. 77551, which allowed for distinguishing between small cell and macro cell technology and established a Master Agreement for the Non-Exclusive Installation and Property Use of Small-Scale Telecommunications Facilities in the Right-of-Way and on City-owned property. This resolution enacted no change to macro cell agreements. The multi-site and the single-site Non-Exclusive Property Use Agreement have been in use for macro cell sites on City-owned property, not including Airport properties, since 2001 and 2006, respectively.

On May 21, 2021, the Office of the City Auditor published a report titled "Real Estate Services: Better Tools and Coordination Can Improve Asset Management and Service Delivery," with six recommendations to better manage the City's real estate assets. Audit #21-03, Recommendation #5 states "to improve San José residents' access to cellular networks, after the Real Estate Services Division completes the market rate analysis of its telecommunication fees, it should bring recommendations for a new fee schedule to the City Council for approval." The telecommunications industry has evolved since 2006 necessitating an update to the City's macro cell leasing practices to bring our rates and agreements in-line with current market trends. The proposed modifications to the City's fee schedule and template lease agreement are aimed to provide incentives to telecommunication providers to invest in cell infrastructure in our lower density suburban neighborhoods outside of the urban core.

ANALYSIS

The City of San José has an established telecommunications facilities leasing program with approximately 36 active sites with DISH Wireless, T-Mobile, and AT&T, which has benefited San José businesses, residents, and visitors. However, gaps in coverage or weak signal are still an issue in parts of the City. Accessibility to cellular coverage plays a vital role in bridging the Digital Divide and fostering equitable growth in all of the City's communities.

Since 2006, the telecommunications market has changed, with more installations of small cell and distributed antenna systems providing cellular coverage and connections for the dense downtown core due to their ability to provide capacity and coverage over short ranges. However, macro cell installations remain a crucial element of a robust telecommunication network due to their ability to provide coverage over a larger radius, such as suburban areas. The City of San José has the fourth-largest total land area among California municipalities, making macro cell installations an attractive way for telecommunication providers to reach a larger population in urban areas. Macro cells can provide coverage over a large area, while small cells supplement the data and voice capacity of a macro cell to support cellular traffic in a densely populated area.

As telecommunication providers approach the City seeking lease sites, including on vacant land, City-owned buildings, and certain assets within the public right-of-way, it is critical that the usage fee schedule and lease agreement are appropriate for the market conditions. City staff follow Council Policy 7-10 when selecting a lease site and the City reserves the right to deny a proposed telecommunication installation on the basis of aesthetics or location.

Federal Aviation Administration regulation necessitate the management and use of Airport property separately from other City-owned property. As a result, on August 7, 2001, City Council adopted Resolution No. 70538, which set forth standardized agreements and rates for City and Airport properties; authorized monopoles on City-owned property; and authorized the City Manager to execute these standardized agreements. The Airport has active agreements with multiple telecommunication operators and its unique nature regarding Federal Aviation Administration requirements necessitate flexibility. Therefore, this memorandum only updates the City's telecommunication program on City-owned property outside of the lands managed by the Airport. The standardized agreement and rates for Airport properties shall continue to be assessed separately in accordance with Resolution No. 70538.

Proposed Usage Fee Schedule and Lease Agreement Changes

City staff engaged with Valbridge Property Advisors to provide a market rate study for telecommunication sites in the City of San José. The appraisal gathered pertinent market data on usage fee schedules from within the San Francisco Bay Area and Southern California including, but not limited to, the County of San Mateo, County of Santa Clara, City of Redwood City, and City of Long Beach as well as evaluated the typical lease terms seen throughout the market.

Valbridge Property Advisors recommended the fee schedule seen below in **Attachment A**. The City of San José is an urban area with a downtown urban core. Therefore, the below fee schedule creates two distinct zones within the City of San José, designating the downtown urban core of the City as "Prime Urban" and the lower density residential areas surrounding and expanding outward from the downtown urban core as "Urban". The map shown in **Attachment B** designates the boundaries of the "Prime Urban" area. The usage fee matrix further divides telecommunication sites into "Tiers." The Tiers account for the physical space of the equipment and appurtenant improvements needed for the operation of the telecommunication facilities and/or the number of antennae in operation.

Usage fees will automatically increase by four percent on July 1st of each fiscal year, which is within the range of the comparable data collected by Valbridge Property Advisors.

The proposed updates to the Telecommunication Agreement were recommended by Valbridge Property Advisors appraisal and outlined below. Additionally, based on staff experience managing the telecommunication lease program and recurring challenges in negotiating new telecommunication leases with providers, staff propose the following significant recommended changes to the 2006 single-site template Telecommunication Agreement:

- Increasing the term of the agreement to an initial 10 year term with a one-time five-year option for a total of 15 years
- An administration fee of $3,000 to cover staff time for the negotiation and execution of a lease. This administration fee would go directly to the General Fund
- In the event the lessee remains on the property after the expiration of the agreement term, a new year-to-year tenancy shall be created, known as "Holding Over", and shall be subject to the same terms and conditions of the Telecommunication Agreement at a Usage Fee equal to 105 percent of the then current Usage Fee at the time of the term expiration
- Usage Fee Schedule shall increase by four percent on July 1st each year
- Removal of the term which requires a telecommunication company to pay a higher use rate as established by any substantially similar agreement entered into with another governmental entity, including but not limited to, federal, state, or local agencies
- City may terminate without cause, relocate, or remove the site with a 365-day notice to telecommunications provider
- City can execute either a single-site or multi-site agreement using the same template Telecommunication Agreement

- At City's sole discretion, telecommunication providers shall install a separate electrical meter when reasonably necessary due to site limitations and/or logistics, or if the above is not necessary, providers shall install a sub-meter and reimburse the City for the use of utilities at a rate equal to City's unit cost

The above changes are informed by staff's experience managing the telecommunication program and negotiating to execute new leases. The changes address terms that have historically challenged lease negotiations with telecommunication providers. In briefs with AT&T, it was identified that the City's right to terminate without cause and to relocate the site are concerns. AT&T's preference is to have a lease that provides it with "real estate rights", which essentially would give the lessor full site control. Providing "real estate rights" to telecommunication providers is not consistent with Council Policy 7-10 and it would prevent the City's ability to lease space to multiple carriers at the same site and to reserve space at each site for public and emergency use. Instead, staff recommend extending the notice period for termination without cause or relocation of the site to 365 days. This is an increase from the current 120 days providing the telecommunication provider time to identify a new site in the case of relocation or termination. Both T-Mobile and DISH Wireless are supportive of this change. The change to a one-year notice period does not adversely affect the City's ability to terminate the agreement immediately if the telecommunication provider fails to cure a material breach of the agreement.

These changes to use rates and the template lease will be in effect for all newly executed leases, not including the Airport. Eleven active Telecommunication Agreements contain a provision that will modify their lease rates to the new rate schedule approved by City Council. Multi-site agreements will still be allowed using the Telecommunication Agreement as a template, however, the 20 percent discount for executing five lease sites concurrently will no longer be offered. Similar discount structures were not identified by Valbridge Property Advisors, as market standard and staff did not find the discount to meaningfully incentivize a provider to enter into additional site agreements with the City.

Contribution to Digital Inclusion Fund

Telecommunication providers have responded to changes in market conditions making macro cell sites the preferred installation and as a result they have lowered their investments in small cell infrastructure. The Digital Inclusion Fund has primarily been supported by telecommunication providers investment in small cell installations. To support the City's Digital Inclusion Program, 10 percent of the revenue received for newly executed macro cell telecommunication agreements under the new Telecommunication Agreement shall be transferred to the City's Digital Inclusion Program Fund. As existing lease agreements expire and are renewed under the new contract terms, in the short term, approximately $10,000 to $20,000 annually would be projected to be transferred to the Digital Inclusion Program Fund, instead of remaining with the General Fund. In the mid-to-long term, with the anticipated growth of the macro cell sites lease program, the revenue to the Digital Inclusion Fund could increase to $140,000 annually.

EVALUATION AND FOLLOW-UP

Staff will follow the updated rate schedule approved by City Council, and for those active contracts containing the appropriate provisions, notify the provider of the change in usage fees. No further City Council action is needed.

COST SUMMARY/IMPLICATIONS

Approval of the usage fee schedule and Telecommunication Agreement lease changes will result in increased lease revenue to the General Fund by making the City's telecommunication lease terms more competitive and facilitating an expansion of the lease program. Approval of the terms outlined in this memorandum will be applied to all newly executed Telecommunication Agreements. Eleven active Telecommunication Agreements contain a provision that will modify their lease rates to the new rate schedule resulting in a decrease of approximately $44,000 in projected rent for 2023-2024. Overall, after accounting for the new rate schedule and the number of leased sites, the revenue estimate in the General Fund for 2023-2024 is $1.3 million. In the short term, approximately $10,000 to $20,000 annually would be projected to be transferred to the Digital Inclusion Fund, instead of remaining with the General Fund. In the mid-to-long term, as the City enters into new leases and renews existing lease agreements, the revenue to the Digital Inclusion Fund could increase to approximately $140,000 annually, although diversions from the General Fund are anticipated to be offset by the anticipated growth of the telecommunications lease program.

COORDINATION

This memorandum has been coordinated with the Airport Department, City Attorney's Office, the Office of the City Auditor, the City Manager's Budget Office, the Information Technology Department, and the Department of Planning, Building, and Code Enforcement.

PUBLIC OUTREACH

This memorandum will be posted on the City's Council Agenda website for the June 13, 2023 City Council meeting. Staff briefed all carriers that have active lease agreements with the City, which are DISH Wireless, T Mobile, and AT&T.

COMMISSION RECOMMENDATION AND INPUT

No commission recommendation or input is associated with this action.

CEQA

Not a Project, File No. PP17-003, Agreement/Contracts (new or amended) resulting in no physical changes to the environment.

PUBLIC SUBSIDY REPORTING

This item does not include a public subsidy as defined in section 53083 or 53083.1 of the California Government Code or the City's Open Government Resolution.

/s/
NANCI KLEIN
Director of Economic Development and
Cultural Affairs

For questions, please contact Kevin Ice, Senior Real Estate Manager, at kevin.ice@sanjoseca.gov or (408) 535-8197.

ATTACHMENTS

Attachment A - Matrix of Usage Fees Separated by Prime Urban and Urban

Attachment B – Map of City of San José Downtown Core area designated as "Prime Urban"

ATTACHMENT A

Matrix of Usage Fees Separated by Prime Urban and Urban.

Table Definitions:

Tier 3 = (500-2,000 + sq ft site area and/or 9 or more antennas).
Tier 2 = (150-499 sq ft site area and/or 5-8 antennas).
Tier 1 = (less than 150 sq ft site area and/or 1-4 antennas).
Prime Urban = City of San José Downtown Core and surrounding area as shown in **Attachment B**.
Urban = Area outside of the Downtown Core, excluding the Airport.

USAGE FEE MATRIX UPDATE				
		Tier 3	**Tier 2**	**Tier 1**
Appraisal Rates (Annual)	**Prime Urban**	$65,000	$48,000	$43,000
	Urban	$60,000	$45,000	$40,000

Usage Fees shall increase annually by four percent (4%) on the ADJUSTMENT DATE (July 1st).

ATTACHMENT B

Map of City of San José Downtown Core area designated as “Prime Urban”