Local Gov. Code, Chapter 283:
Legislative and PUC Implementation History, 1999-2010.

Municipal Public Rights-of-Way Access and Compensation

The Transition: 1984-2001 from Franchise fees to Access Line fees.

With Long Distance, Cable and Wireless Networks

Excluded from Framework of Chapter 283.

Legislative and PUC Modification through 2010.

(With epilogue on current PUC Complaints asserting that Chapter 283 applies to allow wireless facilities in the Rights-of-Way)

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Clarence A. West, Attorney and *City Consiglieri*,
Austin, Texas
Telephone: 512-401-3468
E-Mail: cawest@cawestlaw.com

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Local Gov. Code, Chapter 283:

Legislative and PUC Implementation History, 1999-2010.[1]

(With epilogue on current PUC Complaints asserting that Chapter 283 applies to allow wireless facilities in the Rights-of-Way)

Overview: This paper will discuss the historic rights of municipalities to consent to access to use the public rights-of-way for the conducting of private business. It will detail in particular the statutory rights of access to use the public rights-of-way by telecommunications service providers that have been certificated by the Public Utility Commission of Texas ("PUC") to provide local exchange telephone services since the enactment of H.B. 1777 in 1999.[2]

This legal analysis will trace both the legislative history of H.B. 1777 from its predecessor 1997 Interim Joint Senate–House Committee study legislation, to H.B. 1777's enactment in 1999; and it will also detail the history of the PUC's implementation of H.B. 1777/Chapter 283 in 1999-2001, concluding with the most recent PUC redefinition of an access line and categories of access lines project in 2010. The paper will review:

- Historic legislative basis for municipal authority to grant access to rights-of-way, and basis of value based rights-of-way use rental fees.
- Case law distinctions between long distance service derived from statutes enacted initially for telegraph, and for local telephone service, requiring city consent for access.
- Discuss relevant portions of PURA enacted in 1975 and in 1995 with deregulation.
- Review the precipitating factors that led to enactment of Chapter 283 in 1999, including judicial divestiture in the 1980s; statutory deregulation by state and federal law in the mid-1990s, prior legislation and extensive litigation between cities and the telecommunication industry.
- Review the various PUC implementation orders in 1999, as well as PUC Staff letters interpreting those Orders, particularly where those orders determined that long distance, cable and wireless networks were outside the framework of Chapter 283 and that city compensation for the use of public rights-of-way by those providers would be separate from Chapter 283 access line fee compensation.
- A review of the PUC Staff letter in 2001 that stated that being a CTP was not the only consideration of whether Chapter 283 applied, but that the services to be provided by the facilities to be installed was also a consideration.

The paper will also review as to wireless providers:

- A discussion of federal law preempting states and local governments from regulating wireless service providers' entry into the state or local markets and that, in conformity with federal law, no PUC certificate is required to provide wireless service.

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[1] This paper expresses the views of the author and does not offer legal advice. See your local, friendly City Attorney for that kind of advice. The author wants to thank the Texas Coalition of Cities for Utility Issues ("TCCFUI"), as this paper is based in large part upon work previously done on behalf of TCCFUI, and could not have been prepared at this level of detail without the prior support of TCCFUI and its member cities. (For those cities not already members of TCCFUI that are interested in these issues should consider joining TCCFUI.)

[2] H.B. 1777, 76th leg. [1999], ch. 840, sec. 1, codified as Chapter 283, in the Texas Local Government Code ("Chapter 283").

- The absence of participation by wireless service providers as negotiating stakeholders or appearing as witnesses at the Legislative hearings on H.B. 1777
- The lack of wireless provider comments in the PUC's implementation of H.B. 1777 in 1999-2000.
- Review the various PUC implementation orders in 1999, particularly where those orders determined that wireless networks were outside the framework of Chapter 283 and that city compensation for the use of public rights-of-way by those providers would be separate from Chapter 283 access line fee compensation.
- Review the PUC implementation order in 1999 that determined that lines to a wireless provider were not considered to be "interoffice transport", but that back-haul lines between the wireless cellular site and the wireline public switched network was considered "interoffice transport".
- Concludes with an epilogue on current PUC complaints asserting that Chapter 283 applies to allow wireless facilities in the rights-of-way.

I. MUNICIPALITY AS TRUSTEE FOR STATE TO CONTROL ACCESS AND MANAGE USE OF PUBLIC RIGHTS-OF-WAY.

> ***The streets being the property of the public, whoever represents the public not only has a right, but it is their duty, to see that the streets shall subserve the interests of those who wish to use them for the designated purpose.***
>
> *City of Waco v. Powell*, 32 Tex. 258, 272 (Tex. 1869).

In Texas, the Legislature long ago delegated to municipalities the exclusive right to control and manage access for the use of its public rights-of-way.[3] The City manages its public rights-of-ways in its proprietary capacity, as a fiduciary, as trustee for the State,[4] just as a private landowner. A private landowner may manage its property and control and grant access or not, at the landowners' discretion,

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[3] Tex. Civ. Statutes, art. 1175 "A home-rule municipality has the following powers: 1. *To prohibit the use of any street,* alley, highway or grounds of the city by any telegraph, telephone, electric light, …, gas company, *or any other character of public utility without first obtaining the consent* of the governing authorities expressed by ordinance and upon paying such *compensation* as may be prescribed *and upon such condition* as may be provided by any such ordinance…."; Tex. Trans. Code, § 311.001. General Authority of Home-rule Municipality. "(a) A home-rule municipality has *exclusive control over and under the public highways, streets*, and alleys of the municipality. …"; Tex. Trans. Code § 311.071. Authority to Grant Franchise "... (b) The authority to grant a franchise is the exclusive authority of the governing body"; Tex. Utilities Code, § 14.008. "This title does not restrict the rights and powers of a municipality to grant or refuse a franchise to use the streets and alleys in the municipality or to make a statutory charge for that use." Tex. Utilities Code, Section 54.205. "Municipality's Right to Control Access." "This title does not restrict a municipality's historical right to control and receive reasonable compensation for access to the municipality's public streets, alleys, or rights-of-way or to other public property." See also, *Southwestern Bell v. City of El Paso and the El Paso County Water Improvement District, Number 1*, 168 Fed. Supp. 2nd 640, 648 (2001) a city, unlike the water district, is "not limited in terms of their ability to "control and receive compensation for access to the municipality's public streets…" citing Tex. Utilities Code § 54.205.

[4] *Texas Dept. of Transp. v. City of Sunset Valley*, 146 S.W.3d 637,645 (Tex. 2004) "As the State's agent or trustee, a municipality does possess a superior interest in its public roads vis-a-vis private citizens. The Legislature may grant cities and towns "exclusive dominion" over the public ways within their corporate or municipal boundaries. …. as has been delegated to them by the Home Rule Amendment to the Texas Constitution, art. 11, § 5, or by the legislature…. "; See also, *West v. Waco*, 294 S.W. 832, 833 (Tex. 1927) Quoting approvingly "'No individual has the inherent right to use a street or highway for business purposes. No man has the right to use a street for the prosecution of his private business, and his use for that purpose may be prohibited or regulated as the state or municipality may deem best for the public good. Not having the absolute right to use streets for the prosecution of private business, within the bounds of reason, where no discrimination is shown, persons or classes of persons may be controlled or regulated in the use of streets. This is a self-evident proposition, for, if it were not so, sidewalks and streets could be rendered impassable by those vending their wares or soliciting patronage.' *City of San Antonio v. Fetzer* (Tex. Civ. App.) 241 S.W. 1034 (writ refused); *Waid v. City of Fort Worth* (Tex. Civ. App.) 258 S.W. 1114 (writ refused.)."

and so may a city manage its public property and control and grant access or not, at the cities' discretion, acting a fiduciary trustee for the public, not as a regulator. Federal law concerning wireless siting local regulation does not apply when the city is acting in its proprietary capacity as a landowner, as has long been recognized by the Courts[5] and the Federal Communication Commission ("FCC").[6]

With the municipality as the trustee for the State, effectively the proprietary property owner, Texas law has long balanced the needs of "access" to the public rights-of-way for new communication technologies since the advent of telegraph services in the late 1800s, with the statutory and Texas Constitutional requirements of value based compensation for use of that public property.

A. 1800s State Legislature Delegated Exclusive Local Control of Rights-of-Way to Municipalities.

No man has the right to use a street for the prosecution of his private business…. Not having the absolute right to use streets for the prosecution of private business….. This is a self-evident proposition, for, if it were not so, sidewalks and streets could be rendered impassable by those vending their wares or soliciting patronage.
Green v. City of San Antonio, 178 S.W. 6 (Tex. Civ. App.-San Antonio 1915, writ denied)

The legal basis for municipal control and compensation for use of local public rights-of-way has long been a settled matter of Texas law. The legal authority for Texas cities to manage and control local public rights-of-way began with Texas statutes in 1858. On January 27, 1858, the Texas Legislature adopted the initial statute which delegated to cities the authority to "exercise control over the streets and other public places" within the city.[7]

In 1875 the Texas Legislature cities were given "the ***exclusive control and power over the streets, alleys and public grounds and highways of the city***…"[8] And while the statutes have been revised and recodified many times over the last 135 years, they have always including the phrase of "exclusive control" over the streets.[9] This provision is now in the Tex. Transp. Code, § 311.001

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[5] *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 201 (9th Cir. 2013) 47 U. S.C. § 332 (c) (7) (B) (iv) "applies only to local zoning and land use decisions and does not address a municipality's property rights as a landowner."; Accord *Sprint Spectrum, L.P. v. Mills,* 283 F.3d 404, 417-21 (2d Cir. 2002) Section 332(c)(7) "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity"); And see, *Omnipoint Commc'ns Enters., L.P. v. Township of Nether Providence*, 232 F. Supp. 2d 430, 433-435 (E.D. Pa. 2002). "…Township's refusal to lease its own property does not constitute an exercise of zoning or regulatory powers, the Township had no duty under the TCA to negotiate or ultimately to lease portions of municipal property to Omnipoint for the purpose of installing an antenna."; *Sprint Spectrum, L.P. v. City of Woburn*, 8 F. Supp. 2d 118, 120 (D. Mass. 1998) (§ 332(c)(7)(B) does not apply to requests to locate wireless facilities on municipal property); Also see *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only "regulatory schemes").

[6] *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No., 13-238, Report and Order, 29 FCC Rcd 12865 (2014) ("*FCC 2014 Wireless Infrastructure Order*"), ¶ 239, "we conclude that Section 6409 (a) applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities. … Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances." with the FCC referencing: *American Airlines v. Dept. of Transp*., 202 F.3d 788, 810 (5th Cir. 2000); *Building & Construction Trades Council of Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island Inc*., 507 U.S. 218, 231-32 (1993).

[7] Acts of 1858, 7th Leg., p. 69, ch. 61, sec. 17. *City of Waco v. Powell,* 32 Tex. 258, 272 (Tex. 1869) Construed by the Texas Supreme Court eleven years later upholding the city's authority to adopt (in its very earliest form) a rights-of-way management ordinance which prohibited the running of hogs in the streets.

[8] Acts 1875, 14th Leg., 2nd C.S., p. 113, § 32.

[9] *See e.g.* Acts 1885, 19th Leg., p. 57, Chap. 60, Art. 375 Gam. Vol. 9; see also Rev.Civ.St. 1879, art. 375 as amended by Acts 1889, 21st Leg., p. 1; Acts 1913, 33rd Leg., p. 326, Art. 1016; Acts 1917, 35th Leg., p. 351, § 1, Art. 854; Acts 1961, 57th Leg., p. 704, ch. 329, § 1; Acts 1979, 66th Leg., p. 477, ch. 218, § 1, Tex.Civ.St. art. 1016, and former Art. 1146.

[Home rule city] and § 311.002 [general law City]. Both sections have the same wording in subsection (a) of each statute, the same phrase dating back from 1875, "*exclusive control over the highways, streets, and alleys of the municipality*."

In 1913, the legislature adopted the statutory enabling act of the Home Rule Amendment to the Texas Constitution, Tex. Civ. Stat., Art. 1175, which details home-rule municipalities' powers.[10] Article 1175 states, in pertinent part:

> ***A home-rule municipality has the following powers*…. [t]o prohibit the use of any street, alley, highway or grounds of the city by any …. telephone…., company**…. without first obtaining the ***consent of the governing authorities*** … and ***upon paying such compensation as may be prescribed*** ….

B. 1876 Texas Constitution Prohibited Cities from Making "Gifts of Public Property" for Less than Market Value.

> ***cities have the right to fix charges in the nature of rentals for the use of their streets and other public places by telephone companies conducting a local business.*** *Fleming v. Houston Lighting and Power*, 138 S.W. 2d 520, 522 (Tex. 1940).

Value-based compensation for use of public property arises directly from the 1876 Tex. Constitution, Article III, § 52 (a) and Article. XI, § 3, which prohibits governmental entities, such as cities, from making "gifts of public property"—the granting of the use of public property to any entity for less than market value.[11]

In 1915 the right of cities to charge a value based payment for use of the local streets by a local telephone company was upheld by the Dallas Court of Appeals, relying on an 1893 U.S. Supreme Court decision.[12] In 1940 the Texas Supreme Court expressly approved the 1915 Dallas Court case when it upheld a rental based rights-of-way fee.[13] The Court, in the rehearing on the question of whether this payment was an unauthorized "tax" or a street "rental" payment, held the payment was "in the nature of a rental" payment", *not* a "tax", stating: "The authorities recognize a distinction between a rental charge and a tax or charge for the privilege of doing business." citing the "leading case" 1893 U.S. Supreme Court case of *St. Louis v. Western Union Tel. Co.*, for the holding the

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These provisions are now codified in the Tex. Transp. Code, §§ 311.001 [home rule city] and 311.002 [general law city]; and see also, Tex. Civ. Stat. Art. 1175 [home rule city].

[10] Acts 1913, p. 307.

[11] Tex. Const. Art. III, § 52 (a) "the Legislature shall have no power to authorize any …. city, town … to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever ….". Tex. Const. Art. XI, § 3 "No …. city, or other municipal corporation shall hereafter … make any appropriation or donation to the same, or in anywise loan its credit….". These constitutional provisions were a direct response to financial problems that arose in the 1860s and 1870s when city and county lands and credit were granted without value based compensation to the then nascent industry of railroads, which led to dire financial consequences for those local governments.

[12] *Southwestern Tel. & Tel. v. City of Dallas*, 174 S.W. 636, 641-42 (Tex. Civ. App. 1915, writ refused) "the city possesses ample power under its present charter to make the charge for the use and occupancy of the streets …. The exact question has been determined by the Supreme Court of the United States", citing, *St. Louis v. Western Union Tel. Co.*, 149 U.S. 465 (rehearing, 1893) ("*1893 U.S. Sup. Ct., St. Louis, reh.*".)

[13] *Fleming v. Houston Lighting and Power*, 138 S.W. 2d 520, 522 (Tex. 1940) ("Fleming I") upholding a 4% gross revenue fee.

payment was "rent".[14] That a franchise fee is a street rental fee and not a "tax" has also been noted in several Texas Attorney General Opinions.[15]

C. PURA 1975: Preserved a city's right to franchise the *use* of streets and to charge for that use, Tex. Util. Code, § 14.008.

In 1975, a provision was included as part of the initial Public Utility Regulatory Act ("PURA") to preserve a city's right to franchise the *use* of streets and to charge for that use, now codified as Tex. Utilities Code, § 14.008.[16]

D. PURA 1995: Preserved Municipality's Historic Right to Control Access, Tex. Util. Code, § 54.205.

Legislative deregulation of the wireline telecommunication industry allowing local competition in a former monopoly industry occurred in the mid-1900s; first by Texas in 1995[17], then by Congress in February 1996.[18] With state telecommunications deregulation in 1995, PURA 1995 also added a provision to preserve cities "historic rights *to control …. access to municipality's public streets*", now codified as Tex. Utilities Code, § 54.205 and entitled "Municipality's Right to Control Access."[19]

These provisions preserved historic city authority under Texas case law, the Texas common-law, and preserved rights granted in Tex. Utilities Code, § 181.089 (b), that a "*municipality.... may direct any change in…. location of the facilities*", which dates back to 1871, with cities' "historic rights *to control …. access"* by consent to use rights-of-way dates back at least a century.[20]

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[14] *Fleming v. Houston Lighting and Power*, 143 S.W.2d 923, 924 (Tex. 1940) ("Fleming II") citing *St. Louis v. Western Union Tel. Co*., 148 U.S. 92 (1893)" ("*U.S. Sup. Ct., 1893 St. Louis*").

[15] Tex. Atty. Gen. Op. H-1265 (1978) (State agencies must pay the municipal charge on telephone bills, as it is a rental payment, there is no "tax" exemption); Tex. Atty Gen. Op. JM-16 (1983) (municipal fee may be passed through to the county as a customer as it is a rental payment; there is no "tax" exemption).

[16] Acts 1975, 64th Leg., ch. 721. ("PURA 1975"), Tex. Civ. Stat. Art. 1446c, section 21, recodified in 1997 as Tex. Utilities Code, § 14.008. "This *title does not restrict the rights and powers of a municipality to grant or refuse a franchise* to *use* the streets and alleys in the municipality or to make a statutory *charge for that use*." (Emphasis added.)

[17] H.B. 2128, Acts of 1995, 75th leg., ch. 231, ("PURA 1995"), Adopted Tex. Civ. Stat. Art. 1446c-0, the Public Utility Regulatory Act of 1995, now recodified in the Utilities Code, principally in Title 2, Public Utility Regulatory Act, Subtitle C, Telecommunication Utilities.

[18] 1996 Federal Telecommunication Act (47 U.S.C. § 151, *et seq*.) ("*1996 FTA*").

[19] PURA 1995, sec. 29, codified as Tex. Civ. Stat. Art. 1446c-O § 3.2555 (f), and recodified in 1997 in Tex. Utilities Code, § 54.205. "Municipality's Right to Control Access." "This title *does not restrict a municipality's historical right to control and receive reasonable compensation for access to the municipality's public streets*, alleys, or rights-of-way or to other public property." (Emphasis added.) *See also, Southwestern Bell v. City of El Paso and the El Paso County Water Improvement District, Number 1*, 168 Fed. Supp. 2nd 640, 648 (2001) a city, unlike the water district, is "not limited in terms of their ability to "control and receive compensation for access to the municipality's public streets…", citing Tex. Utilities Code § 54.205.

[20] A local telephone company's access rights to use local city streets was addressed over a century ago, in *Athens Telephone Co. v. City of Athens*, 163 S.W. 371, 373 (Tex.Civ.App.-Dallas Jan 24, 1914, writ refused), when the Court stated: "[t]he appellant [telephone company] had no original right in law to use the streets of appellee [City] upon and along which to conduct a telephone business, *without the consent of appellee [City*]"; Requiring city consent to use the local streets, e.g. *Athens Telephone Co. v. City of Athens*, 182 S.W. 42, 42 (Tex.Civ.App.-Dallas Dec 11, 1915, writ refused): *Southwestern Tel. & Tel. v. City of Dallas*, 174 S.W. 636 (Tex. Civ. App. 1915, writ refused); *Fink v. City of Clarendon*, 282 S.W. 912, 915 (Tex. Civ. App.-Amarillo, 1926, no writ); *Alpine Tele. Corp. v. McCall*, 143 Tex. 335, 338, 184 S.W.2d 830 (Tex. 1945). In 1999, after the deregulation of wireline local facilities in Texas, to some extent City consent was supplanted to eligible CTPs for local wireline facilities by Chapter 283 of the Local Government Code, which is inapplicable to wireless network facilities, as discussed below.

II. LOCAL ACCESS FOR USE OF THE PUBLIC RIGHTS-OF-WAY BY TELECOMMUNICATIONS SERVICE PROVIDERS BEFORE 1999.

A. 1871-1999: Wireline Telegraph and Telephone Long Distance State Grant of Authority to Use Rights-of-way, but no Local Access without Local Consent.

In 1871 Texas allowed telegraph companies "to set their [facilities] along, upon and across any of the public roads …of this State in such manner *as not to incommode the public* in the use of such roads, streets and waters."[21]

And in the same 1871 act, a parallel provision authorizing any city the right to designate a telegraph companies' facilities location before construction, and relocation after construction was also adopted:

> *any city*….through which the line of any telegraph corporation is to pass, *may*, by ordinance …*specify where [the facilities] ...shall be located* …and after erection of the [facilities]…any city…shall have *the power to direct any alteration in the* erection or *location of said [facilities*] … having first given company…opportunity to be heard…[22]

As the legislative grant to use the public-rights-of way for telegraph service (and later telephone) [23] was amended and recodified over the course of the next 144 years, it was coupled with that same parallel provision for cities, allowing the city to specify where the facilities are located.[24] The condition on the grant to use the right-of-way for telephone and telegraph service is now codified as Tex. Utilities Code, § 181.082 with virtually the same phrase from 1871: that the use of the streets must be "in a manner that *does not inconvenience the public* in the use of the road…" Similarly, the parallel city rights to specify facility location, as in 1871, are now codified in Tex. Utilities Code, § 181.089, which still provides that a city "may ... by ordinance …. *specify* the…location of the facilities" and "[a]*fter the construction of the telephone or telegraph line, the … municipality… may direct any change in…location of the facilities…"*

B. Texas case law has long made a distinction between "access" to municipal rights-of-way by a "long distance" telephone company under state law and a "local" telephone company that must have municipal consent.

Texas court cases have repeatedly stated that Tex. Utilities Code, § 181.082 grant to use the public rights-of-way was a grant to a "long distance" telephone company, not a "local telephone company." The rationale for the distinction between a long distance telephone company and a local telephone company in the rights to use the local public rights-of-way was that a "'long distance" telephone company, like a telegraph company, only passes through a city with minimal amount of disruption for its use of the public streets; as opposed to a "local telephone company," which makes extensive and intensive use of the local public streets. This distinction between "long" distance and

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[21] Acts 1871, 12th Leg., 2nd Ses.,. G.L., vol. 7, p. 76, Article VII-Telegraph Corp., Section 53. (Emphasis added).

[22] Acts 1871, 12th Leg., 2nd Ses.,. G.L., vol. 7, p. 77 Article VII-Telegraph Corp., Section 57. (Emphasis added).

[23] A 1900 Texas Supreme Court case discusses in detail the legislative history of the "telegraph" rights-of-way access statute and the "new" invention of the telephone. *San Antonio & A.P. Ry. Co. v. Southwestern Tel. Tel. Co*, 55 S.W. 117, 118 (Tex. 1900). The Court held that "telegraph" included "telephone".

[24] The 1871 grant to use the rights-of-way has been recodified many times: Acts 1874, 14th Leg., p. 132. G.L. vol. 8; Rev.Civ.St.1879, art. 622; Rev.Civ.St.1895, art. 698; Rev.Civ.St.1911, art. 1231; Rev. Civ. St. 1925, art. 1416. Now codified as Tex. Utilities Code, Section 181.082. Compare with the parallel legislative history of city authority to specifying facility location. Acts 1874, 13th Leg., p. 133, G.L. vol. 8; Rev.Civ.St.1879, art. 626; Rev.Civ.St.1895, art. 702; Rev.Civ.St.1911, art. 1235; Tex. Civ. St. art. 1422. Now codified in the Tex. Util. Code, § 181.089.

"local" telephone companies' right of access was initially discussed by the Texas Supreme Court as early as 1913.[25]

The next year, 1914, in citing to the prior year's *Brownwood Case,* the distinction between the rights of a long distance telephone company and a local telephone company's access rights to use local city streets was addressed directly in *Athens Telephone Co. v. City of Athen*s, 163 S.W. 371, 373 (Tex. Civ. App.-Dallas Jan 24, 1914, writ refused), when the Court stated:

> [While long] distance telegraph and telephone companies might pass through towns and villages, using their streets so as not to incommode the public, ……facts in this case show appellant [telephone company] is conducting a ***local telephone business***, and that a ***different rule*** with reference to the ***rights of such companies*** pertains in law is made clear by Mr. Chief Justice Brown, in the *Brownwood* Case, [157 S.W. 1163, 1165-1166] supra, by the statement in the opinion that '"it is not to be inferred from this opinion that this company can, without consent of the city, transact the business of a local company." Concluding ... [t]he appellant ***[telephone company] had no original right in law to use the streets of appellee [City] upon and along which to conduct a [local] telephone business, without the consent of appellee [City]…..***[26]

III. LOCAL ACCESS FOR USE OF THE PUBLIC RIGHTS-OF-WAY BY TELECOMMUNICATIONS SERVICE PROVIDERS AFTER 1999, AND CHAPTER 283.

A. Prelude to Adoption of Chapter 283.

Prior to the adoption of Chapter 283 in 1999 there was a perfect storm of an industry in dynamic change—judicial action in the 1980s, deregulation in the 1990s, and technological changes throughout that period. Each episode was followed by litigation between cities and both the older, incumbent telecommunications service providers, and the new telecommunications service providers. A brief overview of those issues is set out below.

1. Telecom Industry Changes: Divestiture (1980s) and Deregulation (1990s).

Divestiture 1981-1984: Long Distance "access charges," lawsuits and the new "flat-fee."

Other than the litigation in the early of the 1900s on the issue of "local" vs. "long" distance companies' rights of access to local streets, city compensation disputes for use of the rights-of-way

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[25] *City of Brownwood v. Brown Telegraph & Telephone Co*. 157 S.W. 1163, 1165-1166 (Tex. 1913). "[1165] we express no opinion as to the rights of local telephone companies or the local business of long distance companies…. [1166] ...and we expressly *reserve from any implication the relative rights of local telephone companies and city governments. N*or do we intend to imply any limitation upon the authority of a city in the regulation of placing of poles, etc., or placing wires underground when necessary to avoid 'incommoding' the public."

[26] Emphasis added. Holding similarly in requiring city consent for local telephone company to use the local streets, e.g. *Athens Telephone Co. v. City of Athens*, 182 S.W. 42, 42 (Tex.Civ.App.-Dallas Dec 11, 1915, writ refused): *Southwestern Tel. & Tel. v. City of Dallas*, 174 S.W. 636 (Tex. Civ. App. 1915, writ refused); *Fink v. City of Clarendon*, 282 S.W. 912, 915 (Tex. Civ. App.-Amarillo, 1926, no writ); *Alpine Tele. Corp. v. McCall*, 143 Tex. 335, 338, 184 S.W.2d 830 (Tex. 1945): "…a local telephone company…. can derive no right to use the streets from Article 1416"; *Hooks Tel. v. Town of Leary, 352 S.W.2d 755, 758* (Tex.Civ.App.-Texarkana 1961, no writ): "A local telephone system is not entitled to the privileges granted long distance telephone companies by Art. 1416 …. telephone companies in Texas fall into two classes, either local or long distance."; *Weslaco v. General Tele. S.W.,* 359 S.W. 2d 260, 263 (Tex.Civ.App.-San Antonio 1961, writ ref'd n.r.e.) "That [legislative grant] statute applies to long-distance telephone companies; *Hooks Tel. v. Town of Leary*, 370 S.W.2d 749, 754 (Tex.Civ.App.-Texarkana 1963). *Cf., Richmond v. Southern Bell Tel. Co.*, 174 U.S. 761 (1899). On the limits of the 1866 Federal Post Roads Act as to "long" distance and not local road use due to the enormous increase in the burdens placed on public property by a local telephone company as opposed to a "distant" telegraph company.

were uneventful for decades. This was true until the Justice Department - AT&T agreed divestiture of AT&T; the "break up" of AT&T into seven "local" wireline regional "Baby Bell" companies and the remaining AT&T as a wireline "long distance" company in the 1980s.[27] With divestiture came the relatively new network long distance "access charges" paid by "long" distance companies to the local telephone franchisee (the new local regional telephone company) to complete long distance calls. As this was a substantial amount of revenue paid to the local companies a dispute arose between cities and the local telephone franchisees as to whether this new "access charge" payment constituted part of the "gross revenue" for purposes of calculating the city rights-of-way gross revenue based franchise fee. Litigation ensued, ultimately resulting in revisions to the way franchise fees were paid in many cities to a "flat-fee", adjusted periodically.[28]

Deregulation in 1995 and 1996: ILECS, CLECS and more lawsuits.

Eleven years after the 1984 divesture there was another significant event, legislative deregulation of the wireline telecommunication industry of the former local area monopoly of the wireline telecommunications industry to allow local competition which occurred in the mid-1900s; first by Texas in 1995[29], then Congress in February 1996.[30] This "deregulation" allowing local competition also precipitated litigation over rights-of-way franchising and compensation, both from incumbent local exchange carriers ("ILECS") and also from the new providers, the Competitive Local Exchange Carriers ("CLECs").[31] After deregulation, in order to accommodate access rights and allocate compensation to ILECs and CLECS, a few cities adopted the first iteration of access line fee compensation franchises, e.g. Austin, Houston, Irving, and San Antonio, in the late 1900s. The legal authority for these access line ILEC/CLEC franchises post-deregulation was grounded, in part, on the added provision in PURA 1995 to preserve cities "historic rights *to control … access to municipality's public streets*" (now codified as Tex. Utilities Code, § 54.205.)

The deregulation legislation allowing competing local telecommunication providers their need to use local public rights-of-way, coupled with the pending litigation, ultimately led to legislative changes in Texas as to how cities were to be compensated for use of the public rights-of-way.

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[27] *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom Maryland v. United States*, 460 U.S. 1001 (1983). U.S. Justice Dept. antitrust case against AT&T where AT&T agreed to a settlement in 1981, with implementation in 1984 with the so called "divestiture" of AT&T into the seven "local" regional companies, the so called "Baby Bells", with AT&T, as the "long distance" company. Southwestern Bell Telephone (SWB) was the regional Baby Bell in Texas. Now re-formed as at&t.

[28] *City of Mesquite vs. SWB*, unreported in F. Supp. (No. 3-89-0115-T, N. Dist. Tex., Dallas Div, circa. 1989); *City of Port Arthur, et. al., vs. Southwestern Bell Telephone Company* (No. D-142,176, 136th District Court, Jefferson Co., circa. 1989-1992 [city class action]). The class action litigation was settled and resulted in new rights-of way compensations in some cities in the early 1990s, with historical revenue adjusted to a flat fee, annually indexed to the Texas Industrial Production Index (TIPI); *City of Dallas v. GTE Southwest, Inc.*, 980 S.W. 2d 928, 937 (Tex. App.-Fort Worth 1998, pet. denied) (Describes the network "access charges" franchise fee dispute in some detail, and in this instance, the court held that the city had waived its claim in the franchise fee dispute.)

[29] PURA 1995, now recodified in the Utilities Code, principally in Title 2, Public Utility Regulatory Act, Subtitle C, Telecommunication Utilities.

[30] *1996 FTA.*

[31] *e.g. AT & T Communications of the Southwest, Inc. v. City of Austin*, Tex., 975 F. Supp. 928 (W.D.Tex. Aug 21, 1997) [*Austin I*]; 40 F.Supp.2d 852 (W.D.Tex. Jun 04, 1998) [*Austin II*]; 235 F.3d 241 (5th Cir. (Tex.) Dec 21, 2000) [*Austin III*]; and 8 F.Supp.2d 582 (N.D. Tex. 1998). [*Dallas I*]; (242 F.3d 928 [*Dallas IV*]; 249 F.3d 336 (5th Cir. 2001.) [*Dallas V*]; *Southwestern Bell Telephone Company vs. City of Arlington, Texas*, unreported in F. Supp. (No. 3:98-CV-0844-X, N. Dist. Tex., Dallas Div). All of these suits, and several others, were dismissed by the cities in 1999 due to provisions in H.B. 1777 which allowed a different base amount if the pending franchise fee litigation was dismissed.

2. 1997 Legislation: S.B. 1937 and the Interim Joint Senate-House Committee holds Statewide Hearings on Telecom RoW Franchise fee issues.

After several competing bills were filed in the 1997 Texas Legislative Session (75th Legislature), what was ultimately adopted was S.B. 1937, a compromise bill of sorts--an interim joint legislative study committee. S.B. 1937 established a joint Senate and House "Interim Committee on the use of Municipal Rights-of-Way for the Provision of Telecommunication Services Wholly Within Municipalities by Telecommunication Utilities" (also known as the "Legislative Committee on Municipal Franchise Agreements with Telecommunication Utilities".) The Committee focused on issues raised by 1995 state deregulation and then by federal law deregulation in 1996; particularly issues as to local rights-of-way access and compensation by both ILECs and new CLECs, and how they could have "standard" rights-of-way use conditions and terms. There were seven Committee hearings throughout the state from September 1997 to July 1998 (e.g., Austin (Sept. 30, 1997), McAllen (Nov. 20, 1997), San Antonio (Jan. 13,1998), Ft. Worth (Feb. 25, 1998), Houston (March 19, 1998), El Paso (April 29, 1998), and Lubbock.)

Many cities, including Dallas, Houston and Irving, presented testimony at most, if not all hearing sites. Both the Texas Municipal League ("TML") and the Texas Coalition of Cities For Franchised Utility Issues ("TCCFUI") presented testimony, with detailed franchise information and studies, including a consultant's report on the value of the public rights-of-way, along with TML's 123-page collection of prepared testimony at Committee's meeting in March 1998. The Committee continued to meet in various cities across the state until July, at which time it issued a July 21, 1998 draft interim report.

Despite the materials and testimony submitted by Texas cities, the draft report seemed to inordinately track the industry's positions. Committee member and Chairman of the House State Affairs Committee, Steve Wolens, D- Dallas, drafted an alternative "First Revised Draft Report" with a more balanced view as to cities, dated August 6, but on August 26, 1998 the committee met and voted five to one to issue the initial report, with some amendments, as its interim report.[32]

Significantly, while the manner of calculating franchise fees was contested between the industry (advocating a cost-based fee) and cities (advocating the historic value based fee), all drafts of the report, including the final adopted report emphasized that any transition to a new fee structure should be revenue neutral, and not decrease revenue, e.g., "Ensure that, upon implementation … revenues received by cities for use of the ROW will not decrease from the level of fiscal year 1998."

While all drafts of the reports and the final reports mention wireless networks and compensation, it was determined that as those wireless facilities were not located in the rights-of-way, the committee report therefore made no recommendations concerning wireless facilities.

Cities, TML and TCCFUI expected the telecommunications franchise issue to continue to be a controversial one again, with competing legislation in the 1999 session. They were not disappointed.

[32] However, there is one more wrinkle to this Interim 1998 report. After the report was adopted Chairman Wolens requested copies of the materials submitted to the committee's staff by the industry. He quickly discovered that the initial draft report was drafted, not by the committee staff, but by the industry. He prepared a side by side comparison, which revealed identical misplaced commas and typographical errors, which he, in turn, provided to the Governor, Lt. Governor, Speaker of the House, and each member of the Legislature. A flurry of newspaper articles and editorials questioning the report were printed, one of which was entitled "The Report from Oz." As a result, the Interim Report was discredited, and carried no weight for consideration of prospective legislation going into the 1999 session.

B. 1999: Adoption of H.B. 1777: Transition from a percentage of gross revenue based franchise fee to an access line fee.

Two bills that would have reformed telecommunications franchising practices were filed early in the 1999 legislative session. H.B. 1646, by Representative Bill Carter of Fort Worth, was the bill favored by the industry. Under its terms, all franchises would be standardized and city compensation would be limited to recovery of cities' costs. The other bill was H.B. 1777, by Representative Steve Wolens, from the Dallas area, and it was favored by cities. It would have amended the Transportation Code to specify that in addition to their police power-based regulatory costs, cities could collect four percent of gross receipts from telecommunications providers that owned facilities in city ROWs, and two percent of gross receipts from telecommunications providers that provided service in a city without using city ROWs. Contemporaneous with the start of the 1999 legislative session TML formed a select city committee to review and propose ideas on any telecommunications-franchise fee legislation.

By March 1999 two critical pieces of the legislative puzzle fell into place. First, H.B. 1777 became the legislative vehicle from which a negotiated bill would evolve;[33] and secondly, there was a proposal from Mayor Ron Kirk of Dallas that was presented and agreed to by the TML select City Committee. That proposal formed the basis of the initial negotiation.[34] The city proposal was to convert city compensation from 1998 levels to a standardized access line rate; to preserve city police power authority; to end ongoing litigation (which required specified incentives to both sides terminate the lawsuits); and to establish a method for future growth of city compensation. After several negotiating sessions between the city and industry stakeholders an agreed draft bill was delivered to Chairman Wolens in early May, just prior to the deadline to vote bills out of the House.[35]

After that draft was presented to Rep. Wolens, H.B. 1777 moved quickly to final adoption. In a matter of weeks, the bill was approved by the House Committee, the full House, the Senate Committee, and had a concurrence by the House on minor Senate amendments and was sent to the Governor for signature. The bill became effective on September 1, 1999, adding a new Chapter 283 to the Texas Local Government Code.

1. Chapter 283's Regulatory Scheme:

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[33] The stakeholder negotiators were: For Cities—TML, Dallas, Houston, and Corpus Christi. For telecommunications interest there were three principal groups— (1) ILECs--Southwestern Bell [now AT&T], GTE [Now Verizon]; Telephone Association (2) CLECs –AT&T [then a CLEC/long distance provider], CLEC Coalition, E-Spire; and (3) Long distance/IXCs, Sprint, AT&T. There were no wireless providers in the negotiations. The May 10, 1999, House Research Organization Bill Analysis, stated: "CSHB 1777 is the result of lengthy negotiations between cities and telecommunications companies over proper compensation for the use of public rights-of-way. The bill would establish a uniform method for establishing proper compensation that represents the best interests of all Texans." Texas 76th (1999) Regular Legislative Session, May 10, 1999, House Research Organization Bill Analysis on H.B. 1777. ("*HRO Bill Analysis CSHB 1777*"). http://www.hro.house.state.tx.us/pdf/ba76r/hb1777.pdf#navpanes=0.

[34] Dallas, as well as several other cities, e.g., Austin, El Paso and Arlington, were in litigation over telecommunications franchise issues. The issues in the litigation placed cities in the middle of controversies between facility-based providers and resellers or rebundlers. The proposal was designed, in part, to end the litigation and accommodate most, if not all of the industry's concerns, while preserving city compensation and ROW management authority.

[35] The only formal testimony given on H.B. 1777 was at the State Affairs Committee Public Hearing on April 29, 1999 by Monte Akers, General Counsel for TML, and David Brown, Staff Attorney for SWB. Texas 76th (1999) Regular Legislative Session, House State Affairs Committee Hearing of April 29, 1999. Witness list. http://www.capitol.state.tx.us/tlodocs/76R/witlistbill/html/HB01777H.htm (See Appendix for an unofficial transcript of that testimony, and of the House Floor Debate.)

Chapter 283 concerned PUC Certificated Telecommunication Provider ("CTP"),[36]and was crafted to both implement a new municipal right-of-way compensation methodology that would apply equally to ILECs and others with facilities in the rights-of-way ("underlying CTPs") and CLECs reselling services or using others' facilities ("reseller CTPs")[37] and to precipitate settlements of pending lawsuits between cities and telecom providers concerning compensation under city franchises.[38]

Chapter 283 replaced the almost century-old "percentage of gross revenue" rights-of-way compensation system by an "access line fee" methodology. Pursuant to Chapter 283 cities converted their total 1998 CTP franchise fee revenue to access line fees.[39] Under Chapter 283, access line fees were *proxies* for the former percent of gross revenue franchise fee.[40]

Chapter 283 did away with a requirement of a separate, city by city, franchise. Chapter 283 allowed CTPs to unilaterally terminate individual city franchise agreements until December 1, 1999, and with rare exceptions, most local telecommunication franchises were terminated.[41]

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[36] Chapter 283, § 283.002 "Definitions", "(2) "Certificated telecommunications provider" means a person who has been issued a certificate of convenience and necessity, certificate of operating authority, or service provider certificate of operating authority by the commission to offer local exchange telephone service or a person who provides voice service."

[37] *P.U.C. Subst. R.* 26.467 (k) (4) "(A) *Definition of 'underlying CTP' and 'reselling CTP*.' (i) An *underlying CTP* is a CTP that owns facilities or provides facilities or capacity to another CTP in the rights-of-way of municipalities. (ii) A *reselling CTP* is a CTP to whom an underlying CTP resold, leased or otherwise provided access lines that extend to the end-use customer's premises." (Italics added)

[38] For the seven "eligible" litigating cities, Chapter 283, § 283.053 (d) allowed a different base amount formula, as an alternative. It allowed a higher amount of compensation for any of the seven cities in franchise fee litigation with CTPs. The litigating city could choose that alternative, but to qualify for that higher amount of compensation the litigating city was required to repeal any ordinances that were the subject of the litigation, voluntarily dismiss with prejudice any claims in the litigation for compensation, and agree to waive any potential claim for compensation under any franchise agreement or ordinance expired or in existence on September 1, 1999, and must do so not later than December 31, 1999. All of the eligible litigating cities opted for this alternative, but not all selected the highest amounts allowed.

[39] Base Amount Calculations: The transition from a gross revenue percentage based franchise fee to an access line fee methodology involved a formula that required two preliminary factual determinations and then a calculation based on those two factual determinations to yield a city specific access line rate by access line category to recoup a city's base amount.

First, each city totaled all of its 1998 CTP revenue to establish its "base amount", contemporaneously, each CTP provided city-specific access line counts for each of the three access line categories: category 1-residential switched, category 2-business switched and category 3-private line. Lastly, for each city to recoup its base amount from the three access line categories, it allocated that recoupment by a city specific allocation ratio (or a city could accept the PUC's "default" allocation ratio) among the three access line categories. The PUC then calculated the access line rate for each category based on each city's allocation ratio. Chapter 283, § 283.055. (d); For the parallel provisions implementing the allocation provisions into the PUC rules s*ee* P.U.C. Subst. R. 26.467 (h) (2) [allocations after 2000]. If a city had no allocation the PUC's default allocation would control, P.U.C. Subst. R. 26.467 (e) "Default allocation. The commission's default allocation shall be a ratio of 1:2.3:3.5 for access line categories 1, 2, and 3 respectively". After the base amount was established and the initial access line rate in each of the three categories of access lines were calculated Chapter 283 provides for only three ways that those access line fee rates may be subsequently modified: (1) municipal change in its allocation ratio among access line categories [Chapter 283, §283.055(d)]; (2) PUC implemented annual one-half inflation rate adjustment [Chapter 283, § 283.055(g)]; and (3) municipality accepting less than the maximum rate it is entitled to receive [Chapter 283, § 283.055(h)]. P.U.C. Subst. R. 26.467 (h) (1) [less than maximum rates]. This basic transition compensation formula was used for all Texas cities except for the seven "eligible" litigating cities.

[40] *Rulemaking Relating To Outstanding HB 1777 Implementation Issues, Commission Order Adopting Amendments to § 26.465*, P.U.C. No. 22909 (September 24, 2001) ("*2001 PUCT Order*"), at 22 "the fee-per-access line compensation methodology established under HB 1777 and the total fees paid to a municipality thereunder are a *proxy* for the compensation formerly received by the municipality under the franchise regime in place prior to the enactment of HB 1777 . . . a municipality's total 1998 franchise revenues from multiple sources, such as fees or in-kind services, were consolidated into one pot and then redistributed over access lines under the HB 1777 compensation methodology . . ."

[41] Chapter 283, § 283.054(a).

If a CTP complied with Chapter 283, i.e. reported to the PUC its access lines and paid municipalities access line fees as required by Chapter 283, it was allowed to place its facilities within the local public rights-of-way and was not subject to municipal franchise requirements.[42]

Municipalities retained the police power authority to manage its rights-of-ways for the health, safety and welfare of the public,[43] and before a CTPs' facilities could be installed in the rights-of-ways, a CTP could be required to obtain a no-cost permit, but must comply with each cities' police power-based rights-of-way management regulations.[44]

The **definition of the three categories of "access lines"** was and is the basis in determining access line counts and compensation.[45]

Books and Records: PUC rules require a close correlation between billing systems and access line counts, [46] although as there is no specific PUC prescribed manner of accounting for access lines, each CTP has developed its own procedures,

"Authorized Review": An "Authorized review" is the statutory term of art for what has historically been termed a "franchise fee compliance review" or audit. Chapter 283, § 283.056 (c) (3) provides that a municipality is prohibited from "inspection of a provider's business records except to the extent necessary to conduct *an authorized review of the provider to ensure compliance with the access line reporting requirements of this chapter*…" PUC Subst. Rule § 26.469 outlines the procedure in conducting a municipal authorized review of access line reporting of a CTP.

2. PUC's Bright Line Excluding Long Distance, Cable and Wireless Network Services as outside the framework of Chapter 283, even if CTPs:

In the *PUC Base Amount Order,* Oct. 1999, the PUC determined that even if interexchange carriers, cable providers or wireless providers were CTPs, they were outside Chapter 283 for those services.

> "The commission is persuaded that the *base amount should not include fees <u>from CTPs that are interexchange carriers, cable providers or wireless providers</u>*. Access lines belonging to IXCs, cable providers, and wireless providers generally *do not meet the statutory definition of "access lines" under HB 1777*. …. Therefore, the commission revises the definition of base amount to *exclude fees from IXCs, cable and wireless*

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[42] Chapter 283, § 283.052. "Effect of Payment of Right-of-Way Fees to Municipality" (a) … a [CTP] that complies with this chapter and commission orders issued under this chapter: (1) may erect poles or construct conduit, cable, switches, and related appurtenances and facilities and excavate within a public right-of-way to provide telecommunications service; and (2) is not subject to municipal franchise requirements….". Chapter 283, § 283.051 (a), 283.056 (a) (1), (2) and (f) provide that the access line fee is the sole compensation to cities for use of the rights-of-way, and while construction permits can be required, they are at no-cost, Chapter 283, § 283.056 (b).

[43] Chapter 283, § 283.001 (b) (1).

[44] Chapter 283, § 283.056 (b)-(c).

[45] PUC Subst. Rules §26.461, on Access Line definitions, and §26.465, on Counting Access Lines. Over the years, the PUC staff has issued clarifying memorandum that address problem areas as to the classification of certain types of lines. PUC Project 23379, "ISSUES RELATING TO ACCESS LINE REPORTING AND COMPENSATION PURSUANT TO SUBST. R. 26.465 AND 26.467" PUC Staff Letter, (Hayden Childs) Classification of Certain types of Lines. Nov. 7, 2003 (Discussing ISDN, T-1, Channelization, DSL and PBX-type services); PUC Staff Letter, (Liz Kayser) May 12, 2004 (*Primary Rate Interfaces (PRI)* sold to an Internet Service provider ("ISP") are counted as non-switched point-to-point data lines.)

[46] P.U.C. Subst. R. §26.467(k) (2) requires that the CTP billing system "must be sufficient to substantiate compliance with the access line reporting requirements..." and P.U.C. Subst. R. §26.465(i) requires CTP records are to be maintained "in a manner which allows for easy identification and review."

providers, who may be CTPs, but whose lines do not meet the definition of access lines. Compensation from these providers will continue outside the framework of HB 1777."[47]

In the *PUC Access Line Counting Rule Order,* Dec. 1999, the PUC determined *lines to wireless networks were also excluded as not being "interoffice transport".*

"… the commission believes that *wireless lines must be excluded for the following reasons*: first, the Local Government Code §283.002(6) states that, "the term (public right-of-way) does not include the airwaves above a right-of-way with regard to wireless telecommunications." *By excluding the airways from the definition of the ROW, the Legislature specifically excluded the "last mile" of the wireless network from the application of HB 1777.* Next, each element of the definition of "access line" refers to transmission media *within* the right-of-way extended to the *end-use customer's premises*. Since the framework of HB 1777 is built around the "last mile," (the final segment of the network which terminates at the end-use customer's premises), it would be inappropriate to call a wireless provider an end-use customer simply to capture those lines. Therefore, *by definition, the wireless network falls outside the definition of access lines*. Furthermore, the proposed subsection (f) of the commission's rules has held that other landline-based CTPs are not end users. To be consistent under this approach, the commission also *excludes the lines terminating at a wireless provider. The commission also clarifies that it does not consider lines to wireless providers to be interoffice transport*."[48]

Even if an entity is a CTP, the type of service is looked at to determine eligibility of Chapter 283's application.

In a 2001 informal complaint the PUC Staff, in interpreting the Oct. 1999 *PUC Base Amount Order* excluding long distance revenues from the base amount, concluded that long distance providers were not within the scope of Chapter 283, and would compensate cities separately:

"*Regardless of whether the provider is a CTP*, both Chapter 283 and Commission rules clearly define access lines within the framework of Chapter 283 in terms of the transmission and delivery of *local exchange service*. In other words, contrary to MCIM's assertion, *the statute and rules both take into consideration the type of service being provided (local exchange) and the lines over which that service is delivered (access lines).* Allowing providers to include interexchange lines under this framework would subvert the intent of the law and the policy of the Commission."[49] (Italics added)

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[47] *Implementing HB 1777, Commission Order Adopting Rule § 26.463*, P.U.C. No. 20935, PUC Order, pp. 6-7 (Approved Oct. 21, 1999, Signed Oct. 27, 1999) ("*PUC Base Amount Order*"). (Emphasis added) There is additional legal analysis and detail as to wireless networks, and the corollary, components of a wireless network, being outside Chapter 283, as discussed in Section IV, below.

[48] *Implementing HB 1777, Commission Order Adopting Rule § 26.465*, P.U.C. No. 20935, see pp. 13-14 (Approved Dec. 16, 1999, Signed December 17, 1999) ("*PUC Access Line Counting Rule Order*").

[49] PUC Project 23557, "FORUM TO ADDRESS MUNICIPAL AND PROVIDER COMPLAINTS" (Filed April 26, 2001) PUC Staff Letter, April 23, 2001, page 3 (Hayden Childs).

"Interoffice transport" lines do not count as "access lines".[50] "Interoffice transport" are lines that do not terminate with an end-use retail customer, rather they are wholesale billed lines among and between telecommunication carriers.

Interoffice transport lines include lines which "pass-through" a city without end-use customers, and ***back-haul lines*** between a wireless cell site interconnecting to the public switched telephone network also constitute "interoffice transport," and are allowed under Chapter 283, the back-haul lines being considered part of the wireline network, not part of the wireless network, in part as they are billed as wholesale customers, not as retail end-use customers by wireline CTPs.[51]

DSL service was initially included, but was then excluded as an "access line".[52]

C. Legislative Modifications of Chapter 283 in 2005 adding uncertificated VoIP "Voice Services"

The Texas Legislature recognized the increasing trend of Internet protocol "voice services" being provided by uncertificated providers using wireline facilities, when it amended Chapter 283 in

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[50] Chapter 283, Sec. 283.002. Definitions. In this chapter: "(1) "Access line": …(B) may not be construed to include interoffice transport or other transmission media that do not terminate at an end-use customer's premises or to permit duplicate or multiple assessment of access line rates on the provision of a single service."

[51] *PUC Access Line Counting Rule Order* at 52, "The commission's intention was to exclude back-haul facilities, as these would constitute interoffice transport. Therefore, the commission has revised subsection (f)(2) by replacing the term "transmission facilities" with the term "back-haul" facilities to provide clarity."

[52]The PUC determined that DSL broadband Internet access service did not constitute an "access line". *PUC Access Line Counting Rule Order*, see pp. 35-36. *See also Commission Order Approving Amendments to P.U.C. Subst. Rule § 26.465*, Project Number 26412, p. 16 (Approved Feb. 13, 2003). Similarly, cable service providers have not paid municipalities any cable service franchise fee on cable modem service revenue since March of 2002, when the Federal Communication Commission declared that "cable modem service" was not a "cable service", but an interstate "information service". *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4824, para. 7 (2002) "… *cable modem service* ….is properly classified as an *interstate information service*…." (*2002 FCC Cable Modem Declaratory Ruling*), *aff'd sub nom. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*). Since 2005 municipal broadband over power Lines ("BPL") rights-of-way charges may not exceed what a city charges other broadband providers, such as DSL and cable modem service providers. Tex. Utilities Code, § 43.101 (e). (Added by Acts 2005, 79th Leg., 2nd C.S., ch. 2, Sec. 2, eff. Sept. 7, 2005.) As DSL service, does not constitute an access line and DSL providers do not pay a fee, and as cable provider do not pay a fee on cable modem service no fee can be charged BPL providers.

However, the *2002 FCC Cable Modem Declaratory* Ruling was effectively overturned on the classification issue in the *2015 FCC Open Internet Order*, *Protecting and Promoting the Open Internet*, Report and Order, GN Docket No. 14-28, FCC 14-61, para. 40-49, and 331, et seq. (March 12, 2015) (2015 *Open Internet Order*), para. 308, "we conclude that retail broadband Internet access service is ….an offering of a "telecommunications service." Para. 336 "We define "broadband Internet access service" as a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service."

Texas cities may now argue that with the FCC reclassifying Internet service providers ("ISP") as being a "telecommunication services," that may change Chapter 283 access fees, as arguably an ISP may now qualify as a category 3 private line access line under Chapter 283, but will need to artfully maneuver other state law restrictions on municipal regulation or even charges on broadband services.

But see 2015 *Open Internet Order* pp. 202-204, para. 430-433, on the effect on local regulation, and particularly footnote 1285 "We note also that we do not believe that the classification decision made herein would serve as justification for a state or local franchising authority to require a party with a franchise to operate a "cable system" (as defined in Section 602 of the Act) to obtain an additional or modified franchise in connection with the provision of broadband Internet access service, or to pay any new franchising fees in connection with the provision of such services."

2005 to include any "person that provides voice service" "through wireline facilities located at least in part the public right-of-way, without regard to the delivery technology, including Internet protocol technology."[53]

D. PUC clarification and modification of the definition of "access line" and "categories" 2003-2010.

The PUC has statutory authority in Chapter 283, § 283.003 (b) to review and "*modify the definition of 'access line' and the categories of access lines as necessary to ensure competitive neutrality and nondiscriminatory application and to maintain consistent levels of compensation, as annually increased by growth in access lines and consumer price index, as applicable, to the municipalities."*[54]

And by Chapter 283, § 283.003 (c) the PUC is required to make the determination on whether to "*modify the definition of 'access line' and the categories of access lines"* at *least once every three years."*

The PUC has had several such "access line" redefinition proceedings since 2000, with the last one concluding in 2010.[55] Some resulted in changes, some did not. The significant ones will be commented on below.

2003: Deleted "circuit" added "packet switched": In the 2003 review "*to ensure competitive neutrality and nondiscriminatory application*" of the definitions the PUC deleted the requirement for a "circuit" switch so that the rules were "technologically" neutral between traditional "circuit" switches and (the then) new "packet" switched voice services.[56] The PUC also laid out a guiding principle in these reviews that "functionality, rather than technology, is the threshold" as a key concept in any modifications to the definitions.[57]

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[53] S.B. 5, 79th Legislature, 2nd Called Special Session, effective Sept. 1, 2005. ("SB 5"), Section 28 of SB 5 amended Chapter 283, § 283.002 (2) to expand the definition of a CTP to include not only a PUCT certificated telecommunication provider, but "a person that provides voice service" and added § 283.002 (7), a new definition of "voice service" to mean "voice communications services provided through wireline facilities located at least in part the public right-of-way, without regard to the delivery technology, including Internet protocol technology."

[54] Chapter 283, § 283.003. COMMISSION REVIEW. (a) Not later than September 1, 2002, *the commission shall determine whether changes in technology, facilities, or competitive or market conditions justify a modification in the commission-established categories of access lines or, if necessary, the adoption of a definition of "access line"* provided by this section. ….. (b) As part of the proceeding described by Subsection (a), and as necessary after that proceeding, *the commission by rule may modify the definition of "access line" and the categories of access lines as necessary to ensure competitive neutrality and nondiscriminatory application and to maintain consistent levels of compensation, as annually increased by growth in access lines and consumer price index, as applicable, to the municipalities*. (c) After September 1, 2002, the commission, on its own motion, shall make the determination required by this section at *least once every three years*. (Emphasis added)

[55] P.U.C. Project No. 25450 (2002); P.U.C. Project No. 26412 (2002-2003); P.U.C. Project No. 29347 (2004-2005); P.U.C. Project No. 33004 (2006); P.U.C. Project No. 36830 (2009); and P.U.C. Project No. 37498 ("*PUC No. 37498, 2010 Redefinition*").

[56] PUC *Commission Order Adopting Amendments to § 26.465*, P.U.C. No. 26412, at 12 (February 13, 2003) ("*2003 PUC Order"*).

[57] *Id*., and at 15.

2006: PUC Implementation of VoIP "Voice service": **T**he PUC implementing the 2005 "voice service" amendment to Chapter 283 in 2006, [58] The PUC also reviewed the issue of whether "over-the-top" VoIP service providers where included by the "voice service" amendment, and if they were, did the PUC have jurisdiction to include them. It concluded that the answer to both questions was yes.[59]

> The commission agrees [quoting a commenter] ... "this is not a question of classifying VoIP as a telecommunications service or as an information service which debate has engendered such consternation in the telecommunications industry. ***This is purely a state government question revolving around fees for use of the public ROW."*** At this time, it is not clear whether the FCC will decide to occupy the entire field regarding all types of VoIP services. It has not done so as yet. As such, ***the commission believes it has the statutory authority to subject providers of voice services, as defined in Local Government Code §283.002, to the provisions of Subchapter R of the commission's substantive rules.***[60]

Notwithstanding the PUC's conclusion that it had jurisdiction to require "over-the-top" VoIP providers to comply with Chapter 283, the PUC choose to temporarily exclude "voice services" provided by "over-the–top" VoIP providers in the 2006 amended rules.[61]

The PUC provided several reasons for that exclusion in 2006, but chief among them was the relative scarcity (then) of over-the-top-VoIP providers and technical difficulty in locating their customers.[62] However the PUC also gave clear indications that its decision to exclude "over-the–top" providers was not static, but only a temporary decision that would be revisited in three years as there was growth in VoIP s customers and as technology allowed them to be located easier.[63]

2010: Although there had been a continuing increase in "voice services" provided by "over-the-top" VoIP providers since the 2006 review, the PUC again did not include them in *PUC Project*

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[58] *Commission Order Implementing SB 5 and modifying the definition of an "access line",* P.U.C. Project No. 33004, at 22 (Dec. 14, 2006). ("*2006 PUC Order"*).Emphasis added unless otherwise noted.

[59] *2006 PUC Order,* at 10 ["over-the-top VoIP service providers are providing 'voice services' per the statutory definition"; at 7-8, and 19 [on having jurisdiction to impose fee on over-the-top VoIP service providers].

[60] *2006 PUC Order,* at 18-19. This determination of no federal preemption was two years *after* the FCC's *Vonage Order* narrowly preempting state commissions to requiring state certifications prior to providing service of certain "nomadic" interconnected VoIP providers. *In the Matter of Vonage Holding Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion, and Order* (FCC 04-267, adopted November 9, 2004, released November 12, 2004) ("*Vonage Order*"), *aff'd and rev'd on other grounds, Minnesota PUC v FCC,* 483 F.3d 570 (8th Cir. 2007). *See 47 C.F.R. § 9.3* "interconnected VoIP service provider", "means an interconnected voice over Internet Protocol service that: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible customer premises equipment (CPE); and (4) permits users generally to receive calls that originate on the public switched telephone network [PSTN] and to terminate calls to the public switched telephone network". All wireline interconnected VoIP service providers are "functionally equivalent" to traditional telephone providers that receive calls that originate on the public switched telephone network ("PSTN") and terminate calls on the PSTN. Requiring interconnected VoIP providers to comply with Chapter 283 would be consistent with the PUC's principle that "functionality, rather than technology, is the threshold" in applying Chapter 283.

[61] *P.U.C. Subst. R.* 26.461(c) (1) (A) (iv) currently states that a voice service must be "delivered by means of owned facilities, unbundled network elements or leased facilities, or resale" before they are counted, excluding "over-the-top" VOIP providers.

[62] *2006 PUC Order,* at 15 "VoIP …service is presently small relative to all other types of voice provisioning", at 17, "*de minimus* usage of 'over-the-top' VoIP at present".

[63] *Id,* at 11 and 15-17.

No. 37498, 2010 Redefinition rulemaking. While the PUC staff recommended several changes --to include "over-the-top VoIP" providers; revise how high capacity data lines were counted; and clarified PBX access line counting rules, those staff recommendation was not accepted by the Commissioners' at the May 14, 2010 PUC Open Meeting.

Although a redefinition review is required every three years, 2010 was the last time these issues have been examined by the PUC.

IV. WIRELESS PROVIDERS ARE NOT AUTHORIZED TO USE CITY RIGHTS-OF-WAY BY FEDERAL OR STATE LAW WITHOUT CITY CONSENT.

For any private business entity to place facilities in the public rights-of-way, they must be authorized to do so, by either city consent or by state law.

Wireless providers are not authorized by state law to place wireless networks, or their related facilities, in the public rights of way.

Chapter 283 does not apply to wireless providers, or allow placement of wireless network facilities in the rights-of-way. While a wireless provider may be a CTP for purpose of placing back-haul in the rights of way for interoffice transport, that is all that is allowed. Therefore, a wireless provider is not authorized to use the city rights-of-way by state law, and would need a specific city agreement, i.e. a "license agreement" or a city wide franchise agreement to use the rights-of-way.

A wireless provider or wireless network facilities infrastructure company in Texas may only use public rights-of-way in the City with the express written consent of the City; consent which is discretionary, with the City acting in its proprietary capacity, as a fiduciary, as trustee for the State. No wireless facilities infrastructure company, be it a provider of wireless services directly, a wireless infrastructure company, a neutral host, or a lessor to a wireless provider company, has the "right" to use the local public rights-of-way without consent of the City.[64]

A. PUC Orders of 1999 excluding wireless networks from Chapter 283

By definition, a "line" is not wireless. Chapter 283 applies to "lines" There are several instances in the statute,[65] in the PUC Rules §§ 26.461 and 26.465 (see appendixes) that refer to lines "physically

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[64] A local telephone company's access rights to use local city streets was addressed over a century ago, in *Athens Telephone Co. v. City of Athens*, 163 S.W. 371, 373 (Tex.Civ.App.-Dallas Jan 24, 1914, writ refused), when the Court stated: "[t]he appellant [telephone company] had no original right in law to use the streets of appellee [City] upon and along which to conduct a telephone business, *without the consent of appellee [City*]"; Requiring city consent to use the local streets, e.g. *Athens Telephone Co. v. City of Athens*, 182 S.W. 42, 42 (Tex.Civ.App.-Dallas Dec 11, 1915, writ refused): *Southwestern Tel. & Tel. v. City of Dallas*, 174 S.W. 636 (Tex. Civ. App. 1915, writ refused); *Fink v. City of Clarendon*, 282 S.W. 912, 915 (Tex. Civ. App.-Amarillo, 1926, no writ); *Alpine Tele. Corp. v. McCall*, 143 Tex. 335, 338, 184 S.W.2d 830 (Tex. 1945). In 1999, after the deregulation of wireline local facilities in Texas, to some extent City consent was supplanted to eligible CTPs for local wireline facilities by Chapter 283 of the Local Government Code, which is inapplicable to wireless network facilities, as discussed below.

[65] Chapter 283, Sec. 283.002. DEFINITIONS. In this chapter:

(1) "Access *line*":

(A) means, unless the commission adopts a different definition under Section 283.003, a unit of measurement representing:

(i) each *switched transmission path* of the transmission media that is *physically within a public right-of-way* extended to the end-use customer's premises within the municipality, that allows the delivery of local exchange telephone services within a municipality, and that is provided by means of owned facilities, unbundled network elements or leased facilities, or resale;

within the rights of way", as past PUC Orders make clear. There is no applicability of Chapter 283 of the Texas Local Government Code for wireless network facilities, as the PUC stated in 1999 in two separate orders:

"…. *wireless providers, who may be CTPs, but whose lines do not meet the definition of access lines. Compensation from these providers will continue outside the framework of HB 1777*."[66]

"… the commission believes that *wireless lines must be excluded … by definition, the wireless network falls outside the definition of access lines*. … commission ….*does not consider lines to wireless providers to be interoffice transport.*"[67]

Chapter 283 is applicable to only to a company using the rights-of-way when offering *wireline* local exchange telephone service or *wireline* voice service that has a certificate from the PUC to provide *wireline* local exchange services, as a CTP. Even if a company is a CTP, the provisions of Chapter 283 only apply to the provisioning of *wireline* local exchange telephone service or *wireline* voice service through facilities in the rights-of-way, and related equipment for *wireline* local exchange telephone service.

Even if an entity is a CTP, the type of service is taken into consideration to determine eligibility of Chapter 283's application,[68] including whether it is wireless service provided over a wireless network, or its components,[69] or wireline service.

(ii) *each termination point or points of a nonswitched* telephone or other circuit consisting of transmission media located *within a public right-of-way* connecting specific locations identified by, and provided to, the end-use customer for delivery of nonswitched telecommunications services within the municipality; or

(iii) each switched transmission path *within a public right-of-way* used to provide *central office-based PBX-type services* for systems of any number of stations within the municipality, and in that instance, one path shall be counted for every 10 stations served; …" (Italics added)

[66] *PUC Base Amount Order*, pp. 6-7.

[67] *PUC Access Line Counting Rule Order*, pp. 13-14.

[68] PUC Project 23557, "FORUM TO ADDRESS MUNICIPAL AND PROVIDER COMPLAINTS" (Filed April 26, 2001) In a 2001 informal complaint the PUC Staff, in interpreting the Oct. 1999 *PUC Base Amount Order* excluding long distance revenues from the base amount, concluded that long distance providers were not within the scope of Chapter 283, and would compensate cities separately. PUC Staff Letter, April 23, 2001, page 3 (Hayden Childs). "*Regardless of whether the provider is a CTP*, both Chapter 283 and Commission rules clearly define access lines within the framework of Chapter 283 in terms of the transmission and delivery of *local exchange service*. In other words, … *the statute and rules both take into consideration the type of service being provided (local exchange) and the lines over which that service is delivered (access lines).*"

[69] DAS providers are but a component of a wireless network. See *FCC 2014 Wireless Infrastructure Order*, para. 31, 84-88, 166, 172, 270, and 271. At: http://www.fcc.gov/document/wireless-infrastructure-report-and-order. Para. 166, "…. we define "tower" to include any structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities."; Para. 172 "…we also find that "base station" encompasses the relevant equipment in any technological configuration, including DAS [Distributed Antenna System] and small cell."; Para. 195, "…. we note that, to deploy DAS and small-cell wireless facilities, carriers and infrastructure providers must often deploy new poles in the rights-of-way. Because these structures are constructed for the sole or primary purpose of supporting Commission-licensed or authorized antennas, they fall under our definition of "tower." …."; Para. 270, "We clarify that to the extent DAS or small-cell facilities, including third-party facilities such as neutral host DAS deployments, are or will be used for the provision of personal wireless services, their siting applications are subject to the same presumptively reasonable timeframes that apply to applications related to other personal wireless service facilities. We note that courts have addressed the issue and, consistent with our conclusion, have found that the timeframes apply to DAS and small-cell deployments." Citing *Crown Castle NG East Inc. v. Town of Greenburgh*, 2013 WL 3357169 (S.D.N.Y. 2013), *aff'd*, 552 Fed.Appx. 47 (2d Cir. 2014); Para. 271, "Determining whether facilities are "personal wireless service facilities" subject to Section 332(c)(7) does not rest on a provider's characterization in another context; rather, the analysis turns simply on whether they are facilities used to provide personal wireless services. Based on our review of the record, we find no evidence sufficient to compel the conclusion that the characteristics of DAS and small-cell deployments somehow exclude them from Section 332(c)(7) and the *2009 Declaratory Ruling."*

B. Federal law and FCC Orders on Local Regulation of Wireless Services and Use of Local Public Property

1. Federal law Preemption to Regulate entry of Wireless Providers.

While a PUC certificate is required to provide wireline local exchange services, by federal law the State is prohibited from requiring any PUC certificate or in any way regulating the "entry" into the wireless market, therefore no PUC certificate is required to provide wireless services; even though a wireless provider or wireless network facilities infrastructure company may be a CTP, that CTP does not grant them the authority to provide wireless service or place to place wireless network facilities in the rights-of-way, anymore that a CTP held by a cable provider grants any rights to place cable facilities in the rights-of-way under Chapter 283.[70]

Federal law (47 U. S.C. § 332 (c) (3) (A)) preempts the state and city from regulating "… *the entry* of or the *rates charged* by any *commercial mobile service or any private mobile service*, *except* that this paragraph *shall not prohibit a State* from regulating the *other terms and conditions of commercial mobile services*."[71] And in conformity, PURA both expressly recognizes the preemption of federal law,[72] and further it states it does not apply to commercial mobile service,[73] and no PUC

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[70] Cable services being outside the scope of Chapter 283, as determined in the two 1999 PUC Orders cited previously. (In 2005 legislation was enacted that does allow a cable provider to use the public rights-of-way based on a separate PUC application and certification process. Tex. Util. Code, Chapter 66.

[71] 47 U.S.C.A. § 332. Mobile services… (c) Regulatory treatment of mobile services, (3) State preemption. "….no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." Note this restriction is as to *entry* into the cellular market—it has nothing to do with use of local public RoW.

[72] Tex. Util. Code, § 51.001 "(a) Communication providers, including providers not subject to state regulation, including wireless communication providers and….".

[73] Tex. Util. Code, § 51.003 "Except as otherwise provided by tis title, this title does not apply to: … (5) a provider of commercial mobile services as defined by 47 USC § 332 (d)…"; Tex. Util. Code, § 51.001 (a) acknowledges and states "Communication providers, including providers not subject to state regulation, including wireless communication providers and…."; 47 USC § 332 (d) Definitions. For purposes of this section--(1) the term "*commercial mobile service*" means any *mobile service* (as defined in section 153 of this title) that is provided for profit and makes *interconnected* service available (A) to the *public* or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission …."

Other relevant federal definitions (Italics added):

47 USC § 332. (c) (7) (C) For purposes of this paragraph--

(i) the term "*personal wireless services*" means *commercial mobile services*, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "*personal wireless service facilities*" means facilities for the provision of personal wireless services ...

47 USC § 153 – Definitions…

(33) *Mobile service*. The term "*mobile service*" means a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes

(A) both one-way and two-way *radio communication services*,

(B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, ….

certificate is required (nor may be required) to provide commercial mobile service.[74] While a wireless commercial mobile service provider may be a CTP, that certificate is for local exchange telephone service or voice service, not for providing wireless services or for using the public rights-of-way for either a wireless network, of for the facilities or components of a wireless network, such as an antenna, or type of antenna system, e.g., Distributed Antenna Systems ("DAS").[75] This is consistent with the two 1999 PUC orders excluding wireless networks from application of Chapter 283, the *PUC Base Amount Order* and *PUC Access Line Counting Rule Order*, and the 2001 PUC Staff letter interpreting PUC Orders and rules, stating that the service provided is a consideration in determining if Chapter 283 applies.

The overriding federal law in this area as to restricting municipal regulatory authority is 47 U.S.C. § 332 (c) (7), entitled "Preservation of local zoning authority".[76] The statute provides the broad outlines

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(34) *Mobile station*. The term "*mobile station*" means a *radio-communication station* capable of being moved and which ordinarily does move.

(40) *Radio communication*. The term "*radio communication*" or "*communication by radio*" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

[74] Tex. Util. Code, § 54.003 "A telecommunication utility is not required to obtain a certificate…for: … (5) a commercial mobile service…"

[75] DAS providers are but a component of a wireless network. See *FCC 2014 Wireless Infrastructure Order*, para. 11, 23, 84-88, 160-161, 166, 172, 195, 270, and 271. FCC description of DAS, para. 31. "DAS provides another alternative to macrocells mounted on tall antenna structures. A DAS network distributes RF signals from transceivers at a central hub to a specific service area with poor coverage or inadequate capacity. As typically configured, a DAS network consists of: (1) a number of remote communications nodes deployed throughout the desired coverage area, each including at least one antenna for transmission and reception; (2) a high capacity signal transport medium (typically fiber optic cable) connecting each node to a central communications hub site; and (3) radio transceivers located at the hub site (rather than at each individual node as is the case for small cells) to process or control the communications signals transmitted and received through the antennas. DAS deployments offer robust and broad coverage without creating the visual and physical impacts of multiple macrocells. Further, whereas small cells are usually operator-managed and support only a single wireless service provider, DAS networks can often accommodate multiple providers using different frequencies and/or wireless air interfaces." (Footnotes omitted)

For example, see PUC Docket No. 30616, *In re Application of NextG Networks of Illinois, Inc*. The City of Austin filed a motion to intervene that raised issues as to whether this was a wireless provider. That Austin filing precipitated the PUC Staff to promulgate questions to NextG to clarify the matter. In reply to the questions of the PUC Staff in a Feb. 9, 2005 filing NextG stated "…. NextG is a fiber provider, *not a wireless provider*……" NextG, also specifically indicated *that it would not be providing wireless service* in its response to Question 4(b) of the application. Later the Austin Intervention was denied, as it was determined by the PUC staff that while Chapter 283 issues had been raised, this was a CTP application, and therefore was not the forum to raise those Chapter 283 issues. There was no mention of the merits of the City arguments. Contemporaneous with this CTP application, NextG also had negotiated with the City its consent to use the rights-of-way in a License Agreement, so the City had no need to continue an action at the PUC on the matter. NextG never formally accepted the agreement, nor did it ever install any facilities in the rights-of-way, not fiber backhaul nor any other facilities in Austin. As of 2015 Crown Castle became a successor to NextG.

[76] 47 U.S.C. § 332 (c) (7) Preservation of local zoning authority:

(A) General authority. Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations.

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof - (I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

of the process to be followed by a city acting as a regulator in reviewing applications. It grants no rights to use the public rights-of-way by wireless providers. Neither wireless providers nor wireless network infrastructure companies have been granted any authority to place wireless network facilities in the local public rights-of-way by federal law, nor could federal law do so without compensation.[77]

The two principal FCC orders that discuss wireless provider issues and local government authority are: the *2009 FCC Wireless Shot Clock Order*;[78] and the October 2014 FCC Order implementing the collocation of wireless facilities in accordance with a federal law enacted in 2012, Section 6409 (a), the *FCC 2014 Wireless Infrastructure Order*. Both FCC Orders gave cities guidance to determine the extent of local regulatory authority to grant or deny an application for a wireless antenna site; how the city may determine if those applications are complete and the time to give notice on "incompleteness"; the time for city review to act on them, the "shot clock", and the consequences of not acting within those time frames. They also discuss the role of the city when acting not as a regulator, but as a landowner.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) 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.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions. For purposes of this paragraph –

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title)."

[77] *St. Louis v. Western Union Tel. Co*., 148 U.S. 92, 100-102 (1893). "No one would suppose that a franchise from the Federal government to a corporation . . . to construct interstate . . . lines of . . . communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. . . And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State. . .. it is not within the competency of the national government to dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are the public property of the State"; And see *St. Louis v. Western Union Tel. Co*., 149 U.S. 465 (rehearing, 1893). The 1893 *St. Louis v. Western Union Tel. Co*. U.S. Supreme Court cases established the legal principle that even where federal statutory law restricts local governments from denying access to rights-of-way for telecommunications services, Congress cannot appropriate or "give" local public rights-of-way to telecommunications service providers without reasonable compensation for that use of the local public rights-of-way.

[78] *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, FCC 09-99, 24 FCC Rcd 13994 (2009), *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S.Ct. 1863 (2013) ("*FCC 2009 Declaratory Ruling*") presumptively set the time frames of what constituted "a reasonable period of time" for a city to act under Section 332(c) (7). See at: https://apps.fcc.gov/edocs_public/Query.do?mode=advance&rpt=cond

2. Federal Case law and FCC Orders recognizing the City as a Landowner:

47 U. S.C. § 332 (c) (7) and Section 6409 (a) (47 U.S.C. § 1455(a)), *FCC 2014 Wireless Infrastructure Order* **on City as landowner:**

- *City as land owner*: 47 U. S.C. § 332 (c) (7) (B) (iv) "applies only to local zoning and land use decisions and does not address a municipality's property rights as a landowner."[79]

- *Section 6409 (a) does not apply to a city's proprietary public property* (City buildings, towers, rights-of-way, i.e., will not apply to public property, absent an agreement by the city as property owner, not a regulator.

> …we conclude that Section 6409(a) applies only to State and local governments acting in their role as land use regulators and ***does not apply to such entities acting in their proprietary capacities***. … ***Like private property owners, local governments enter into lease and license agreements to allow parties*** to place antennas and other wireless service facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances.[80]

3. Congress Cannot "Take" Public Property Without Compensation.

The 1893 *St. Louis v. Western Union Tel. Co*. U.S. Supreme Court cases established the legal principle that even where federal statutory law restricts local governments from denying access to rights-of-way for telecommunications services, Congress cannot appropriate or "give" local public rights-of-way to telecommunications service providers without reasonable compensation for that use of the local public rights-of-way.[81]

> **"[I]t is not within the competency of the national government to dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of**

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[79] *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 201 (9th Cir. 2013) (Was not discrimination to condition lease of city property on a charter required voter approval.) Accord *Sprint Spectrum, L.P. v. Mills*, 283 F.3d 404, 417-21 (2d Cir. 2002) (School district could impose conditions on lease on school roof top, finding that Section 332(c)(7) "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity"); *Omnipoint Commc'ns Enters., L.P. v. Township of Nether Providence*, 232 F. Supp. 2d 430, 433-435 (E.D. Pa. 2002)"…Township's refusal to lease its own property does not constitute an exercise of zoning or regulatory powers, the Township had no duty under the TCA to negotiate or ultimately to lease portions of municipal property to Omnipoint for the purpose of installing an antenna."; *Sprint Spectrum, L.P. v. City of Woburn*, 8 F. Supp. 2d 118, 120 (D. Mass. 1998) (§ 332(c)(7)(B) does not apply to requests to locate wireless facilities on municipal property) (Lease of city property signed by Mayor without City Council consent; as the wireless company had no property interest in the property due to a defective lease, they had no standing to challenge zoning requirement."; See also, *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only "regulatory schemes")."

[80] *FCC 2014 Wireless Infrastructure Order*, ¶ 239, with the FCC referencing: *American Airlines v. Dept. of Transp*., 202 F.3d 788, 810 (5th Cir. 2000); *Building & Construction Trades Council of Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island Inc*., 507 U.S. 218, 231-32 (1993); *Sprint Spectrum, L.P. v. Mills*, 283 F.3d 404, 417-21 (2d Cir. 2002)) (School district could impose conditions on lease on school roof top, finding that Section 332(c)(7) "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity"); and *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only "regulatory schemes").

[81] *U.S. Sup. Ct., 1893 St. Louis and U.S. Sup. Ct., 1893 St. Louis, reh.*

> **any its corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are public property of the State."[82]**

The Court held that cities could require telegraph companies to pay reasonable street rental franchise fee payments for the use of the public streets, as the federal statute did not grant an "unrestricted right to appropriate the public property of a State."[83] The Court went on to say:

> **the occupation by this interstate commerce company of the streets cannot be denied by the city; . . . all . . . [the city] can insist upon is . . . reasonable compensation for the space in the streets thus exclusively appropriated . . ..**[84]

The U.S. Constitution's Fifth Amendment Takings Clause has long applied to local public property, as well as private property.[85]

4. Texas Public Lands Were Retained from Federal Government in 1845 Annexation Resolution Making Texas Unique.

Texas is different, as all Texans know. Texas appears to be in a unique legal position relative to other states as to any federal legislation granting access rights to public properties in the State, such as public rights-of-way. In the Joint Annexation Resolution of Congress authorizing the annexation of Texas into the United States in 1845 there was the following provision concerning the State's retention of its public property:

> said republic of ***Texas*** … shall retain all the public funds, debts, taxes, and dues of every kind which may belong to or be due in owing said republic; and ***shall also retain all the vacant and unappropriated lands lying within its limits***, to be applied to the payment of debts and liabilities of said republic of Texas; ***and the residue of said lands,*** after discharging said debts and liabilities, ***to be disposed of as said state may direct***…[86]

While one cannot ascertain with any certainty all the implications of Texas' retaining its public lands after annexation into the United States in this context, the provision does seem to give the

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[82] *U.S. Sup. Ct., 1893 St. Louis*, 100-01.

[83] *U.S. Sup. Ct., 1893 St. Louis,* at 100-01. "While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. No one would suppose that a franchise from the Federal government to a corporation . . . to construct interstate . . . lines of . . . communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. . .. [T]he franchise . . . would be . . . subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State. . .."

[84] *Id*. at 105. The vitality of *U.S. Sup. Ct., 1893 St. Louis* opinion was evidenced in 1982 by the U.S. Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp,* 458 U.S. 419, 428 (1982) and by the Federal Fifth Circuit in *City of Dallas, Tex. v. F.C.C*, 118 F.3d 393, 398 (5th Cir. 1997) on the issue of street franchise fees as "'rent".

[85] *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984). "When the United States condemns a local public facility, the loss to the public entity, to the persons served by it, and to the local taxpayers may be no less acute than the loss in a taking of private property. Therefore, it is most reasonable to construe the reference to "private property" in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States. [additional cites at fn15] Under this construction, the same principles of just compensation presumptively apply to both private and public condemnees." In this case, it was the property of the City of Duncanville, Texas.

[86] *Joint Annexation Resolution of Congress*, adopted March 1, 1845, by the 28th Congress, Second Session. (Emphasis added.)

custodians of public property in Texas an additional argument as to uncompensated "takings" of those lands, an argument separate and apart from the case law cited *supra* which has held that the U.S. Constitution's Fifth Amendment "takings" clause applies equally to public lands as it does to private lands.[87]

V. STATE AND FEDERAL NON-DISCRIMINATION PROVISIONS:

A. Texas State Law Non-discrimination provisions:

The non-discrimination provisions of Tex. Util. Code, Sec. 54.204 (a) (3) and (b) (1)[88] only apply to a PUC CTPs, and by definition, exclude a "*commercial mobile service provider as defined by 47 U.S.C. Section 332(d)"*,[89] and thus wireless providers, including DAS providers, as a component of a wireless network, are excluded.

The non-discrimination provisions of private and *public* property owners in Tex. Util. Code, Sec. 54.259 applies to a "*telecommunications utility*"[90] when a tenant requests telecommunications services in the property where they are located. Conditions of use may be imposed by a property

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[87] While the issue concerning Texas's retaining of its public "interior" lands has not been litigated with the federal government, there was extensive litigation with the United States concerning Texas' seaward boundary, the so called "tidelands" boundary. Once oil was discovered in the Gulf of Mexico it was important to determine how far out Texas', and other states' boundaries went into the Gulf, as opposed to the Federal Government, to determine which entity could lease the "tidelands" property and receive the oil royalties. While most states had a three-mile limit as to their seaward boundaries, Texas claimed, along with a number of other states, a larger area. Texas claimed that in its 1836 Treaty between the Republic of Texas and the Government of Mexico ending Texas's Revolutionary War established a seaward boundary of "three leagues" (three leagues being approximately 10.5 miles). Texas took the position that when it was annexed into the United States in 1845, it was taken with its then existing boundaries, as established in the 1836 Treaty. This issue was not to be resolved for over a century until the U.S. Supreme Court ruled in *United States v. Louisiana, Texas, et al* [all the Gulf bordering states], 363 U.S. 1 (1960) upholding Texas's claim of the three league seaward boundary based in part on the Annexation Resolution of 1845 and the 1836 Treaty. All other Gulf bordering states have a three-mile seaward boundary, except Texas and Florida (for different reasons than Texas). For a fascinating description of the Annexation of Texas and the "tidelands" litigation, see 363 U.S. 1, p. 24 and p. 36-65.

[88] Tex. Util. Code, Sec. 54.204. Discrimination by Municipality Prohibited. (a) "…a municipality or a municipally owned utility may not discriminate against a *certificated telecommunications provider* regarding: (1) the authorization or placement of a facility in a public right-of-way; (2) access to a building; or (3) a municipal utility pole attachment rate or term." (b) "In granting consent, a franchise, or a permit for the use of a public street, alley, or right-of-way within its municipal boundaries, a municipality or municipally owned utility may not discriminate in favor of or against a *certificated telecommunications* provider regarding: (1) municipal utility pole attachment … rates or terms." (Italics added)

[89] Tex. Local Gov. Code., Sec. 283.002. Definitions. (Italics added)

(2) "*Certificated telecommunications provider*" means a person who has been issued a certificate …by the commission to offer local exchange telephone service or a person who provides voice service.

(6) "Public right-of-way" means the area on, below, or above a public roadway, highway, street, public sidewalk, alley, waterway, or utility easement in which the municipality has an interest. *The term does not include the airwaves above a right-of-way with regard to wireless telecommunications*.

(7) "Voice service" means voice communications services provided through wireline facilities located at least in part in the public right-of-way, without regard to the delivery technology, including Internet protocol technology. The term *does not include voice service provided by a commercial mobile service provider as defined by 47 U.S.C. Section 332(d).*

[90] Tex. Util. Code, § 51.002. Definitions (11) of "telecommunication utility" does Not include a provider of "commercial mobile service", although subsection (E) includes a "communication carrier" broadly, which arguably could include a wireless provider.

owner, as detailed in Tex. Util. Code, Sec. 54.260, including, safety, security, appearance, time of access, and number of providers, dependent on space available.

B. Section 332 (c) (7): Federal law only prohibits "unreasonable discrimination" against functionally equivalent wireless providers.

47 U. S.C. § 332 (c) (7) (B) (i) (I),[91] only prohibits "unreasonable" discrimination between functional equivalents of providers of *personal wireless services*. Note this explicitly contemplates and allows discrimination among providers of functionally equivalent services, provided such discrimination is reasonable. And case law has held that *reasonable* (explainable) discrimination among providers of functionally equivalent services was implicitly allowed.[92]

VI. CONCLUSION AND EPILOGUE ON CURRENT PUC COMPLAINTS ASSERTING THAT CHAPTER 283 APPLIES TO ALLOW WIRELESS FACILITIES IN THE RIGHTS-OF-WAY.

Prior to H.B. 1777, the historic rights of municipalities to consent to access to use the public rights-of-way for conducting local telephone business was well established. After the passage of H.B. 1777, codified as Chapter 283 in the Texas Local Government Code, those same historic rights remain for providers not covered by that chapter, which includes wireless providers and facilities for those wireless networks. Wireless providers must still obtain consent to use the right-of-way, because Chapter 283 did not address wireless providers.

The statutory rights for land line telecommunications providers is set out in Chapter 283 and the subsequent and ongoing PUC rulings. The precedents of the PUC's implementation and rulemakings, including through the 2010 PUC redefinition of access lines and categories of access lines, has further supported the need for providers outside the framework of Chapter, including wireless providers, to obtain municipal consent to the rights-of- way, based on municipalities historic rights to control access, as delegated to municipalities over a century ago.

FCC Orders and federal case law have long distinguished between cities, as landowners, landowners in this instance of the right-of-way as the fiduciary trustee for the state, with the discretion of landowners to allow or not allow access and use of property, including public property, in contrast to the role a city may have as a regulator.

Since the two PUC Orders from 1999, neither long distance, cable nor wireless providers have been able to rely upon Chapter 283 for authority to use the public right-of-way. It has been and continues to be clear that wireless providers, as well as wireless networks and related wireless network

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[91] 47 U. S.C. § 332 (c) (7) (C) Definitions for purposes of this paragraph--(i) the term "*personal wireless services*" means commercial mobile services [cellular service], unlicensed wireless services, and common carrier wireless exchange access services; (ii) the term "*personal wireless service facilities*" means facilities for the provision of personal wireless services…"

[92] *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 638 (2d Cir. 1999); *AT & T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 427 (4th Cir. 1998). (finding no unreasonable discrimination) "even assuming that the City Council discriminated, it did not do so "unreasonably," under any possible interpretation of that word as used in subsection (B) (i) (I). … emphasizing the obvious point that the Act explicitly contemplates that some discrimination "among providers of functionally equivalent services" is allowed. Any discrimination need only be reasonable. [citing lower court] See 979 F.Supp. at 425 ("The fact that a decision has the effect of favoring one competitor, in and of itself, is not actionable."). There is no evidence that the City Council had any intent to favor one company or form of service over another. In addition, the evidence shows that opposition to the application rested on traditional bases of zoning regulation: preserving the character of the neighborhood and avoiding aesthetic blight...)"

equipment, antenna and other components of a wireless network are outside the framework of Chapter 283 and must obtain municipal consent to use the public's right-of-way.

Epilogue on current PUC Complaints asserting that Chapter 283 applies to allow wireless facilities in the Rights-of-Way.

While there have been recent technological changes in the wireless industry in moving to smaller and smaller geographic cellular sites, that has in turn has led to smaller antenna and sizes of the structures (towers or utility poles) that hold those antennae, that technology has not altered the law, or Chapter 283. As discussed, one of these technologies uses wireless facilities that supplement and augment wireless networks by what are called Distributed Antenna Systems (DAS). Similarly, there are wireless facilities that are called "small cells" (with "small" being in the eye of the beholder) that likewise supplement and augment wireless networks. In the last few years some of the wireless infrastructure companies that install these newer technologies, most based outside of Texas, perhaps through an ignorance of Texas law and the historic underpinnings of Chapter 283, have asserted a misinterpretation of Chapter 283 -- that Chapter 283 allows wireless devices in the rights-of-way either outright as a "telecommunication facility" or as a subset of "interoffice transports" as wireless back-haul service. This is a mistaken interpretation of chapter 283. As has been discussed in some detail in the paper, since 1999 Chapter 283 has never applied to wireless services or facilities to support, enhance, expand, link, supplement or argument wireless services. The PUC not only determined that wireless networks, and by definition, facilities that supported those wireless networks, were outside the framework of Chapter 283,[93] but that lines to wireless sites were not interoffice transport.[94]

Chapter 283 is applicable to only to a Certificated Telecommunication Provider using the rights-of-way when offering *wireline* local exchange telephone service, wireline private line or data service or *wireline* voice service, and related equipment for *wireline* service. Any proposal to install facilities for *wireless* services in the right-of-way Chapter 283 is not applicable.

Nevertheless, as of late 2015 there have been assertions by two wireless infrastructure companies in complaints filed at the PUC that Chapter 283 does applied to allow wireless facilities in the rights-of-way as interoffice transport back-haul.[95] It is beyond the scope of this paper to outline further why those assertions are an incorrect application of Chapter 283. For those interested in those legal arguments they are thoroughly briefed in the two PUC dockets in City of Houston's and City of Dallas' filings.[96]

It is this author's view that a wireless provider or wireless network facilities infrastructure company in Texas may only use public rights-of-way in the City with the express written consent of the City; consent which is discretionary, with the City acting in its proprietary capacity, as a fiduciary trustee for the State. No wireless facilities infrastructure company, be it a provider of wireless services directly, a wireless infrastructure company, a neutral host, or a lessor to a wireless provider company, has the "right" to use the local public rights-of-way without consent of the City. Attached is an example of such an agreement to place wireless facilities in the local public rights-of-ways based on a negotiated agreement among an array of wireless stakeholders in Houston in late 2015. Not all agreed, but two wireless companies did so immediately, Crown Castle, a wireless infrastructure company, and

[93] *Base Amount PUC Order*, pp. 6-7.

[94] *PUC Order on counting rule*, pp. 13-14.

[95] Pending, PUC Dkt. No. 45280, *ExteNet v. Houston* (Complaint filed Oct. 2015) and PUC Dkt. No. 45780, *Crown Castle v. Dallas* (Complaint filed Dec. 2015).

[96] With full disclosure, the author is co-counsel in both of those two PUC dockets.

Verizon Cellular. Since then another company that provides fiber optic connectivity services between cellular sites has also agreed, Zayo.[97]

To the extent public property, be it rights-of-way, or other public property, e.g., a city building or water tower, that is proposed to be used to place or install wireless equipment and facilities, a wireless provider and/or wireless network infrastructure company must formally request the city's consent for use of that public property. Each city should review such a formal request in its discretionary, proprietary capacity as the manager of the public rights-of-way, in a non-discriminatory manner, within the bounds of the law.

[97] My thanks to the City of Houston Legal Department for the fine work on the agreement.

Appendix "A": House State Affairs Committee Witnesses Testimony on H.B. 1777.

Texas 76th (1999) Regular Legislative Session, House State Affairs Committee Hearing of April 29, 1999, Witnesses Testimony on H.B. 1777.
(Unofficial Transcripts -- excerpts of the relevant portions of 4 tapes of that day.)

April 29, 1999 2:00 PM

Considered in public hearing, with Testimony taken in committee.

WITNESS LIST

For: Akers, Monte (Texas Municipal League)
On: Brown, David (Southwestern Bell Telephone Co.)

Tape 3 - 4/29/99 (committee debate)

The Chair [Mr. Woolens]: Members, I'd like you to lay out H.B. 1777 which is a telecommunications franchise Bill and let me briefly tell you there was, as you know, an interim committee on the telecommunications franchise issue as it relates to the charges that municipalities charge telecommunication companies be they incumbent carriers, or re-sellers, or long distances companies for use of the right-of-ways. There were 2 Bills there were filed. Representative Carter who is, and has been very much interested in this issue, not only here in the Texas legislature but in the National State Legislator Association filed a Bill, and I did too. The Cities have been working with the telecommunication companies and they have been negotiating this issue for the last several weeks. And what I am hoping, I just wanted to bring this issue before us and let you know that this is a vehicle and if there is a compromise between the Cities and telecommunication companies, that this could be a vehicle for the Bill, as well as there is some other vehicles that could be used for the Bill. It is unlikely - it is very unlikely that anything would come before us where there is not an agreement and - I mean, I don't see how that's possible, because it won't be on this Bill. So, I am not here to advocate one side or the other, but only to advocate this as a vehicle for a compromise. I ask folks who are negotiating this, I had told them that there is no necessity to testify, because we are not looking to pick sides, nor are we looking to make a Solomonic decision but we are inviting them to find a common ground. That said, there is one person who would like to speak for the Bill, I think, and that is Monty Akers from the Texas Municipal League. And, members, let me tell you that I am not sure what Monty Akers is going to say, but the Bill before you is not necessarily relevant - is not relevant to anything that we'll be doing. It will be a substitute. The substitute has yet to be figured out.

Mr. Akers: Thank you, Mr. Chairman. My name is Monty Akers. I am the Director of Legal Services for the Texas Municipal League and essentially all I want to do is affirm what you already said, Mr. Chairman, which is that we have been talking yesterday, today; we are meeting again tomorrow. We have made much progress. Essentially, we are down to about 6 issues. They are going to be hard issues. I can't promise we'll come back with a compromise, but we are definitely trying.

The Chair: Just so the member know, that's 6 out of how many issues that you all have been through?

Mr. Akers: Anywhere from 14 to 20.

The Chair: Thank you. Members, David Brown is here from Southwestern Bell Telephone Company, neutral on the Bill. Mr. Brown are you here? Would you like to come forward and echo what's been said? Say anything that you would like to say.

Mr. Brown: Mostly, I echo, Mr. Chairman, what Mr. Akers said. I'm David Brown, Senior Counsel for Southwestern Bell here in Austin. I represent the people who lobby these ordinances in the almost 600 cities across the State of Texas that we have [inaudible] on this. We that the Chairman for the opportunity to speak on the Bill. I won't belabor this. As the Chairman is aware and most of you are probably aware, the relationship between certificated telecommunication providers and the Cities is a very complex one and it has become more complex as the industry has changed and as the law has evolved both on the state and federal fronts. We support the goals of the legislation that are to increase competition, or at least to support it, to reduce uncertainty in litigation and to obtain a degree of standardization in these ordinances. The introduction to this Bill gives the Cities and the industry the opportunity to talk and to try and to come to a resolution of that, and we have been working a lot as the Chairman is aware on trying to reach that resolution. While a number of details remain, and we think on the verge of getting those resolved, it's our hope that ultimately this Bill will come out - will result in legislation that - results in standardization of the regulation of the rights-of-way, gives a uniform compensation method, results in competitive neutrality and nondiscriminatory access to the rights-of-way. That's our goal.

The Chair: Thank you, Mr. Brown. Any questions? Thank you, sir. Finally, Charlie Land is here only to answer any questions that you may have for Charlie, either individually or on behalf of TexalTel. Is there anybody else here like to be heard of for or against H.B. 1777? It will be left as pending business.

Appendix "B": Texas 76th (1999) Regular Legislative Session, House Floor Debate on H.B. 1777.

Texas 76th (1999) Regular Legislative Session, H.B. 1777. 76th (1999) House Floor Debate on H.B. 1777
(Unofficial Selected Transcripts excerpts of the relevant portions of the House tapes of the days on the House Floor for 2nd and 3rd reading (1st reading was procedural introduction and referral to committee]

Tape 116 - 5/10/99 (House floor debate on 2nd reading)

The Speaker: You've heard the motion. Is there objection? Chair hears none. [Gavel] So ordered. Chairs lay out second reading, House Bill 1777. Clerk, read the Bill.

Clerk: House Bill 1777 by Woolens relating to compensation a municipality can receive from a provider of communications services in the municipality.

The Speaker: The chair recognizes Mr. Woolens, Mr. Carter.

Mr. Carter: Thank you members, Mr. Speaker. This Bill is one of those true miracles of negotiation of issues that are important to all citizens in the State of Texas. It's an example of how the Texas Municipal League and their member cities and all segments of the telecommunications industry can get together in many hours of good-faith negotiations and come up with a Bill that is truly good for the State of Texas and will accelerate investments and infrastructure across the state. It will encourage competition, reduce barriers to entry, increase the types of services that will encouraged by competition. It fairly removes the uncertainty of litigation concerning franchise fees and continues cities' authorities to manage their rights-of-ways and it also guarantees favorable revenues for the cities. Mr. Speaker.

The Speaker: Passage of House Bill 1777. All those in favor, say "Aye;" opposed, "No." The Ayes have it. House Bill 1777 passed to [inaudible] Third reading….

Tape 120 - 5/11/99 (House floor debate on 3rd reading)

The Speaker: The House lays out on the 3rd reading House Bill 1777. Clerk read the Bill.

Clerk: H.B. 1777 by Woolens relating to compensation a municipality may receive from provider of telecommunication services.

The Speaker: The Chair recognized Mr. Woolens to explain his Bill.

Mr. Woolens: Mr. Speaker and members, this is the telecommunications franchise fee agreement that we passed on second reading yesterday. As Bill Carter told you, it has been the subject of enormous discussion and controversy. Representative Carter brought this to our attention last session, but it was so controversial that we weren't able to pass it but it was placed in a resolution to be studied in the interim. Bill Carter knows an enormous amount about the subject because he has been the head of a committee for the - national council…

Mr. Carter: Alex

Mr. Woolens: for Alex to study this issue. And this is what the issue turns on. It is how many contracts and how many franchise agreements that a competitive access provider or any other telecommunications provider has to enter in trying to enter the local markets in our state. So this would standardize it. What we did yesterday, we passed the committee substitute that had been placed before our committee. After doing that, all of the interest got together and they hammered out the details of their agreement. And so there is a committee substitute that we bring you today, which is a total substitute and it takes into account a lot of the rough edges. I want to represent to you that everybody has agreed to this Bill on a competing sides. There is no one who is involved in the industry who has disagreed with it. I filed that - Bill Carter and I filed it last night at 5:00 o'clock, so it is subject to our consideration as a floor substitute. Since that was put together, they met again last night at 6:00, and they put together an amendment to it. So filled the amendment earlier today, and I will represent to you that everybody on all sides of this issue is in agreement on the amendment and on the complete substitute which are offered to you on third reading today. And, Mr. Speaker, if we could, we need to adopt the amendment and then the substitute as amended, assuming that is alright with the House.

The Speaker: The following amendment, the Clerk will read the Amendment.

Clerk: For amendment by Woolens.

The Speaker: The chair recognizes Mr. Woolens to explain the amendment.**…….**

Mr. Woolens: Mr. Speaker and members, we are laying out the floor substitute which, as I said, was laid out last night and filed properly with the clerk's office.**……..**.

The Speaker: The chair recognizes Mr. Woolens to explain his amendment to the amendment.

Mr. Woolens: Mr. Speaker and members, the amendment consists of 9 clarifying or corrective changes that were identified by representatives of the telecommunications industry as well as the municipalities after they reviewed the legislative council complete substitute, which was filed last night at 12:00 o'clock.

Mr. Madden: Mr. Speaker.

The Speaker: Mr. Madden, what purpose?
Mr. Madden: Will the gentleman yield?

The Speaker: Do you yield, Mr. Woolens?
Mr. Woolens: I yield, Mr. Speaker.

The Speaker: Mr. Madden, the gentleman yields.

Mr. Madden: Mr. Woolens, I just have one question. Can you tell us who the parties were to this as far as the parties to the agreement? You said that all the parties were -**……**.

Mr. Woolens: Jerry, did you just ask who was in there?

Mr. Madden: Who are the parties that were into this agreement?

Mr. Woolens: Let me answer you globally and then with specificity, if I can. Globally, they were everyone who has an interest in telecommunications, which would include all of the providers and the cities. Now, let me be specific. On the cities' side, I remember that you had TML was involved and you had some individual people from TML such as Dallas, Houston, I think El Paso was involved in part of it. There were some other small cities that I remember hearing from and they were all at the table. But the umbrella organization was TML. On the telecommunications side, you had representatives of Southwestern Bell, GTE, AT&T; the competitive access providers were represented through Cathy Grant's law firm. And if you want to ask me some other people, I'm just trying to go around the table in my mind. But you are welcome to ask me about any other specifics that you would like to ask me.

Mr. Madden: No, I'd like you at this stage to give a little more detail description now of what the substitute does. What are the major points of the substitute?

Mr. Woolens: Well, what the substitute - the substitute on the floor is the same as the substitute that we did out of our committee but it is a refinement of what was done in the committee and it sets out the agreement that they came in deciding how they would get to a basis. And this is generally how they would do it. There is a base franchise fee and it looks to what the base fees were in the municipalities in 1998 from franchise license and permit application fees from the certified providers. And it had a separate way of the calculation when you dealt with municipalities that were fewer than 75,000 in size. [inaudible conversation off mike - long pause]

The Speaker: The chair recognizes Mr. Woolens for a motion.

Mr. Woolens: I don't mean to cut you off. Fred Hill just asked if we could postpone this for a couple of hours so that Fred Hill could read it, and I have no objection to Fred Hill reading it over the next 2 hours. I would welcome that. And in doing that, I just want to reiterate - **….**

Tape 154 - 5/20/99 (Continued House floor debate on H.B. 177 after the Senate amendments)

The Speaker: The chair recognizes Mr. Carter.

Mr. Carter: Mr. Speaker, members, I want to call up House Bill 1777.

The Speaker: The chair lay out House Bill 1777 with Senate amendments and recognizes Mr. Carter to explain the amendments.

Mr. Carter: Thank you Mr. Speaker, this amendment put on by the Senate just clarifies that metro tax and special venue taxes were not part of the base and we move to accept the Senate amendments.

The Speaker: Mr. Carter moves the House concur in Senate amendments to House Bill 1777. Is there objections? The chair hears none. The House concurs with Senate amendments to House Bill 1777.

Appendix "C": PUC Subst. Rule §26.461, on Access Line definitions.

PUC Subst. Rule, §26.461. Access Line Categories.
[relevant excerpts on wireless as not being access lines, bold italics added.]

(a)-(b) **[omitted]**

(c) **Definitions**. The following words and terms when used in this subchapter, shall have the following meaning, unless the context clearly indicates otherwise.

(1) **Access *lines*** –

(A) means a unit of measurement representing

(i) each switched transmission path of the transmission media that is ***physically within a public right-of-way*** extended to the end-use customer's premises within the municipality, that allows the delivery of local exchange telephone services within a municipality, and that is provided by means of owned facilities, unbundled network elements or leased facilities, or resale; or

(ii) each termination point or points of a nonswitched telephone or other circuit consisting of transmission media located ***within a public right-of-way*** connecting specific locations identified by, and provided to, the end-use customer for delivery of nonswitched telecommunications services within the municipality; or

(iii) each switched transmission path ***within a public right-of-way*** used to provide central office-based PBX-type services for systems of any number of stations within the municipality, and in that instance, one path shall be counted for every 10 stations served; or

(iv) any other line not described in clauses (i), (ii) or (iii) of this subparagraph that provides voice service delivered by means of owned facilities, unbundled network elements or leased facilities, or resale.

(B) The definition of "access line" may not be construed to include interoffice transport or other transmission media that do not terminate at an end-use customer's premises or to permit duplicate or multiple assessment of access line rates on the provision of a single service.

(2) **Certificated telecommunications provider (CTP)** – A person who has been issued a certificate of convenience and necessity, certificate of operating authority, or service provider certificate of operating authority by the commission to offer local exchange telephone service or a person who provides voice service.

(3) **Public right-of-way** – The area on, below, or above a public roadway, highway, street, public sidewalk, alley, waterway, or utility easement in which the municipality has an interest. The term does not include the airways above a right-of-way with regard to wireless telecommunications.

(4) **Residential** – Services provided at residential locations and primarily for residential (non-commercial) use. Definitions in the tariffs or price sheets of the provider, and the determinations made by provider for billing purposes shall control, unless the provider's definitions unreasonably depart from the general definition herein for purposes of avoidance of the payment of appropriate fees to the municipality.

(5) **Non-Residential** – All other locations not served by a residential line.

(6) **Voice service** – Voice communications services provided through ***wireline*** facilities located at least in part in the public right-of-way, without regard to the delivery technology, including Internet protocol technology. The term does not include voice service provided by a commercial mobile service provider as defined by 47 U.S.C. Section 332(d).

(d) **Access line categories**. There shall be three categories of access lines. The three categories shall be as follows:

(1) Category 1 shall include both analog and digital residential switched access lines and any other access line that provides residential voice service. It shall also include point-to-point private lines, whether residential or non-residential, only to the extent such lines provide burglar alarm or other similar security services.

(2) Category 2 shall include all analog and digital non-residential switched access lines and any other access line that provides non-residential voice service.

(3) Category 3 shall include all other point-to-point private lines, whether residential or non-residential, not otherwise included within category 1

Appendix "D": PUC Subst. Rule §26.465, Counting Access Line.

PUC Subst. Rule, §26.465. Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers.

(Relevant excerpts on wireless as not being access lines. Bold italics added)

(a) – (b) [omitted] ….

(c) **Definitions.** The following words and terms when used in this section, shall have the following meaning, unless the context clearly indicates otherwise.

(1) **Customer** – The retail end-use customer.

(2) **Transmission *path*** – A path within the transmission media that allows the delivery of switched local exchange service or provides voice service.

(A) Each individual switched service shall constitute a single transmission path.

(B) Where services are offered as part of a bundled group of services, each switched service in that bundled group of services shall constitute a single transmission path.

(C) Services that constitute vertical features of a switched service, *e.g.*, call waiting, caller-ID, do not constitute a transmission path.

(D) Where a service or technology is channelized by the CTP and results in a separate switched path for each channel, each such channel shall constitute a single transmission path.

(E) Voice service provided through ***wireline*** facilities located at least in part in the public right-of-way, without regard to the delivery technology, switched or not, and including Internet protocol technology, shall constitute a single transmission path.

(3) **Wireless provider** – A provider of commercial mobile service as defined by §332(d), Communications Act of 1934 (47 U.S.C. §151 *et seq*.), Federal Communications Commission rules, and the Omnibus Budget Reconciliation Act of 1993 (Public Law 103-66).

(d) **Methodology for counting access lines.** A CTP's access line count shall be the sum of all lines counted pursuant to paragraphs (1), (2), (3), and (4) of this subsection, and shall be consistent with subsections (e), (f) and (g) of this section.

(1) **Switched transmission paths and services.**

(A) ……..

(B) All switched services shall be counted in the same manner regardless of the type of transmission media used to provide the service.

(C) If the transmission path crosses more than one municipality, the line shall be counted in, and attributed to, the municipality where the end-use customer is located. Pursuant to Local Government Code §283.056(f), the per-access-line franchise fee paid by CTPs constitutes full compensation to a municipality for all of a CTP's facilities located within a public right-of-way, including interoffice transport and other transmission media that do not terminate at an end-use customer's premises, even though those types of lines are not used in the calculation of the compensation.

(2) **Nonswitched telecommunications services or private lines.**

(A) - (B) ……..

(C) A nonswitched telecommunications service shall be counted in the same manner regardless of the type of transmission media used to provide that service.

(D) - (E) …….

(3) **Central office based PBX-type services.** …….

(4) **Voice service.**

(A) The CTP shall count each end-use customer provided voice service as one access line. Services that constitute vertical features of a voice service, or are bundled with the voice service shall not be counted as a separate access line.

(B) ……...

(e) **Lines to be counted.** A CTP shall count the following access lines:

(1) all access lines provided to a retail end-use customer;

(2) all access lines provided as a retail service to other CTPs and resellers for their own end-use;

(3) all access lines provided as a ***retail service*** to ***wireless*** telecommunication providers and interexchange carriers (IXCs) for their own end-use;

(4) ….. as employee concession lines and other similar types of lines;

(5) all access lines provided as a ***retail service*** to a CTP's ***wireless*** and IXC affiliates for their own end-use, and all access lines provided as a retail service to any other affiliate for their own end-use;

(6) …….;

(7) any other lines meeting the definition of access line as set forth in §26.461 of this title;

(8) - (9) …….

(10) all lines that provide voice service delivered by means of owned facilities, unbundled network elements or leased facilities, or resale that are not otherwise counted under paragraphs (1) -(9) of this subsection.

(f) **Lines not to be counted.** A CTP ***shall not count*** the following lines:

(1) all lines that do not terminate at an end-use customer's premises;

(2) lines used by providers who are not end-use customers ***such as*** CTP, **wireless provider**, or IXC for ***interoffice transport, or back-haul facilities*** used to connect such providers' telecommunications equipment;

(3) lines used by a CTP's ***wireless*** and IXC affiliates who are ***not end-use customers, for interoffice transport, or back-haul facilities*** used to connect such affiliates' telecommunications equipment;

(4) lines used by any other affiliate of a CTP for interoffice transport; and

(5) any other lines that do not meet the definition of access line as set forth in §26.461 of this title.

(g) – (m) [omitted] ….

Appendix "E": Draft Sample License Agreement to Place and Install Wireless Devices and Equipment in Local City Rights-of-Way.

CITY OF _____, TEXAS
MASTER LICENSE AGREEMENT
FOR WIRELESS FACILITIES AND POLES IN THE RIGHT-OF-WAY

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EXHIBITS

CITY OF _____, TEXAS
MASTER LICENSE AGREEMENT
FOR WIRELESS FACILITIES AND POLES IN THE RIGHT-OF-WAY

THE STATE OF TEXAS §
§
COUNTY OF _____ §

This **MASTER LICENSE AGREEMENT FOR WIRELESS FACILITIES AND POLES** ("Agreement") is made by and between the **CITY OF _____, TEXAS** ("City"), a home-rule municipal corporation of the State of Texas, and **_____,** ("Licensee"), a _____ with its principal offices at _____.

RECITALS

WHEREAS, Licensee, a Wireless Services provider or Neutral Host Provider, is requesting to attach, install, operate, maintain, repair, replace, reattach, reinstall, relocate, and remove its Wireless Facilities for small cell networks or outdoor distributed antenna systems ("DAS") in the City's Right-of-Way to provide better coverage and meet increased demand for its services; and

WHEREAS, the City owns and controls the Right-of-Way; and

WHEREAS, Section 253 of the Federal Communications Act of 1934, as amended, including 47 U.S.C. § 253, acknowledges that the City has the authority to manage and control access to and use of the Right-of-Way within the City limits; and

WHEREAS, the City has been authorized by the State to act as fiduciary and trustee for the public, in exercising proprietary rights in its discretion to grant use of the Right-of-Way within the City limits and condition that use; and

WHEREAS, conditions to use of the Right-of-Way include height, width, and aesthetic requirements of the Wireless Facilities and Licensee Poles occupying the Right-of-Way; and

WHEREAS, the Licensee shall compensate the City pursuant to state law for the grant of permission to install the Licensee's Wireless Facilities and Licensee Poles at approved locations in the City's Right-of-Way; and

WHEREAS, the City may grant permission, on a site-by-site basis, the Licensee's non-exclusive use at approved locations in its Right-of-Way, subject to the terms and conditions set forth herein, and pursuant to Permits issued by the City Engineer; and

WHEREAS, the City and Licensee desire by this Agreement to set forth their understanding of such matters.

NOW THEREFORE, in consideration of the mutual covenants and agreements contained herein below, City and Licensee agree as follows:

ARTICLE 1. PARTIES

1.1. ADDRESSES

The initial address of the parties, which either party may change at any time by giving written notice to the other party pursuant to the terms of this Agreement, are as follows:

City	Licensee
City [title-- Mayor, Administrator, Manager? Note: City Manager is used in this initial draft until revised by the City]	_____, [ADDRESS_____]
City of _____ P.O. Box _____ _____, TX _____	
With Copy To	_____
City Attorney City of _____ _____ _____, TX _____	
Director of Public Works City of _____ _____ _____, TX _____	

ARTICLE 2. DEFINITIONS

2.1. As used in this Agreement, the following terms have the meanings set out below:

2.1.1. *"Abandon"* and its derivatives means the Wireless Facility, Licensee Pole, or portion thereof that has been left by Licensee in an unused or non-functioning condition for more than 120 consecutive days unless, after notice to Licensee, Licensee has established to the reasonable satisfaction of the City that the Wireless Facility, Licensee Pole, or portion thereof has the ability to provide communications.

2.1.2. *"Affiliate"* means (a) any entity who (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with the Licensee; (b) any entity acquiring substantially all of the assets of Licensee in the market defined by the Federal Communications Commission in which the Licensed Locations are located; or (c) any successor entity in a merger, acquisition, or other business reorganization involving Licensee. For purposes of this definition, "own" means to own an equity or other financial interest (or the equivalent thereof) of more than 10 percent or any management interest.

2.1.3. *"Agreement"* means this contract between the Parties, including any exhibits and any written amendments as authorized by this Agreement.

2.1.4. *Camouflaged Wireless Facility or Licensee Pole* means any Wireless Facility or Licensee Pole that is covered, blended, painted, disguised, camouflaged or otherwise concealed such that the Wireless Facility or Licensee Pole blends into the surrounding environment and is visually unobtrusive. A Camouflaged Wireless Facility or Licensee Pole also includes any Wireless Facility or Licensee Pole approved by the City as conforming to the surrounding area in which the Wireless Facility or Pole is located and may include, but is not limited to hidden beneath a façade, blended with surrounding area design, painted to match the supporting area, or disguised with artificial tree branches.

2.1.5. *"Carrier"* means a provider of Wireless Services authorized by the Licensee to utilize the Wireless Facilities and/or Licensee Poles.

2.1.6. *"City"* is defined in the preamble of this Agreement and includes its successors and assigns.

2.1.7. "City Attorney" means the currently appointed or acting City Attorney or his/her designee.

2.1.8. "City Code" means the Code of Ordinances, City of _____, Texas.

2.1.9. "*City Engineer*" means the city engineer for the City from City's Public Works Department, or its successor department, or a person he or she designates.

2.1.10. "City Manager" means the current and successor City Manager of the City. [**This is the principal City representative with oversight of this agreement. Can be City Administrator, as designated by the Mayor?]**

2.1.11. *"Director"* means the Director of Public Works Department, or its successor department, or a person he or she designates.

2.1.12. *"Effective Date"* means that date countersigned by the [designate one, either the Mayor, City Manager or City Engineer.] on the signature page of this Agreement for each respective Licensee.

2.1.13. "*Ground Equipment"* means a Wireless Facility that is located on the surface of the Right-of-Way and, if included in an approved Application for Location Review or otherwise approved by the City in writing, an incidental structure to support metering devices.

2.1.14. *"Historic District"* recognized by the City, state or federal government under the City Code of Ordinances, State Law, including, but not limited to, Sec. 442.001(3) of the Texas Government Code, a federal law, including, but not limited to, 16 U.S.C. § 470.

2.1.15. *"Historic Landmark"* recognized by the City, state or federal government under the City Code of Ordinances, State Law, including, but not limited to, Sec. 442.001(3) of the Texas Government Code, a federal law, including, but not limited to, 16 U.S.C. § 470.

2.1.16. *"Licensee"* means _____ and includes its successors and assigns.

2.1.17. "*Licensed Location"* means the location in the Right-of-Way, as listed in Exhibit A of this Agreement, in which Licensee is authorized to place its Wireless Facilities and Licensee Poles, provided that it has obtained all Permits.

2.1.18. *"Licensee Pole"* or *"Licensee Poles"* means pole(s) or similar vertical structure(s) owned and installed by Licensee or Neutral Host Provider for the sole purpose of supporting Wireless Facilities, but does not include incidental structure for supporting metering devices.

2.1.19. *"Modification"* means any addition, removal, or alteration of any kind, to the Wireless Facility or Licensee Pole, including altering the concealment, camouflage or stealth appearance, from the exact Licensed Location, except for

routine maintenance or replacement with equipment that has identical dimensions and appearance.

2.1.20. *"Neutral Host Provider"* means a provider of Wireless Facilities and Licensee Poles that leases space on its Wireless Facilities and Licensee Poles to Carriers.

2.1.21. *"Other Party"* or *"Other Parties"* means a Wireless Services provider or Neutral Host who is not a Party to this Agreement.

2.1.22. *"Park"* means the various properties under the direction, control and supervision of the City's Director of Parks Department pursuant to the authority granted by City's Council and the City Code of Ordinances.

2.1.23. *"Park Director"* means the City's director of the Department of Parks.

2.1.24. *"Party"* or *"Parties"* mean the Licensee and City, individually or collectively as indicated in the context in which it appears.

2.1.25. *"Permit"* means a document issued by the City's Department of Public Works and Engineering authorizing installation of Licensee's Wireless Facilities or Licensee Pole at a Licensed Location in the Right-of-Way in accordance with the approved plans and specifications.

2.1.26. *"Rental Fee"* means the amount Licensee is required to pay the City, as calculated according to Article V of this License, for the use of the City's Right-of-Way.

2.1.27. *"Right-of-Way"* means the ground level, air space above, and space below a public street, road, alley, and/or sidewalk located in the City's jurisdiction, including the entire area between the boundary lines of every right-of-way, and public utility easements, whether acquired by purchase, grant or dedication and acceptance by the City or by the public, that has been dedicated or designated for or opened to the use of the public for purposes of vehicular and pedestrian travel; and shall include any designated state or federal highway or road or any designated county road under the administrative control of the City for maintenance, repair, or vehicular traffic control purposes.

2.1.28. "*School"* means an educational institution that offers a course of instruction for students in one or more grades from kindergarten through grade 12.

2.1.29. *"Term"* means the Initial Term and any Extension Terms, collectively, during which this Agreement is in effect.

2.1.30. *"Traffic Signal"* means any device, whether manually, electrically, or mechanically operated by which traffic is alternately directed to stop and to proceed.

2.1.31. "*Traffic-Control Devices"* means all sign, signals, markings, or devices placed or erected by the City or a public body having jurisdiction for the purpose of regulating, warning, or guiding traffic.

2.1.32. *"Underground Utility Area"* means an area where poles, overhead wires, and associated overhead or above ground structures have been removed and buried or have been approved for burial underground.

2.1.33. *"Utility Pole"* or *"Utility Poles"* means a pole or vertical structure owned by the local electric utility, or successor electric utilities, and other utilities with a vertical structure in the Right-of-Way pursuant to State law authorization or City franchise agreement to support their electric utility and wireline telecommunications lines.

2.1.34. "*Wireless Facility"* or *"Wireless Facilities"* means the approved and permitted equipment in Exhibit B that consists of radios, antennas, wires, fiber optic cables, amplifiers, switches, power sources, repeaters, and other supporting devices installed overhead or above the ground on a Licensee Pole or Utility Pole and control boxes, pull boxes, cabinets, and other supporting devices installed at ground level, and other wireless network infrastructure components provided by unlicensed wireless infrastructure companies for the purpose of providing, supporting, enhancing or expanding Wireless Services but not including any separate Licensee Poles or Utility Poles, that are located within the Right-of-Way as part of a wireless network, such as a small cell or distributed antenna system ("DAS") network.

2.1.35. *"Wireless Services"* means 'personal wireless services' as that term is defined in 47 U.S.C. § 322(c)(7)(C), now or hereafter in effect, including commercial mobile services, (defined in 47 U.S.C. § 332(d)), now or hereafter in effect, provided to personal mobile communication devices through or by Wireless Facilities located wholly or partially in the Right-of-Way.

2.2 When not inconsistent with the context, words used in the present tense include the future, words used in the plural number include the singular number, and words in the singular include the plural.

2.3. The word "shall" is always mandatory and not merely permissive.

2.4. "Include" and "including," and words of similar import, shall be deemed to be followed by the words "without limitation."

ARTICLE 3. AUTHORIZATION TO USE RIGHT-OF-WAY

3.1. GRANT OF PERMISSION

3.1.1. The City hereby grants Licensee the right to enter and to use the Right-of-Way located in the areas listed in Exhibit A to attach, install, construct, operate, lease, maintain, repair, replace, reattach, reinstall, relocate, and remove Licensee Poles and Wireless Facilities in the most recently approved version of Exhibit B, Approved Wireless Facilities and Equipment List, subject to the terms of this Agreement.

3.1.2. This Agreement does not confer any other rights not described herein nor does it permit Licensee or third parties to use the Right-of-Way for purposes not specified in this Agreement.

3.1.3. This Agreement does not authorize the Licensee to install equipment and facilities associated with or for macro wireless towers in the Right-of-Way.

3.1.4. Only Neutral Host Providers that have an existing agreement with a Carrier to use or lease the Neutral Host Provider's Wireless Facilities or Licensee Poles are authorized to be in Licensed Locations.

3.2. SCOPE OF AGREEMENT

3.2.1. This Agreement is not exclusive and the City reserves the right to grant permission to use its Right-of-Way for the same or similar purposes to Other Parties.

3.2.2. Except as expressly provided herein, this Agreement does not grant Licensee the authority to grant any rights under this Agreement to any Other Party without the written consent of the City. If Other Parties seek to install Wireless Facilities on a Licensee Pole, either the Licensee or Other Party must first notify the City Manager in writing and submit an Application for Location Review (Exhibit C) for each Wireless Facility and Licensee Pole and obtain the City Engineer's written consent.

3.2.3. Licensee and City agree that Licensee Poles once installed shall not be considered "Utility Poles" within the definition of this Agreement, and that third-party wireline attachments (unrelated to Licensee's network or Wireless Facilities) shall not be permitted to be on Licensee Poles.

3.2.4. This Agreement only authorizes permission to use the Right-of-Way and does not confer any rights or permission to install Wireless Facilities to a Utility Pole. Licensee must obtain permission from the owner of the Utility Pole or

Licensee Pole prior to submitting its proposed plans to the City Engineer for Permits to install its Wireless Facilities within the Right-of-Way.

3.2.5. This Agreement does not grant to the Licensee an interest in any property.

3.3. LIST OF LICENSED LOCATIONS

3.3.1. Licensee shall install its Wireless Facilities or Licensee Poles only in the Licensed Locations. Licensee requesting to use City Right-of-Way location not listed in Exhibit A must submit to the City Engineer an Application for Location Review, a representative example of which is attached as Exhibit C of this Agreement.

3.3.2. The City Engineer shall review the Application for Location Review to determine availability, compliance with this Agreement, public safety impact, and other applicable considerations related to the requested location. The City Engineer shall provide written notice of the approval or denial of the Application for Location Review and reasons for denial, if applicable, within 30 days of receipt of the complete and accurate application.

3.3.3. The City Manager may revoke a Licensee's permission to use a Licensed Location listed in Exhibit A for that Licensee's non-compliance with a term or terms of this Agreement. The City Manager may amend or supplement Exhibit A as needed during the Term of this Agreement without further approval from City Council.

3.4. UNAUTHORIZED WIRELESS FACILITIES AND LICENSEE POLES

3.4.1. The City Manager will review proposed Wireless Facilities, Licensee Poles, and other equipment specifications at least once a calendar year and may amend and supplement Exhibit B without further approval from City Council.

3.4.2. The City Manager shall deem as unauthorized any type of Wireless Facility or Licensee Pole not listed in or attached under Exhibit B. The City Manager at his or her sole discretion may, upon 30 days' written notice, remove or require the Licensee to remove unauthorized Wireless Facilities or Licensee Poles at Licensee's expense without any liability to the City. The City will invoice and Licensee shall reimburse the City within 30 days of receipt of the invoice for the City's cost of removal of unauthorized Wireless Facilities and Licensee Poles.

3.4.3. Any Modification to a Wireless Facility or Licensee Pole must be approved by the City Engineer except for routine maintenance or replacement of an existing Wireless Facilities with equipment that (1) has identical dimensions and

appearance or smaller dimensions and a less intrusive appearance and (2) does not require a permit or plan approval from the City Engineer.

3.5. LICENSEE POLES

3.5.1. Licensee shall not install Licensee Poles in the Right-of-Way unless Licensee demonstrates that all of the following are satisfied: (1) Licensee certifies that a new Licensee Pole and Wireless Facilities in the Right-of-Way are necessary to fill a coverage or capacity gap in Wireless Services, (2) there are no other existing structures in the Right-of-Way or City buildings in the area that are available and capable of supporting the Licensee's Wireless Facilities.

3.5.2. If there is a City building in the area of the requested Licensed Location that is available (as solely determined by the City) and capable of supporting Licensee's Wireless Facilities, Licensee may use the City building instead of installing a new Licensee Pole. The installation, if any, of Licensee Poles or Wireless Facilities on a City building, shall be subject to a duly authorized contract executed between Licensee and the City. This Agreement does not authorize the use of any City building or property, except the Rights-of-Way, as set forth herein.

3.5.3. Licensee Poles must be spaced at least 300 linear feet from another pole that is capable of supporting Wireless Facilities along the proposed location, unless otherwise approved by the City Engineer in writing.

3.5.4. References to Licensee Poles throughout this Agreement shall not be construed as permission to install Licensee Poles in the Right-of-Way absent a Permit.

3.5.5. Licensee shall not install wooden poles, unless it is consistent with the design of other poles in the surrounding area.

3.6. LEASING AND SUBLEASING

No later than ninety (90) days from the Effective Date, Licensee shall notify the City Engineer, in writing, when more than one Carrier is using the same Licensed Location and every ninety (90) days thereafter, Licensee shall provide an updated notice of the existence of any additional Carriers added at each Licensed Location during that period.

The written notification to the City Engineer must identify the Licensed Location.

Licensee may license use of its Wireless Facilities and/or Licensee Poles to Carrier(s) for provision of Wireless Services only if the use strictly complies with this Agreement.

ARTICLE 4. PERMITS AND PERMISSION

4.1. REQUEST FOR LICENSED LOCATION

4.1.1. Prior to installation or Modification of a Wireless Facility or Licensee Pole, Licensee shall complete and submit to the City Engineer the plan review form referenced in this Agreement as the Application for Location Review, attached as Exhibit C as a representative sample, and the following:

4.1.1.1. A one-time nonrefundable plan review fee for review of the Application for Location Review (whether submitted electronically or in hard copy) in the amount stated in the most recent City fee schedule for plan reviews;

4.1.1.2. Documents necessary for the review or requested by the City Engineer, including but not limited to:

4.1.1.2.1. Map showing intended location of the Wireless Facility or Licensee Pole and its distance from a designated Historic Landmark, Park, or School, if any;

4.1.1.2.2. Representative drawings or Pictures of the intended Wireless Facility and Licensee Pole;

4.1.1.2.3. Engineering and construction plans and drawings; and

4.1.1.2.4. Written confirmation of an agreement between Carrier and Licensee for Carrier to use Licensee Pole and Wireless Facility, if applicable.

4.1.2. If the applicant is not the same as the Licensee listed on the Application for Location Review, the Licensee is presumed to be the owner of the Licensee Pole, Wireless Facilities, and Ground Equipment and shall be responsible for them and the Rental Fees.

4.2. LOCATION REVIEW PROCESS

4.2.1. The City Engineer shall review an Application for Location Review for completeness and notify the Licensee in writing within 30 days of receipt of the application if Licensee needs to submit additional or missing information. The notice shall include the information that must be submitted to the City Engineer. If Licensee does not submit the missing or additional information within 180 days of the notice, then the Licensee's Application for Location Review shall be deemed withdrawn.

However, Application for Location Review will not be accepted and shall be deemed incomplete if it is not accompanied by the following information:

4.2.1.1. Written permission from the Utility Pole owner authorizing the Licensee to install a Wireless Facility or Licensee Pole on Utility Pole.

4.2.1.2. The City Manager or City Engineer's written approval that the Camouflaged Wireless Facility or Licensee Pole conforms to the required standards, if applicable.

4.2.2. The City Engineer shall review the application to determine:

4.2.2.1. If the requested site has already been approved as a Licensed Location listed in Exhibit A;

4.2.2.2. The requested site is in the Right-of-Way;

4.2.2.3. Compliance with Article 6 of this Agreement;

4.2.2.4. That written permission has been obtained by applicable parties as required by this Agreement; and

4.2.2.5. Compliance with applicable construction, engineering, design specifications, and other applicable requirements, including the Americans with Disabilities Act.

4.2.3. The City Engineer shall deny a requested location in the Application for Location Review if the Licensee's application is not in compliance with Articles 3, 4, and 6 of this Agreement.

4.3. PERMITS

4.3.1. Licensee shall not install a Wireless Facility or Licensee Pole without the requisite Permit(s).

4.3.2. Upon approval of the Application for Location Review, the Licensee is authorized to apply for Permit(s). Such Permit application shall include the permit fee in the amount stated for similar permits as set forth in the most recent City fee schedule for permits.

4.3.3. The Licensee shall give notice to the City Manager of any revocation or denial of any such Permit affecting its performance hereunder within 15 days of such revocation or of the day upon which the Licensee received actual or constructive notice of denial of such Permit.

4.3.4. The City Engineer shall forward to the City Manager each approved GIS or Street Address and related information in the Application for Location Review when a Permit is approved.

4.4. INVENTORY

Licensee shall maintain a list of its Wireless Facilities and Licensee Poles and Licensed Locations during the Term of this Agreement. Licensee shall provide to the City Manager such list on the fifth anniversary of the Effective Date and every two years thereafter until the end of the Term.

City shall maintain an accounting of all Rental Fees owed from, invoiced to, and received from Licensee under this Agreement. City shall provide such accounting to the Licensee on the fifth anniversary of the Effective Date and every two years thereafter until the end of the Term.

ARTICLE 5. RENTAL FEES AND OTHER PAYMENTS

5.1. RENTAL FEE

Licensee shall pay the City an annual Rental Fee for use of each Licensed Location for which Licensee has obtained Permit(s) regardless of whether or not a Licensee installs Wireless Facilities or Licensee Poles in the Right-of-Way during the Term of this Agreement. Except as provided for in this Agreement, the Rental Fee is non-refundable. Licensee shall pay the City the Rental Fee as provided in Exhibit D, Rental Fee Schedule.

5.1.1. The Rental Fee payment for the first year at any Licensed Location ("Initial Payment") is due 30 days after Licensee obtains a Permit to install a Wireless Facility or Licensee Pole at the Licensed Location. The Initial Payment shall be pro-rated monthly for the remainder of the calendar year.

5.1.2. The Rental Fee for every year after the Initial Payment shall be paid in advance on or before January 31 of each calendar year during the Term for each Wireless Facility and each Licensee Pole in the Right-of-Way for the then-current calendar year.

5.2. PERIODIC FEE ADJUSTMENT

On January 1 of each year, the annual Rental Fee Rates shall automatically increase by 2% over the annual Rental Fee Rates in effect the prior calendar year.

5.3. OTHER PAYMENTS

The Rental Fee payable hereunder shall be exclusive of, and in addition to all ad valorem taxes, special assessments for municipal improvements, and other lawful obligations of the Licensee to the City.

5.4. LATE PAYMENT CHARGE

Until the payment due is received, Licensee shall incur 12 percent annual interest, compounded daily from the due date until payment is made on the amount due.

5.5. HOLD OVER CHARGE

The Rental Fee for any Hold Over Period, as described in section 12.6, shall be 150% of the Rental Fee due according to the most recent ROW Rental Fee Schedule. Payment pursuant to this subsection does not extend or renew this Agreement.

5.6. NON-FUNCTIONING WIRELESS FACILITIES

Licensee shall continue to pay Rental Fees for Wireless Facilities or Licensee Poles that are no longer in service or operational if the Wireless Facilities or Licensee Poles occupy the Right-of-Way.

5.7. PAYMENT

5.7.1. No later than 30 days before the payment due date, City Manager shall mail notice to Licensee that includes the current Rental Fees and other fees, payment, or charges due.

5.7.2. Rental Fee and other payments shall be payable by ACH direct deposit or check payable to the City of _____ and sent to the following address:

ATTN: _____
City of _____
P.O. Box _____
_____, TX _____

5.8. REIMBURSEMENT

When under the terms of this Agreement, the City at its own expense has removed or remediated Licensee's Wireless Facilities or Licensee Poles or Licensee is required to reimburse the City, the Licensee shall remit payment to the City to the address listed in Article 5.7 within 30 days of the date of the invoice for removal, remediation, or requirement.

5.9. PAYMENT LIMITS

Following removal of any Wireless Facility or Licensee Pole consistent with the terms of this Agreement, there will be no compensation due, including any Rental Fees, to the City by Licensee for such Wireless Facility or Licensee Pole except that the City shall not issue any refunds for any amounts already paid by Licensee for Wireless Facilities or Licensee Poles that have been removed.

Notwithstanding the foregoing, if Licensee is required by the City to remove a Wireless Facility or Licensee Pole and such removal is not the result of Licensee's failure to comply with this

Agreement, City will reimburse Licensee the Rental Fee for such Wireless Facility or Licensee Pole pro-rated monthly for the remainder of the calendar year.

5.10. COMPLIANCE REVIEW

The City may, at its discretion, upon no less than 30 days prior written notice, require that the Licensee produce its records related to this Agreement for review by the City Manager to ascertain the correctness of the information provided under Article 5 of this Agreement. If the City Manager identifies, as a result of a review of the information provided pursuant to Article 5 of this Agreement amounts owed by the Licensee from prior periods, the Licensee shall pay a late penalty of 12 percent per annum on the amount identified. If the review determines that payment of the Rental Fee was not made in accordance with the terms of this Agreement and that such payment represents an underpayment of at least 20 percent of the Rental Fees due, the Licensee shall reimburse the City for all reasonable review costs, and pay the Rental Fees determined to be due and payable to the City hereunder. Such costs and fees shall be paid within 30 days after determination of amount due is made. If the review determines that payment of the Rental Fee was not made in accordance with the terms of this Agreement and that such payment represents an overpayment of any amount, City will credit such overpayment against Licensee's future obligations to City under this Agreement and reimburse Licensee the remainder of such amount within 30 days of the end of the Term.

ARTICLE 6. WIRELESS FACILITIES AND LICENSEE POLES REQUIREMENTS

6.1. AESTHETIC REQUIREMENTS

6.1.1. The Wireless Facilities shall be concealed or enclosed as much as possible in an equipment box, cabinet or other unit that may include ventilation openings and external cables and wires hanging off a pole shall be sheathed or enclosed in a conduit, so that wires are protected and not visible or visually minimized to the extent possible.

6.1.2. Unless required by this Agreement, Licensee may, at its own expense, install a Camouflaged Wireless Facilities or Licensee Poles, provided Licensee obtains the requisite approvals and permits required by this Agreement. Camouflaged Wireless Facilities or Licensee Poles shall not be installed unless they conform to the aesthetic or design standards for the proposed installation site, if any, unless otherwise approved by the City Manager.

6.1.3. In order to minimize negative visual impact to the surrounding area, the City Engineer may deny a request for a proposed License Location if the Licensee installs Wireless Facilities or Ground Equipment where 100 cubic feet of Wireless Facilities or Ground Equipment already exist at that time of the request that is in close proximity of 300 feet, or less to the proposed or an existing Licensed Location.

6.1.4. Licensee shall comply with and observe all applicable City, State, and federal historic preservation laws and requirements.

6.1.5. If a Licensed Location becomes an Underground Utility Area during the Term of this Agreement, then Licensee's grant of permission for the Licensed Location with the Utility Poles at such Licensed Location will be automatically revoked upon removal of said Utility Poles. When installing or re-installing Wireless Facilities in the area where the Utility Poles at issue were removed, Licensee must install Camouflaged Wireless Facilities, Ground Equipment, and Licensee Poles as authorized by the City Manager and in compliance with Underground Utility Area's aesthetic standards, as approved by the City Manager.

6.1.6. Licensee shall not install Licensee Poles in Underground Utility Area except as authorized by the City Manager and in compliance with any aesthetic standards. Any Licensee Poles authorized to be installed in Underground Utility Areas shall be Camouflaged Wireless Facilities or Licensee Poles as required by the City Manager.

6.1.7. For Permits in the Underground Utility Areas Licensee shall provide to the City Engineer written documentation that the City Manager has reviewed and approved the aesthetics of the proposed Wireless Facilities or Licensee Poles, including the design and concealment plan or the proposed Camouflaged Wireless Facility or Licensee Pole, if any, prior to obtaining a Permit from the City Engineer for installation or Modification of Licensee Poles or Wireless Facilities within a service area that has betterments or enhancements. Betterment and enhancements are decorative or specialty street light fixtures, street signs, traffic signals sidewalks, pavement, and other infrastructure that are above City standards.

6.1.8. Licensee must obtain written approval from the City Manager that the City approves the aesthetics of the proposed Wireless Facilities or Licensee Poles, including the design and concealment plan or the proposed Camouflaged Wireless Facility or Licensee Pole, before an Application for Location Review can be approved by the City Engineer for the installation or Modification of Licensee Poles or Wireless Facilities within a Historic District.

6.1.9. The City Manager or City Engineer may request that Licensee explore the feasibility of using certain equipment, including certain Wireless Facility, Ground Equipment, Licensee Pole, to improve the aesthetics of the Wireless Facilities, Licensee Poles, Ground Equipment or any portion thereof or to minimize the impact to the aesthetics of the surrounding area. If Licensee, at its sole discretion, chooses to utilize or install such equipment at its sole cost and expense, Exhibit B will be amended to add the equipment.

6.2. INSTALLATION

Licensee shall, at its own cost and expense, install the Wireless Facilities or Licensee Poles in a good and workmanlike manner and in accordance with the requirements promulgated by the City Engineer, as such may be amended from time to time. Licensee's work shall be subject to the regulation, control and direction of the City Engineer. All work done in connection with the installation, operation, maintenance, repair, and/or replacement of the Wireless Facilities or Licensee Poles shall be in compliance with all applicable laws, ordinances, codes, rules and regulations of the City, applicable county, the state, and the United States ("Laws").

6.3. INSPECTIONS

6.3.1. The City Engineer may perform visual inspections of any Wireless Facilities or Licensee Poles located in the Right-of-Way as the City Engineer deems appropriate without notice. If the inspection requires physical contact with the Wireless Facilities, the City Engineer shall provide written notice to the Licensee within five business days of the planned inspection. Licensee may have a representative present during such inspection.

6.3.2. In the event of an emergency situation, the City may, but is not required to, notify Licensee of an inspection. The City may take action necessary to remediate the emergency situation and the City Engineer shall notify Licensee as soon as practically possible after remediation is complete.

6.4. PLACEMENT

6.4.1. *Parks.* Placement of Wireless Facilities and Licensee Poles on any Parks, Park roads, sidewalk, or property is prohibited unless dedicated as Right-of-Way and the placement complies with city ordinance, state law, private deed restrictions, or other public or private restrictions on the use of the Park.

6.4.1.1 The Licensee shall not install Ground Equipment in a Right-of-Way that is within 150 feet of the boundary line of a Park, unless approved by the City Engineer and Park Director in writing.

6.4.1.2. The Licensee shall not install a Licensee Pole in a Right-of-Way that is within 300 feet of the boundary line of a Park, unless approved by the City Engineer and Park Director in writing.

6.4.2. *Traffic Signals.* Licensee shall neither allow nor place a Wireless Facility on a Traffic-Control Device or Traffic-control Signal or any structure supporting a Traffic-Control Device or Traffic-control Signal.

6.4.3. *City Infrastructure.* Licensee shall neither not allow nor install Wireless Facilities or Licensee Poles on any part of a City bridge, overpass, or tunnel, unless approved by the City Engineer in writing.

6.4.4. *Streets.* Licensee Poles and Ground Equipment shall not be installed in Right-of-Ways that are adjacent to streets and thoroughfares that are 50 feet or less in width and both sides of the street or thoroughfare are adjacent to exclusively single-family residential lots, unless approved by the City Engineer in writing.

6.4.5. *Historic Landmarks.* A Wireless Facility must not be within 300 feet of a historic, site, structure, or Historic Landmark recognized by the City, state or federal government under the City Code of Ordinances, State Law, including, but not limited to, Sec. 442.001(3) of the Texas Government Code, and federal law, including, but not limited to, 16 U.S.C. 470, as of the date of the submission of the Application for Location Review (Exhibit C) for the requested location, unless approved by the City Engineer in writing.

6.4.6. *Schools.* Licensee shall adhere to the federal radio frequency (RF) emissions standards set forth in Federal Communications Commission OET Bulletin 65 (as may be amended or replaced during the Term) when installing or allowing to be installed a Wireless Facility or Licensee Pole within 150 feet of a School.

6.4.7. *Poles.* Wireless Facilities on a Utility Pole or Licensee Pole shall be installed at least 8 feet above the ground.

6.4.8. *Right-of-Way.* Licensee Poles and ground-level Wireless Facilities shall be placed, as much as possible, within two feet of the outer edge of the Right-of-Way line. Licensee Pole or Wireless Facility shall not impede pedestrian or vehicular traffic in the Right-of-Way. If a Licensee Pole or Wireless Facility is installed in a location that is not in accordance with the plans approved by the City Engineer and impedes with pedestrian or vehicular traffic or does not comply or otherwise renders the Right-of-Way non-compliant with applicable laws, including the American Disabilities Act, then the Licensee shall remove the Wireless Facility or Licensee Pole. Licensee shall be subject to a $2,000 per day penalty until the Licensee Pole or Wireless Facility is relocated to the correct area within the Licensed Location, regardless of whether or not the Licensee's contractor, subcontractor, or vendor installed the Licensee Pole or Wireless Facility. Licensee may request from the City Engineer a waiver of underground construction requirements to allow for "microtrenching" at a depth of less than 24 inches for lateral connections connecting Wireless Facilities to the fiber-optic network.

6.4.9. *Design Manual.* Placement or Modification of Wireless Facilities and Licensee Poles shall comply with the City's Guidelines for Construction in the Rights-of-Way Manual as published and amended from time to time.

6.5. ELECTRICAL SUPPLY

Licensee shall be responsible for obtaining any required electrical power service to the Wireless Facilities and Licensee Poles. The City shall not be liable to the Licensee for any stoppages or shortages of electrical power furnished to the Wireless Facilities or Licensee Poles, including without limitation, stoppages or shortages caused by any act, omission, or requirement of the public utility serving the structure or the act or omission of any other tenant or Licensee of the structure, or for any other cause beyond the control of the City. Licensee shall not be entitled to any abatement of the Rental Fee for any such stoppage or shortage of electrical power.

6.6. FIBER CONNECTION

Licensee shall be responsible for obtaining access and connection to fiber optic lines or other backhaul solutions that may be required for its Wireless Facilities or Licensee Pole.

6.7. GENERATORS

Licensee shall not allow or install generators or back-up generators in the Right-of-Way.

6.8. EQUIPMENT DIMENSIONS

6.8.1. *Wireless Facilities.* Licensee's Wireless Facilities installed above ground shall not exceed 4 feet in height, 2 feet in width, and 2 feet in depth, unless otherwise approved, in writing, by the City Engineer. Licensee shall not install any equipment not described in or included in Exhibit B. Extensions to an existing Wireless Facility shall not result in a combined width of more than 3 feet as measured from the edge of the pole, including a Utility Pole and a Licensee Pole, and any subsequent Modifications to said pole. Licensee shall be allowed an additional cabinet for emergency battery back-up power that will not be counted towards the dimension requirements previously stated in this paragraph, provided the battery back-up power cabinet does not exceed 2 feet in height, 2 feet in width, and 21 inches in depth.

6.8.2. *Licensee Poles.* Licensee Poles shall not exceed 40 feet in height as measured from the ground, and with subsequent Modifications shall not exceed 45 feet in height as measured from the ground. Licensee Poles shall not exceed 3 feet in diameter or 3 feet in width as measured from the edge of the pole, including a Utility Pole and a Licensee Pole, and any subsequent Modifications to said pole.

6.8.3. *Ground Equipment.* Any Ground Equipment that contains equipment necessary for supporting Wireless Facilities and Licensee Poles shall be no more than 3 feet in height, 3.5 feet in width, and 2 feet in depth and not total more than 21 cubic feet, excluding any concrete pad that is at grade or no more than one inch above grade, per Licensed Location. Licensee shall be allowed an additional cabinet for emergency battery back-up power that will not be counted towards the dimension requirements previously stated in this paragraph, provided the

battery back-up power cabinet does not exceed 2 feet in height, 2 feet in width, and 21 inches in depth

6.9. TREE MAINTENANCE

Licensee, its contractors, and agents shall obtain written permission from the City Manager before trimming trees hanging over its Licensee Poles to prevent branches of such trees from contacting attached Wireless Facilities or the Licensee Poles. When directed by the City Manager, Licensee shall trim under the supervision and direction of the City Parks Director or his designee. The City shall not be liable for any damages, injuries, or claims arising from Licensee's actions under this section.

6.10. SIGNAGE

6.10.1. Licensee shall post its name, location identifying information, and emergency telephone number in an area on the cabinet of the Wireless Facility that is visible to the public. Signage required under this section shall not exceed 4" x 6", unless otherwise required by law (e.g. RF ground notification signs) or the City Manager.

6.10.2. Except as required by law or by the Utility Pole owner, Licensee shall not post any other signage or advertising on the Wireless Facilities, Licensee Pole, or Utility Pole.

6.11. OVERHEAD LINES PROHIBITED

In Underground Utility Areas, Licensee shall not allow or install overhead lines connecting to Licensee Poles. All overhead lines connecting to the Licensee Pole in Licensed Locations where other overhead telecommunications or utility lines are or would be to be buried below ground as part of a project, shall be buried below ground.

6.12. REPAIR

Whenever the installation, placement, attachment, repair, removal, operation, use, or relocation of the Wireless Facility, Licensee Pole, or any portion thereof is required or permitted under this Agreement, and such installation, placement, attachment, repair, removal, operation, use, or relocation causes any property of the City or any third party to be damaged or to have been altered in such a manner as to make it unusable, unsafe, or in violation of any law, rule, regulation or code, Licensee, at its sole cost and expense, shall promptly repair and return such property to its original condition. If Licensee does not repair such property or perform such work as described in this paragraph, then the City shall have the option, upon 15 days' prior written notice to Licensee or immediately if there is an imminent danger to the public, to perform or cause to be performed such reasonable and necessary work on behalf of Licensee and to

charge Licensee for the reasonable and actual costs incurred by the City. Licensee shall reimburse the City for the costs in accordance with Article 5.8 of this Agreement.

6.13. GRAFFITI ABATEMENT

As soon as practical, but not later than 30 days from the date Licensee receives notice thereof, Licensee shall remove all graffiti on any of its Wireless Facilities or Licensee Poles located in the Right of Way.

ARTICLE 7. INTERFERENCE WITH OPERATIONS AND COLLOCATIONS

7.1. NO LIABILITY

7.1.1. The City shall not be liable to Licensee for any damage caused by other Licensees with Wireless Facilities sharing the same Utility Pole.

7.1.2. The City shall not be liable to Licensee by reason of inconvenience, annoyance or injury to the Wireless Facility, Licensee Pole, or activities conducted by Licensee therefrom, arising from the necessity of repairing any portion of the Right-of-Way, or from the making of any necessary alteration or improvements, in, or to, any portion of the Right-of-Way, or in, or to, its fixtures, appurtenances or equipment. The City will use reasonable efforts not to cause material interference to Licensee's operation of its Wireless Facility or Licensee Pole.

7.2. NO INTERFERENCE

7.2.1. Licensee's Wireless Facilities must not cause harmful interference to the City's radio frequency, wireless network, or communications operations ("City Operations) and other Licensee's Wireless Facilities~~;~~ or similar third party equipment in the Right-of-Way or adjacent City property ("Protected Equipment"). If Licensee's Wireless Facilities interfere with the City's Operations, then Licensee shall immediately cease operation of the Wireless Facilities causing said interference upon receiving notice from the City and refrain from operating until Licensee has eliminated the interference. If after notice Licensee continues to operate Wireless Facilities that cause interference with the City's radio frequency, wireless network, or communications operations, such Wireless Facilities may be deemed unauthorized and subject to the provisions of Section 3.4 of this Agreement. If Licensee's Wireless facilities interfere with Protected Equipment, then Licensee shall take the steps necessary to correct and eliminate such interference within 24 hours of receipt of notice from the City. If the Licensee is unable to resolve the interference issue within this timeframe, it will voluntarily power down the Wireless

Facilities causing the interference, except for intermittent testing until such time as the interference is remedied

7.2.2. Following installation or Modification of a Wireless Facility, the City Engineer may require Licensee to test the Wireless Facility's radio frequency and other functions to confirm that it does not interfere with the City's Operations or Protected Equipment.

7.2.3. The City will include in any agreement or otherwise obligate other Wireless Services providers or Neutral Host Providers with permission from the City to use the Right-of-Way to provide Wireless Services to comply with the provisions of Section 7.2.1 and 7.2.2 of this Agreement to avoid, correct, and/or eliminate harmful interference with Licensee's Wireless Facilities.

ARTICLE 8. ABANDONMENT, RELOCATION AND REMOVAL

8.1. ABANDONMENT OF OBSOLETE WIRELESS FACILITIES AND LICENSEE POLES

Licensee shall remove Wireless Facilities or Licensee Poles when such facilities are Abandoned regardless of whether or not it receives notice from the City. Unless the City sends notice that removal must be completed immediately to ensure public health, safety, and welfare, the removal must be completed within the earlier of 90 days of it being Abandoned or within 90 days of receipt of written notice from the City. When Licensee removes or abandons permanent structures in the Right-of-Way, the Licensee shall notify the City Engineer and City Manager in writing of such removal or abandonment and shall file with the City Engineer and City Manager the location and description of each Wireless Facility or Licensee Pole removed or abandoned. The City Engineer may require the Licensee to complete additional remedial measures necessary for public safety and the integrity of the Right-of-Way.

8.2. REMOVAL REQUIRED BY CITY

8.2.1. Licensee shall, at its sole cost and expense, promptly disconnect, remove, or relocate the applicable Wireless Facility or Licensee Pole within the time frame and in the manner required by the City Engineer if the City Engineer reasonably determines that the disconnection, removal, or relocation of any part of a Wireless Facility or Licensee Pole (a) is necessary to protect the public health, safety, welfare, or City property, (b) the Wireless Facility, Licensee Pole, or portion thereof, is adversely affecting proper operation of streetlights, or City property, or (c) Licensee loses or fails to obtain all applicable licenses, permits, and certifications required by Law for its Wireless Facility, Licensee Pole, or use of any Licensed Location under this Agreement. If the City Engineer reasonably determines that there is imminent danger to the public, then the City

may immediately disconnect, remove, or relocate the applicable Wireless Facilities or Licensee Pole at the Licensee's sole cost and expense.

8.2.2. The City Engineer shall provide 90 days written notice to the Licensee before removing a Wireless Facility or Licensee Pole under this Section 8.2, unless there is imminent danger to the public health, safety, and welfare.

8.2.3. Licensee shall reimburse City for the City's actual cost of removal of its Wireless Facilities or Licensee Poles in accordance with this Agreement within 30 days of receiving the invoice from the City.

8.3. REMOVAL OR RELOCATION BY LICENSEE

8.3.1. If the Licensee removes or relocates a Wireless Facility or Licensee Pole at its own discretion, it shall notify the City Engineer and City Manager in writing not less than 10 business days prior to removal or relocation. Licensee shall obtain all permits required for relocation or removal of its Wireless Facility or Licensee Pole prior to relocation or removal.

8.3.2. Except as provided in Section 5.9, the City shall not issue any refunds for any amounts paid by Licensee for Wireless Facilities or Licensee Poles that have been removed.

8.4. REMOVAL OR RELOCATION REQUIRED FOR CITY PROJECT

8.4.1. Licensee understands and acknowledges that the City may require Licensee to remove or relocate its Wireless Facility, Licensee Pole, or any portion thereof from the Right-of-Way, and Licensee shall at the City Engineer's direction remove or relocate the same at Licensee's sole cost and expense, whenever the City Engineer reasonably determines that the relocation or removal is needed for any of the following purposes:

8.4.1.1. Required for the construction, completion, repair, widening, relocation, or maintenance of, or use in connection with, any City construction or maintenance project.

8.4.1.2. Required for the creation of an Underground Utility Area.

8.4.2. In any such case, the City shall use reasonable efforts to afford Licensee a reasonably equivalent alternate location, if available.

8.4.3. If Licensee fails to remove or relocate the Wireless Facility, Licensee Pole, or portion thereof as requested by the City Engineer within 90 days of Licensee's receipt of the request, then the City shall be entitled to remove the Wireless Facility, Licensee Pole, or portion thereof at Licensee's sole cost and expense, without further notice to Licensee, and Licensee shall, within 30 days following issuance of invoice for the same, reimburse the City for its reasonable expenses

incurred in the removal (including, without limitation, storage expenses) of the Wireless Facility, Licensee Pole, or portion thereof.

8.5. REMOVAL REQUIRED AFTER TERMINATION OR EXPIRATION OF LICENSE

Within 30 days after termination or expiration of this Agreement, Licensee shall commence removal of all of Licensee's Wireless Facilities and Licensee Poles from the Right-of-Way and peaceably surrender the Right-of-Way to City in the same condition the Right-of-Way was in on the Effective Date, excepting (A) ordinary wear and tear. Removal of all the Licensee's Wireless Facilities and Licensee Poles under this section must be completed within 180 days. If Licensee fails to begin removal of the Wireless Facilities or Licensee Poles on or before the 30 day after the Agreement expires or terminates or fails to complete removal within 180 days, the City may remove, store, or dispose of any remaining portion of the Wireless Facilities or Licensee Poles in any manner the City Engineer deems appropriate. Licensee shall, within 30 days after receipt of the City's written request and invoice, reimburse the City for all costs incurred by the City in connection therewith (including any reasonable overhead and storage fees).

8.6. REMOVAL REQUIRED AFTER REVOCATION

Within 30 days after the date of the notice of revocation of a Licensed Location, Licensee shall commence removal of the Wireless Facility or Licensee Pole from the Right-of-Way and peaceably surrender the Right-of-Way to City in the same condition the Right-of-Way was in on the Effective Date, excepting ordinary wear and tear. If Licensee fails to complete removal within 90 days, the City may remove, store, or dispose of any remaining portion of the Wireless Facilities or Licensee Poles in any manner the City Engineer deems appropriate. Licensee shall, within 30 days after receipt of the City's written request and invoice, reimburse the City for all costs incurred by the City in connection therewith (including any reasonable overhead and storage fees).

8.7. OWNERSHIP

The City agrees that no part of a Wireless Facility or Licensee Pole constructed, erected or placed on the Right-of-Way by Licensee will become, or be considered by the City as being affixed to or a part of, the Right-of-Way. All portions of the Wireless Facility or Licensee Pole constructed, modified, erected or placed by Licensee on the Right-of-Way will be and remains the property of Licensee and may be removed by Licensee at any time during or after the Term.

8.8. RESTORATION

Licensee shall repair any damage to the Right-of-Way, and the property of any third party resulting from Licensee's removal activities (or any other of Licensee's activities hereunder) within 10 days following the date of such removal or relocation, at Licensee's sole cost and expense, to include restoration of the Right-of-Way and property to substantially the same

condition as it was immediately before the Effective Date, including restoration or replacement of any damaged trees, shrubs or other vegetation. Such repair, restoration and replacement shall be subject to the sole, reasonable approval of the City Manager.

8.9. LICENSEE RESPONSIBLE

Licensee shall be responsible and liable for the acts and omissions of Licensee's employees, temporary employees, officers, directors, consultants, agents, Affiliates, subsidiaries, sublicensees, sublessees, and subcontractors in connection with the performance of this Agreement, as if such acts or omissions were Licensee's acts or omissions.

8.10. ALLOCATION OF FUNDS FOR REMOVAL AND STORAGE

The City has appropriated $0 under this Agreement to pay for the cost of any removal or storage of Wireless Facilities or Licensee Pole, as authorized under this Article, and no other funds are allocated in connection with the performance of this Agreement.

ARTICLE 9. ENVIRONMENTAL LAW REQUIREMENTS

Licensee shall comply with all rules, regulations, statutes, or orders of the Environmental Protection Agency, the Texas Commission on Environmental Quality, and any other governmental agency with the authority to promulgate environmental rules and regulations applicable to Licensee's use of any Licensed Location under this Agreement ("Environmental Laws"). Licensee shall promptly reimburse the City for any fines or penalties levied against the City because of Licensee's failure to comply with Environmental Laws.

Licensee shall not possess, use, generate, release, discharge, store, dispose of, or transport any Hazardous Materials on, under, in, above, to, or from the site except in compliance with the Environmental Laws. "Hazardous Materials" mean any substances, materials, or wastes that are or become regulated as hazardous or toxic substances under any applicable federal, state, or local laws, regulations, ordinances, or orders. Licensee shall not deposit oil, gasoline, grease, lubricants, or any ignitable or hazardous liquids, materials, or substances in the City's storm sewer system or sanitary sewer system or elsewhere on City Property in violation of the Environmental Laws. Except for its contractors, subcontractors, and vendors, Licensee will not have any responsibility for managing, monitoring, or abating, nor be the owner of, nor have any liability for, any Hazardous Materials that it did not bring into the Licensed Locations.

ARTICLE 10. SECURITY

Within 30 days of the execution of this Agreement, Licensee shall maintain and furnish to the City Manager a Security in favor of the City. "Security" means either an executed performance bond, letter of credit or a bank or cashier's check made payable to the City, or other form of security acceptable to the City Manager for the purpose of protecting the City from the costs and expenses associated with Licensee's failure to comply with its material obligations under and

throughout the life of this Agreement, including but not limited to, (a) the City's restoration of the Right-of-Way; (b) the City's removal of any of Licensee's Wireless Facilities or Licensee Poles that are Abandoned or not properly maintained or that need to be removed to protect public health, safety, welfare, or City property; (c) the City's remediation of environmental and hazardous waste issues caused by Licensee; or (d) the City's recoupment of Rental Fees that have not been paid by Licensee in over 12 months, after Licensee receives reasonable notice from the City of any of the non-compliance listed above and opportunity to cure.

The amount of the Security shall be determined by mutual agreement by the Licensee and City Manager in writing, provided that in no event shall the Security be less than (a) $25,000 for the installation of any and all Wireless Facilities and (b) $100,000 for the installation of any and all Licensee Poles.

The Bond, if any, must be in a form approved by the City Attorney and issued by a corporate surety authorized and admitted to write surety bonds in Texas. An example of a City approved bond has been provided in Exhibit "E." The surety must be listed on the current list of accepted sureties on federal bonds published by the United States Treasury Department or reinsured for any liability up to $100,000.00, by a reinsurer listed on the U.S. Treasury list.

In the event the surety or party issuing the Security cancels or decides not to renew or extend the Security, Licensee shall obtain, and provide to the City Attorney for approval, a replacement Security with another surety, authorized to do business in Texas, within 30 days of the date the Security has been cancelled or non-renewed. If Licensee fails to provide the replacement Security within the 30-day period, the City Manager, after consulting with the City Attorney, may immediately suspend Licensee from any further performance under this Agreement and begin procedures to terminate for default pursuant to the terms of Section 12.3.

In the event that the City draws upon the Security, Licensee must replenish the amount of the Security within 30 days. Notwithstanding any provisions of this Agreement to the contrary, the City Manager shall be required to notify Licensee in writing as a precondition to drawing on, seeking payment under, or executing against the Security.

In the event that Licensee shall fully and faithfully comply with all of the terms of this Agreement, the City shall return the Security to Licensee within 60 days of the Agreement's expiration or termination, to the extent not otherwise applied in compliance with this Agreement.

ARTICLE 11. RELEASE, INDEMNIFICATION, AND INSURANCE

11.1. RELEASE

LICENSEE AGREES TO AND SHALL RELEASE THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") FROM ALL LIABILITY FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR

INCIDENTAL TO PERFORMANCE UNDER THIS AGREEMENT, EVEN IF THE INJURY, DEATH, DAMAGE, OR LOSS IS CAUSED BY THE CITY'S SOLE OR CONCURRENT NEGLIGENCE AND/OR THE CITY'S STRICT PRODUCTS LIABILITY OR STRICT STATUTORY LIABILITY.

NEITHER LICENSEE NOR CITY WILL BE LIABLE TO THE OTHER FOR ANY INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL, OR PUNITIVE DAMAGES, OR LOST PROFITS FOR ANY CLAIM ARISING OUT OF THIS AGREEMENT. THIS SECTION WILL SURVIVE EXPIRATION OR TERMINATION OF THIS AGREEMENT.

11.2. <u>INDEMNIFICATION</u>

11.2.1. LICENSEE AGREES TO AND SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS (COLLECTIVELY "INDEMNIFY" AND "INDEMNIFICATION") THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY PARTIES") FOR ALL THIRD-PARTY CLAIMS, SUITS, DAMAGES, LIABILITIES, FINES, AND EXPENSES INCLUDING, WITHOUT LIMITATION, REASONABLE ATTORNEYS' FEES, COURT COSTS, AND ALL OTHER DEFENSE COSTS (COLLECTIVELY "LOSSES") FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH LICENSEE'S USE OR OPERATION OF ANY WIRELESS FACILITY, LICENSEE POLE, OR UTILITY POLE UNDER THIS AGREEMENT INCLUDING, WITHOUT LIMITATION THOSE CAUSED BY LICENSEE'S AND/OR ITS AGENTS', EMPLOYEES', OFFICERS', DIRECTORS', CONSULTANTS' OR SUBCONTRACTORS' ACTUAL OR ALLEGED NEGLIGENCE OR INTENTIONAL ACTS OR OMISSIONS.

11.2.2. LICENSEE'S INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT WILL SURVIVE FOR FOUR YEARS AFTER THE AGREEMENT EXPIRES OR TERMINATES.

11.2.3. NOTWITHSTANDING ANYTHING TO THE CONTRARY, LICENSEE'S INDEMNIFICATION OBLIGATION UNDER THIS AGREEMENT IS LIMITED TO $500,000 PER OCCURRENCE.

NOTWITHSTANDING ANYTHING TO THE CONTRARY, LICENSEE WILL NOT BE REQUIRED TO INDEMNIFY THE CITY PARTIES FOR THE CITY PARTIES' ACTS OR OMISSIONS.

11.2.4. SUBCONTRACTORS' AND SUBLICENSEES' INDEMNIFICATION: LICENSEE SHALL REQUIRE ALL OF ITS SUBCONTRACTORS AND SUBLICENSEES (AND THEIR SUBCONTRACTORS) TO RELEASE AND INDEMNIFY THE CITY TO THE SAME EXTENT AND IN SUBSTANTIALLY THE SAME FORM AS ITS RELEASE AND INDEMNITY TO THE CITY AS SET FORTH IN THIS AGREEMENT.

11.3. INDEMNIFICATION PROCEDURES

11.3.1 The following procedures shall apply to indemnification under this Agreement:

11.3.1.1 Notice of Claims. If the City receives notice of any claim or circumstances that could give rise to Losses, the City shall give written notice to the other party within 10 days. The notice must include the following:

11.3.1.1.1 A description of the indemnification event in reasonable detail;

11.3.1.1.2 The basis on which indemnification may be due; and

11.3.1.1.3 The anticipated amount of Losses.

This notice does not estop or prevent the City from later asserting a different basis for indemnification or a different amount of Losses than that indicated in the initial notice. If the City does not provide this notice within the 10-day period, it does not waive any right to indemnification except to the extent that the Licensee is prejudiced, suffers loss, or incurs expense because of the delay.

11.3.2 Defense of Claims. The Licensee may assume the defense of the claim at its own expense with counsel chosen by it that is reasonably satisfactory to the City. The Licensee shall then control the investigation, defense, and any negotiations to settle the claim. Within 10 days after receiving written notice of the indemnification request, the Licensee must advise the City as to whether or not it will defend the claim. If the Licensee does not assume the defense, the City shall assume and control the defense, and all defense expenses shall constitute Losses.

11.3.3 Continued Participation. If the Licensee elects to defend the claim, the City may retain separate counsel at its own expense to participate in (but not control) the defense and to participate in (but not control) any settlement negotiations. The City will provide the Licensee with reasonable information and assistance related to such claim. The Licensee may settle the claim without the consent or agreement of the City unless the settlement (i) would result in injunctive relief or other equitable remedies or otherwise require the City to comply with restrictions or limitations that adversely affect the City; (ii) would require the

City to pay amounts that the Licensee does not fund in full; or (iii) would not result in the City's full and complete release from all liability to the plaintiffs or claimants who are parties to or otherwise bound by the settlement.

11.4. INSURANCE

11.4.1 The Licensee shall maintain certain insurance and Endorsements in full force and effect at all times during the term of this Agreement and any extensions thereto. Such insurance is described as follows:

11.4.1.1. **Risks and Limits of Liability.** The Licensee shall maintain the following coverage and limits of liability:

COVERAGE	LIMIT OF LIABILITY
Workers' Compensation	Statutory for Workers' Compensation
	Bodily Injury by Accident $1,000,000 (each accident)
Employer's Liability	Bodily Injury by Disease $1,000,000 (policy limit)
	Bodily Injury by Disease $1,000,000 (each employee)
Commercial General Liability:	
Bodily and Personal Injury; Bodily Injury and Property Damage; Products and Completed Operations Coverage; Explosion, Collapse, and Underground	Combined Limits of $2,000,000 per occurrence and $2,000,000 aggregate
Automobile Liability	$2,000,000 combined single limit for each accident for bodily injury and property damage coverage for all owned, hired, and non-owned Autos

Aggregate limits are per 12-month policy period, unless otherwise indicated.

11.4.1.2. **Form of Policies.** The insurance may be in one or more policies of insurance, which must be reasonably approved by the City Manager and City Attorney; however, such approval shall not be unreasonably withheld.

11.4.1.3. **Issuers of Policies.** The issuer of any policy (1) shall have a Certificate of Authority to transact insurance business in Texas or (2) shall be an eligible non-admitted insurer in the State of Texas and have a Best's rating of at least B+ and a Best's Financial size Category of Class VI or better, according to the most current edition of Best's Key Rating Guide.

11.4.1.4. **Additional Insured Parties.** The City and its officers and employees shall be included as additional Insureds as their interest may appear under this Agreement on the above commercial general liability and automobile liability policies.

11.4.1.5. **Deductibles.** Licensee shall be responsible for and pay any claims or losses to the extent of any deductible amounts and waives any claim it may have for the same against the City, its officers, agents, or employees.

11.4.1.6. **Cancellation.** Upon receipt of notice from its insurer Licensee will provide the City Manager 30 days' advance written notice of any cancellation. Within the 30-day period, Licensee shall provide other suitable policies in lieu of those about to be canceled or non-renewed so as to maintain in effect the required coverage. If Licensee does not comply with this requirement, the City Manager, at his or her sole discretion, may immediately suspend Licensee from any further performance under this Agreement and begin procedures to terminate for default pursuant to the terms of Section 12.4.

11.4.1.7. **Subrogation.** Licensee waives any claim or right of subrogation to recover against the City, its officers, agents, or employees and each of Licensee's insurance policies must on its face or by endorsement state that the issuer waives any claim or right of subrogation to recover against the City, its officers, agents, or employees.

11.4.1.8. **Endorsement of Primary Insurance.** Each policy, except Workers' Compensation, shall be primary and non-contributory with any insurance or program of self-insurance maintained by the City.

11.4.1.9. **Liability for Premium.** Licensee shall pay all insurance premiums, and the City shall not be obligated to pay any premiums.

11.4.1.10. **Subcontractors.** Licensee shall require all subcontractors to obtain and maintain substantially the same insurance as required of Licensee.

11.4.2 **Certificates of Insurance.** At the time this Agreement is signed and as long as this Agreement continues, Licensee must furnish to the City Manager certificates of insurance, including any blanket additional insured endorsements that meet the requirements of Section 11.4 of this Agreement. These certificates must bear the Licensee's name in which it is insured. If requested by the City Manager, Licensee must provide the originals of all policies referred to above,

or copies certified by the agent or attorney-in-fact issuing them. Licensee shall provide updated certificates of insurance to the City Manager upon request. Every certificate of insurance Licensee delivers for the shall:

11.4.2.1. evidence coverage in effect for a twelve (12) month period;

11.4.2.2. include the company name and address, policy number, NAIC number or AMB number, and authorized signature;

11.4.2.3. include the name and reference numbers and indicate the name and address of the project manager or authorized contact person in the Certificate Holder Box; and be appropriately marked to accurately identify all coverages and limits of the policy;

11.4.2.4. be appropriately marked to accurately identify:

11.4.2.4.1. All coverage and limits of the required under this Agreement;

11.4.2.4.2. effective and expiration dates; and

11.4.2.4.3. waivers of subrogation, endorsement of primary insurance and additional insured language, as described above.

11.4.2.5. Licensees shall, upon the City's request, deliver an assurance letter from Licensee's insurer stating that the insurer intends to issue Licensee a new policy that meets the terms of this Article.

ARTICLE 12. TERM AND TERMINATION

12.1. TERM

12.1.1. This Agreement is effective on the Effective Date and unless sooner terminated under other provisions of this Agreement, will remain in effect until December 31, 2025 ("Initial Term").

12.2. RENEWALS

Upon expiration of the Initial Term, this Agreement will automatically renew for up to two (2) successive five (5) year terms (each a "Renewal Term") on the same terms and conditions, unless either the City or Licensee chooses not to renew. If either the City or Licensee chooses not to renew this Agreement, the City Manager shall notify the Licensee or the Licensee shall notify the City Manager of non-renewal at least 90 days before the expiration of the then-current term.

12.3. TERMINATION FOR CAUSE BY CITY

12.3.1. If Licensee defaults under this Agreement, the City may terminate this Agreement subject to Licensee's ability to cure such defaults below. The City's right to terminate this Agreement for Licensee's default is cumulative of all its

rights and remedies which exist now or in the future. Default by Licensee includes, but is not limited to:

12.3.1.1. Failure of the Licensee to comply with any material term of this Agreement;

12.3.1.2. Licensee becomes insolvent.

12.3.1.3. The Licensee's failure to obtain all licenses, permits, and certification required by the City under this Agreement and pay all fees associated therewith after the City has notified the Licensee that licenses, permits, and certifications must be obtained to work in the Right-of-Way;

12.3.1.4. All or a substantial part of Licensee's assets are assigned for the benefit of its creditors;

12.3.1.5. A receiver or trustee is appointed for Licensee; or

12.4.1.6. Licensee fails to install any Wireless Facilities or Licensee Poles in the Right-of-Way within 1 year of the Effective Date.

12.3.2. If a default occurs, the City Manager shall deliver a written notice to Licensee describing the default and the termination date. If the City Manager sends a default notice, the Licensee shall have 60 days from the receipt of such notice to cure the default (unless the nature of the event takes longer to cure and the Licensee commences a cure within such 60-day period and thereafter diligently pursues it but will not exceed 180 days unless agreed to by the City Manager which agreement will not be unreasonably withheld). If Licensee cures the default before the proposed termination date, the proposed termination is ineffective.

12.3.3. If the default is not cured in the time and manner set out above or by the City Manager, then the City Manager may immediately terminate this Agreement by notifying Licensee in writing of such termination. After receiving the notice, Licensee shall, immediately cease operations and remove Wireless Facilities and Licensee Poles from the Right-of-Way in accordance with the Sections 8.5 and 8.7 of this Agreement, and any payment due shall be remitted by Licensee within 30 days of the receipt of the notice to the address in the Section 1.1 of this Agreement.

12.4. TERMINATION BY LICENSEE

12.4.1. The Licensee may terminate this Agreement at any time by giving 30 days advance written notice to the City Manager.

12.4.2. If the Licensee does not remove all Wireless Facilities and Licensee Poles from the Right-of-Way within the time period required by Section 8.5 of this Agreement, the Wireless Facilities and Licensee Poles shall be deemed to be in

a Hold Over Period subject to the payment obligations in Section 12.6 and Article 5 of this Agreement.

12.5. HOLDING OVER

If Licensee's Wireless Facilities or Licensee Poles continue to occupy the Right-of-Way after expiration of this Agreement, as extended, such occupancy shall not be deemed to be a renewal or extension of this Agreement, but shall be a month to month use of the Right-of-Way (known as the Hold Over Period) provided Licensee a) pays the Holdover Fee and other payments required in Article 5 of this Agreement and b) continues to comply with this Agreement.

ARTICLE 13. TRANSFER OF AUTHORITY

13.1. ASSIGNMENT

13.1.1. Licensee may not assign, delegate, transfer, or sell all or any portion of its rights, privileges and obligations under this Agreement without written notice to and the prior written consent of the City Manager, which consent will not be unreasonably withheld. No assignment in law or otherwise shall be effective until the assignee has filed with the City Manager an instrument, duly executed, reciting the fact of such assignment, accepting the terms hereof, and agreeing to comply with all of the provisions hereof. A mortgage or other pledge of assets in a bona fide lending transaction shall not be considered an assignment of this Agreement for the purposes of this Article.

13.2.2. This Agreement binds and benefits the Parties and their legal successors and permitted assigns; however, this provision does not alter the restrictions on assignment and disposal of assets set out in this Article. This Agreement does not create any personal liability on the part of any officer or agent of the City.

13.2.3. Notwithstanding anything to the contrary contained in this Agreement, Licensee will, whenever in its sole discretion it is required or appropriate for the operation of its business, have the right, without notice to or consent of City, City Manager, or any other party, to assign all or any portion of its rights under this Agreement in whole or in part, to (a) any Affiliates as long as such entity has expertise in the operation of Wireless Facilities, Licensee Poles, or provision of Wireless Services; (b) any entity with which the Licensee or an Affiliate of the Licensee shares joint ownership of the Wireless Facilities or Licensee Poles; or (c) any entity that is a holder of a then-current Agreement. The Licensee shall give written notice to the City Manager within thirty (30) days of such assignment.

13.2. BUSINESS STRUCTURE AND ASSIGNMENTS

Nothing in this clause, however, prevents the assignment of accounts receivable or the creation of a security interest as described in §9.406 of the Texas Business & Commerce Code. In the case of such an assignment, Licensee shall immediately furnish to the City Manager with proof of the assignment and the name, telephone number, and address of the assignee and a clear identification of the fees to be paid to the assignee.

ARTICLE 14. RECORDS AND AUDITS

14.1. RECORDS

14.1.1. Licensee shall keep complete and accurate GIS location information, maps, plans, equipment inventories, and other records related to Licensee's Wireless Facilities and Licensee Poles in Licensed Locations.

14.1.2. The City Manager or City Engineer may at any time examine, review, or verify the records described in 14.1.1.

14.2. INSPECTIONS AND AUDITS

14.2.1. City representatives shall have the right to perform, or to have performed, (1) inspections or audits of the records described in 14.1.1 and (2) inspections of all places in the Right-of-Way where work is undertaken in connection with this Agreement. Licensee shall keep its books and records available for this purpose for at least four years after this Agreement terminates or expires. The inspection or audit may be performed by City staff or third-party representatives engaged by the City. This provision does not affect the applicable statute of limitations.

14.2.2. In addition to other records or filings required hereunder or by law, the Licensee shall maintain and provide access to a current map by either paper or electronic means, upon request by the City Manager or City Engineer, showing the approximate locations of the Wireless Facilities and Licensee Poles in the Right-of- Way.

14.2.3. The City Manager may reasonably require the keeping of additional records or accounts reasonably necessary to determine the Licensee's compliance with the terms of this Agreement.

14.3. CONFIDENTIAL INFORMATION

The City Manager shall not disclose any confidential information reproduced for documentation of audit issues unless required by law. If the City receives a request to review or copy confidential information under the Texas Public Information Act or related law (the "Act"), the City shall comply with the requirements for handling third party information under the Act, including notifying the Licensee that a request to review or copy Confidential Information has

been submitted to the City. Confidential information deemed subject to disclosure under the Act by the Attorney General of the State of Texas shall be disclosed.

ARTICLE 15. MISCELLANEOUS

15.1. FORCE MAJEURE

Other than the Licensee's failure to pay amounts due and payable under this Agreement, the Licensee shall not be in default or be subject to sanction under any provision of this Agreement when its performance is prevented by Force Majeure. Force Majeure means an event caused by epidemic; act of God; fire, flood, hurricanes, tornadoes, or other natural disasters; explosions; terrorist acts against the City or Licensee; act of military or superior governmental authority that Licensee is unable to prevent by exercise of reasonable diligence; war; riots; or civil disorder; provided, however, that such causes are beyond the reasonable control and without the willful act, fault, failure or negligence of the Licensee. The term does not include any changes in general economic conditions such as inflation, interest rates, economic downturn or other factors of general application; or an event that merely makes performance more difficult, expensive or impractical. Performance is not excused under this section following the end of the applicable event of Force Majeure. Licensee is not relieved from performing its obligations under this Agreement due to a strike or work slowdown of its employees. Force Majeure does not entitle Licensee to reimbursement of payments.

This relief is not applicable unless the affected party does the following:

15.1.1. uses due diligence to remove the effects of the Force Majeure as quickly as possible and to continue performance notwithstanding the Force Majeure; and

15.1.2. provides the other party with prompt written notice of the cause and its anticipated effect.

The City Manager will review claims that a Force Majeure that directly impacts the City or Licensee has occurred and render a written decision within 14 days. The decision of the City Manager is final.

Licensee is not relieved from performing its obligations under this Agreement due to a strike or work slowdown of its employees. Licensee shall employ only fully trained and qualified personnel during a strike.

15.2. DISPUTE RESOLUTION

15.2.1. In the event of a dispute between the Parties that arises during the Term of this Agreement, the Parties shall attempt to expeditiously and amicably resolve any dispute through good faith discussions in the ordinary course of business at the level at which the dispute originates.

15.2.2. If the Parties are not able to resolve the dispute in the ordinary course of business, the City Manager and representatives of other City departments that are involved in the dispute will meet with Licensee's authorized representative in an attempt to resolve the dispute.

15.2.3. If the Parties are unable to resolve the dispute pursuant to Article 15.2.2 of this Agreement and if either of the Parties intends to file suit, the Parties shall agree to first refer the matter to mediation before a mutually-agreed upon neutral, third-party mediator and to diligently pursue a mediated settlement. If within thirty (30) days of the request to mediate, the Parties cannot agree on a mediator, the mediator selected by the City shall be the default mediator. Mediation shall begin within thirty (30) days of choosing a mediator, unless the Parties otherwise agree, in writing, to a later date.

15.2.3.1. The Parties shall initiate mediation by providing written notice to the other Party stating a desire to mediate the dispute and describing the disputed issues.

15.2.3.2. Mediation shall occur in _____, Texas and each party shall bear its own costs incurred in connection with the mediation, including traveling expenses. The parties shall equally share the costs of the mediator's fees.

15.2.3.3. The resolution of any dispute during mediation will be in writing and made available to both Parties by the mediator.

15.2.3.4. If a party receiving a mediation request refuses to mediate, participate in selecting a mediator, to attend mediation, or fails to attend the mediation, this dispute resolution provision will be deemed to have been fulfilled by the aggrieved party and the aggrieved party is permitted to pursue any other remedies it may have.

15.2.4. Except in emergencies, no lawsuit under or related to this Agreement by one party against the other may be filed until mediation of the issue has ended as determined by the mediator or has ended in accordance with section 15.2.3.4. Before initiating litigation, either party shall notify the other party of its intent to sue.

15.2.5. This section does not apply to disputes that involve a question of law.

15.2.6. Notwithstanding the existence of any dispute between the Parties, insofar as is possible under the terms of this Agreement, each Party shall continue to perform the obligations required of it during the continuation of any such dispute, unless enjoined or prohibited by a court of competent jurisdiction or unless this Agreement terminates or expires under the terms provided herein.

15.3. ACCEPTANCE AND APPROVAL; CONSENT

An approval by the City Manager, the City Engineer, or any other instrumentality of City, of any part of the Licensee's performance shall not be construed to waive compliance with this Agreement or to establish a standard of performance other than required by this Agreement or by law. Where this Agreement contains a provision that either party approve or consent to any action of the other party, such approval or consent shall not be unreasonably withheld or delayed. Except as provided for in this Agreement, the City Manager or City Engineer are not authorized to vary the terms of this Agreement.

15.4. REPRESENTATIONS AND WARRANTIES

In addition to the representations, warranties, and covenants of the Licensee to the City set forth elsewhere herein, the Licensee represents and warrants to the City and covenants and agrees (which representations, warranties, covenants and agreements shall not be affected or waived by any inspection or examination made by or on behalf of the City) that, as of the Effective Date and throughout the term of this Agreement:

15.4.1. *Organization, Standing and Power.* The Licensee is a Neutral Host Provider or Wireless Services provider duly organized, validly existing and in good standing under the laws of the state of its organization and is duly authorized to do business in the State of Texas and in the City. The Licensee has all requisite power and authority to own or lease its properties and assets, subject to the terms of this Agreement, to conduct its businesses as currently conducted and to execute, deliver and perform this License and all other agreements entered into or delivered in connection with or as contemplated hereby.

15.4.2. *Truthful Statements.* The Licensee warrants, to the best of its knowledge and belief, that information provided and statements made in connection with its application for this Agreement were true and correct when made and are true and correct upon execution hereof.

15.4.3. *Condition of Right-of-Way.* Licensee accepts the Right-of-Way where Wireless Facilities and Licensee Poles are authorized to be located **"AS IS,"** without any express or implied warranties of any kind.

15.5. STATEMENT OF ACCEPTANCE

Licensee and City, for themselves, their successors and assigns, hereby accept and agrees to be bound by all terms, conditions and provisions of this Agreement.

15.6. RELATIONSHIP OF THE PARTIES

Licensee shall be responsible and liable for its contractors, subcontractors, and sublicensees. The City has no control or supervisory powers over the manner or method of Licensees' contractors'

and subcontractors' performance under this Agreement. All personnel Licensee uses or provides are its employees, contractors, or subcontractors and not the City's employees, agents, or subcontractors for any purpose whatsoever.

15.7. SEVERABILITY

If any part of this Agreement is for any reason found to be unenforceable, all other parts remain enforceable unless the result materially prejudices either Party.

15.8. ENTIRE AGREEMENT

This Agreement merges the prior negotiations and understandings of the Parties and embodies the entire agreement of the Parties. No other agreements, assurances, conditions, covenants (express or implied), or other terms of any kind, exist between the Parties regarding this Agreement.

15.9. WRITTEN AMENDMENT

Unless otherwise specified elsewhere in this Agreement, this Agreement may be amended only by written instrument executed on behalf of the City (by authority of an ordinance adopted by the City Council) and Licensee. The City Manager and City Engineer are only authorized to perform the functions specifically delegated to him or her in this Agreement.

15.10. APPLICABLE LAWS AND VENUE

15.10.1. This Agreement is subject to the laws of the State of Texas, the City Charter and Ordinances, the laws of the federal government of the United States, and all rules and regulations of any regulatory body or officer having jurisdiction (collectively "Law"), including any lawful court or administrative decisions, judgments or orders that have been fully and finally adjudicated, including any appeals of such decisions judgments, or orders ("Decisions"). This Agreement shall be governed, construed, and enforced according to the laws of the State of Texas, without regard to its choice of law provisions.

If any material provision of this Agreement is superseded or affected by Law, then the Parties shall negotiate in good faith to revise this Agreement.

15.10.2. Subject to the Parties' obligation to submit to the dispute resolution process or mediation as described in this Agreement, Licensee shall submit any and all litigation and legal proceedings between any of them and the City to the exclusive jurisdiction of the state or federal courts in the State of Texas and waive any objections or right as to forum non conveniens, lack of personal jurisdiction, or similar grounds. Venue for any litigation relating to this Agreement is _____ County, Texas.

15.11. NOTICES

15.11.1. All notices to either party to the Agreement must be in writing and must be delivered by hand, facsimile, United States registered or certified mail, return receipt requested, United States Express Mail, Federal Express, Airborne Express, UPS or any other national overnight express delivery service. The notice must be addressed to the party to whom the notice is given at its address set out in Article I, Section 1.1 of this Agreement or other address the receiving party has designated previously by proper notice to the sending party. Postage or delivery charges must be paid by the party giving the notice.

15.11.2. Licensee shall address a copy to the City Engineer at the address set out in Article I, Section 1.1 of all notices pertaining to Article 6 and 8 and other notices to the City Engineer required under this Agreement.

15.12. CAPTIONS

Captions contained in this Agreement are for reference only, and, therefore, have no effect in construing this Agreement. The captions are not restrictive of the subject matter of any section in this Agreement.

15.13. NON-WAIVER

If either Party fails to require the other to perform a term of this Agreement, that failure does not prevent the Party from later enforcing that term and all other terms. If either Party waives the other's breach of a term, that waiver does not waive a later breach of this Agreement.

15.14. ENFORCEMENT

The City Attorney may enforce all legal rights and obligations under this Agreement without further authorization. Licensee shall provide to the City Attorney all documents and records pertaining to this Agreement that the City Attorney requests to assist in determining Licensee's compliance with this Agreement, with the exception of those documents made confidential by federal or State law or regulation.

15.15. AMBIGUITIES

If any term of this Agreement is ambiguous, it shall not be construed for or against any Party on the basis that the Party did or did not write it.

15.16. SURVIVAL

Licensee and the City shall remain obligated to the other Party under all provisions of this Agreement that expressly or by their nature extend beyond the termination or expiration of this

Agreement, including, but not limited to, the provisions regarding warranty, indemnification and confidentiality.

All representations and warranties contained in this Agreement shall survive the term of the Agreement.

15.17. RESERVED

15.18. PARTIES IN INTEREST

This Agreement does not bestow any rights upon any third party, but binds and benefits the City and Licensee only.

15.19. REMEDIES CUMULATIVE

Unless otherwise specified elsewhere in this Agreement, the rights and remedies contained in this Agreement are not exclusive, but are cumulative of all rights and remedies which exist now or in the future. Neither party may terminate its duties under this Agreement except in accordance with its provisions.

15.20. LICENSEE DEBT

IF CITY MANAGER BECOMES AWARE THAT LICENSEE OWES ANY DELINQUENT SUM OF MONEY IN AN AMOUNT GREATER THAN $100.00 TO THE CITY OR ANY RELATED ENTITY FOR AD VALOREM TAXES ON REAL OR PERSONAL PROPERTY LOCATED WITHIN THE BOUNDARIES OF THE CITY ("DEBT"), IT SHALL NOTIFY LICENSEE IN WRITING. IF LICENSEE DOES NOT PAY THE DEBT WITHIN 30 DAYS OF SUCH NOTIFICATION, THE CITY MANAGER MAY DEDUCT FUNDS IN AN AMOUNT EQUAL TO THE DEBT FROM ANY PAYMENTS OWED TO LICENSEE UNDER THIS AGREEMENT.

15.21. PARTS INCORPORATED

All of the above-described sections listed in the Table of Contents and the listed exhibits are made a part of and incorporated into this Agreement.

15.22. CONTROLLING PARTS

If a conflict between the sections of the Agreement and any of the exhibits arises, the sections of the Agreement control over the exhibits.

15.23. SIGNATURES

IN WITNESS WHEREOF, the Original Signatories, through their duly authorized officers, have executed this Agreement in multiple counterparts, each of equal force and effect,

effective as of the as of the date countersigned by the [designate one, either the Mayor, City Manager or City Engineer.]

LICENSEE:

_____

_____
Name:
Title:
Tax Identification No.:
ATTEST/SEAL:

_____
Name:

CITY:

CITY OF _____, TEXAS
Signed by:

_____
Mayor

ATTEST/SEAL:

_____
City Secretary

APPROVED:

_____
City Manager

APPROVED AS TO FORM:

_____
_____ City Attorney

APPROVED AND COUNTERSIGNED BY:

_____
[designate one, either the Mayor, City Manager or City Engineer.]

DATE COUNTERSIGNED:

_____
("Effective Date")

Exhibit A

Licensed Locations

Licensee	Nearest Street Address	GIS or GPS Coordinates

Exhibit B

Approved Wireless Facilities and Equipment List

Not Final – Subject to Change

Exhibit C –Representative Sample

Office of the City Engineer Application for Small Cell/DAS Location Review

Required under the License Agreement for Wireless Facilities and Licensee Poles
Please Note: Submittal of false information will result in invalidation of the application.

Please read the following information before proceeding

- Field Marks with "*" are required.
- Any Application submitted by anyone other than the property owner must be accompanied by the Application Authorization Form that designates the applicant as an "authorized representative"
- The specified number of sheets must be accurate or the application may not be accepted.

Application

Request Location for (Please check all boxes that apply for the location):

☐**Wireless Facility**

☐ **Licensee Pole**

☐ **Ground Level Wireless Facility**

Number of Sheets _____

Applicant/Engineer Information

Firm License/Type
Mailing Address
City State Zip
Contact
Phone Number
Email Address
Facsimile Number
Engineer of Record
Phone Number
Email Address

Owner Information

Entity Name Type Individual☐ Corporation or Firm☐ Applicant is Owner☐
Last, First Middle Name
Mailing Address Name Unit
City State Zip
Contact
Phone Number
Email Address
Facsimile Number

Requested Location

GIS coordinates
Street Number (provide closest number)
Address
Zip Code
Is the requested location within 300 feet of a historic district? Yes☐ No☐
Is the requested location within 1000 feet of another pole? Yes☐ No☐
Is the requested location in an Underground Utility Area? Yes☐ No☐

Dimensions in feet height circumference
Number of Wireless Facilities
Wireless Facility Owner(s)
Dimensions of Wireless Facilities height width depth
Attached to pole height width depth
height width depth
Backhaul Type and Provider
Ground Level Wireless Facility or Equipment Yes No
FCC License # (if any)

Wireless Facilities Attached to Pole

Number of Wireless Facilities			
Dimensions of Wireless Facilities	height	width	depth
Attached to pole	height	width	depth
	height	width	depth
Number of Existing Facilities on Pole			
Dimensions	height	width	depth
For extensions to existing Wireless facilities only:			
Total Dimensions of Wireless facilities from pole		height	width
Pole Owner			
Ground Level Wireless Facility or Equipment	Yes	No	
Backhaul Type and Provider			
FCC License # (if any)			

Ground Level Wireless Facilities (if applicable)

GIS coordinates			
Street Number (provide closest number)			
Address			
Zip Code			
Dimensions in feet	height	width	depth
Ground Equipment Owner			
Backhaul Type and Provider			
FCC License # (if any)			

Permission

License Agreement with the City for Use of the Right-of-Way

☐ Applicant certifies that s/he has permission from the City to use the Right-of-Way locations listed in Exhibit A of the Wireless Facilities License Agreement ("Agreement") for the purposes specified therein.

Permission to Use Utility's Property (If Applicable)

☐ If Applicant is installing, modifying, or removing Wireless Facilities from a utility pole, Applicant certifies that s/he has permission from the owner of the utility pole to install its Wireless Facilities on the utility pole located in the City's Right-of-Way. A copy of the Agreement or permission from the utility pole owner has been provided and will be attached as **Exhibit B** of this Application.

Permission to Use Wireless Facilities and Licensee Poles (If Applicable)

☐ If Applicant is installing, modifying, or removing Wireless Facilities from a Licensee Pole that it does not own, Applicant certifies that s/he has permission from the owner of the Licensee Pole to install its Wireless Facilities on the Licensee Pole located in the City's Right-of-Way. A copy of the Agreement or permission from the owner of the Licensee Pole has been provided and will be attached as **Exhibit B** of this Application.

Written Approval of Concealment Options from City Manager (If Applicable)

☐ If Applicant is installing or modifying Wireless Facility or Licensee Pole in an area that has been identified as requiring concealment options under the terms of this Agreement, Applicant shall provide a copy of the approved concealment options from the City Manager.

Exhibit D
Exhibit D – Annual Rental Fee Schedule

Licensee shall pay the City a Rental Fee under Section 5.1.1 (Standard Rental Fee).

5.1 STANDARD RENTAL FEE

5.1.1. Licensee shall pay the City annually in advance a Rental Fee in the amount set forth in Table 1, Standard Fee for each Licensed Location and for each additional Carrier using the Licensee Pole, if any. The amount of the initial Rental Fee for Licensed Locations with new Licensee Poles or Existing Utility Poles shall be determined based on the calendar year in which the Licensee submits the Application for Location Review. The amount of the initial New Carrier fee shall be determined based on the calendar year in which Licensee provides or should have provided the notice required pursuant to section 3.6 of this Agreement. For example, the Fee for Applications for Location Review submitted in 2016 is (a) ____dollars ($____), and (b) the Annual Rental Fee for each Licensed Location that has an existing Utility Pole is ____dollars ($____), and (c) ____ dollars ($___) for each Licensed Location with a Licensee Pole, which includes one Wireless Facility and its associated Ground Equipment at the Licensed Location, plus _____ dollars ($___) for each additional Carrier using the Licensee Pole.

5.1.1.1 Within thirty (30) days after notifying the City Manager pursuant to section 3.6 of this Agreement, Licensee shall pay the fee for additional Carrier per year in the event that more than one Carrier is using the same Licensed Location. If Licensee is a Carrier using a Licensee Pole owned by another party, then the Licensee Pole owner, and not the Carrier, shall be responsible for submitting all fees to the City for Licensee's Wireless Facilities on such Licensee Pole.

5.1.1.2 For purposes of this Section, the Ground Equipment at a Licensed Location must support the overhead Wireless Facilities at such Licensed Location.

5.1.1.3. The Rental Fee payment for the first year at any Licensed Location ("Initial Payment") is due sixty (60) days after Licensee obtains Permit(s) to install a Wireless Facility or Licensee Pole at the Licensed Location. The Initial Payment shall be pro-rated monthly for the remainder of the calendar year based on the month in which the permit was granted, including the month in which the permit is granted.

Table 1: Annual Rental Fee

Annual Rental Fee Schedule Per Licensed Location:			
Year of Application Submittal	**New Licensee Pole**	**Existing Utility Pole**	**Fee Per each Additional Carrier (after 1st)**
2016	$____	$___	$___
2017			
2018			
2019			
2020			
2021			
2022			
2023			
2024			
2025			
2026			
2027			
2028			
2029			
2030			
2031			
2032			
2033			
2034			
2035			

5.2 PERIODIC FEE ADJUSTMENT

5.2.1. On January 1 of each year after 2016, the Annual Rental Fees shall automatically increase by 2% over the Rental Fees in effect the prior calendar year, as shown in Table 1.

EXHIBIT "E"- SAMPLE PERFORMANCE BOND

PERFORMANCE BOND

THE STATE OF TEXAS §

§

COUNTY OF _____ §

_____ , ("Principal") and_____("Surety"), shall pay to the City of _____, Texas ("City"), the sum of $_____ in accordance with the terms and conditions stated below:

On or about this date, the Principal executed an _____ Agreement in writing with the City for _____ ("Agreement"), which is incorporated into this Bond.

The conditions of this obligation are that if the Principal performs its obligations under the terms of the Agreement and this Bond in all respects, then this obligation is void and has no further force and effect; otherwise this obligation remains in effect and the sum of $_____is payable to the City on demand.

The Surety relieves the City and its representatives from the exercise of any diligence whatever in securing the Principal's compliance with the terms of the Agreement, and the Surety waives any notice to it of the Principal's default or delay in the performance of the Agreement. The Surety shall take notice of and is held to have knowledge of all acts or omissions of the Principal, its agents, and representatives in all matters pertaining to the Agreement.

The City and its representatives may at any time, without notice to the Surety, make any changes in the terms and conditions of the Agreement, or extend it, and may add to or deduct from the Principal's obligations under the Agreement. Such changes, if made, do not in any way relieve, release, condition, or limit the obligation in this Bond and undertaking or release the Surety therefrom.

SURETY AND PRINCIPAL AGREE TO AND SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS THE CITY, ITS AGENTS, AND REPRESENTATIVES FROM ALL CLAIMS, CAUSES OF ACTION, LIABILITIES, DAMAGES, FINES, AND EXPENSES ARISING OUT OF OR RESULTING FROM ANY FAILURE ON THE PART OF THE PRINCIPAL, ITS AGENTS, AND REPRESENTATIVES, TO FULLY PERFORM UNDER THE AGREEMENT, INCLUDING ANY CHANGES OR EXTENSIONS TO IT.

If the City brings any suit or other proceeding at law on the Agreement or this Bond, or both, the Principal and the Surety shall pay to the City the additional sum of 10 percent of whatever amount the City recovers, which sum of 10 percent is agreed by all parties to be indemnity to the City for the expense of and time consumed by its City Attorney, his or her assistants, and office staff, and other costs and damages to the City. The amount of 10 percent is fixed and liquidated by the parties because the exact damage to the City would be difficult to ascertain.

This Bond and all obligations created under it shall be performable in _____ County, Texas, and all are non-cancelable. This Bond must be automatically renewed annually on the anniversary of the effective date of the Bond for the term of the Agreement and any extensions, unless the Surety gives the Principal and the City 30 days written notice before the renewal date that the Surety will not renew this Bond, in which case the Principal shall provide the City with a replacement bond (in the same form as this Bond) before the renewal date. The provisions of V.T.C.A., Government Code Section 2253, as amended, control even though the Statute may not be applicable.

All notices required or permitted by this Bond must be in writing and are deemed delivered on the earlier of the date actually received or the third day following: (1) deposit in a United States Postal Service post office or receptacle; (2) with proper postage (certified mail, return receipt requested); and (3) addressed to the other party at the address set out on the signature page of this Bond or at such other address as the receiving party designates by proper notice to the sending party.