

ORDINANCE NO. 2017-09-_____

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS, AMENDING ARTICLE IV, "RIGHTS-OF-WAY USE AND MANAGEMENT," OF CHAPTER 90, "STREETS AND SIDEWALKS," OF THE CODE OF ORDINANCES OF THE CITY OF MCKINNEY, TEXAS, BY (1) AMENDING SECTION 90-224, "DEFINITIONS" BY ADDING SIX NEW DEFINITIONS SPECIFICALLY RELATED TO TELECOMMUNICATIONS AND WIRELESS SERVICE PROVIDERS, (2) AMENDING EXISTING SECTION 90-227, ENTITLED "PENALTIES, ENFORCEMENT, AND CULPABLE MENTAL STATE," BY RE-NUMBERING SAID SECTION AS SECTION 90-229, ALSO ENTITLED "PENALTIES, ENFORCEMENT, AND CULPABLE MENTAL STATE," AND CONTAINING THE SAME PROVISIONS WITHOUT MODIFICATION, (3) ADDING A NEW SECTION 90-227 ENTITLED "CERTIFICATED TELECOMMUNICATION PROVIDERS," TO PROVIDE FOR REGULATIONS FOR USE OF THE CITY'S RIGHTS-OF WAY BY CERTIFICATED TELECOMMUNICATIONS PROVIDERS, IN ACCORDANCE WITH CHAPTER 283 OF THE TEXAS LOCAL GOVERNMENT CODE, (4) ADDING A NEW SECTION 90-228 ENTITLED "NETWORK PROVIDERS," TO PROVIDE FOR REGULATIONS FOR USE OF THE CITY'S RIGHTS-OF-WAY BY WIRELESS NETWORK PROVIDERS, IN ACCORDANCE WITH CHAPTER 284 OF THE TEXAS LOCAL GOVERNMENT CODE, (5) ADOPTING A PUBLIC RIGHT-OF-WAY WIRELESS SERVICES DESIGN MANUAL, AND (6) AMENDING APPENDIX A – SCHEDULE OF FEES TO PROVIDE FOR NEW FEES APPLICABLE TO NETWORK PROVIDERS; REPEALING ALL CONFLICTING ORDINANCES; PROVIDING A SEVERABILITY CLAUSE; RESERVING ALL EXISTING RIGHTS AND REMEDIES; PROVIDING FOR IMMUNITY; PROVIDING FOR INJUNCTIONS; PROVIDING FOR THE PUBLICATION OF THE CAPTION OF THIS ORDINANCE; AND PROVIDING FOR AN EFFECTIVE DATE

WHEREAS, the City of McKinney, Texas, (the "City") is a Home-Rule City possessing the full power of local self-governance pursuant to Article XI, Section 5 of the Texas Constitution, Section 51.072 of Texas Local Government Code and its Home Rule Charter; and

WHEREAS, the Texas Legislature adopted Senate Bill 1004 (SB 1004), which became effective on September 1, 2017; and

WHEREAS, SB 1004 takes away much of a city's power to regulate the installation of cell service and wireless internet by telecommunications providers and allows such providers to put up "small cell network nodes" within the public rights-of-ways and private property on streetlights, street signs and utility poles to the detriment of cities and private property owners and without fair and reasonable compensation for the use of their respective property rights; and

WHEREAS, the City Council of the City of McKinney ("City Council") has determined that the adoption of this Ordinance best serves the general welfare of the City and its residents by providing a regulatory base for the providers of telecommunications services in the City, subject to reasonable restrictions, which will preserve the public health and safety, and will protect and enhance the City's environmental and aesthetic quality to the limited extent allowed by SB 1004; and

WHEREAS, the City Council has further determined that the amendments provided herein will ensure the Code of Ordinances, City of McKinney, Texas ("McKinney Code"), as applicable to the use of the City's Rights-of-Way by Certified Telecommunications Providers and Network Providers, is consistent with state law, as it has been amended by SB 1004.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS, THAT:

Section 1. FINDINGS

All of the above premises are found to be true and correct and are incorporated into the body of this Ordinance as if copied in their entirety.

Section 2. AMENDMENT TO SECTION 90-224, "DEFINITIONS," OF CHAPTER 90, "STREETS AND SIDEWALKS," OF THE MCKINNEY CODE BY ADDING SIX NEW DEFINITIONS SPECIFICALLY RELATED TO TELECOMMUNICATIONS AND WIRELESS SERVICE PROVIDERS

From and after the effective date of this Ordinance, Chapter 90, "Streets and Sidewalks," of the McKinney Code is hereby amended by amending Section 90-224, "Definitions," to insert six new definitions for the following words and phrases, in alphabetical order, to read as follows:

"Certificated Telecommunications Provider or "CTP" means a person who has been issued a certificate of convenience and necessity, certificate of operating authority, or service provider certificate of operating authority by the Texas Public Utility Commission or "PUC" to offer local exchange telephone service or a person who provides voice service as defined by Texas Local Government Code Chapter 283 or "the Act".

"Network node" means equipment at a fixed location that enables wireless communications between user equipment and a communication network."

"Network Provider" means a wireless service provider, or 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, network nodes or node support poles or any other structure that supports or is capable of supporting a network node."

"Transport Facility" 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."

"Wireless service" 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."

"Wireless service provider" means a person that provides wireless services to the public."

Section 3. AMENDING EXISTING SECTION 90-227, ENTITLED "PENALTIES, ENFORCEMENT, AND CULPABLE MENTAL STATE," OF CHAPTER 90, "STREETS AND SIDEWALKS," OF THE MCKINNEY CODE BY RE-NUMBERING SAID SECTION AS SECTION 90-229, ALSO ENTITLED "PENALTIES, ENFORCEMENT, AND CULPABLE MENTAL STATE," AND CONTAINING THE SAME PROVISIONS WITHOUT MODIFICATION

From and after the effective date of this Ordinance, Chapter 90, "Streets and Sidewalks," of the McKinney Code is hereby amended by amending existing Section 90-227, entitled "Penalties, Enforcement, and Culpable Mental State," by re-numbering said section as Section 90-229, also entitled

“Penalties, Enforcement, and Culpable Mental State,” and containing the same provisions without modification.

Section 4. **ADDING A NEW SECTION 90-227 ENTITLED “CERTIFICATED TELECOMMUNICATION PROVIDERS,” TO CHAPTER 90, “STREETS AND SIDEWALKS,” OF THE MCKINNEY CODE TO PROVIDE FOR REGULATIONS FOR USE OF THE CITY’S RIGHTS-OF WAY BY CERTIFIED TELECOMMUNICATIONS PROVIDERS, IN ACCORDANCE WITH CHAPTER 283 OF THE TEXAS LOCAL GOVERNMENT CODE,**

From and after the effective date of this Ordinance, Chapter 90, “Streets and Sidewalks,” of the McKinney Code is hereby amended by adding a new Section 90-227, titled “Certificated Telecommunications Provider,” to read as follows:

“Sec. 90-227. CERTIFICATED TELECOMMUNICATION PROVIDERS

- (a) *Certificated telecommunications providers’ authority required/nonexclusive use.* A CTP must provide evidence that the CTP has acquired authorization from the PUCT pursuant to state law, prior to obtaining a permit to use public right-of-way. The CTP’s right to use and occupy the public right-of-way shall not be exclusive, and the City shall have the right to exercise its police powers and manage its public right-of-way, based on the Act and all other state or federal laws.
- (b) *Transfer and notice.* A CTP shall notify the right-of-way manager of any sale, transfer, merger or assignment of the ownership or control of a CTP’s business within 30 days of such sale, transfer, merger or assignment. A CTP shall also maintain and provide current point-of-contact information with the right-of-way manager at all times during which the CTP uses the right-of-way.
- (c) *Exemption from fees.* CTPs are exempted from the following fees provided for in this article:
 - (1) Permit application fee, including expedited application fee and permit expiration fee;
 - (2) Additional permit fee;
 - (3) Saturday inspection fee; and
 - (4) Registration fee.
- (d) *Waiver bonds.* Unless determined otherwise by the right-of-way manager a CTP will be exempt from the bonding requirements of this chapter, however, in the event that the right-of-way manager determines, based upon reasonable grounds, that a bond is necessary to protect the public assets, and/or the health and safety of the public, then the right-of-way manager may require that a CTP post a reasonable bond not to exceed \$100,000.00. Factors to be considered in determining reasonable grounds may include, but are not limited to, a conviction for violation of this article, a general pattern of substandard adherence to the provisions of this article or the failure to comply with this article. If three years pass from the date that the

right-of-way manager requires a bond of a CTP and it has not been necessary for the City to seek performance under the bond, then a bond will no longer be required pursuant to this section.

- (e) *CTP indemnity.* A CTP shall indemnify the City as specified by Texas Local Government Code Section 283.057, as may be amended. A CTP shall be exempt from all indemnity requirements of this article that are inconsistent with Texas Local Government Code Section 283.057, as amended.”

Section 5. **ADDING A NEW SECTION 90-228 ENTITLED “NETWORK PROVIDERS,” TO CHAPTER 90, “STREETS AND SIDEWALKS,” OF THE MCKINNEY CODE TO PROVIDE FOR REGULATIONS FOR USE OF THE CITY’S RIGHTS-OF WAY BY WIRELESS NETWORK PROVIDERS, IN ACCORDANCE WITH CHAPTER 284 OF THE TEXAS LOCAL GOVERNMENT CODE**

From and after the effective date of this Ordinance, Chapter 90, “Streets and Sidewalks,” of the McKinney Code is hereby amended by adding a new Section 90-228, titled “Network Providers,” to read as follows:

“Sec. 90-228. NETWORK PROVIDERS

- (a) *Network provider’s authority required/nonexclusive use.* A network provider must provide evidence that the network provider has acquired all required authorization pursuant to state law, prior to obtaining a permit to use public right-of-way. The network provider’s right to use and occupy the public right-of-way shall not be exclusive, and the City shall have the right to exercise its police powers and manage its public right-of-way, based on the Texas Local Gov’t Code Chapter 284 and all other state or federal laws.
- (b) *Transfer and notice.* A network provider shall notify the right-of-way manager of any sale, transfer, merger or assignment of the ownership or control of a network provider’s business within 30 days of such sale, transfer, merger or assignment. A network provider shall also maintain and provide current point-of-contact information with the right-of-way manager at all times during which the network uses the right-of-way.
- (c) *Network Provider indemnity.* A network provider shall indemnify the City as specified by the Texas Local Government Code, as may be amended.
- (d) *Compliance with Design Manual.* A network provider shall comply with the City of McKinney, Texas, Public Right-of-Way Wireless Communication Facilities Design Manual, as amended, for the Installation of Network Nodes and Node Support Poles, as amended by the Public Works Director.”

Section 6. **ADOPTING A PUBLIC RIGHT-OF-WAY WIRELESS SERVICES DESIGN MANUAL**

From and after the effective date of this Ordinance, the City of McKinney’s Wireless Services (Small Cells) Design Manual, Dated September 19,

2017, attached to this Ordinance is hereby adopted and effective immediately.

Section 7. **AMENDMENT OF APPENDIX A – SCHEDULE OF FEES TO PROVIDE FOR NEW FEES APPLICABLE TO NETWORK PROVIDERS**

From and after the effective date of this Ordinance, Appendix A – Schedule of Fees of the McKinney Code is hereby amended by adding a new section to Chapter 90, “Streets and Sidewalks,” of the Schedule of Fees related to Network Providers’ use of the City Rights-of-Way identified as “Section 90-228 Network Providers’ Fees” to read in its entirety as follows:

“Section 90-228. Network Providers’ Fees.

Small cell application fee. (This fee shall not exceed and is capped by statutory limits): \$500.00 covering up to five (5) network nodes; \$250.00 for each additional network node with a limit of a total of 30 network nodes per application; \$1,000.00 per pole

Small cell user fees. (This fee shall not exceed and is capped by statutory limits): \$250.00 annually for each network node within the City’s corporate limits; \$20.00 per year for City pole attachment.

Transport Facility monthly user fee. (This fee shall not exceed and is capped by statutory limits): \$28 per month 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, until the time the network provider’s payment to the City exceeds its monthly aggregate per month compensation to the City.”

Section 8. **RESERVATION OF RIGHTS REGARDING SMALL CELL NETWORK NODE INSTALLATIONS**

The City hereby places any and all small cell providers on notice that should the courts overturn SB 1004, the City specifically reserves the right to repeal this Ordinance, which is being adopted solely to conform to SB 1004, refuse to recognize any purported vested rights based on or arising out of SB 1004 and this Ordinance, and:

- (a) require small cell providers to enter into individual agreements with the City for the continued operation of small cell systems within and about the City’s rights-of-ways;
- (b) refuse to be bound by the “Network Provider Fees” mandated by SB 1004 and set out in Section 7 of this Ordinance and will instead require small cell providers to pay City fair and reasonable compensation for the use of the City’s poles, facilities and rights-of-ways;
- (c) require small cell providers to remove or alter non-conforming poles, network nodes and/or any and all equipment and facilities appurtenant to their small cell systems and reinstall the same in accordance with any and all ordinances, rules and regulations as are applicable in the absence of SB 1004 and this Ordinance.

Section 9. **REPEALER CLAUSE**

This Ordinance shall be cumulative of all other ordinances of the City and shall not repeal any of the provisions of said ordinances except in those

instances where provisions of those ordinances are in direct conflict with the provisions of this Ordinance and such ordinances shall remain intact and are hereby ratified, verified and affirmed.

Section 10. **SEVERABILITY CLAUSE**

If any section, article, paragraph, sentence, clause, phrase or word in this Ordinance, or application thereof to any person or circumstance, is held invalid or unconstitutional by a court of competent jurisdiction, such holding shall not affect the validity of the remaining portions of the Ordinance, and the City Council hereby declares it would have passed such remaining portions of the Ordinance despite such invalidity, which remaining portions shall remain in full force and effect.

Section 11. **IMMUNITY**

All of the regulations provided in this ordinance are hereby declared to be governmental and for the health, safety and welfare of the general public. Any member of the City Council or any City official or employee charged with the enforcement of this ordinance, acting for the City of McKinney in the discharge of his duties, shall not thereby render himself personally liable; and he is hereby relieved from all personal liability for any damage that might accrue to persons or property as a result of any act required or permitted in the discharge of his said duties.

Section 12. **INJUNCTIONS**

Any violation of this ordinance can be enjoined by a suit filed in the name of the City of McKinney in a court of competent jurisdiction, and this remedy shall be in addition to any penal provision in this ordinance or in the Code of the City of McKinney.

Section 13. **PENALTY**

Any person, firm or corporation violating or failing to comply with any of the provisions of this ordinance and/or the City of McKinney's Wireless Services (Small Cells) Design Manual, attached to and adopted by this Ordinance, shall be subject to the penalty provisions set forth in Section 1-18 of the McKinney Code; and each and every day such violation or failure to comply shall continue shall be deemed to constitute a separate offense.

Section 14. **PUBLICATION OF THE CAPTION**

The caption of this Ordinance shall be published one time in a newspaper having general circulation in the City of McKinney following the City Council's adoption hereof as provided by law.

Section 15. **EFFECTIVE DATE**

This Ordinance shall become effective from and after the date of its final passage and publication as provided by law, and it is accordingly so ordained.

[Signatures are found on following page.]

DULY PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF
McKINNEY, TEXAS ON THE 19th DAY OF SEPTEMBER, 2017.

CITY OF McKINNEY, TEXAS

GEORGE C. FULLER
Mayor

CORRECTLY ENROLLED:

SANDY HART, TRMC, MMC
City Secretary
DENISE VICE, TRMC
Assistant City Secretary

DATE: _____

APPROVED AS TO FORM:

MARK S. HOUSER
City Attorney