

EMERGING RIGHT OF WAY ISSUES  
SMALL CELLS ARE A BIG DEAL  
Implementing Texas Local Government Code Chapter 284

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## I. INTRODUCTION

The purpose of this article is guide Texas municipalities in implementing Tex. S.B. 1004, 85th Leg., R.S. (2017), which will become the new Texas Local Government Code Chapter 284, that mandates that wireless infrastructure providers and wireless service providers have access to public right of way to locate their facilities. The steps to implementation will include reviewing and understanding the key provisions of Chapter 284; designating areas and districts within each city by zoning or otherwise that allow for enhanced police powers protections under the new law; and lastly, developing the new documents and forms that will be needed to manage the right of way pursuant to Chapter 284.

## II. REVIEWING AND UNDERSTANDING THE KEY PROVISIONS OF CHAPTER 284

A comprehensive section-by-section analysis and commentary of Chapter 284 is contained in Appendix A, but in general the key provisions are set out below.

### A. Definitions

1. To begin to understand Chapter 284 it is necessary to Review the definitions in Sec. 284.002, including several newly coined terms. The discussion below is only commentary on those terms, not the language of the statutory definition.

2. "*Collocate or Collocation*" - this term is broader than its "normal" meaning, and thus confusing as it includes not only adding (collocating) facilities to existing installation or structure, it also includes the new/initial installation. It is also inconsistent and confusing relative to the FCC definition of "collocation" in the Section 6409 rules, 47 C.F.R. § 1.40001 Wireless Facility Modifications, *et al*, where a "collocation" only applies to an "existing" "eligible support structure". 47 C.F.R. § 1.40001 (b) (2) "*Collocation*", (4) "*Eligible Support Structure*", (5) "*Existing*".

3. "*Decorative pole*" - is specific definition for certain qualified street lights that results in their access not being mandated by Sec. 284.101 (a) (3) as that section only applies to "Poles" and while "Poles" includes "Service poles", "Service poles" does not include "Decorative poles".

4. "*Design district*" - A new type of area that is generally an area that has land use controls as to certain design elements, including Decorative poles. A city may require concealment of wireless facilities in a Design district. For the city to apply stealth/concealment conditions to network nodes or node support poles in a Design district under Sec. 284.105, each city must formally zone or designate the applicable areas as Design districts that meet the statutory definition.

5. "*Historic district*" - In a Historic district the city may require concealment of wireless facilities, but for the City to apply stealth/concealment conditions to network nodes or node support poles in Historic districts under Sec. 284.105, each City must formally zone or designate applicable areas as Historic Districts that meet the statutory definition.

6. "*Micro network node*" - These are the tennis racket size devices cable companies have installed by lashing in the lines between poles in the rights-of-ways for several years now.

7. "*Municipal park*" - For the exclusion of Node support poles in a Municipal park Right of Way under Sec. 284.104 each City must formally zone or designate the applicable areas as a Municipal park.

8. "*Network node*" - is the broadly written term in Chapter 284 for wireless equipment but does not include fiber connecting "Transfer Facilities" or the "Pole, which are separately defined, below.

9. "*Network provider*" - is very broad, as it includes a "wireless provider" which is defined such that it could arguably include any entity that provides a wi-fi hot spot to the public.

10. "*Node support pole*" - is a new pole installed just to support a network node facility.

11. "*Pole*" - includes three other defined term items: "Node support pole", "Service pole", "Utility pole". This is key as to what is included as mandated access and use in Sec. 284.101 (a) (3).

12. "*Public right-of-way management ordinance*" - this is a Right of Way Ordinance conforming to Chapter 284.

13. "*Public right-of-way rate*" - annual rental charge per Network node site, CPI adjusted, Sec. 284.054.

14. "*Service pole*" - includes city traffic signal poles, non-decorative street lights, street signs.

15. "*Transport facility*" - is the physical fiber or line connection between the Network node in the right-of-way and the cellular network's mobile switching location, which in most instances is on private property. A Transport facility is "for the purpose of providing backhaul for network nodes."

16. "Wireless service" and "Wireless service provider" - are very broadly defined that could arguably include any entity that provides a wi-fi hot spot to the public. It is not limited to a CMRS provider (Cellular telephone) licensed by the FCC, or an entity that installs for them.

#### B. Mandated Access v. Conditional Access v. Limited Access v. Prohibited Access

1. Chapter 284 mandates access to RIGHT OF WAY for Network nodes and Node support poles, like Chapter 283 for Certificated Telecommunications Providers. However, what is new in Chapter 284 is mandated access to use and collocate on Service poles, found in Sec. 284.101 (a) (3) (and in Sec. 284.056.)

2. It is important to understand the distinction between mandated access, conditional access, limited access and prohibited access and distinguish between what facilities are allowed or not allowed, and whether the facility is a Network Node or a Node support pole:

a. Sec. 284.101 (a) (1) -(2) **mandated access to Right of Way to install** Network nodes, use utility poles and install new Node support poles.

b. Sec. 284.101 (a) (3) **mandated use of City Service poles**-traffic signals, non-decorative street lights, street signage, with agreement, but **prohibits access or use** of Decorative poles, as defined in Sec. 284.002;

c. Sec. 284.104 (a) **limited access** to place Node Support poles in designated or zoned Municipal parks Right of Way and in certain designated or zoned residential areas if street is 50 ft. wide or less, "without *the municipalities' discretionary, non-discriminatory, and written consent*";

d. Sec. 284.104 (b), includes *additional restrictions* for Network nodes and Node support poles in *Municipal parks or residential areas* that meet the area criteria of Sec. 284.104 (a) as they must comply with private deed restrictions and other private restrictions.

e. Sec. 284.105. **Conditional concealment restrictions** -- Before installations of Network nodes and Node support poles in designated Historic districts and Design districts with decorative Poles, they "must obtain *advance approval from municipality*". "As a condition for approval... [a city] may require reasonable design or concealment measures".

#### 3. Additional Restrictions Applicable to Network Nodes and Node Support Poles

a. Sec. 284.107. City can require compliance with *undergrounding requirements*.

b. Sec. 284.102. General installation requirements.

c. Sec. 284.103. 55-foot max. height.

d. Sec. 284.108 (a) (2). Equipment must be 8 ft. above grade and (b) comply with Design manual.

#### C. When Permits Are Required

Permits are generally required for a Network node, Node support pole and Transfer facility, with up to 30 Network nodes per permit per Sec. 284.152. Exceptions when no permit is required are detailed in Sec. 284.157 (a) (1) -(3), but there still must be notice of work in the RIGHT OF WAY, per Sec. 284.157 (d). Sec. 284.157 (a) (1) -(3), exceptions when no permit is required are:

- Routine maintenance without excavation or closing sidewalks or vehicular lanes.
- Replacing or upgrading that is substantially the same size (as defined in Sec. 284.157 (b)).
- Micro network node needs no permit if the installation is "strung" on lines between poles or node support poles. Sec. 284.157 (a) (3).

#### D. Shot Clocks Vary with Type of Installation

1. In determining how much time is allowed before a permit application will be deemed approved, if not acted on, you must distinguish between different types of installations allowed under Sec. 284.154. Note the very short time to review fiber Transport facility installations for completeness of within 10 days of the application date, while the time allowed for Network nodes and Node support poles is 30 days. Transfer facilities also have a very short period of 21 days to act to approve or deny, or they are deemed granted. The various time periods for approval are:

- **Network nodes**—30 days to determine completeness; 60 days to approve or deny, or if not acted on by that time permit is deemed approved.

- **Node Support poles**-30 days to determine completeness; 150 days to approve or deny, or if not acted on by that time permit is deemed approved
- **Transfer facility**-10 days to determine completeness; 21 days to approve or deny, or if not acted on by that time permit is deemed approved
- **Micro network node**-no permit, and no shot clock *if* the installation is “strung” on lines between poles or node support poles. Sec. 284.157 (a) (3).

2. For denied applications and arguably for incomplete applications:

- Applicant may resubmit in 30 days a completed or cured application.
- City has 90 days to act on resubmitted applications that were either initially incomplete or denied.

E. Distinguish between types of installations to determine different application and annual fees:

1. Network nodes:

- **Application Fee:** Sec. 283.156 (b) application fee is lesser of: actual cost or \$500 for up to 5 Network nodes, and \$250 for each additional Network node on a permit (up to 30, per Sec. 284.152 (b).) Sec. 283.156 (c) has restrictions on what may be included in “cost”.
- **Annual Network Node site rental rate:** Sec. 284.053 \$250 per Network Node site, with annual CPI adjustment. Sec. 284.054.

2. Node Support poles:

- **Application Fee:** Sec. 283.156 (b). application fee is lesser of: actual cost or \$1,000 for each pole. Sec. 283.156 (c) has restrictions on what may be included in “cost”.
- **Annual rental rate:** No separate rate from Sec. 284.053 of \$250 per Network node site, with annual CPI adjustment. Sec. 284.054.

3. Transfer facility:

- **Application Fee:** Sec. 284.152 requires a permit for Transfer facilities, thus an application is required. Sec. 284.156 (a) allows a city to charge a permit fee “if the municipality requires the payment of the fee for similar types of commercial development inside the municipality’s territorial jurisdiction other than a type for which application or permit fees are not allowed by law”. Although inartfully written, it seems that either under a city’s home rule authority or under Sec. 283.156 (b) the application fee for a Transfer facility is the lesser of: actual cost or \$500 for an application including up to 5 Network nodes, and \$250 for each additional Network node on a permit. Sec. 283.156 (c) has restrictions on what may be included in “cost”.
- **Annual Transfer Facility rental rate:** Sec. 284.055. \$28 monthly for each Network Node site, unless an equal or greater amount is paid the city, e.g., under Chapter 283, Tex. Loc. Gov. Code or Chapter 66, Tex. Util. Code.

4. Micro network node: no fee *if* the installation is “strung” on lines between poles or node support poles. Sec. 284.157 (a) (3).

### III. DESIGNATE AREAS AND DISTRICTS BY ZONING OR OTHERWISE

A. Chapter 284’s Enhanced Protections Depend on Designations by the City

Chapter 284 allows additional restrictions on placement and characteristics of network nodes and node support poles when they are proposed to be located in municipal parks, residential areas, historic districts and what the statute calls “design districts” and “underground districts.” Cities should, prior to the effective date, designate areas within its municipal boundaries, either through land use regulation or other appropriate enactment, to take advantage of these provisions.

## B. Relevant Statutory References for Each District or Area

The various districts and areas and the Section that sets out the applicable criteria and definitions are:

- Municipal parks that meet the definition in Sec. 284.002.
- Residential areas that meet the criteria of Sec. 284.104.
- Historic Districts that meet the definition in Sec. 284.002 and the criteria in Sec. 284.105.
- Design Districts that meet the definition in Sec. 284.002 and the criteria of Sec. 284.105.
- Areas that qualify for compliance with underground requirements that meet the criteria of Sec. 284.107.

## IV. CITY DOCUMENTS TO BE PREPARED OR REVIEWED

Various documents and regulations must be reviewed or prepared anew to prepare for the implementation of Chapter 284.

### A. Pole Attachment Agreement

1. Cities can require an agreement between the city and a “Network provider” to access and use municipal “Service Poles” which includes city traffic lights, non-decorative street lights, and traffic signage. “Service Poles” is a defined term in Sec. 284.002 (22).). While access to “Service poles” is “mandated” by Sec. 284.101 (a) (3), the city can require a detailed agreement that spells out the terms of the use. The agreement must be consistent with and not in conflict with Chapter 284. This agreement can be very short i.e., simply requiring compliance with Right of Way ordinance and Design Manual, or more detailed, e.g., based on a Houston Master License Agreement Template, conformed to be consistent with Chapter 284.

2. Note: While city police powers are retained in Sec. 284.301, they are subject to the extent they do not conflict with Chapter 284, in accordance with Sec. 284. 151, arguably a general preemption of police powers by Chapter 284. Therefore, if there is any dispute on any conflict between the Right of Way Ordinance and Chapter 284, litigation may ensue. Sec. 284.110, reiterates no discrimination among providers.

### B. Design Manual

Chapter 284 gives cities authority to apply regulations by way of what it calls a Design Manual pursuant to Sec. 284.108. Sec. 284.102 and Sec. 284.103 both set out general limitations on installations and Sec. 284.107 requires compliance with undergrounding requirements. In addition, both pole minimum spacing and a single network node per pole restriction should be authorized per testimony by an AT&T attorney and comments from the House sponsor at House hearing on the companion to S.B. 1004.

### C. Review of Right of Way Management Ordinance

Sec. 284.101 (b) requires compliance with a city’s Right of Way Ordinance. Right of Way Management Ordinance is defined in Sec. 284.002 (19) as an ordinance that complies with Subchapter C [Sec. 284.101-284.110]. Therefore, the City should review and, if needed, update its Right of Way Management Ordinance

### D. Application Forms

While most cities probably have application forms for wireless facilities applying for land use authorization, it is now necessary to distinguish between wireless facilities in the Right of Way those sited on private property.

#### 1. For those on private property

Unrelated to Chapter 284, cities must distinguish between new installations, and modifications, and for those that are modifications distinguishing between substantial changes and those that are not “substantial changes” under FCC Rules for Section 6409 unilateral expansion purposes and different FCC shot clocks.

2. For those on Right of Way
  - a. Since under Chapter 284 the shot clock, application and annual rental fees can all vary, the application form must distinguish between:
    - “Network node” installations.
    - “Node support poles” installation;
    - “Transport facility” installations.
  - b. Forms should include contact info. for allowable CPI changes to Right of Way fees.
  - c. Permits allowed for Network node, Node support pole and Transfer facility, but can only request the same information requested of other telecoms, plus information to show compliance with Chapter 284. Sec. 284.153.
  - d. No permit is allowed as to “Micro network nodes” *if* the installation is “strung” on lines between poles or node support poles. Sec. 284.157 (a) (3).

E. Suggested Timeline for Preparation:

June 2017:

- Review Bill in detail.
- Plan for the designation by zoning of other designation of:
  - Municipal parks that meet the definition in Sec. 284.002.
  - Residential areas that meet the criteria of Sec. 284.104.
  - Historic Districts that meet the definition in Sec. 284.002 and the criteria in Sec. 284.105.
  - Design Districts that meet the definition in Sec. 284.002 and the criteria of Sec. 284.105.
  - Perhaps areas that qualify for compliance with underground requirements that meet the criteria of Sec. 284.107.
- Draft:
  - Agreement for use of “Service poles” (traffic signals, non-decorative street lights, street signage.) per Sec. 284.056 and 284.101 (a) (3).
  - Ordinance to allow Administrative authority to sign Agreement.
  - Design Manual per Sec. 284.108.
  - Review of Right of Way Ordinance for conforming changes.
  - Application and or permit forms.

July 2017:

- Designate Areas and Districts by zoning or otherwise:
  - Municipal parks that meet the definition in Sec. 284.002.
  - Residential areas that meet the criteria of Sec. 284.104.
  - Historic Districts that meet the definition in Sec. 284.002 and the criteria in Sec. 284.105.
  - Design Districts that meet the definition in Sec. 284.002 and the criteria of Sec. 284.105.
  - Perhaps areas that qualify for compliance with underground requirements that meet the criteria of Sec. 284.107.
- Adopt Documents:
  - Agreement to Use City “Service Poles” per Sec. 284.056 and 284.101 (a) (3).
  - Ordinance to allow Administrative authority to sign Agreement.
  - Design Manual per Sec. 284.107.
  - Changes in Right of Way Ordinance.

August 2017:

- Post documents on publicly available portions of the City website.
- Education of application and permit processing personnel, including detailed review of types of installations.
- Shot clock time lines- detailed review.

**September 1, 2017**-Effective date of Chapter 284.

# APPENDIX A

## CHAPTER 284, TEXAS LOCAL GOVERNMENT CODE (S.B. 1004, Effective Sept. 1, 2017)

### ANNOTATED COMMENTARY IN FOOTNOTES (May 2017)<sup>1</sup>

SECTION 1. Subtitle A, Title 9, Local Government Code, is amended by adding Chapter 284 to read as follows:

#### CHAPTER 284. DEPLOYMENT OF NETWORK NODES IN PUBLIC RIGHT-OF-WAY<sup>2</sup>

##### SUBCHAPTER A. GENERAL PROVISIONS

###### Sec. 284.001. FINDINGS AND POLICY.

(a)<sup>3</sup> The legislature finds that:

(1) network nodes are instrumental to increasing access to advanced technology and information for the citizens of this state and thereby further an important public policy of having reliable wireless

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<sup>1</sup> The commentary discusses some selected issues that may arise for a city in implementing Chapter 284. It is not intended as legal advice for any specific circumstance, rather it is intended as a general analysis of a newly enacted statute that has no judicial interpretation. Before relying on this annotation commentary, the reader should obtain legal counsel in applying this annotation interpretation to any specific circumstances at hand. *Clarence A. West*

<sup>2</sup> The Title of Chapter 284. "Deployment of Network Nodes in Public Right-of-Way" supports legislative intent that Ch. 284 is to be the statewide, uniform application of Ch. 284 for installations of wireless network nodes in the RoW controlling over any other common-law or statutory authority.

See also: The May 12, 2017 *House Legislative Analysis of the bill* that states the bill "seeks to update state law and provide a uniform framework for the deployment of network nodes in a public right-of-way." supporting statewide uniform application of Ch. 284 for installations of wireless network nodes in the RoW.

<http://www.capitol.state.tx.us/tlodocs/85R/analysis/pdf/SB01004H.pdf#navpanes=0>

See also: The May 17, 2017 *House Research Organization Analysis of the bill* states on page two the "Background of Ch. 283, and the FCC's characterizations of small cells as a type of network node used for wireless cellular coverage, concluding in the DIGEST:

"CSSB 1004 would allow wireless network companies to place network nodes in the public right-of-way (ROW) and would provide rules, regulations, and fee structures to reimburse cities for use of the ROW. Municipalities would retain authority to manage the public ROW to ensure the health, safety, and welfare of the public, and would receive compensation installing network nodes on poles."

Thus, also supporting statewide uniform application of Ch. 284 for installations of wireless network nodes in the RoW.

<http://www.hro.house.state.tx.us/pdf/ba85r/sb1004.pdf#navpanes=0>

<sup>3</sup> Sec. 284.001. The whereas clauses (a) (3) - (10), and policy clauses (b) and (c) support uniform application of Ch. 284 for installations of wireless network nodes in the RoW.

networks and services;

(2) this state has delegated to each municipality the fiduciary duty, as a trustee, to manage the public right-of-way for the health, safety, and welfare of the public, subject to state law;<sup>4</sup>

(3) network nodes often may be deployed most effectively in the public right-of-way;

(4) network providers' access to the public right-of-way and the ability to attach network nodes to poles and structures in the public right-of-way allow network providers to densify their networks and provide next-generation services;

(5) expeditious processes and reasonable and nondiscriminatory terms, conditions, and compensation for use of the public right-of-way for network node deployments are essential to state-of-the-

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<sup>4</sup> Sec. 284.001 (a) (2). Findings and policy clauses. This whereas clause supports the retention of city police powers in managing the rights-of-way as reserved in Sec. 284.301. While Sec. 284.301 (a) states those police powers are subject to Chapter 284, there is a general police power authority reservation. The city may exercise those police powers promulgating Network Node regulations in RoW Management Ord. or Design Manual standards for placement of Network Nodes in accordance with Sec. 284.102 (1) that has broad categories of prohibitions on installations to not “obstruct, impede, or hinder the usual travel or public safety on a public right-of-way”. There is also the police power authority reservation in the whereas clause cited above in Sec. 284.001 (a) (2), and (c). See also, Sec. 284.151. Prohibitions of Certain Municipal Actions. This is the broad preemption of city police powers except as allowed by Ch. 284.

The statement that the state “has delegated to each municipality the fiduciary duty, as a trustee, to manage the public right-of-way” further supports that the city is acting in a proprietary manner, not allowing section 6409 unilateral expansion claims without further city approval.

Maximum sizes in Sec. 284.003 may not be expanded upon, as reiterated in Sec. 284.109 (no expansion exceeding Sec. 284.003 size without city approval); and Sec. 284.157 (b) (1) (A)-(B) and (d) (3), even if an initial installation was smaller than in Sec. 284.003, it can only expand up to the sizes in Sec. 284.003, i.e., it does not allow section 6409 expansions without further city approval.

See *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Report and Order*, 29 FCC Rcd 12865, 12866-69, 12878-81, ¶ 239 (2014) (2014 Sec. 6409 Infrastructure Order), erratum, 30 FCC Rcd 31 (2015), *aff'd*, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015).

“... we [the FCC] 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. ... As the Supreme Court has explained, “[i]n the absence of any express or implied implication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and when analogous private conduct would be permitted, this Court will not infer such a restriction.” [fn 445] 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 [fn 446]”

The FCC cited in support of its statements in paragraph 239, at footnote 445, *Building & Construction Trades Council of Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island Inc.*, 507 U.S. 218, 231-32 (1993); and in footnote 446: *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only “regulatory schemes”); *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002) (finding that Section 332(c)(7) “does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity”)

art wireless services and thereby further an important public policy of having reliable wireless networks and services;

(6) network nodes help ensure that this state remains competitive in the global economy;

(7) the timely permitting of network nodes in the public right-of-way is a matter of statewide concern and interest;

(8) requirements of this chapter regarding fees, charges, rates, and public right-of-way management, when considered with fees charged to other public right-of-way users under this code, are fair and reasonable and in compliance with 47 U.S.C. Section 253;<sup>5</sup>

(9) to the extent this state has delegated its fiduciary responsibility to municipalities as managers of a valuable public asset, the public right-of-way, this state is acting in its role as a landowner in balancing the needs of the public and the needs of the network providers by allowing access to the public right-of-way to place network nodes in the public right-of-way strictly within the terms of this chapter;<sup>6</sup> and

(10) as to each municipality, including home-rule municipalities, this state has determined that it is reasonable and necessary to allow access to the public right-of-way for the purposes of deploying network nodes to protect and safeguard the health, safety, and welfare of the public as provided by this chapter.

(b) In order to safeguard the health, safety, and welfare of the public, it is the policy of this state to promote the adoption of and encourage competition in the provision of wireless services by reducing the barriers to entry for providers of services so that the number and types of services offered by providers continue to increase through competition.

(c) It is the policy of this state, subject to state law and strictly within the requirements and limitations prescribed by this chapter, that municipalities:

(1) retain the authority to manage the public right-of-way to ensure the health, safety, and welfare of the public;<sup>7</sup> and

(2) receive from network providers fair and reasonable compensation for use of the public right-of-way and for collocation on poles.<sup>8</sup>

**Sec. 284.002. DEFINITIONS.** In this chapter:

(1) "*Antenna*" means communications equipment that transmits or receives electromagnetic radio

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<sup>5</sup> Sec. 284.001 (a) (8). Findings and policy clauses. This whereas clause further mitigates any section 253 claims of unreasonable compensation.

<sup>6</sup> Sec. 284.001 (a) (9). Findings and policy clauses. This whereas clause supports the retention of city police powers in managing the rights-of-way as reserved in Sec. 284.301 as discussed in footnote 4.

The statement that “to the extent this state has delegated its fiduciary responsibility to municipalities as managers of a valuable public asset, the public right-of-way, *this state is acting in its role as a landowner in balancing the needs of the public and the needs of the network providers by allowing access to the public right-of-way to place network nodes in the public right-of-way strictly within the terms of this chapter*” supports that the city is acting in a proprietary manner, further mitigating any section 6409 unilateral expansion claims. See in Sec. 284.109 and Sec. 284.157(d)(3) also for similar section 6409 mitigation.

<sup>7</sup> Sec. 284.001 (c) (1). Findings and policy clauses. This policy clause supports the broad retention of city police powers in managing the rights-of-way as reserved in Sec. 284.301 as discussed in footnote 4.

<sup>8</sup> Sec. 284.001 (c) (3). Findings and policy clauses. This policy clause further mitigates any section 253 claims of unreasonable compensation.

frequency signals used in the provision of wireless services.

(2) "*Applicable codes*" means:

(A) uniform building, fire, electrical, plumbing, or mechanical codes adopted by a recognized national code organization; and

(B)<sup>9</sup> local amendments to those codes to the extent not inconsistent with this chapter.

(3) "*Collocate*" and "*collocation*" mean the installation, mounting, maintenance, modification, operation, or replacement of network nodes in a public right-of-way on or adjacent to a pole.<sup>10</sup>

(4) "*Decorative pole*" means a streetlight pole specially designed and placed for aesthetic purposes and on which no appurtenances or attachments, other than specially designed informational or directional signage or temporary holiday or special event attachments, have been placed or are permitted to be placed according to nondiscriminatory municipal codes.<sup>11</sup>

(5) "*Design district*" means an area that is zoned, or otherwise designated by municipal code, and for which the city maintains and enforces unique design and aesthetic standards on a uniform and nondiscriminatory basis.<sup>12</sup>

(6) "*Historic district*" means an area that is zoned or otherwise designated as a historic district under municipal, state, or federal law.<sup>13</sup>

(7) "*Law*" means common law or a federal, state, or local law, statute, code, rule, regulation, order,

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<sup>9</sup> Sec. 284.002. Definitions. (2) "*Applicable codes*" (B) allows local amendments to national codes to continue to be implemented.

<sup>10</sup> Sec. 284.002. Definitions. (3) "*Collocate or Collocation*" is a broad and confusing term that includes not only adding facilities to an existing installation or structure but also the initial installations. In doing so the definition of "*Collocate or Collocation*" in Chap. 284 is inconsistent and confusing relative to the FCC definition of "collocation" in the Section 6409 rules, 47 C.F.R. § 1.40001 Wireless Facility Modifications, *et al*, where a "collocation" only applies to an "existing" "eligible support structure". 47 C.F.R. § 1.40001 (b) (2) "*Collocation*", (4) "*Eligible Support Structure*", (5) "*Existing*".

<sup>11</sup> Sec. 284.002. Definitions. (4) "*Decorative pole*" is specific definition for certain qualified street lights that results in their access not being mandated by Sec. 284.101 (a) (3) as that section only applies to "Poles" and while "Poles" includes "Service poles", "Service poles" does not include "Decorative poles".

<sup>12</sup> Sec. 284.002. Definitions. (5) "*Design district*" A new type of area that is generally an area that has land use controls as to certain design elements, including Decorative poles. A city may require concealment of wireless facilities in a Design district. For the city to apply stealth/concealment conditions to network nodes or node support poles in a Design district under Sec. 284.105, each city must formally zone or designate the applicable areas as Design districts that meet the statutory definition. It may be helpful to have overlay maps showing the "Design districts". In accordance with Section 284.105 this designation is a valuable tool for cities to use that will require "advance approval" with conditions on stealth/concealment requirements. Note minimum criteria for a Design district is that it must have decorative poles. See Sec. 284.105.

<sup>13</sup> Sec. 284.002. Definitions. (6) "*Historic district*" In a Historic district the city may require concealment of wireless facilities, but for the City to apply stealth/concealment conditions to network nodes or node support poles in Historic districts under Sec. 284.105, each City must formally zone or designate applicable areas as Historic Districts that meet the statutory definition. It may be helpful to have overlay maps showing the "Historic districts". In accordance with Section 284.105 this designation is a valuable tool for cities to use that will require "advance approval" with conditions on stealth/concealment requirements prior to installation.

or ordinance.<sup>14</sup>

(8) "*Macro tower*" means a guyed or self-supported pole or monopole greater than the height parameters prescribed by Section 284.103 and that supports or is capable of supporting antennas.

(9) "*Micro network node*" means a network node that is not larger in dimension than 24 inches in length, 15 inches in width, and 12 inches in height, and that has an exterior antenna, if any, not longer than 11 inches.<sup>15</sup>

(10) "*Municipally owned utility pole*" means a utility pole owned or operated by a municipally owned utility, as defined by Section 11.003, Utilities Code, and located in a public right-of-way.

(11) "*Municipal park*" means an area that is zoned or otherwise designated by municipal code as a public park for the purpose of recreational activity.<sup>16</sup>

(12) "*Network node*"<sup>17</sup> means equipment at a fixed location that enables wireless communications between user equipment and a communications network. The term:

(A) includes:

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<sup>14</sup> Sec. 284.002. Definitions. (7) "*Law*" includes the "common-law", which may be very critical on relocation issues when coupled with Sec. 284.303 on "Relocation" which refers to "state and federal law", which would include *Southwestern Bell (SWB) as SBC (now AT&T). v. Harris Co. Toll Rd.*, 282 S.W.3d 59, 62, 67 (Tex. 2009), a case broadly describing the common-law rule on relocation as requiring utilities to relocate at their own cost when required for governmental projects enhancing the travel and transportation aspects of roadways.

<sup>15</sup> Sec. 284.002. Definitions. (9) "*Micro network node*" These are the tennis racket size devices cable companies have installed by lashing in the lines between poles in the rights-of-ways for several years now. Note under section 284.157 (a) (3) no application, permit or payment is required as to "*Micro network nodes*" so long as they are "strung on cables between existing poles or node support poles"; and under Sec. 284.253 no services are authorized to be provided over a "*Micro network node*" by Chapter 284—only the installation for which services have otherwise been authorized.

<sup>16</sup> Sec. 284.002. Definitions. (11) "*Municipal park*" For the exclusion of Node support poles in a Municipal park under Sec. 284.104 to apply, each City must formally zone or designate the applicable areas as a Municipal Park. It may be helpful to have overlay maps showing the "Municipal park". Once formally zoned or designated to install Node Support poles will require a "*municipality's discretionary, nondiscriminatory, and written consent if the public right-of-way is in a municipal park ...*".

<sup>17</sup> Sec. 284.002. Definitions. (12) "*Network node*" is the key term in Chapter 284 for wireless equipment that is broadly written to include essentially the vertical "equipment at a fixed location that *enables* wireless communication". Examples of the equipment are described in some detail subsection (A) as the antenna, and related equipment which some restrictions. Significantly it only includes in (A) (iii) "coaxial or fiber-optic *cable that is immediately adjacent* to and directly associated with a particular collocation." The horizontal connecting fiber between a Network node location and a cellular switch is separately defined as "Transport facility", below.

The definition has specific exclusions in subsection (B), such as generators and the pole itself, as a "pole" is a separate item, as defined in "Pole", which includes three other defined term items: "Node support pole", "Service pole", "Utility pole".

The exact size limits of a "Network node" are in Sec. 284.003, including ground equipment in Sec. 284.003 (a) (4), and referenced again in Sec. 284.106. Additional restrictions on height of installations are in Sec. 284.103 with a 55-ft. max., and in Sec. 284.108 that equipment must be at least 8 feet above the grade.

- (i) equipment associated with wireless communications;
- (ii) a radio transceiver, an antenna, a battery-only backup power supply, and comparable equipment, regardless of technological configuration; and
- (iii) coaxial or fiber-optic cable that is immediately adjacent to and directly associated with a particular collocation; and

(B) does not include:

- (i) an electric generator;
- (ii) a pole; or
- (iii) a macro tower.

(13) "*Network provider*" means:<sup>18</sup>

(A) a wireless service provider; or

(B) a person that does not provide wireless services and that is not an electric utility but builds or installs on behalf of a wireless service provider:

- (i) network nodes; or
- (ii) node support poles or any other structure that supports or is capable of supporting a network node.

(14) "*Node support pole*"<sup>19</sup> means a pole installed by a network provider for the primary purpose of supporting a network node.

(15) "*Permit*" means a written authorization for the use of the public right-of-way or collocation on a service pole required from a municipality before a network provider may perform an action or initiate, continue, or complete a project over which the municipality has police power authority.

(16) "*Pole*"<sup>20</sup> means a service pole, municipally owned utility pole, node support pole, or utility pole.

(17) "*Private easement*" means an easement or other real property right that is only for the benefit of the grantor and grantee and their successors and assigns.

(18) "*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:

(A) a private easement; or

(B) the airwaves above a public right-of-way with regard to wireless telecommunications.

(19) "*Public right-of-way management ordinance*" means an ordinance that complies with

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<sup>18</sup> Sec. 284.002. Definitions. (13) "*Network provider*" is very broad, as it includes a "wireless provider" which is defined below such that it could arguably include any entity that provides a wi-fi hot spot to the public. It is not limited to a CMRS provider (Cellular telephone) licensed by the FCC, or an entity that installs for them, as was in prior drafts of the bill.

<sup>19</sup> Sec. 284.002. Definitions. (14) "*Node support pole*" is a new pole installed just to support a network node facility. It is the essentially the same as a "Tower" in the FCC Section 6409 Rules, 47 C.F.R. § 1.40001 (b) (9) "*Tower*. Any structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities, including structures that are constructed for wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul, and the associated site."

<sup>20</sup> Sec. 284.002. Definitions. (16) "*Pole*" includes three other defined term items: "Node support pole", "Service pole", Utility pole". This is key as to what is included as mandated access and use in Sec. 284.101 (a) (3). As noted above, "Decorative pole" is excluded from "Service pole". So, there is no mandated access or use of a "Decorative pole".

Subchapter C.<sup>21</sup>

(20) "*Public right-of-way rate*" means an annual rental charge paid by a network provider to a municipality related to the construction, maintenance, or operation of network nodes within a public right-of-way in the municipality.<sup>22</sup>

(21) "*Service pole*"<sup>23</sup> means a pole, other than a municipally owned utility pole, owned or operated by a municipality and located in a public right-of-way, including:

(A) a pole that supports traffic control functions;

(B) a structure for signage;

(C) a pole that supports lighting, other than a decorative pole; and

(D) a pole or similar structure owned or operated by a municipality and supporting only network nodes.

(22) "*Transport facility*"<sup>24</sup> means each transmission path physically within a public right-of-way, extending with a physical line from a network node directly to the network, for the purpose of providing backhaul for network nodes.

(23) "*Utility pole*" means a pole that provides:

(A) electric distribution with a voltage rating of not more than 34.5 kilovolts; or

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<sup>21</sup> Sec. 284.002. Definitions (19) "*Public right-of-way management ordinance*" This is a RoW Ord. conforming to Subchapter C, which includes Sec. 284.101-284.110.

<sup>22</sup> Sec. 284.002. Definitions (20) "*Public right-of-way rate*" Significantly the RoW fee is a "rental charge", which supports value-based charge as opposed to a cost based fee. It is CPI adjusted. Sec. 284.054.

<sup>23</sup> Sec. 284.002. Definitions (20) "*Service pole*" broadly includes city traffic signal poles, non-decorative street lights, street signs, but subsection (D) is limited to other city poles that are "supporting only network nodes." It is not clear what that would include, but seems to be fully in the City's discretion which poles the city owns that are "supporting only network nodes."

Significantly Section 284.108 allows the city in the Design manual to require "an industry standard pole load analysis" with any request to place network nodes on a "Service Pole".

Additionally, while access to Service Poles is mandated, in accordance with Sect. 284.056 use of "Service Poles", and Sec. 284.101 (a) (3) use of "Poles", including "Service Poles", are "subject to an agreement with the municipality that does not conflict with this chapter", i.e., additional details that conforms with Chapter 284, as well as a RoW Management Ord., as defined above. The rate for attaching to a "Service Pole is \$20 per year. Sec. 284.057.

<sup>24</sup> Sec. 284.002. Definitions (22) "*Transport facility*" is the physical connection using fiber-optic cable between the Network node in the rights-of-way and the cellular network's mobile switching location, which in most instances is on private property. The length of the fiber-optic cable can be a short length or be several miles in length. The function the fiber-optic cable provides is called "backhaul" in the wireless industry; the definition of Transport facility states it is "for the purpose of providing backhaul for network nodes." It is crucial to distinguish the Transport facility from the Network node. Typically, the Transport facility is a physical line in the ROW (generally running horizontally and parallel to the ROW and the Network node is a facility in the ROW standing vertically and typically perpendicular to the ROW. Section 284.055 provides for a separate minimum fee/rate that is paid for installation of a Transport facility and it is subject to its own "shot clock" under Sec. 284.154. Those sections must be reviewed and understood in detail to distinguish the rate paid for installation of a "Network Node" in the ROW and the fee paid for installation of a Transport Facility and the shot clock for each.

(B) services of a telecommunications provider, as defined by Section 51.002, Utilities Code.

(24) "*Wireless service*"<sup>25</sup> means any service, using licensed or unlicensed wireless spectrum, including the use of Wi-Fi, whether at a fixed location or mobile, provided to the public using a network node.

(25) "*Wireless service provider*"<sup>26</sup> means a person that provides wireless service to the public.

**Sec. 284.003. LIMITATION ON SIZE OF NETWORK NODES.**<sup>27</sup>

(a) Except as provided by Section 284.109, a network node to which this chapter applies must conform to the following conditions:

(1) each antenna that does not have exposed elements and is attached to an existing structure or pole:

- (A) must be located inside an enclosure of not more than six cubic feet in volume;
- (B) may not exceed a height of three feet above the existing structure or pole; and
- (C) may not protrude from the outer circumference of the existing structure or pole

by more than two feet;

(2) if an antenna has exposed elements and is attached to an existing structure or pole, the antenna and all of the antenna's exposed elements:

- (A) must fit within an imaginary enclosure of not more than six cubic feet;
- (B) may not exceed a height of three feet above the existing structure or pole; and
- (C) may not protrude from the outer circumference of the existing structure or pole

by more than two feet;

(3) the cumulative size of other wireless equipment associated with the network node attached to an existing structure or pole may not:

- (A) be more than 28 cubic feet in volume; or
- (B) protrude from the outer circumference of the existing structure or pole by more than two feet;

(4) ground-based enclosures, separate from the pole, may not be higher than three feet six inches from grade, wider than three feet six inches, or deeper than three feet six inches; and

(5) pole-mounted enclosures may not be taller than five feet.

(b) The following types of associated ancillary equipment are not included in the calculation of equipment volume under Subsection (a):

- (1) electric meters;
- (2) concealment elements;
- (3) telecommunications demarcation boxes;

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<sup>25</sup> Sec. 284.002. Definitions (24) "*Wireless service*" is very broadly defined that could arguably include any entity that provides a wi-fi hot spot to the public. It is not limited to a CMRS provider (Cellular telephone) licensed by the FCC, or an entity that installs for them, as was in prior drafts of the bill.

<sup>26</sup> Sec. 284.002. Definitions (25) "*Wireless service provider*" is very broadly defined to include any provider of a "Wireless service", a wi-fi provider to the public. It is not limited to a CMRS provider (Cellular telephone) licensed by the FCC, or an entity that installs for them, as was in prior drafts of the bill.

<sup>27</sup> Sec. 284.003. Limitation on Size of Network Node is not limited to the size of an iPad, as some have suggested. However, it is important to note that the maximum sizes in Sec. 284.003 may not be expanded upon, as reiterated in Sec. 284.109 (no expansion exceeding Sec. 284.003 without city approval); and Sec. 284.157 (b) (1) (A)-(B) and (d) (3), even if an initial installation was smaller than in Sec. 284.003, it can only expand up to the sizes in Sec. 284.003.

- (4) grounding equipment;
- (5) power transfer switches;
- (6) cut-off switches; and
- (7) vertical cable runs for the connection of power and other services.

(c) Equipment attached to node support poles may not protrude from the outer edge of the node support pole by more than two feet.

(d) Equipment attached to a utility pole must be installed in accordance with the National Electrical Safety Code, subject to applicable codes, and the utility pole owner's construction standards.

## **SUBCHAPTER B. USE OF PUBLIC RIGHT-OF-WAY**

**Sec. 284.051. APPLICABILITY OF SUBCHAPTER.** This subchapter applies only to activities related to transport facilities for network nodes, activities of a network provider collocating network nodes in the public right-of-way or installing, constructing, operating, modifying, replacing, and maintaining node support poles in a public right-of-way, and municipal authority in relation to those activities.

**Sec. 284.052. EXCLUSIVE USE PROHIBITED.** A municipality may not enter into an exclusive arrangement with any person for use of the public right-of-way for the construction, operation, marketing, or maintenance of network nodes or node support poles.

**Sec. 284.053. ANNUAL PUBLIC RIGHT-OF-WAY RATE.<sup>28</sup>**

(a) A public right-of-way rate for use of the public right-of-way may not exceed an annual amount equal to \$250 multiplied by the number of network nodes installed in the public right-of-way in the municipality's corporate boundaries.

(b) At the municipality's discretion, the municipality may charge a network provider a lower rate or fee if the lower rate or fee is:

- (1) nondiscriminatory;
- (2) related to the use of the public right-of-way; and
- (3) not a prohibited gift of public property.

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<sup>28</sup> Sec. 284.053 Annual Public Right-of-Way rate is the rate paid annual for each network node site. It is CPI adjusted, Sec. 284.054. This is a separate min. fee for "Transport facilities", see Sec. 284.055; and a separate fee for attachments to "Service Poles" of \$20/year. Sec. 284.056. Note this is no separate fee for a node support pole.

It should also be noted that in city testimony in the Senate and House several cities raised Tex. Constitutional issues concerning the level of these rental rates. Article III, Section 52, of the Texas Constitution, provides that "the Legislature shall have no power to authorize any...city...to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever..."

Chap. 284 caps the rental fee paid by a network provider to place facilities in the public rights-of-way at \$250 per network node site annually. That amount is significantly below the typical market rate for that use. As a comparison, the as-filed version of the bill provided for a \$1,000 rental fee and in 2015-2017 cities negotiated agreements with network providers with rates of up to \$2,500 per network node. Cities argued, and may do so in future litigation, that Chap. 284 has rental rates that are a prohibited "grant [of] public money or thing of value in aid of, or to any individual, association or corporation"; that the rates are so low that access and use of the public rights-of-way is no more than a government subsidy to network providers that is prohibited by Article III, Section 52.

**Sec. 284.054. PUBLIC RIGHT-OF-WAY RATE ADJUSTMENT.**<sup>29</sup>

(a) In this section, "consumer price index" means the annual revised Consumer Price Index for All Urban Consumers for Texas, as published by the federal Bureau of Labor Statistics.

(b) A municipality may adjust the amount of the public right-of-way rate not more often than annually by an amount equal to one-half the annual change, if any, in the consumer price index. The municipality shall provide written notice to each network provider of the new rate, and the rate shall apply to the first payment due to the municipality on or after the 60th day following that notice.

**Sec. 284.055. USE OF PUBLIC RIGHT-OF-WAY AND APPLICABLE RATE.**<sup>30</sup>

(a) A network provider that wants to connect a network node to the network using the public right-of-way may:

- (1) install its own transport facilities subject to Subsection (b); or

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<sup>29</sup> Sec. 284.054 Public Right-of-Way Rate Adjustment is the CPI adjustment for the Sec. 284.053 "public right-of-way rate" for the network nodes installed should made be annually on the \$250 network node rate. While it does not seem to include CPI adjustments to Sec. 284.055 fees/rates paid for transport facilities or the fee/rate paid under Sec. 284.056 for collocations/pole attachment to "Service poles", arguably through Sec. 284.051 "Applicability of Subchapter" it may include CPI adjustments to those two sections, as they are part of the subchapter B, but it likely would not apply to application and permit fees in Sec. 284.156, in subchapter D. Each application and or permit should require contact information, and that it be updated annually, as notice is required to be sent to all Network providers in the city.

<sup>30</sup> Sec. 284.055 Use of the Public Right-of-Way and Applicable Rate under Sec. 284.055 (b) (2) *is the Transport facility separate minimum fee/rate due for installation of a Transport facility* under Section 284.055 (a), and in addition to the payment for the network node site under Sec. 284.053. The minimum Transport facility payment is roughly equivalent to the fee that a Certificated Telecommunication Provider ("CTP") would pay under Chapter 283 of the Local Government Code for a category 3 access line fee for a private-line service with two termination points at \$14 per month per termination point. This section likewise assumes there are at least two termination points for each Network Node, at \$14 per termination point. During the contemporary stakeholder meetings in the Senate Conference room on the bill in the spring of 2017 between City representatives, the industry and with Senate staff they discussed the recent Public Utility Commission of Texas ("PUC") case in PUC Docket No. 45280, *Complaint of ExteNet Network Systems, Inc. Against the City of Houston for Imposition of Fees for Use of Public Right of Way*, Order signed on May 10, 2017 ("*ExteNet Order*"). This minimum fee for Transport facilities was included in the bill with full acknowledgement of *ExteNet Order*.

The Transport facility rate under Section 284.055 rate is a minimum of \$28 multiplied by the number of Network node locations. However, if the Network provider is already paying the city an amount equal to or greater than that amount in other municipal ROW fees, i.e., access line fees under Chapter 283, Tex. Loc. Gov. Code, or cable franchise fees under Chap. 66, Tex. Utility Code, then the fees under Section 284.055 do not apply.

In order to calculate the amount due for Transport facilities under Sec. 284.055 the city will need to know how many Network nodes there are, then multiply that amount by \$28 and compare it to the amount the Network provider pays the city under Chapter 283 or Chap. 66 for that same period. If the payment under Chapter 283 or Chap. 66 is more, then nothing is due under Chapter 284.055; if it is less, then the difference is due. This minimum payment for installation of a Transport facility is to ensure that providers that only install "backhaul" under Chapter 283 with no access line fees (which is one and the same as a Transfer facility under Chap. 284), pay at least the minimum amount under Sec. 284.055.

(2) obtain transport service from a person that is paying municipal fees to occupy the public right-of-way that are the equivalent of not less than \$28 per node per month.

(b) A network provider may not install its own transport facilities unless the provider:

(1) has a permit to use the public right-of-way; and

(2) pays to the municipality a monthly public right-of-way rate for transport facilities in an amount equal to \$28 multiplied by the number of the network provider's network nodes located in the public right-of-way for which the installed transport facilities provide backhaul unless or until the time the network provider's payment of municipal fees to the municipality exceeds its monthly aggregate per-node compensation to the municipality.

(c) A public right-of-way rate required by Subsection (b) is in addition to any public right-of-way rate required by Section 284.053.

**Sec. 284.056. COLLOCATION OF NETWORK NODES ON SERVICE POLES.**<sup>31</sup> A municipality, subject to an agreement with the municipality that does not conflict with this chapter, shall allow collocation of network nodes on service poles on nondiscriminatory terms and conditions and at a rate not greater than \$20 per year per service pole.

**Sec. 284.057. PROHIBITION ON OTHER COMPENSATION.** A municipality may not require a network provider to pay any compensation other than the compensation authorized by this chapter for the right to use a public right-of-way for network nodes, node support poles, or transport facilities for network nodes.

### SUBCHAPTER C. ACCESS AND APPROVALS

**Sec. 284.101. RIGHT OF ACCESS TO PUBLIC RIGHT-OF-WAY.** (a) Except as specifically provided by this chapter, and subject to the requirements of this chapter and the approval of a permit application, if required, a network provider is authorized, as a permitted use, without need for a special use permit or similar zoning review and not subject to further land use approval, to do the following in the public right-of-way:

(1) construct, modify, maintain, operate, relocate, and remove a network node or node support pole;

(2) modify or replace a utility pole or node support pole; and

(3) collocate on a pole, subject to an agreement with the municipality that does not conflict with this chapter.<sup>32</sup>

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<sup>31</sup> Sec. 284.056. Collocation on Service Poles. While access to Service Poles is mandated, in accordance with Sec. 284.056, prior to use of "Service Poles" they are "subject to an agreement with the municipality that does not conflict with this chapter", i.e., additional details that conforms with Chapter 284; and similarly, under Sec. 284.101 (a) (3) use of "Poles", including "Service Poles", are also subject to an identical agreement; and in Sec. 284.101 (b) states that they are also subject to a RoW Management Ord., as defined above.

<sup>32</sup> Sec. 284.101, Right of Access to ROW. Sec. 284.101 (a) (1) - (2) mandate access to ROW for Network nodes and Node support poles, similar to Chapter 283 for CTPs. *However, what is new in this Chap. 284 is mandated access to use and collocate on Service poles in Sec. 284.101 (a) (3) (and in Sec. 284.056.)* However, prior to use of "Service Poles" they are "subject to an agreement with the municipality that does not conflict with this chapter", i.e., additional details that conforms with Chapter 284; and under Sec. 284.101 (b) use of "Poles", including "Service Poles", they are also subject to a RoW Management Ord., as defined above.

(b) A network provider taking an action authorized by Subsection (a) is subject to applicable codes, including applicable public right-of-way management ordinances.

**Sec. 284.102. GENERAL CONSTRUCTION AND MAINTENANCE REQUIREMENTS.** A network provider shall construct and maintain network nodes and node support poles described by Section 284.101 in a manner that does not:

- (1) <sup>33</sup> obstruct, impede, or hinder the usual travel or public safety on a public right-of-way;
- (2) obstruct the legal use of a public right-of-way by other utility providers;
- (3) violate nondiscriminatory applicable codes;
- (4) violate or conflict with the municipality's publicly disclosed public right-of-way design specifications; or
- (5) violate the federal Americans with Disabilities Act of 1990 (42 U.S.C. Section 12101 et seq.).

**Sec. 284.103. GENERAL LIMITATION ON PLACEMENT OF POLES.** A network provider shall ensure that each new, modified, or replacement utility pole or node support pole installed in a public right-of-way in relation to which the network provider received approval of a permit application does not exceed the lesser of:

- (1) 10 feet in height above the tallest existing utility pole located within 500 linear feet of the new pole in the same public right-of-way; or
- (2) 55 feet above ground level.

**Sec. 284.104. INSTALLATION IN MUNICIPAL PARKS AND RESIDENTIAL AREAS.**

(a) A network provider may not install a new node support pole in a public right-of-way without the municipality's discretionary, nondiscriminatory, and written consent if the public right-of-way is in a municipal park<sup>34</sup> or is adjacent to a street or thoroughfare that is:

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<sup>33</sup> Sec. 284.102. General Limitations on Placement of Poles. Sec. 284.102 (1) provides broad guidelines where a Chap. 284 installation cannot “obstruct, impede, or hinder the usual travel or public safety on a public right-of-way”. These terms should be cited in promulgating Network Node regulations in any RoW Management Ord. or Design Manual standards for placement of Network Nodes to evidence the underlying authority reserved in Chapter 284, as well as the police power authority reserved in the whereas clauses cited above in Sec. 284.001 (a) (2), and (c) and the general police power authority reservation in Sec. 284.301, which is still subject to Chap. 284. See also, Sec. 284.151. Prohibitions of Certain Municipal Actions. This is the broad preemption of city police powers except as allowed by Ch. 284.

<sup>34</sup> Sec. 284.104. Installations in Municipal Parks and Residential Areas. For the exclusion of Node support poles in Municipal park and Residential area to apply, each city must formally zone or designate the applicable areas as a Municipal park or if undeveloped, as residential. It may be helpful to have overlay maps showing the “Municipal park” and if undeveloped, as residential. Once so designated (or used as residential) to install Node Support poles will require a “*municipality's discretionary, nondiscriminatory, and written consent if the public right-of-way is in a municipal park ...*”.

To exclude by designation or zoning new Node support poles from residential areas except with city discretionary consent, two criteria need to be met: The “street” must be no more than 50 ft. wide, *and* the street must be “adjacent to single-family residential lots or other multifamily residences or undeveloped land that is designated for residential use by zoning or deed restrictions”. The term “street” was used—not ROW. Seems a street is a subset of ROW, which would include the paved roadbed, curb to curb. Note this

(1) not more than 50 feet wide; and

(2) adjacent to single-family residential lots or other multifamily residences or undeveloped land that is designated for residential use by zoning or deed restrictions.

(b)<sup>35</sup> In addition to the requirement prescribed by Subsection (a), a network provider installing a network node or node support pole in a public right-of-way described by Subsection (a) shall comply with private deed restrictions and other private restrictions in the area that apply to those facilities.

**Sec. 284.105. INSTALLATION IN HISTORIC OR DESIGN DISTRICTS.**<sup>36</sup>

(a) A network provider must obtain advance approval from a municipality before collocating new network nodes or installing new node support poles in an area of the municipality zoned or otherwise designated as a historic district or as a design district if the district has decorative poles. As a condition for approval of new network nodes or new node support poles in a historic district or a design district with decorative poles, a municipality may require reasonable design or concealment measures for the new network nodes or new node support poles. A municipality may request that a network provider comply with the design and aesthetic standards of the historic or design district and explore the feasibility of using certain camouflage measures to improve the aesthetics of the new network nodes, new node support poles, or related ground equipment, or any portion of the nodes, poles, or equipment, to minimize the impact to the aesthetics in a historic district or on a design district's decorative poles.

(b) This section may not be construed to limit a municipality's authority to enforce historic preservation zoning regulations consistent with the preservation of local zoning authority under 47 U.S.C. Section 332(c)(7), the requirements for facility modifications under 47 U.S.C. Section 1455(a), or the National Historic Preservation Act of 1966 (54 U.S.C. Section 300101 et seq.), and the regulations adopted to implement those laws.

**Sec. 284.106. EQUIPMENT CABINETS.** A network provider shall ensure that the vertical height of an equipment cabinet installed as part of a network node does not exceed the height limitation prescribed by Section 284.003, subject to approval of the pole's owner if applicable.

**Sec. 284.107. COMPLIANCE WITH UNDERGROUNDING REQUIREMENT.**<sup>37</sup>

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does not seem to exclude Network node installations on other existing “poles” in Municipal parks or residential areas, except as may be otherwise excluded in Ch. 284.

<sup>35</sup> Sec. 284.104 (b), however, under Sec. 284.104 (b), both Network nodes and node support poles in designated residential areas *must comply with private deed restrictions and other private restrictions in the area*, i.e., if wireless facilities are excluded, then neither installations would not be allowed; or if concealment/stealth is required, that must be complied with, as well as any ground size limitations.

<sup>36</sup> Sec. 284.105 Installations in Historic and Designs districts. For the City to apply stealth conditions to network nodes or node support poles in Historic and Design districts as are authorized by Section 284.105, each City must formally zone or designate applicable areas as Historic or Design districts, and it would be helpful to have overlay maps showing the Historic or Design districts. Once so designated to collocate network nodes or installing new node support poles will require “advance approval” with conditions on stealth/concealment requirements. Note minimum criteria for a Design district is that it must have Decorative poles.

<sup>37</sup> Sec. 284.107 Compliance with Undergrounding Requirement. This a broadly worded provision *excluding overhead Network nodes and new Node support poles in areas at that have “... nondiscriminatory undergrounding requirements, including municipal ordinances, zoning regulations, state law, private deed restrictions, and other public or private restrictions, that prohibit installing aboveground structures in a*

(a) A network provider shall, in relation to installation for which the municipality approved a permit application, comply with nondiscriminatory undergrounding requirements, including municipal ordinances, zoning regulations, state law, private deed restrictions, and other public or private restrictions, that prohibit installing aboveground structures in a public right-of-way without first obtaining zoning or land use approval.

(b) A requirement or restriction described by Subsection (a) may not be interpreted to prohibit a network provider from replacing an existing structure.

**Sec. 284.108. DESIGN MANUAL.**<sup>38</sup> (a) A municipality may adopt a design manual for the installation and construction of network nodes and new node support poles in the public right-of-way that includes additional installation and construction details that do not conflict with this chapter. The design manual may include:

(1) a requirement that an industry standard pole load analysis be completed and submitted to the municipality indicating that the service pole to which the network node is to be attached will safely support the load; and

(2) a requirement that network node equipment placed on new and existing poles be placed more than eight feet above ground level.

(b) A network provider shall comply with a design manual, if any, in place on the date a permit application is filed in relation to work for which the municipality approved the permit application. A municipality's obligations under Section 284.154 may not be tolled or extended pending the adoption or modification of a design manual.

**Sec. 284.109. EXCEPTIONS.**<sup>39</sup> Subject to Subchapter D, a network provider may construct, modify, or maintain in a public right-of-way a network node or node support pole that exceeds the height or distance limitations prescribed by this chapter only if the municipality approves the construction, modification, or maintenance subject to all applicable zoning or land use regulations and applicable codes.

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*public right-of-way without first obtaining zoning or land use approval.*” Undergrounding requirements should be clearly available to protect existing undergrounding areas, and there should be clear designations of future areas that may require underground facilities, within the bounds of existing law, particularly as it has been developed as to electrical utility distribution or transmission facilities.

<sup>38</sup> Sec. 284.108 Design Manual. The Design manual is an excellent tool to assist the city in having consistent uniform standards for wireless facilities. As is typical, whatever the Design standards are at the time of the application is submitted apply, thus it is imperative to have a design manual in place by Sept. 1, 2017. It should be noted that in public testimony at the House Committee from the industry (AT&T), as agreed to by the sponsor of the bill (Rep. Geren), the city can include minimum distance spacing requests between Node support poles in the ROW and limit the number of network nodes per site. It is also suggested that the specific allowance of “an industry standard pole load analysis” should be required of all applications to use city Service poles.

<sup>39</sup> Sec. 284.109. Exceptions to size limits require city discretionary consent. This Section further supports that the city is acting in a proprietary manner on behalf of the State in not allowing section 6409 unilateral expansion claims without further city approval beyond the maximum sizes in Sec. 284.003; similarly, in Sec. 284.157 (b) (1) (A)-(B) and (d) (3), even if an initial installation was smaller than in Sec. 284.003, it can only expand up to the sizes in Sec. 284.003, similarly does not allow section 6409 expansions without further city approval. The reference to subsection D is specifically to Sec. 284.157 (b) and (d) (3) the allowance of increases in size when the initial installation was less than the maximum allowed under sec. 284.003.

**Sec. 284.110. DISCRIMINATION PROHIBITED.** A municipality, in the exercise of the municipality's administrative and regulatory authority related to the management of and access to the public right-of-way, must be competitively neutral with regard to other users of the public right-of-way.

#### **SUBCHAPTER D. APPLICATIONS AND PERMITS**

**Sec. 284.151. PROHIBITION OF CERTAIN MUNICIPAL ACTIONS.**<sup>40</sup> (a) Except as otherwise provided by this chapter, a municipality may not prohibit, regulate, or charge for the installation or collocation of network nodes in a public right-of-way.

(b) A municipality may not directly or indirectly require, as a condition for issuing a permit required under this chapter, that the applicant perform services unrelated to the installation or collocation for which the permit is sought, including in-kind contributions such as reserving fiber, conduit, or pole space for the municipality.

(c) A municipality may not institute a moratorium, in whole or in part, express or de facto, on:

(1) filing, receiving, or processing applications; or

(2) issuing permits or other approvals, if any, for the installation of network nodes or node support poles.

**Sec. 284.152. AUTHORITY TO REQUIRE PERMIT.**<sup>41</sup> (a) Except as otherwise provided by this chapter, a municipality may require a network provider to obtain one or more permits to install a network node, node support pole, or transport facility in a public right-of-way if the permit:

(1) is of general applicability to users of the public right-of-way;

(2) does not apply exclusively to network nodes; and

(3) is processed on nondiscriminatory terms and conditions regardless of the type of entity submitting the application for the permit.

(b) A network provider that wants to install or collocate multiple network nodes inside the territorial jurisdiction of a single municipality is entitled to file a consolidated permit application with the municipality for not more than 30 network nodes and receive permits for the installation or collocation of those network nodes.

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<sup>40</sup> Sec. 284.151. Prohibitions of Certain Municipal Actions. This is a preemption of city police powers except as allowed by Ch. 284. See also Sec. 284.301 (a) "Subject to Chapter 284", there is a general police power authority reservation. And Sec. 284.102 (1) has broad categories of prohibitions on installations to not "obstruct, impede, or hinder the usual travel or public safety on a public right-of-way" that support promulgating Network Node regulations in RoW Management Ord. or Design Manual standards for placement of Network Node based on the underlying authority reserved in Sec. 284.301, as well as the police power authority reserved in the whereas clause cited above in Sec. 284.001 (a) (2), and (c).

<sup>41</sup> Sec. 284.152. Authority to Require Permit. This section expressly allows the requirement of a permit for network node, node support pole, or transport facility. (Omitted from the list are cable's Micro network nodes that are lashed among lines between poles.) Note that subsection (b) that allows "a consolidated permit application with the municipality for not more than 30 network nodes..." This 30-network node application should be considered in light of the tight shot requirements of Sec. 284.154, particularly the 10-day review time for completeness of an application for a Transfer facility and the 30 days for the other applications.

**Sec. 284.153. GENERAL PROCESS RELATING TO PERMIT APPLICATION.**<sup>42</sup> (a) Except as otherwise provided by this section, a municipality may not require an applicant to provide more information to obtain the permit than a telecommunications utility that is not a network provider is required to provide unless the information directly relates to the requirements of this chapter.

(b) As part of the standard form for a permit application, a municipality may require the applicant to include applicable construction and engineering drawings and information to confirm that the applicant will comply with the municipality's publicly disclosed public right-of-way design specifications and applicable codes.

(c) A municipality may require an applicant to provide:

(1) information reasonably related to the provider's use of the public right-of-way under this chapter to ensure compliance with this chapter;

(2) a certificate that the network node complies with applicable regulations of the Federal Communications Commission; and

(3) certification that the proposed network node will be placed into active commercial service by or for a network provider not later than the 60th day after the date the construction and final testing of the network node is completed.

**Sec. 284.154. MUNICIPAL REVIEW PROCESS.** (a) A municipality shall process each permit application on a nondiscriminatory basis.

(b) Not later than the 30th day after the date the municipality receives an application for a permit for a network node or node support pole, or the 10th day after the date the municipality receives an application for a permit for a transport facility,<sup>43</sup> the municipality shall determine whether the application is complete and notify the applicant of that determination. If the municipality determines that the application

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<sup>42</sup> Sec. 284.153. General Process Relating to Permit Application. In an application, a municipality *may ask* what is asked of “a telecommunications utility” and “*information directly relates to the requirements of this chapter*”.

Subsection (b) suggest a “standard form” application which may require “*applicable construction and engineering drawings and information to confirm that the applicant will comply with the municipality's publicly disclosed public right-of-way design specifications and applicable codes.*”

Subsection (c) allows a city to request information on compliance with chapter 284 and a certification of compliance with FCC regulations.

<sup>43</sup> Sec. 284.154. Municipal Review Process. This section sets out the shot clock times to determine completeness of an application and to act on it, that is to approve or deny it within the specified time allowed. There are different times for different installations. There is a much shorter shot clock under Sec. 284.154 for “*Transport facility*” installations, which are the physical fiber horizontal connections between the Network Node in the rights-RoW and the cellular network’s mobile switching location that is on private property in most instances. It is termed “backhaul” in the industry, and the definition of Transport facility states that it is “for the purpose of providing backhaul for network nodes.”

It is critical to distinguish this fiber Transport facility “horizontal” installation from the “vertical installation” of the Network node itself to calculate the shot clock time frames. Subsection (b) allows 10 days to review the Transport facility application for completeness, as opposed to 30 days for network node or node support pole; and Subsection (d) only allows 21 days to act to approve or deny an application on the Transport facility permit, as opposed to 60 days for network node or 150 days for a new Node support pole.

is not complete, the municipality shall specifically identify the missing information.

(c) A municipality shall approve an application that does not require zoning or land use approval under this chapter unless the application or the corresponding work to be performed under the permit does not comply with the municipality's applicable codes or other municipal rules, regulations, or other law that is consistent with this chapter.

(d) A municipality must approve or deny an application for a node support pole not later than the 150th day after the date the municipality receives the complete application. A municipality must approve or deny an application for a network node not later than the 60th day after the date the municipality receives the complete application. A municipality must approve or deny an application for a transport facility not later than the 21st day after the date the municipality receives a complete application. An application for a permit for a node support pole, network node, or transport facility shall be deemed approved if the application is not approved or denied on or before the applicable date for approval or denial prescribed by this subsection.

(e) A municipality that denies a complete application must document the basis for the denial, including the specific applicable code provisions or other municipal rules, regulations, or other law on which the denial was based. The municipality shall send the documentation by electronic mail to the applicant on or before the date the municipality denies the application.

(f) Not later than the 30th day after the date the municipality denies the application, the applicant may cure the deficiencies identified in the denial documentation and resubmit the application without paying an additional application fee, other than a fee for actual costs incurred by the municipality. Notwithstanding Subsection (d), the municipality shall approve or deny the revised completed application after a denial not later than the 90th day after the date the municipality receives the completed revised application. The municipality's review of the revised application is limited to the deficiencies cited in the denial documentation.

**Sec. 284.155. TIME OF INSTALLATION.** (a) A network provider shall begin the installation for which a permit is granted not later than six months after final approval and shall diligently pursue the installation to completion.

(b) Notwithstanding Subsection (a), the municipality may place a longer time limit on completion or grant reasonable extensions of time as requested by the network provider.

**Sec. 284.156. APPLICATION FEES.**<sup>44</sup> (a) A municipality may charge an application fee for a permit only if the municipality requires the payment of the fee for similar types of commercial development inside the municipality's territorial jurisdiction other than a type for which application or permit fees are not allowed by law.

(b) The amount of an application fee charged by a municipality may not exceed the lesser of:

(1) the actual, direct, and reasonable costs the municipality determines are incurred in granting or processing an application that are reasonably related in time to the time the costs of

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<sup>44</sup> Sec. 284.152 requires a permit for a Network node, Node support pole and Transfer facility, thus an application is required. Sec. 284.156 (a) allows a city to charge a permit fee "if the municipality requires the payment of the fee for similar types of commercial development inside the municipality's territorial jurisdiction other than a type for which application or permit fees are not allowed by law". Although inartfully written, it seems that either under a city's home rule authority or under Sec. 283.156 (b) the application fee for a Network node, Node support pole or Transfer facility is the lesser of: actual cost or \$500 for an application including up to 5 Network nodes, and \$250 for each additional Network node on a permit and a \$1,00 for a pole. Subsection (c) has restrictions on what may be included in "cost".

granting or processing an application are incurred; or

(2) \$500 per application covering up to five network nodes, \$250 for each additional network node per application, and \$1,000 per application for each pole.

(c) In determining for purposes of Subsection (b)(1) the amount of the actual, direct, and reasonable costs, the municipality may not:

(1) include costs incurred by the municipality in relation to third-party legal or engineering review of an application; or

(2) direct payments or reimbursement of third-party public right-of-way rates or fees charged on a contingency basis or under a result-based arrangement.

**Sec. 284.157. CERTAIN WORK EXEMPTED.**<sup>45</sup> (a) Notwithstanding any other provision of this chapter, a municipality may not require a network provider to submit an application, obtain a permit, or pay a rate for:

(1) routine maintenance that does not require excavation or closing of sidewalks or vehicular lanes in a public right-of-way;

(2) replacing or upgrading a network node or pole with a node or pole that is substantially similar in size or smaller and that does not require excavation or closing of sidewalks or vehicular lanes in a public right-of-way; or

(3) the installation, placement, maintenance, operation, or replacement of micro network nodes that are strung on cables between existing poles or node support poles, in compliance with the National Electrical Safety Code.

(b) For purposes of Subsection (a)(2):

(1) a network node or pole is considered to be "substantially similar" if:

(A) the new or upgraded network node, including the antenna or other equipment element, will not be more than 10 percent larger than the existing node, provided that the increase may not result in the node exceeding the size limitations provided by Section 284.003; and

(B) the new or upgraded pole will not be more than 10 percent higher than the existing pole, provided that the increase may not result in the pole exceeding the applicable height limitations prescribed by Section 284.103;

(2) the replacement or upgrade does not include replacement of an existing node support pole; and

(3) the replacement or upgrade does not defeat existing concealment elements of a node support pole.

(c) The determination under Subsection (b)(1) of whether a replacement or upgrade is substantially similar is made by measuring from the dimensions of the network node or node support pole as approved by the municipality.

(d) Notwithstanding Subsection (a):

(1) a municipality may require advance notice of work described by that subsection;

(2) a network provider may replace or upgrade a pole only with the approval of the pole's owner; and

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<sup>45</sup> Sec. 284.157. Certain Work Exempted. This sections primary concerns when a permit is not required. It also clearly caps the size to what is allowed under Sec. 284.003. Section 284.157 (b) (1) (A)-(B) and (d) (3) does not allow expansion in size beyond the max. in Sec. 284.003, even if an initial installation was smaller than in Sec. 284.003. This further supports that the city is acting in a proprietary manner on behalf of the State in not allowing section 6409 unilateral expansion claims without further city approval beyond the maximum sizes in Sec. 284.003. See also: Sec. 284.109. Exceptions to size limits require city discretionary consent.

(3) the size limitations may not in any event exceed the parameters prescribed by Section 284.003 without the municipality's approval in accordance with Section 284.109, with the municipality acting on behalf of this state as the fiduciary trustee of public property.

#### **SUBCHAPTER E. ACCESS TO MUNICIPALLY OWNED UTILITY POLES**

**Sec. 284.201. USE OF MUNICIPALLY OWNED UTILITY POLES.** (a) The governing body of a municipally owned utility shall allow collocation of network nodes on municipally owned utility poles on nondiscriminatory terms and conditions and pursuant to a negotiated pole attachment agreement, including any applicable permitting requirements of the municipally owned utility.

(b) The annual pole attachment rate for the collocation of a network node supported by or installed on a municipally owned utility pole shall be based on a pole attachment rate consistent with Section 54.204, Utilities Code, applied on a per-foot basis.

(c) The requirements of Subchapters B, C, and D applicable to the installation of a network node supported by or installed on a pole do not apply to a network node supported by or installed on a municipally owned utility pole.

#### **SUBCHAPTER F. EFFECT ON OTHER UTILITIES AND PROVIDERS**

**Sec. 284.251. DEFINITIONS.** In this subchapter:

(1) "*Cable service*" and "video service" have the meanings assigned by Section 66.002, Utilities Code.

(2) "*Electric cooperative*" has the meaning assigned by Section 11.003, Utilities Code.

(3) "*Electric utility*" has the meaning assigned by Section 31.002, Utilities Code.

(4) "*Telecommunications provider*" has the meaning assigned by Section 51.002, Utilities Code.

(5) "*Telephone cooperative*" has the meaning assigned by Section 162.003, Utilities Code.

**Sec. 284.252. EFFECT ON INVESTOR-OWNED ELECTRIC UTILITIES, ELECTRIC COOPERATIVES, TELEPHONE COOPERATIVES, AND TELECOMMUNICATIONS PROVIDERS.** Nothing in this chapter shall govern attachment of network nodes on poles and other structures owned or operated by investor-owned electric utilities, electric cooperatives, telephone cooperatives, or telecommunications providers. This chapter does not confer on municipalities any new authority over those utilities, cooperatives, or providers.

**Sec. 284.253. EFFECT ON PROVIDERS OF CABLE SERVICES OR VIDEO SERVICES.** (a) An approval for the installation, placement, maintenance, or operation of a network node or transport facility under this chapter may not be construed to confer authorization to provide:

(1) cable service or video service without complying with all terms of Chapter 66, Utilities Code; or

(2) information service as defined by 47 U.S.C. Section 153(24), or telecommunications service as defined by 47 U.S.C. Section 153(53), in the public right-of-way.

(b) Except as provided by this chapter, a municipality may not adopt or enforce any regulations or requirements that would require a wireless service provider, or its affiliate, that holds a cable or video franchise under Chapter 66, Utilities Code, to obtain any additional authorization or to pay any fees based on the provider's provision of wireless service over its network nodes.

#### **SUBCHAPTER G. GENERAL CONDITIONS OF ACCESS**

**Sec. 284.301. LOCAL POLICE-POWER-BASED REGULATIONS.**<sup>46</sup> (a) Subject to this chapter and applicable federal and state law, a municipality may continue to exercise zoning, land use, planning, and permitting authority in the municipality's boundaries, including with respect to utility poles.

(b) A municipality may exercise that authority to impose police-power-based regulations for the management of the public right-of-way that apply to all persons subject to the municipality.

(c) A municipality may impose police-power-based regulations in the management of the activities of network providers in the public right-of-way only to the extent that the regulations are reasonably necessary to protect the health, safety, and welfare of the public.

**Sec. 284.302. INDEMNIFICATION.** The indemnification provisions of Sections 283.057(a) and (b) apply to a network provider accessing a public right-of-way under this chapter.

**Sec. 284.303. RELOCATION.** Except as provided in existing state and federal law, a network provider shall relocate or adjust network nodes in a public right-of-way in a timely manner and without cost to the municipality managing the public right-of-way.

**Sec. 284.304. INTERFERENCE.** (a) A network provider shall operate all network nodes in accordance with all applicable laws, including regulations adopted by the Federal Communications Commission.

(b) A network provider shall ensure that the operation of a network node does not cause any harmful radio frequency interference to a Federal Communications Commission-authorized mobile telecommunications operation of the municipality operating at the time the network node was initially installed or constructed. On written notice, a network provider shall take all steps reasonably necessary to remedy any harmful interference.

**SECTION 2.**<sup>47</sup> (a) In this section, "collocation," "network node," "network provider," and "public right-of-

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<sup>46</sup> Sec. 284.301. Local Police Power-Based regulations. Sec. 284.301 (a) provides that the regulations are subject to chapter 284, otherwise this is a general police power authority reservation. For instance, Sec. 284.102 (1) has broad categories of prohibitions on installations to not "obstruct, impede, or hinder the usual travel or public safety on a public right-of-way" that support promulgating Network node regulations in RoW Management Ord. or Design manual standards for placement of Network node based on the underlying authority reserved in this Sec. 284.301, as well as the police power authority reserved in the whereas clause cited above in Sec. 284.001 (a) (2), and (c). But see also Sec. 284.151. Prohibitions of Certain Municipal Actions. This is the broad preemption of city police powers except as allowed by Ch. 284. Compare with the reservation of city police powers in this Sec. 284.301.

<sup>47</sup> Section 2. Of the bill is the "grandfathering" section as to agreements between cities and wireless providers currently existing or entered into prior to Sept. 1, 2017. As of Sept. 1, 2017, under subsections (b) and (c) all rates, terms, and conditions in those agreements that are inconsistent with the Chapter 284 are preempted and unenforceable, subject to subsection (d).

Subsection (d) only applies to "network nodes *installed and operational on or after*" Sept. 1, 2017. It is not likely any Network nodes will be installed *and* operational under agreements after Sept. 1, 2017, as Chapter 284 processes will be utilized for those installations, so this Subsection (d) as a practical matter only concerns network nodes installed *and* operational prior to Sept. 1, 2017. The installation date is not key; it is the operational date prior to Sept. 1, 2017 that will trigger this section. To determine the operational date each city must inquire of each provider as its operational date of each network node.

way" have the meanings assigned by Section 284.002, Local Government Code, as added by this Act.

(b) Public/private agreements between a municipality and a network provider for the deployment of network nodes in the public right-of-way on fair and reasonable terms as provided by Chapter 284, Local Government Code, as added by this Act, and corresponding ordinances governing that deployment, are necessary to protect the health, safety, and welfare of the public by facilitating robust and dependable wireless networks. Accordingly, those agreements and ordinances shall be conformed as provided by this section.

(c) Subject to Subsection (d) of this section, the rates, terms, and conditions of agreements and ordinances entered into or enacted before the effective date of this Act shall apply to all network nodes installed and operational before the effective date of this Act.

(d) For all network nodes installed and operational on or after the effective date of this Act:

(1) if a rate, term, or condition of an agreement or ordinance related to the construction, collocation, operation, modification, or maintenance of network nodes does not comply with the requirements of Chapter 284, Local Government Code, as added by this Act, a municipality shall amend the agreement or ordinance to comply with the requirements of Chapter 284, Local Government Code, as added by this Act, and the amended rates, terms, or conditions shall take effect for those network nodes on the six-month anniversary of the effective date of this Act; and

(2) the rates, terms, and conditions of each agreement executed, and each ordinance enacted, on or after the effective date of this Act shall comply with the requirements of Chapter 284, Local Government Code, as added by this Act.

**SECTION 3.** This Act takes effect September 1, 2017.

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Subsection (d) (1). If a city has such network nodes that were “*installed and operational* on or after” Sept. 1, 2017 then Subsection (d) (1) requires that *a city affirmatively amend the agreements* to conform to Chapter 284, with the amendments taking effect 6 months after Sept. 1, 2017. In other words, and network nodes that were both installed and operational on or after Sept. 1, 2017 are grandfathered under the city agreements rates and terms for 6 months after Sept. 1, 2017. However, it seems even if network nodes were installed prior to Sept. 1, few will be activated to be operational before Sept. 1, 2017.