

85R6449 CBH-F

By: Hancock

S.B. No. 1004

A BILL TO BE ENTITLED
AN ACT

relating to the deployment of network nodes in public rights-of-way; authorizing fees.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

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 RIGHTS-OF-WAY
SUBCHAPTER A. GENERAL PROVISIONS

Sec. 284.001. FINDINGS AND POLICY. (a) The legislature finds that:

(1) the design, engineering, permitting, construction, modification, maintenance, and operation of network nodes are instrumental to increasing access to advanced technology and information for the citizens of this state;

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

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

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

(5) expeditious processes and reasonable and nondiscriminatory compensation for use of the public rights-of-way for network node deployments are essential to the construction and operation of robust broadband communications networks;

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

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

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

(b) It is the policy of this state to promote the adoption of and encourage competition in the provision of telecommunications services, including 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 that municipalities:

(1) retain the authority to manage the public rights-of-way to ensure the health, safety, and welfare of the public; and

(2) receive from telecommunications providers, including network providers, fair and reasonable compensation for use of the public rights-of-way.

Sec. 284.002. DEFINITIONS. In this chapter:

(1) "Antenna" means communications equipment that transmits or receives electromagnetic radio frequency signals.

(2) "Applicable codes" means:

(A) uniform building, fire, electrical,

plumbing, or mechanical codes adopted by a recognized national code organization; and

(B) local amendments to those codes enacted solely to address imminent threats of destruction of property or injury to persons 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 an existing pole with the express, discretionary, and written permission of the pole's owner.

(4) "Fee" means a one-time cost-recovery charge for services performed. The term includes a charge for reviewing and processing an application for a permit.

(5) "Law" means common law or a federal, state, or local law, statute, code, rule, regulation, order, or ordinance.

(6) "Municipal pole" means:

(A) 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 pole that supports lighting or traffic control functions or a structure for signage; and

(B) a pole or similar structure owned or operated by a municipality, located in a public right-of-way, and supporting only network nodes.

(7) "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.

(8) "Network node" means equipment at a fixed location that enables wireless communications between user equipment and a communications network. The term:

(A) includes:

(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 necessary to serve the location, including such cable connecting the network node to the fiber network at a length not to exceed 528 feet; and

(B) does not include:

(i) an electric generator; or

(ii) a pole.

(9) "Network provider" means:

(A) a person granted a certificate of convenience and necessity, certificate of authority, or service provider certificate of authority by the Public Utility Commission of Texas to provide telecommunications service in this state; and

(B) a person authorized and licensed by the Federal Communications Commission to provide services classified as "mobile services" by 47 C.F.R. Section 20.7.

(10) "Node support pole" means a pole installed by a network provider for the primary purpose of supporting a network node.

(11) "Permit" means a written authorization required from a municipality before a network provider may perform an action or initiate, continue, or complete a project over which the municipality has regulatory authority.

(12) "Pole" means a municipal pole, municipally owned utility pole, node support pole, or utility pole.

(13) "Public right-of-way" means the area on, below,

or above a public roadway, highway, street, public sidewalk, alley, waterway, or utility easement in which the municipality has an interest. The term does not include the airwaves above a public right-of-way with regard to wireless telecommunications.

(14) "Public right-of-way rate" means an annual rental charge paid by a network operator to a municipality for the use of a public right-of-way in the municipality.

(15) "Utility pole" means a pole or similar structure that supports a pole attachment, as defined by Section 252.001, Utilities Code, and that provides:

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

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

Sec. 284.003. LIMITATION ON SIZE OF NETWORK NODES. (a) Except as provided by Section 284.108, 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:

(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; and

(C) may not protrude from the outer circumference of the existing structure by more than two feet;

(2) if an antenna has exposed elements and is attached to an existing structure, 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; and

(C) may not protrude from the outer circumference of the existing structure by more than two feet;

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

(A) be more than 28 cubic feet in volume;

(B) exceed a height of three feet above the existing structure; or

(C) protrude from the outer circumference of the existing structure by more than two feet;

(4) ground-based enclosures may not be higher than four feet from grade, wider than four feet, or deeper than four feet; 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;

(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 circumference of the node support pole by more than three feet.

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

SUBCHAPTER B. USE OF PUBLIC RIGHTS-OF-WAY

Sec. 284.051. APPLICABILITY OF SUBCHAPTER. (a) This chapter applies only to activities of a network provider constructing, operating, and maintaining a network node in a public right-of-way and municipal authority in relation to those activities.

(b) Use of a public right-of-way for other telecommunications facilities installed by a network provider is governed by Chapter 283.

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

Sec. 284.053. PUBLIC RIGHT-OF-WAY RATE OR FEE FOR USE OF PUBLIC RIGHTS-OF-WAY. (a) A public right-of-way rate or fee for use of the public rights-of-way may not exceed an annual amount equal to \$1,000 multiplied by the number of node support poles and utility poles, other than municipally owned utility poles, inside the municipality's corporate boundaries on which the network provider has installed a network node.

(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 rights-of-way;

and

- (3) not a prohibited gift of public property.

Sec. 284.054. PUBLIC RIGHT-OF-WAY RATE OR FEE ADJUSTMENT. A municipality shall adjust the amount of the public right-of-way rate or fee annually to reflect the previous year's annual rate of inflation as determined by the Public Utility Commission of Texas. The new rate or fee takes effect for the first payment due to the municipality on or after the 60th day after the date the commission makes the determination.

Sec. 284.055. PUBLIC RIGHT-OF-WAY RATE OR FEE APPLICABLE TO TELECOMMUNICATIONS NETWORK. (a) The right-of-way fee provisions of Subchapter B, Chapter 283, apply to the use of a public right-of-way for telecommunications network facilities, other than network nodes, installed by a network provider.

(b) For the purposes of calculating the right-of-way fee under Subchapter B, Chapter 283:

- (1) each network node is considered to be an end-use customer termination point as specified in the definition of "access line" in Section 283.002(1)(A)(ii); and
- (2) the exception provided by Section 283.002(1)(B) does not apply.

(c) Notwithstanding Section 283.056, a network provider is responsible for paying both the public right-of-way rate or fee required by this chapter and any applicable right-of-way fee required by Chapter 283.

SUBCHAPTER C. ACCESS AND APPROVALS

Sec. 284.101. RIGHT OF ACCESS TO PUBLIC RIGHTS-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 entitled, as a permitted use that is not subject to zoning review or similar approval, and is not subject to further land use approval in an area that is not zoned, to do the following in the public rights-of-way:

(1) construct, modify, maintain, and operate a network node;

(2) construct, modify, maintain, and operate a utility pole or network support pole; and

(3) collocate on a pole with the discretionary, nondiscriminatory, and express written consent of the pole's owner.

(b) A network provider taking an action authorized by Subsection (a) is subject to applicable codes.

Sec. 284.102. GENERAL CONSTRUCTION AND MAINTENANCE REQUIREMENTS. A network provider shall construct and maintain structures and facilities described by Section 284.101 in a manner that does not:

(1) 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 applicable codes;

(4) violate or conflict with the municipality's publicly disclosed public rights-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:

(1) does not exceed the greater of:

(A) 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

(B) 50 feet above ground level; and

(2) is spaced at least 300 linear feet from the nearest existing pole that is capable of supporting network nodes and is located in a public right-of-way.

Sec. 284.104. INSTALLATION IN 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 adjacent to a street or thoroughfare:

(1) that is not more than 50 feet wide; and

(2) both sides of which are adjacent to single-family residential lots or other multifamily residences.

(b) 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. 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. 284.106. COMPLIANCE WITH UNDERGROUNDING REQUIREMENT. (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. 284.107. DESIGN MANUAL. (a) A municipality may adopt a design manual for the installation and construction of network nodes and new node support poles in the public rights-of-way that includes additional installation and construction details that do not conflict with this chapter.

(b) A network provider shall comply with the design manual in relation to work for which the municipality approved a permit application.

Sec. 284.108. EXCEPTIONS. Subject to Subchapter D, a network provider may construct, modify, or maintain in a public right-of-way a network node or network 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.

Sec. 284.109. 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 rights-of-way, must be competitively neutral with regard to other users of the public rights-of-way.

SUBCHAPTER D. APPLICATIONS AND PERMITS

Sec. 284.151. PROHIBITION OF CERTAIN MUNICIPAL ACTIONS.

(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 an express or de facto moratorium 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. (a) A municipality may require a network provider to obtain one or more permits to install a network node or node support pole in a public right-of-way if the permit:

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

(2) does not apply exclusively to network nodes.

(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 a single permit for the installation or collocation of those network nodes.

Sec. 284.153. GENERAL PROCESS RELATING TO PERMIT APPLICATION. (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.

(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 rights-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 rights-of-way under this chapter:

(A) to ensure compliance with this chapter; and

(B) as reasonably necessary to demonstrate that the proposed network node will comply with applicable regulations of the Federal Communications Commission; and

(2) reasonable evidence that the proposed network node will be placed into active commercial service by or for a provider of retail telecommunications service immediately 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, the municipality shall determine whether the application is complete and notify the applicant of that determination. If the municipality determines that the application 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.

(d) A municipality must approve or deny a complete application for a new node support pole not later than the 150th day after the date the municipality receives the application. The municipality must approve or deny all other complete applications not later than the 90th day after the date the municipality receives the application.

(e) A municipality that denies a complete application must document the basis for the denial, including the specific applicable code provisions on which the denial was based. The municipality shall send the documentation to the applicant on or before the date the authority 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 application not later than the 45th day after the date the municipality receives the 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 the 90th day after the date the permit is approved and shall complete the installation not later than the 180th day after the date the installation begins.

(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. (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 must be:

(1) based on the actual, direct, and reasonable costs the municipality determines are incurred in granting or processing an application; and

(2) reasonably related in time to the time the costs of granting or processing an application are incurred.

(c) In determining for purposes of Subsection (b) the amount of the actual, direct, and reasonable costs, the municipality:

(1) may include reasonable and direct reimbursement of costs incurred by the municipality in relation to third-party legal or engineering review of an application, including reasonable and necessary travel expenses in this state; and

(2) may not include 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.

(d) Payment by a network provider of applicable application fees under this chapter does not affect the provisions of Section 283.056 that prohibit a municipality from requiring the provider to pay application or permit fees in relation to telecommunications facilities, other than network nodes, that the provider installs in the public rights-of-way.

Sec. 284.157. CERTAIN WORK EXEMPTED. (a) A municipality may not require a network provider to submit an application for:

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

(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.

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

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

(A) 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; and

(B) 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;

(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; and

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

SUBCHAPTER E. ACCESS TO AUTHORITY STRUCTURES

Sec. 284.201. USE NOT MANDATED. This chapter may not be construed to require that a municipality allow collocation of network nodes on a municipal pole or a municipally owned utility pole.

Sec. 284.202. NONDISCRIMINATORY USE OF MUNICIPAL POLES. A

municipality that chooses to allow collocation of network nodes on municipal poles must comply with Section 54.204, Utilities Code.

SUBCHAPTER F. GENERAL CONDITIONS OF ACCESS

Sec. 284.251. LOCAL POLICE-POWER-BASED REGULATIONS. (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 rights-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 rights-of-way only to the extent that the regulations are reasonably necessary to protect the health, safety, and welfare of the public.

Sec. 284.252. 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. 284.253. RELOCATION. A network provider shall relocate or adjust network nodes in a timely manner and without cost to the municipality if the municipality requires the relocation or adjustment to accommodate public improvements constructed on behalf of the municipality in a public right-of-way.

Sec. 284.254. 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. (a) In this section, "collocation," "fee," "network node," "node support pole," "public right-of-way," and "public right-of-way rate" have the meanings assigned by Section 284.002, Local Government Code, as added by this Act.

(b) Not later than the first anniversary of the effective date of this Act, each municipality that charges a public right-of-way rate or fee to construct, install, mount, maintain, modify, operate, or replace a network node or node support pole in a public right-of-way, including collocation in a public right-of-way, shall:

(1) determine whether the rate or fee complies with the requirements prescribed by Section 284.053, Local Government Code, as added by this Act; and

(2) if the rate or fee does not comply, amend the rate or fee for all persons in any manner necessary for compliance.

SECTION 3. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2017.