TEXAS MUNICIPAL LEAGUE
*Empowering Texas cities to serve their citizens*

President **Holly Gray-McPherson**, Mayor Pro Tem, Roanoke
Executive Director **Bennett Sandlin**

December 18, 2017

Elizabeth Bowles
Chair, Broadband Deployment Advisory Committee
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

Re: GN Docket No. 17-83

Dear Ms. Bowles:

Thank you for your service as chair of the Broadband Deployment Advisory Committee (BDAC).

The Texas Municipal League (TML) is a non-profit association of over 1,150 incorporated cities. TML's member cities have a vested interest in the outcome of the Federal Communications Commission dockets related to broadband deployment.

As you know, the mission of the BDAC is to "make recommendations to the Commission on how to accelerate the deployment of high-speed Internet access by reducing and/or removing regulatory barriers to infrastructure investment."

The framing of that mission statement portends that city right-of-way management will be considered a regulatory barrier to infrastructure investment. To the contrary, Texas cities regulate their rights-of-way in trust for the public, and are mandated by the Texas Constitution to seek fair market value for their use.

We are concerned that the lack of local government representation on the BDAC may result in harmful recommendations. Moreover, the confidential nature of some of the BDAC's proceedings is troubling in light of the public interest in its work.

Rather than reinvent the wheel, we are resubmitting our comments and reply comments from WC Docket No. 16-421, which lay out our concerns with federal right-of-way preemption, to this docket. The BDAC has used that proceeding to identify local barriers to entry, but we wish to call equal attention to the legal issues raised by local governments, including TML, in the proceeding.

Thank you for your attention.

Sincerely,

Scott Houston
*TML General Counsel*

1821 Rutherford Lane, Suite 400, Austin, Texas 78754
P 512-231-7400 • F 512-231-7490 • www.tml.org

Before the
Federal Communications Commission
Washington, DC 20554

| | | |
|---|---|---|
| **In the Matter of Streamlining Wireless infrastructure deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies Mobilitie, LLC Petition for Declaratory Ruling** | **§ § § §** | **WC Docket No. 16-421** |

**TEXAS MUNICIPAL LEAGUE (TML) COMMENTS**

Clarence A. West, Attorney
4001 Lob Cove
Austin, Texas 78730
Telephone: (512) 401-3486
Email: cawest@cawestlaw.com
ATTORNEY FOR TEXAS MUNICIPAL LEAGUE

**Submitted: March 8, 2017**

Before the
Federal Communications Commission
Washington, DC 20554

| | | |
|---|---|---|
| **In the Matter of Streamlining Wireless infrastructure deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies** | **§ § § §** | **WC Docket No. 16-421** |
| **Mobilitie, LLC Petition for Declaratory Ruling** | | |

**TEXAS MUNICIPAL LEAGUE (TML) COMMENTS**

**Table of Contents**


**I. Introduction: Mobilitie's Proposals and TML's Comments in Context ..... 4**

**II. Proprietary, Land Owner/Manager, Right-of-Way Use Charges, a Texas Perspective. .. 6**

**A. Texas municipalities are the proprietors of the local right-of-way in Texas. ..... 6**

**B. PN Questions on Right-of-Way Use Charges, a Texas PerspectiveThe PN asks: ..... 7**

**C. Texas Constitution prohibits use of Public Property for less Than Fair Market Value: ..... 9**

**D. Unique among the fifty states: Texas retained its public lands in the 1845 Congressional Annexation Resolution. ..... 12**

**E. Texas Rights-of-way Fees have long been required by law to be competitively neutral and nondiscriminatory: ..... 13**

**F. Texas State Law Non-discrimination provisions:..... 13**

**G. Pending Wireless Infrastructure Companies Administrative Litigation in Texas. ..... 16**

**H. In Texas, there are no state legislative grants to wireless entities, for wireless transmission equipment, including small cell and DAS, or for any Commercial Mobile Services provider, to use the public-rights of ways, absent city, discrationary consent: . 17**

**I. Texas Municipalities Recent Experiences in Allowing RoW Access to Wireless Providers: Collaboration, not Confrontation. ..... 18**

**1. Dallas-A tale of two Providers. ..... 18**

**2. Houston-Collaboration with wireless provider stakeholders to develop Master License Agreement. ..... 19**

**3. San Antonio-First City in Texas with MLA in 2014. ..... 19**

**4. Other Texas Municipalities' Experience. ..... 19**

**III. The Takings Clause of the Fifth Amendment to the U.S. Constitution bars Congress (and the FCC) from Setting Local Rights of Way Use Rental Fees without "Just Compensation". In Texas, just compensation means value-based compensation. ..... 21**

**IV. FCC is precluded by statute from adjudicating rights of way disputes under Section 253 (c). ..... 22**

**CONCLUSION……. 25**

**Attachment 1--** Mobilitie's June 2016 plans depicting an installation of an 83' 6' tower on Chestnut Street, Denison, Texas, within an historic district, and described throughout as a "utility pole".

**Attachment 2 --** Texas Historical Commission (THC) February 16, 2017, Letter concerning installation of an 83' 6' tower on Chestnut Street, Denison Texas, within an historic district, for which no NHPA Section 106 Notice was provided.

Before the
Federal Communications Commission
Washington, DC 20554

| | | |
|---|---|---|
| **In the Matter of Streamlining Wireless infrastructure deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies** | **§ § § §** | **WC Docket No. 16-421** |
| **Mobilitie, LLC Petition for Declaratory Ruling** | | |

**TEXAS MUNICIPAL LEAGUE (TML) COMMENTS**

COMES NOW the Texas Municipal League (TML) ("Texas Cities or "TML"")[1] and files these Comments in the Federal Communications Commission's (hereinafter "FCC") Public Notice for Comment *In the Matter of Streamlining Wireless infrastructure deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling*.[2] TML's Comments are limited to an explanation of the use of municipal rights-of-way in Texas. Our Comments also include specific Texas examples of clear, non-discriminatory legal and administrative processes to obtain properly-managed access to local rights-of-way and receive fair and reasonable compensation for that use.

## I. Introduction: Mobilitie's Proposals and TML's Comments in Context

[1] Texas Municipal League is an unincorporated affiliation of 1,151 Texas cities. See more about TML at: https://www.tml.org/

Many of TML member cities are also members of Texas Coalition for Utility Issues and as such associates itself with the filing of the "Smart Communities" that is being filed contemporaneously with this filing. TML endorse the legal arguments and research provided in that filing.

[2] *In the Matter of Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling, DA* 1427, WC Docket No. 16-421, Public Notice for Comment (Dec. 22, 2016). ("PN"); *See* Mobilitie, LLC Petition for Declaratory Ruling, *Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way* (filed Nov. 15, 2016) (Mobilitie Petition).

*Mobilitie's Proposals in Context*:

Before responding to the PN questions, it must be noted that Mobilitie mischaracterizes all rights-of-way related fees as "excessive and unfair fees for use of rights of way." Mobilitie also coins a new term for annual rights-of-way rental fees. It characterizes them as "recurring charges." Mobilitie urges that the so called recurring charges "be limited to incremental personnel and other costs for monitoring the facilities …" In doing so, Mobilitie casually conflates *cost based fees* (e.g., application, permitting and processing fees) with use of right-of-way *rental fees*, as if they were all compensation for the same thing.[3] They are not. Mobilitie seems to ignore the substantial litigation that followed enactment of the 1996 Federal Communications Act, specifically Section 253(c), on the very issue of what "fair and reasonable" compensation means. That litigation, which is mentioned in the PN, never limited rights-of-way use compensation to "'incremental personnel and other costs for monitoring the facilities …" The PN cited *TCG Detroit v. City of Dearborn*, in which the Sixth Circuit determined that a 4% gross revenue fee was fair and reasonable based on the amount of the use contemplated, the amount other providers would be willing to pay, and the impact on the profitability of the business, using an analysis based on the "totality of circumstances," including "market based pricing".[4] The PN cited one federal circuit holding that "fees local governments collect from telecommunications providers must at the very least be *related* to the actual use of rights of way" and that "the costs [of maintaining those rights of way] are an essential part of the equation."[5] That holding, at most, stated that cost was only *part* of the compensation "equation." –It is certainly not all of the equation. In fact, cost included maintaining those rights-of-way, which is not an insubstantial cost.

The context of Mobilitie's interpretation that "fair and reasonable compensation" is cost based, rather than value based, compensation[6] must be considered. Is it a new context designed simply to accommodate the new "indispensable" technologies of small cells and Distributed

---

[3] PN, at 12-14.

[4] 206 F. 3d 618, 624-25 (6th Cir. 2000). PN, at 7, FN 50 also citing *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1272-3 (10th Cir. 2004); And PN, at 13, fn 73.

[5] PN, at 13, citing *Puerto Rico Tel. Co., Inc. v. Municipality of Guayanilla*, 450 F. 3d 9, 22 (1st Cir. 2006). (Italics in original)

[6] PN, at 13-14.

Antenna Systems ("DAS"). That is a red herring because this is not really a new technology (we have had wireless communication facilities for decades) so much as it is a smaller version of old technology. The technology is nothing more than a smaller form of macro-cells proposed to be located on public, rather than private, property.[7] In further linguistic Jujutsu, Mobilitie has even have suggested that, just because the facilities are smaller, it takes less time to review detailed engineering plans. In fact, review for placement of private facilities immediately adjacent (within inches in some cases) to public roads with pedestrian and vehicular traffic presents significant safety and line-of-sight issues that do not ordinarily arise on private land sites. Would not such issues require *additional* time to review, rather than less? This is the backdrop of these Comments.

TML's Comments will focus on a city acting in its proprietary capacity. In other words, as the owner of its rights-of-way. As such an owner, a Texas city is entitled to value-based rental charges paid for the private use of the rights-of-way. That capacity is distinguishable from a city's police–power and cost-based administrative fees related to the permitting and application process for the use of the rights-of-way.

## II. Proprietary, Land Owner/Manager, Right-of-Way Use Charges, a Texas Perspective.

### A. Texas municipalities are the proprietors of the local right-of-way in Texas.

FCC Orders have reiterated and cited long-held case law stating that certain federal timelines and other requirements (including Section 6409, 47 C.F.R. § 1.40001, et seq.) do not apply when a governmental entity is acting as a landowner in a proprietary capacity, rather than a regulator, to wit:

> "…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. … Like private property owners, local governments enter into lease and license agreements to allow parties to place

[7] This is not the first (and will not be the last) of a "new" technology that claims it is a panacea and that if the rules would be changed just a little bit, just for a little while, it will be a panacea for all. *Pensacola Tel. Co. v. Western Union Tel. Co*., 96 U.S. 1, 9 (1878). "The electric telegraph marks an *epoch in the progress of time*. [It has] become one of the *necessities of commerce*. It is *indispensable as a means of inter-communication*, but especially is it so in commercial transactions." (Italics added).

antennas and other wireless service facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances" [8]

Texas municipalities control the underlying rights-of-way on which light poles and utility poles are located.[9] They hold the public property in trust, as fiduciaries, to protect the public's interest, with only the state having a superior claim.[10]

**B. PN Questions on Right-of-Way Use Charges, a Texas Perspective**The PN asks:

"How do local governments determine the up-front fees for applications and permits or the recurring fees [a/k/a annual rental fee for use of RoW[11]] for usage of

---

[8] *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); See also FCC "Shot Clock", see *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14020, para. 67 (2009) (2009 Declaratory Ruling), *aff'd, City of Arlington v. FCC,* 668 F.3d 229 (5th Cir. 2012), *aff'd,* 133 S. Ct. 1863 (2013).

[9] In 1875 Texas cities were given "the *exclusive control and power over the streets, alleys and public grounds and highways of the city*…" Acts 1875, 14th Leg., 2nd C.S., p. 113, § 32. Recodified many times, now codified in the Tex. Transp. Code, §§ 311.001 [home rule city] and 311.002 [general law city]; and see also, Tex. Civ. Stat. art. 1175 [home rule city] "A home-rule municipality has the following powers …. [t]o prohibit the use of any street, alley, highway or grounds of the city by any …. telephone…. company…. without first obtaining the consent of the governing authorities … and upon paying such compensation as may be prescribed ….''; Tex. Util. Code, § 54.205. "Municipality's Right to Control Access." *See also, Southwestern Bell v. City of El Paso and the El Paso County Water Improvement District, Number 1*, 168 Fed. Supp. 2nd 640, 648 (2001) a city, unlike the water district, is "not limited in terms of their ability to "control and receive compensation for access to the municipality's public streets…" citing Tex. Util. Code § 54.205.

[10] *Texas Dept. of Transp. v. City of Sunset Valley*, 146 S.W.3d 637,645 (Tex. 2004) "As the State's agent or trustee, a municipality does possess a superior interest in its public roads vis-a-vis private citizens. the Legislature may grant cities and towns "exclusive dominion" over the public ways within their corporate or municipal boundaries. …. as has been delegated to them by the Home Rule Amendment to the Texas Constitution, art. 11, § 5, or by the legislature…. ".

[11] The term "annual recurring fees" seems to be a new term of art that Mobilitie has included in its petition. TML assumes this term is meant to include what has, in over a century of judicial precedent, been termed rights-of-way <u>rental fees</u>. *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 99, (U.S. Sup. Ct. 1893) ("*U.S. Sup. Ct., St. Louis* (1893)")

"… <u>this use is an absolute, permanent and exclusive appropriation of that space in the streets</u> which is occupied by the telegraph poles. To that extent it is a use different in kind and extent from that enjoyed by the general public. Now, when there is this permanent and exclusive appropriation of a part of the highway, is there in the nature of things anything to inhibit the public from *exacting*

> rights of way? … Do they set up-front fees based on the costs they incur in reviewing such applications or related administrative tasks such as monitoring the provider's construction of facilities, ensuring compliance with local building codes and excavation regulations, and verifying liability insurance?"
>
> "Are recurring charges [annual rental RoW access charges] set based on localities' ongoing costs of managing use of rights of way?"
>
> "To what extent are localities imposing charges based on other considerations, such as percentages of gross revenues or other indicia of the value of the use of the right-of-way?" (PN, page 13)

Concluding by asking for comments:

> "…. on Mobilitie's proposal that recurring charges be limited to 'incremental personnel and other costs for monitoring the facilities (for example, to ensure they are maintained in compliance with signage and other requirements).'" (PN, at 13-14)

The PN's discussion of fees and charges intermingles incongruent types of cost-based administrative and processing fees with value-based rights-of-way *rental* fees. The PN inquires about the reasonableness of "up-front fees" and "annual recurring fees."[12] By doing so, the PN conflates fundamentally different types of fees *related* to rights-of-way use and completely ignores the underlying distinction between them. The PN's conflation is not unlike cost-based processing fees paid at the closing of a long-term lease versus the market-based rental fees paid on that lease.

There are two general types of charges related to the private use of public property, including use of local rights-of-way. The type of charge depends on whether the city is acting as a

---

*rental* for the space thus occupied? Obviously not. Suppose a municipality permits one to occupy space in a public park, for the erection of a booth in which to sell fruit and other articles; who would question the right of the city to charge for the use of the ground thus occupied, or call such charge a tax, or *anything else except rental*? So, in like manner, while permission to a telegraph company to occupy the streets is not technically a lease, and does not in terms create the relation of landlord and tenant, yet it is the giving of the exclusive use of real estate, for which the giver has a right to exact compensation, which is in the *nature of rental*." (Italics and underscoring added).

See also, *City of Dallas v. FCC*, 118 F.3d 393, 398 (5th Cir. 1997) on cable right-of-way use franchise fees being *"rent"*; *Fleming v. Houston Lighting and Power*, 143 S.W.2d 923, 924 (Tex. 1940) ("*Fleming II*"), 4% fee was a *street rental fee* citing *U.S. Sup. Ct., St. Louis* (1893). TML will use the term "rental fee" to include charges for the use of the public rights-of-way in lieu of "recurring charges".

[12] PN, at 12.

property owner (i.e., effectively renting property) or in an administrative capacity (i.e., administering the process to allow the use). The two types of charges related to the private use of public rights of way are:

1. *Texas municipalities as a proprietary property owner of Rights-of-Way Value-based charge*: The city, as a proprietary property owner, receives *reasonable* value-based rental payments for private use of public property, including public rights-of-way.[13]
2. *Texas municipalities as a regulating governmental entity - Cost-Based Charge*: The city, as a governmental entity, acting with its police-powers in an administrative capacity, charges cost-based fees to recover the cost for administering the process of its oversight of the private use of public property to avoid tax subsidies.

**C. Texas Constitution prohibits use of Public Property for less Than Fair Market Value:**

Many of the kinds of property the PN lists, including "*light poles, utility poles, buildings, and other structures either on private property or in the public rights of way,"* are municipally

[13] What is a "reasonable" rental fee for use of public property may vary from location to location: *St. Louis v. Western Union Tel. Co*., 148 U.S. 92, 104-05 (1893) "*Prima facie,* an ordinance like that is reasonable. The court cannot assume that such a charge is excessive, and so excessive as to make the ordinance unreasonable and void; for, as applied in certain cases, a like charge for so much appropriation of the streets may be reasonable. *If within a few blocks of Wall Street, New York, the telegraph company should place on the public streets 1500 of its large telegraph poles, it would seem as though no court could declare that five dollars a pole was an excessive annual rental for the ground so exclusively appropriated; while, on the other hand, a charge for a like number of poles in a small village, where space is abundant and land of little value, would be manifestly unreasonable, and might be so excessive as to be void*. Indeed, it may be observed, in [Page 105] the line of the thoughts heretofore expressed, that *this charge is one in the nature of rental*; that the occupation by this interstate commerce company of the streets cannot be denied by the city; that all that it can insist upon is, in this respect, reasonable compensation for the space in the streets thus exclusively appropriated; and it follows in the nature of things that it does not lie exclusively in its power to determine what is reasonable rental. The inquiry must be open in the courts, and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city." (Italics added); Similarly, *Fleming v. Houston Lighting and Power*, 138 S.W.2d 520, 522 (Tex. 1940) (*Fleming I*), upheld a 4% gross revenue fee as reasonable.

owned or controlled property.[14] In the City of Austin, for example, the City owns the streetlights and light poles, and Austin's municipal utility owns most of the utility poles in the City.

Cost-based rights-of-way use fees, as proposed by Mobilitie, contradict Texas law and violate Texas Constitutional provisions. The Texas Constitution requires value-based compensation for private use of public property, including public rights-of-way. The constitutional requirement for value-based compensation for the private use of public property arises directly from the 1876 Texas Constitution, art. III, § 52 (a) and art. XI, § 3.[15] These Texas Constitutional provisions prohibit governmental entities (e.g., cities) from making "gifts of public property." A gift includes allowing the use of public property to any entity for less than market value.[16] Moreover, in 1913, the Texas Legislature adopted the statutory enabling act for the Home Rule Amendment to the Texas Constitution. That legislation details a home rule city's police powers and authority to receive rights-of-way rental compensation.[17]

Anti-donative provisions reflect the concept that public property, including public rights-of-way, is held in trust for the public good rather than for individual enrichment through private use. In Texas, value-based compensation for use of the rights of way has historically been a percentage of gross revenue franchise fee, similar to the five percent of gross revenue cable

---

[14] PN, at 12.

[15] Tex. Const. art. III, § 52 (a) "the Legislature shall have no power to authorize any …. city, town … to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever ..." Tex. Const. art. XI, § 3 "No … city, or other municipal corporation shall hereafter … make any appropriation or donation to the same, or in anywise loan its credit…." These constitutional provisions were a direct response to prevent a repeat of the dire financial consequences to local governments that had improvidently granted use of public property without value-based compensation to the then nascent railroad industry in the 1860s and 1870s.

[16] In construing a similar prohibition applicable to the State, the Texas Supreme Court stated: "a gift or loan of the credit of the state … amounts to a grant of public money in violation of Article III, Section 51. The purpose of this section and of Article XVI, Section 6, of the Constitution is to prevent the application of public funds to private purposes; in other words, to prevent the gratuitous grant of such funds to any individual or corporation whatsoever …" *State v. City of Austin*, 331 S.W.2d 737,742 (1960).

[17] Acts 1913, p. 307. Tex. Civ. Stat. art. 1175, "A home-rule municipality has the following powers… [t]o prohibit the use of any street, alley, highway or grounds of the city by any … telephone…. company… without first obtaining the consent of the governing authorities … and upon paying such compensation as may be prescribed …."

franchise fee paid by cable providers under federal law since 1984.[18] Value–based street rental fees as a method of compensation for use of the public rights-of-way have been upheld both by the U.S. and Texas Supreme Courts in the face of challenges that the charges were either "unreasonable" or an "unlawful tax."[19]

In 1893, the U.S. Supreme Court established the bedrock legal principle that - even where a federal statute granted to private entities the right to use "post roads" and restricted local governments from denying access to rights-of-way to those entities to provide telegraph services - Congress cannot appropriate or "give" local public rights-of-way to telecommunications service providers without payment of reasonable compensation for that use.[20] It is not insignificant that, in narrowly construing the Telegraph Post Roads Act of 1866,[21] the courts determined that telegraph companies could only use the "post roads" for long distance, interstate telegraph service. They could not use local roads for a local, "district" telegraph operation. That is similar to Texas Courts construing Texas statutes for long distant use, not local use, of the same era.[22]

---

[18] 47 U.S.C. § 542.

[19] The U.S. Supreme Court in *U.S. Sup. Ct., St. Louis* (1893) and the Texas Supreme Court in 1940 in *Fleming I* and *Fleming II*.

[20] *U.S. Sup. Ct., St. Louis* (1893), 100-01. "… and it is not within the competency of the national government to dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are the public property of the State."

[21] 14 Stat. 221 (1866). Federally granted rights to telegraph companies to use federal "post roads" (mail routes) for long distant interstate telegraph operations and prohibited states and local governments from interfering with interstate telegraph operations.

[22] *City of Toledo v. Western Union Tel. Co*., 107 F. 10, 14-15 (6th Cir. 1901). Telephone companies did not have the same rights as telegraph companies under the 1866 statute. This distinction was primarily based on the low use of local streets by a long distant telegraph operation versus the intensive use of local streets by a local telephone operation. *Richmond v. Southern Bell Tel. & Tel. Co*., 174 U.S. 761 (1899). Similarly, Texas courts use that same concept of different statutory rights for long distant carriers vs. local users of the right-of- way. *City of Brownwood v. Brown Telegraph & Telephone Co*. 157 S.W. 1163, 1165-1166 (Tex. 1913). *Athens Telephone Co. v. City of Athen*s, 163 S.W. 371, 373 (Tex.Civ.App.-Dallas Jan 24, 1914, writ refused) A telephone company "conducting a *local telephone business,* [has]… a *different rule* with reference to the *rights of such companies* [as]…made clear …. in the *Brownwood* Case..."; *Hooks Tel. v. Town of Leary*, 352 S.W.2d 755, 758 (Tex.Civ.App.-Texarkana 1961, no writ): "A local telephone system is not entitled to the privileges granted long distance telephone companies by Art. 1416 …. telephone companies in Texas fall into two classes, either local or long distance."

Although the principle has been well-settled for over a century, it bears reexamination considering the PN's inquiry on whether the FCC can "*define what constitutes fair and reasonable compensation under section 253(c).*"[23]

All users of the public rights-of-ways in Texas municipalities pay a value based fee ( e.g., telecommunication providers pay an access line fee under Texas Local Gov't Code, Chapter 283; cable providers pay a 5% gross revenue fee, Texas Utilities Code, Chapter 66, § 66.005 (a); electric providers pay a kwh fee based on the former gross revenue fee or an agreed to fee, Texas Utilities Code § 33.008; gas utilities pay at least a 2% of gross revenue fee (most pay 4%-5% by agreement), Texas Tax Code § 182.025 (c). To do otherwise would be discriminatory, discussed in more detail below.

**D. Unique among the fifty states: Texas retained its public lands in the 1845 Congressional Annexation Resolution.**

Advocates for the FCC to "set" rights-of-way use fees at incremental cost may be unaware of the 1845 Joint Annexation Resolution of Congress, which authorized the annexation of Texas into the United States.

Texas is different, as all Texans know. Texas occupies a unique legal position regarding potential FCC or Congressional grants of private access rights to local public properties in Texas. That's because the Joint Annexation Resolution of Congress contained the following provision concerning the state's retention of its public property:

> said republic of ***Texas*** … ***shall*** ... ***retain all*** the vacant and unappropriated ***lands*** lying ***within its limits***, …***and the*** residue of said ***lands,*** after discharging said debts and liabilities, ***to be disposed of as said state may direct***…[24]

In this context, the provision above seems to give the custodians of public property in Texas an additional legal basis for opposing any uncompensated federal "taking" of Texas' public lands.[25] This basis is separate and apart from the case law cited *infra* holding that the U.S.

---

[23] PN, at 12-14.

[24] *Joint Annexation Resolution of Congress*, March 1, 1845, 28th Congress, 2nd Session. (Emphasis added).

[25] While the issue of Texas's retaining of its public "interior" lands vis a vis the federal government has not been litigated, there has been extensive litigation with the United States concerning Texas' seaward boundary, the so called "tidelands" boundary. Once oil was discovered in the Gulf of

Constitution Fifth Amendment's "takings" clause applies to state and local public lands just the same as it does to private lands. While other states may be in different positions, there are no "federal lands" in Texas for Congress or the FCC to "dispose of" to private entities.

**E. Texas Rights-of-way Fees have long been required by law to be competitively neutral and nondiscriminatory:**

The PN asks (PN, at 14) for "comment on Mobilitie's request that the Commission interpret Section 253(c)'s 'competitively neutral and nondiscriminatory' provision as requiring that fees imposed on a provider for access to rights of way may not exceed the charges that were imposed on other providers for similar access."

It would be discriminatory not to charge value-based rental fees for use of the rights-of-way to wireless providers when – as noted above – all other users pay a value-based fee.

**F. Texas State Law Non-discrimination provisions:**

In Texas, several of the wireless infrastructure companies, including Mobilitie, Crown Castle, Zayo and Extenet, are certificated by the Public Utility Commission of Texas ("PUC") to *offer* local exchange telephone service.[26] Those companies may offer other telecommunications

---

Mexico it was important to determine how far out Texas', and other states' boundaries went into the Gulf, as opposed to the Federal Government's, to determine which entity could lease the "tidelands" property and receive the oil royalties. While most states had a three-mile limit as to their seaward boundaries, Texas claimed that in its 1836 Treaty between the Republic of Texas and the Government of Mexico ending Texas's Revolutionary War a seaward boundary of "three leagues" (approximately 10.5 miles) was established. Texas took the position that when it was annexed into the United States in 1845, it was taken with its then existing boundaries, as established in the 1836 Treaty. This issue was resolved in Texas' favor by the U.S. Supreme Court in *United States v. Louisiana, Texas, et al* [all the Gulf bordering states], 363 U.S. 1(1960). Texas's claim of the three-league seaward boundary was based in part on the United States' Annexation Resolution of 1845 and the 1836 Treaty. For an interesting discussion of the Texas case see, 363 U.S. 1, at 24 and 36-65.

[26] Tex. Util. Code, § 54.003 (5). A certificate from the PUC is required to provide--"basic telecommunications service", "local exchange telephone service" "switched access service". Tex. Util. Code, § 54.001 (3). Note -"telecommunications services" is not defined in state law, but "basic telecommunications service", "local exchange telephone service" are defined in Tex. Util. Code, § 51.002, (1) and (5), respectively.

services for which a certificate is not required. Under the state's local rights-of-way access law, they are termed "Certificated Telecommunication Providers" ("CTPs").[27]

The non-discrimination provisions of Tex. Utilities Code, Sec. 54.204 (a) and (b) (1)[28] apply to CTPs. More broadly applicable is Tex. Utilities Code § 54.204 (c), which sets the maximum municipal conduit and pole attachments rates for "any entity" under "rules adopted by the Federal Communications Commission under 47 U.S.C. Section 224(e) … [and a municipality] shall charge a single, uniform pole attachment or underground conduit rate to all entities."

The non-discrimination provisions of private and *public* property owners in Tex. Utilities Code Sec. 54.259 applies to a "*telecommunications utility,*"[29] which is a broader term that CTP. Likewise, Tex. Utilities Code Sec. 54.260 (a) provides that private and *public* property owners may not "(3) discriminate against such a utility regarding installation, terms, or compensation of a telecommunications service facility to a tenant on the owner's property; (4) demand or accept an unreasonable payment of any kind from a tenant or the utility for allowing the utility on or in the owner's property."

Federal law, 47 U. S.C. § 332 (c) (7) (B) (i) (I), provides that a municipality "shall not *unreasonably* discriminate among providers of functionally equivalent services…" This provision explicitly contemplates and allows *reasonable* discrimination among providers of functionally

---

[27] Tex. Local Gov. Code., Sec. 283.002. Definitions. (2) "*Certificated telecommunications provider*" means a person who has been issued a certificate …by the commission to offer local exchange telephone service or a person who provides voice service.

[28] Tex. Util. Code, Sec. 54.204. Discrimination by Municipality Prohibited. (Italics added)

(a) "…a municipality or a municipally owned utility may not discriminate against a certificated telecommunications provider regarding: (1) the authorization or placement of a facility in a public right-of-way; (2) access to a building; or (3) a municipal utility pole attachment rate or term." (b) "In granting consent, a franchise, or a permit for the use of a public street, alley, or right-of-way within its municipal boundaries, a municipality or municipally owned utility may not discriminate in favor of or against a certificated telecommunications provider regarding: (1) municipal utility pole attachment … rates or terms."

[29] Tex. Util. Code, § 54.002. Definitions (11) of "telecommunication utility" does not include a provider of "commercial mobile service", although subsection (E) of the definition includes a "communication carrier" broadly, which arguably could include a wireless provider.

equivalent services. Case law has held that *reasonable* (explainable) discrimination among providers of functionally equivalent services was implicitly allowed.[30]

Federal law (47 U. S.C. § 332 (c) (3) (A)) preempts the state and city from regulating "*the entry* of or the *rates charged* by any *commercial mobile service or any private mobile service*, *except* that this paragraph *shall not prohibit a State* from regulating the *other terms and conditions of commercial mobile services*."[31] In conformity, the Texas Public Utility Regulatory Act (PURA) expressly states it does not apply to commercial mobile service[32] and no PUC certificate is required (nor may be required) to provide commercial mobile service.[33] While a wireless commercial

---

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

[31] 47 U.S.C.A. § 332. Mobile services… (c) Regulatory treatment of mobile services, (3) State preemption. "….no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." Note this restriction is as to *entry* into the cellular market—it has nothing to do with access to or use of the local public rights-of-way.

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

[33] Tex. Util. Code, § 54.003 "A telecommunication utility is not required to obtain a certificate…for: … (5) a commercial mobile service…" (5); Tex. Util. Code, § 54.002. Definitions (11) of "telecommunication utility" does not include a provider of "commercial mobile service", although subsection (E) includes a "communication carrier" broadly, which arguably could include a wireless provider; however, definition (10) "Telecommunication provider", subpart (A) (iv) does include a provider of "commercial mobile service".

mobile service provider may be a CTP, that certificate is for wireline local exchange telephone service or voice service, not for providing wireless services.[34]

**G. Pending Wireless Infrastructure Companies Administrative Litigation in Texas.**

The PN asks (PN, page 9):

> "We seek comment on the extent to which litigation ensues as a result of delay or denial of siting applications. Do litigants invoke Sections 253 or 332 of the Communications Act, Section 6409(a) of the Spectrum Act, or other sources of law in support of their positions?
>
> How long does it take for such lawsuits to be resolved? How often are cases settled and how often do they proceed to final judgment?"

In Texas, the only known litigation concerns three administrative cases filed at the PUC. Two wireless infrastructure companies, ExteNet and Crown Castle, filed separate administrative claims at the PUC against Houston and Dallas in late 2015.[35] The Houston case was filed in October 2015, and is PUC Docket No. 45280, *ExteNet v. Houston.* The second, Dallas case, was filed in December 2015, and is PUC Docket No. 45470, *Crown Castle v. Dallas*. The *Crown Castle v. Dallas* case is being been held in abeyance until the Houston case has been decided. The third case was just filed yesterday afternoon, March 7, 2017 and is pending. It is PUC Docket No. 46914, *ExteNet v. Beaumont.*

The Houston and Dallas cases are virtually identical on the factual and the legal issues presented. The third claim against Beaumont, appears to be substantially similar, but due to its recent filing, it has not been reviewed in detail. The administrative claim in all three cases is based on state law (Tex. Loc. Gov. Code., Chapter 283), not federal law. The two wireless infrastructure companies have asserted that Chapter 283 allows them to install wireless facilities (e.g., antenna, and related equipment) in the local rights-of-way. The cities position is that the state law applies

---

[34] For example, see PUC Docket No. 30616, *In re Application of NextG Networks of Illinois, Inc.*, in which the applicant stated it was not applicable to wireless commercial mobile service providers. Feb. 9, 2005 filing stated "…. NextG is a fiber provider, *not a wireless provider*……" NextG was Crown Castles' predecessor's, which specifically stated it was *not be providing wireless service* in its application.

35 TML is also aware of a permit issuance and removal order dispute with Mobilitie in Denison, Texas. On Feb. 23, 2017, after a 3-hour hearing was held, with witnesses, the City of Denison removal order was upheld.

to allow installation of facilities for wireline services, not facilities for wireless services in the rights-of-way. The principal legal dispute is whether the state law applies to these wireless facilities, and to a lesser degree if the connecting fiber may or may not be allowed access as a dark fiber service under Chapter 283.

On February 24, 2017, the administrative law judges in the *ExteNet v. Houston* case issued a preliminary proposal for decision ("PFD") agreeing with ExteNet to allow the wireless infrastructure company to access the local rights-of-way under state law. This PFD remains a vigorously contested matter as to its scope and application, and is subject to the parties' exceptions. It is scheduled to go before the full PUC for consideration March 30, 2017. The PUC may adopt it, revised it, reject it, or even hold it in abeyance pending recently filed state legislation allowing wireless companies access to the rights-of-way (S.B. 1004).

From filing, through robust discovery, to a hearing on the merits, to full briefing, to a final ruling by the full PUC is estimated to take 18 months. It is not known if any party will appeal.

**H. In Texas, there are no state legislative grants to wireless entities, for wireless transmission equipment, including small cell and DAS, or for any Commercial Mobile Services provider, to use the public-rights of ways, absent city, discrationary consent:**

If there is to be any use of the public rights-of-ways by wireless providers in Texas, that must be granted by either the State, which has not occurred, or by separate express agreement by the city. A city *is not required to lease city property*, facilities, infrastructure to a wireless provider.[36] Therefore, no time lines or "delays" can be imputed for "failure"' to process applications in a "timely" manner, as claimed by Mobilitie, at least not in Texas. However, once permission has been granted to one provider, other providers must be treated similarly.

The legislative grants to use the public-rights of ways in Tex. Loc. Gov. Code, Chapter 283 are restricted to the defined entities of CTPs, which are those that provide wireline services.[37]

---

[36] *Omnipoint Commc'ns Enters., L.P. v. Township of Nether Providence*, 232 F. Supp. 2d 430, 433-435 (E.D. Pa. 2002). "…Township's refusal to lease its own property does not constitute an exercise of zoning or regulatory powers, the Township had no duty under the TCA to negotiate or ultimately to lease portions of municipal property to Omnipoint for the purpose of installing an antenna."

[37] Tex. Local Gov. Code., Sec. 283.052. Effect of Payment of Right-of-Way Fees to Municipality. (a) …., a certificated telecommunications provider that complies with this chapter …:(1) may erect

Wireless providers, including those with DAS facilities, even those that are federal "commercial mobile services providers,"[38] (i.e., cellular telephone) are not included in those state statutes and have no state legislative grant to use the rights-of-way. Therefore, a wireless commercial mobile service providers' request to use city property, be it for a tower, a small cell, or a DAS, must first have *separate* city authority to use city property or to install its facilities in the rights-of-way.

There is pending recently filed state legislation allowing wireless companies access to the rights-of-way (S.B. 1004).

### I. Texas Municipalities Recent Experiences in Allowing RoW Access to Wireless Providers: Collaboration, not Confrontation.

#### 1. *Dallas-A tale of two Providers*.

In the last year, Dallas, Texas, has issued over 200 permits for small cell or DAS locations. Those permits were issued through its standard Temporary License Agreement (TLA). It is significant that most of those permits were issued to companies that accepted the standard terms in that TLA, which set forth reasonable conditions for use of the local rights-of-way. However, some wireless infrastructure companies wanted to re-negotiate the standard terms of the TLA to allow third-party equipment, asking the city to revise definitions, and raising possible section 6409 issues. Due to these extraordinary demands, the permitting process is delayed in some instances, pending these negotiations. In some instances, Dallas has offered alternative terms and has waited literally months for a reply on whether the revised terms were acceptable. Such intransigence in negotiations causing delays in permit approvals should not be used to justify FCC actions.

---

poles or construct conduit, cable, switches, and related appurtenances and facilities and excavate within a public right-of-way to provide telecommunications service…"

[38] 47 USC § 332 (d) Definitions. For purposes of this section--(1) the term "*commercial mobile service*" means any *mobile service* (as defined in section 153 of this title) that is provided for profit and makes *interconnected* service available (A) to the *public* or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission …."

**2. *Houston-Collaboration with wireless provider stakeholders to develop Master License Agreement.***

In the last year, Houston, Texas, has issued over 400 permits for small cell or DAS locations. Those permits were issued through its Master License Agreement (MLA). The MLA was negotiated with stakeholders over several months in the fall of 2015 and formally adopted by the city in late 2015. The MLA sets forth reasonable conditions for use of the local rights-of-way. To date Verizon, Mobilitie, Crown Castle and Zayo have all agreed to the terms in the MLA. One stakeholder that participated in the negotiations did not agree. That is ExteNet, which is discussed above. However, for those wireless infrastructure companies that are parties to the MLA permits have been approved for 400 plus individual sites. Other than ExteNet, there have been no formal complaints on the process to site small cells in the public rights-of-way in Houston. These kinds of collaborative efforts between municipalities and wireless infrastructure companies should be recognized as a best practice nationwide by the FCC. TML would refer the FCC to Houston's filed Comments for additional details.

**3. *San Antonio-First City in Texas with MLA in 2014.***

San Antonio, Texas, had the first Master License Agreement with Verizon for small cell/DAS in Texas in 2014 and should be commended. Other providers have since agreed to that same form Agreement. TML would refer to San Antonio's Comments for more detail.

**4. *Other Texas Municipalities' Experience.***

*Cities have taken differing local approaches to review and allow wireless facilities in the rights-of-way:*

In addition to Houston, Dallas and San Antonio, a number of other Texas cities have entered into agreements to allow small cells/DAS in the local rights of way, among them: College Station and Galveston.

The City of McAllen is poised to initiate a pilot program of 400 sites using a MLA similar to Houston's. The City of Austin has gone through a stakeholder rulemaking and is about to implement a pilot program with a master license agreement to allow wireless facilities in the rights-of-way. For additional details see the City of Austin's filed Comments of March 8, 2017.

*"Towers" are being installed, not "utility poles"*:

A number of Texas cities have had significant processing delays caused by the wireless infrastructure companies' misinformation in submitted applications and plans. It is not uncommon for at least one wireless infrastructure company to state in their applications and in their plans, that they are installing a "utility pole" when they are not. After the plans are reviewed by the city, when it becomes clear that they are installing a structure to support an antenna, which is a "tower", as defined by FCC Rules,[39] not a "utility pole.", the process may need to start anew.

This type of mischaracterization of the structure being installed not only delays the city process, it raises confusion and further delays under the National Historic Preservation Act (NHPA) Section 106 Notice process. For example, this type of incorrect plan information was submitted to the City of Denison, Texas by Mobilitie in describing three structures being built to support an antenna--a 83' 6" structure (Chestnut St.), an 84' 5" structure (Coffin St.), and a 120' monopole structure (Morton St.) -- all labeled in the plans as "utility poles", when they were all towers. Mobilitie's mischaracterization of the 120 foot "tower" on Morton St. as a "utility pole" in their plans was also confusing to the Texas Historical Commission (THC) in reviewing Mobilitie's NHPA Section 106 Notice for a site in Denison.

It should also be noted that, inexplicably, *between Christmas and New Year's 2016, Mobilitie actually installed the 83' 6" tower on Chestnut St., which had been described as a "utility pole" in the plans* (See Attachment 1), *within the City's Historic District for which no NHPA, Section 106 notice was given*, as was noted the attached February 16, 2017, THC letter. (See Attachment 2) And also, inexplicably, while that tower on Chestnut was subsequently removed by Mobilitie, within a few days of that removal Mobilitie resubmitted a request to the city to re-install it – still within the historic district, and still without any Section 106 Notice being filed that the City of Denison is aware of to date.

[39] 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

**III. The Takings Clause of the Fifth Amendment to the U.S. Constitution bars Congress (and the FCC) from Setting Local Rights of Way Use Rental Fees without "Just Compensation". In Texas, just compensation means value-based compensation.**

> ***Even interstate business must pay its way--in this case for its right-of-way ….***
>
> *Postal Tel.-Cable Co. v. City of Richmond*, 249 U.S. 252, 259 (1919).

The federal government cannot compel local governments to allow wireless applicants access to public municipal property as that would be a Fifth Amendment unconstitutional taking of municipal property without just compensation.[40] The Fifth Amendment to the U.S. Constitution has long applied to local public property.[41]

> …when the Federal Government thus takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it…[42]
>
> Therefore, it is most reasonable to construe the reference to "private property" in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States. [FN 15 omitted] Under this construction, the same principles of just compensation presumptively apply to both private and public condemnees."[43]

The Fifth Amendment bars Congress (and the FCC) from mandating private use of public property without compensation. Because Texas rights-of-way are public property, they are protected from federal "takings" for less than "just compensation" by the Takings Clause of the

---

[40] *See Ark. Game & Fish Comm'n v. United States*, 133 S.Ct. 511, 518 (2012); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328-29 (11th Cir. 1999). The law is clear that local governments, no less than private landowners, are entitled to the protection of the Takings Clause of the Fifth Amendment. See, e.g., *United States v. 50 Acres of Land*, 469 U.S. 24, 31 & n.15 (1984); *St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 100-02 (1893).

[41] *United States v. 50 Acres of Land*, 469 U.S. 24, 31, 105 S.Ct. 451, 445-46, 83 L.Ed. 2d 376 (1984). "… the reference to "private property" in the Takings Clause of encompass[es] …. property of … local governments … the same principles of just compensation presumptively apply to both private and public condemnees."

[42] *United States v. Carmack*, 329 U.S. 230, 242 (1946).

[43] *United States v. 50 Acres of Land*, 469 U.S. 24, 31, 105 S.Ct. 451, 445-46, 83 L.Ed. 2d 376 (1984). "When the United States condemns a local public facility, the loss to the public entity, to the persons served by it, and to the local taxpayers may be no less acute than the loss in a taking of private property." In this case, it was the property of the City of Duncanville, Texas.

Fifth Amendment to the U.S. Constitution. Neither may the FCC constitutionally preempt state law to allow private use of the public rights-of-way by wireless providers or wireless infrastructure companies without "just compensation".

## IV. FCC is precluded by statute from adjudicating rights of way disputes under Section 253 (c).

The FCC lacks authority to preempt or even review section 253 (c) local rights-of-way compensation matters as that is precluded by Section 253, subsection (d) and by Section 601 (c) of the 1996 Federal Telecommunications Act ("FTA") regarding state and local authority.[44] An attempt by the FCC to "set" rights-of-way use fees at less than market value in Texas will further compound the lack of FCC authority and visit constitutional error on the FCC.

*FCC Limits of Preemption under Section 253, subsection (d):*

There have been legal arguments over whether the FCC has authority to adjudicate rights-of-way disputes, which the FCC has attributed to "in large part from the language and legislative history of subsection 253 (d)."[45] However, when the Eleventh Circuit reviewed the same legislative history and the language in subsection (d) before and after it was amended by Congress to its current text, it concluded:

> it is clear that subsection (d), despite its less-than-clear language, serves a single purpose-it *establishes different forums based on the subject matter of the challenged statute or ordinanc*e. … we hold that *a private cause of action in federal district court exists under § 253* to seek preemption of a ... local … regulation only when that …. regulation purports to address the management of the public rights-of-way, thereby potentially *implicating subsection (c)*. [FN 14 omitted] All *other challenges brought under § 253 must be addressed to the FCC*.[46]

The final language in subsection (d) was intentionally revised by Congress to narrow the scope of the FCC's preemptive jurisdiction. It now applies only to violations under subsection (a)

---

[44] Pub. L. 104-104, Title VI, sec. 601, Feb. 8, 1996, 110 Stat. 143.

[45] *In the Matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting,* FCC 11-51, WC Docket No. 11-59, Notice of Inquiry, ¶ 58, (April 7, 2011). ("Broadband and Rights of Way NOI" or "NOI").

[46] *BellSouth Telecomm. Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1191 (11th Cir. 2001) ("*BellSouth*"). (Italics added).

or (b). Congress omitted from subsection (d), subsection (c), on rights of way management or compensation disputes.

The "initial" subsection (d) was amended into its final, adopted version by striking two words: "this section." In other words, *the unamended subsection (d) would have included all subsections of 253-- (a), (b) and (c) -- but the final version replaced those two stricken words of "this section" with "subsection (a) or (b)"*. For absolute clarity in showing these final revisions in that amendment, below is a mark-up of subsection (d) from "[i]n its initial form".[47]

> If … the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with subsection (a) or (b) ~~this section~~, the Commission shall ~~immediately~~ preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.[48]

As Senator Gorton, the author of the amendment, stated at the time:

> …the *rules that a city … imposes on how its street rights of way are going to be utilized*, whether there are above-ground wires or underground wires, what kind of equipment ought to be used in excavations, what hours the excavations should take place, *are a matter of primarily local concern* and, of course, they are *exempted by subsection (c)* of this section ... *in the case of these purely local matters dealing with rights of way, there will not be a jurisdiction* [sic] [1191] *on the part of the FCC* immediately to enjoin those local ordinances. [The Gorton amendment] *retains not only the right of local communities to deal with their rights of way, but their right to meet any challenge on home ground in their local district courts…The appropriate balance is to leave purely local concerns to local entities...*[49]

Congress could not have been clearer.

*FCC Limits of Preemption under Section 601(c) in the 1996 FTA:*

However, to avoid an overly broad reading of any provision in the 1996 FTA regarding state and local authority, Congress included Section 601(c) in the 1996 FTA. Section 601(c) sets the framework for construing the breadth and extent of FCC authority under section 253 (d). Section 601(c) provides:

---

[47] *BellSouth*, at 1190. "Senate Bill 652 in the 104th Congress. In its initial form, subsection (d) read…"

[48] Stricken words and underlying were added for emphasis.

[49] *BellSouth*, at 1190-1191. *See also*, *Qwest Corp. v. City of Santa Fe, N.M.*, 380 F.3d 1258, 1265-66 (10th Cir. 2004).

(c) FEDERAL, STATE AND LOCAL LAW. -

> (1) NO IMPLIED EFFECT. - This Act [1996 FTA] and the amendments made by this Act *shall not be construed to modify, impair, or supersede* Federal, State or *local law unless expressly so provided in such Act or amendments*. [Italics added].

Because section 253 (d) did not include subsection (c) in the grant of FCC enforcement jurisdiction, the FCC may not by implication assert such jurisdiction to review or preempt in subsection (c) disputes. The Congressional legislative record is clear: The FCC has no role in any alleged section 253 (c) violation. Disputes under section 253 (c) are to be adjudicated by the local courts, as Congress intended, as the 1996 FTA provided, and as the *BellSouth* court stated.[50]

While to the extent section 253 language is ambiguous -- the FCC may have greater latitude because it should not be "bound by …courts' statutory interpretations."[51] But neither subsection (d) nor (c) suffers from such ills of draftsmanship. As revised by Congress to its final text, subsection (d) contains has no ambiguity on this point. It is a model of clarity that narrows the FCC's scope of preemptive authority to subsections (a) and (b) and denies the FCC any authority to review subsection (c) disputes concerning rights-of-way management and compensation issues by its omission. Where clarity prevails, the agency may not invent ambiguity.

The FCC has acknowledged that in the twenty-one years since section 253 was enacted, despite numerous opportunities, the FCC "has not taken action to resolve this issue" of its jurisdiction to adjudicate rights of way cases or preemption under section 253 (c).[52] That the FCC has not asserted any jurisdiction "to resolve this issue" speaks volumes; apparently even the FCC has recognized since 1996 that it lacks adjudicatory and preemptive jurisdiction to review section 253 (c) disputes.

---

[50] *BellSouth*, at 1191.

[51] NOI ¶ 58. And s*ee* NOI, n.67. The cases cited in this NOI note do not discuss the FCC's jurisdiction under subsection (d) to review section 253 (c) disputes. The discussion was in the context of whether a private right of action existed to bring a claim in *court* under section 253 (c).

[52] NOI ¶ 58, and n.65, citing, *Petition of the State of Minnesota for Declaratory Ruling Regarding the Effect of Section 253 on an Agreement To Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights of Way*, CC Docket No. 98-1, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21730 (1999); Nor did the FCC act in 2009 or 2014, See *PN*, Page 12.

While the courts have taken "differing approaches" on whether the FCC holds section 253 (c) review jurisdiction,[53] the courts "differing approaches" have not related to the FCC's jurisdiction under section 253 (c). Rather, the courts have differed on interpretations of what constitutes a violation section 253 *(a)*, which the FCC has jurisdiction under section 253 (d) to review. To a lesser degree, the courts have differed on whether a private cause of action can be taken in *court* to enforce alleged section 253 *(c)* violations.[54] The courts have not differed on interpretations of the FCC's section 253 (d) preemption authority to resolve section 253 (c) issues. As the *BellSouth* Court stated, the FCC is granted no such jurisdiction to adjudicate or to preempt local rights of way regulations or rights of way compensation where section 253 (c) is "potentially implicat[ed]", those section 253 (c) issues are for the courts.[55]

In the past, the FCC has asserted broad preemptive authority over local franchise requirements, and when they did the courts have held the FCC has no such broad preemptive authority.[56] Section 253 (d) presents an equivalent situation on the lack of FCC preemptive authority to review or adjudicate rights of way management or compensation disputes that are within the purview of section 253 (c).

## CONCLUSION

---

[53] NOI ¶ 58, and NOI n.66, citing *BellSouth*, at 1189.

[54] *BellSouth, at* 1186-87 discussing differing courts interpretations of § 253; at 1187-1191, with its analysis, at 1191, *holding there is a private right of action under § 253 (c), and that § 253 (c) matters are to be litigated in the courts and not at the FCC*. *See also Sw. Bell Tele. L.P. v City of Houston*, 529 F. 3d 257, 261 (5th Cir. 2008) discussing the split among five federal circuits of appeal on private right of action under § 253 (c) for § 1983 claims, noting the narrowing of those private rights of action after 2002, post-*Gonzaga Univ. v. Doe*, 536 U.S. 273, 283, 122 S.Ct. 2268, 153 L.Ed. 2d 309 (2002), which required that courts "first determine whether Congress *intended to create a federal right*". (Emphasis in original).

[55] *BellSouth*, at 1191.

[56] *See*, *City of Dallas v. FCC*, 165 F.3d 341, 347-48 (5th Cir. 1999) "The FCC's broad reading of preemptive authority also conflicts with Supreme Court precedent. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Court held that if Congress intends to preempt a power traditionally exercised by a state or local government, 'it must make its intention to do so `unmistakably [Page 348] clear in the language of the statute.' *Id.* at 460…" Held that FCC rules could not preempt a city required local franchise to use the right-of- ways to provide OVS service, a form of cable services newly authorized by the 1996 FTA.

Texas cities, as are cities across the country, are revising city codes and negotiating reasonable license agreements to accommodate wireless facilities in the rights-of-ways. However, what is done to accommodate placement of wireless facilities rights-of-way in the plains of Nebraska versus rights-of-ways on the Texas coast, subject to hurricanes, are different. The conditions are different, so treatment should be different. Respectfully, TML would ask that the FCC review the best practices nationwide and share those, while accommodating, on a case by case basis, different terms and conditions in different locales.

Respectfully submitted,

Clarence A. West, Attorney

By: /s/ Clarence A. West

Clarence A. West
Texas Bar No. 21196300

4001 Lob Cove
Austin, Texas 78730
Telephone: (512) 401-3468
Email: cawest@cawestlaw.com
ATTORNEY FOR TEXAS MUNICIPAL LEAGUE

**Attachment 1**

**Mobilitie's June 2016 plans depicting an installation of an 83' 6' tower on Chestnut Street, Denison, Texas, within an historic district, and described throughout as a "utility pole".**

# SITE ID: 9TXB008013 / DA90XSBM2A
# W CHESTNUT ST & S FANNIN AVE
# DENISON, TX 75020

Know what's **below.**
**Call** before you dig.

## GENERAL NOTES

THE FACILITY IS UNMANNED AND NOT FOR HUMAN HABITATION. A TECHNICIAN WILL VISIT THE SITE AS REQUIRED FOR ROUTINE MAINTENANCE. THE PROJECT WILL NOT RESULT IN ANY SIGNIFICANT DISTURBANCE OR EFFECT ON DRAINAGE; NO SANITARY SEWER SERVICE, POTABLE WATER OR TRASH DISPOSAL IS REQUIRED AND NO COMMERCIAL SIGNAGE IS PROPOSED.

## SITE INFORMATION

| | |
|---|---|
| PROPERTY OWNER: | PUBLIC RIGHT-OF-WAY |
| ADDRESS/CROSS STREET: | W CHESTNUT ST & S FANNIN AVE<br>DENISON, TX 75020 |
| APPLICANT: | MOBILITIE, LLC |
| APPLICANT ADDRESS: | 925B PEACHTREE STREET NE, SUITE 710<br>ATLANTA, GA 30309<br>PHONE: (312) 638-5400 |
| LATITUDE: | N 33° 45' 16.7" (33.754631) |
| LONGITUDE: | W 96° 32' 31.7" (-96.542138) |
| LAT/LONG TYPE: | NAD 83 |
| GROUND ELEVATION: | ±756' AMSL |
| COUNTY: | GRAYSON COUNTY |
| JURISDICTION: | DENISON CITY |

## BEFORE SCALING:

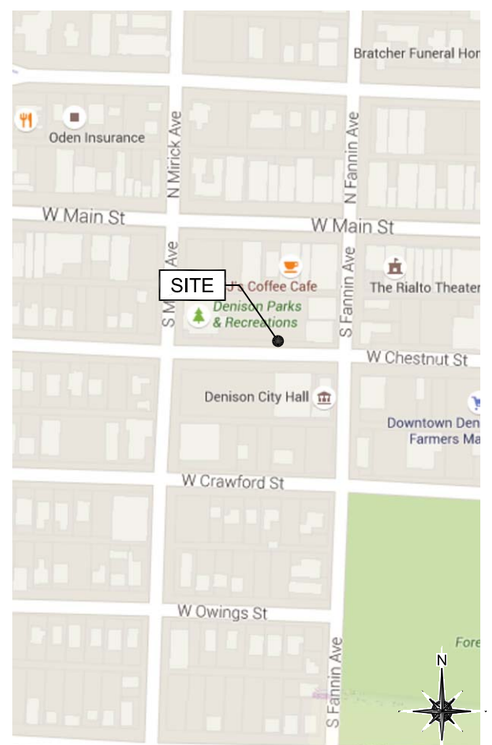
CONTRACTORS SHALL VERIFY ALL PLANS, EXISTING DIMENSIONS & FIELD CONDITIONS ON THE JOB SITE & SHALL IMMEDIATELY NOTIFY THE ARCHITECT/ENGINEER IN WRITING OF ANY DISCREPANCIES BEFORE PROCEEDING WITH THE WORK OR BE RESPONSIBLE FOR SAME.

## LOCATION MAPS

### VICINITY MAP

MAP DATA © 2015 GOOGLE

### REGIONAL MAP




MAP DATA © 2015 GOOGLE

## PROJECT DESCRIPTION

END USER PROPOSES TO INSTALL EQUIPMENT ON PROPOSED UTILITY POLE WITHIN AN EXISTING RIGHT-OF-WAY. THE SCOPE WILL CONSIST OF THE FOLLOWING:

- INSTALL PROPOSED BACKHAUL TRANSPORT ON PROPOSED UTILITY POLE

## CODES

2015 INTERNATIONAL BUILDING CODE
2014 NATIONAL ELECTRICAL CODE

## DRAWING INDEX


| SHEET NO: | SHEET TITLE |
|---|---|
| 0.0 | TITLE SHEET |
| 1.0 | SITE PLAN & EXHIBIT PHOTO |
| 2.0 | POLE ELEVATION |
| 2.1 | POLE ELEVATION |
| 3.0 | ANTENNA & EQUIPMENT MOUNTING DETAILS |
| 3.1 | ANTENNA & EQUIPMENT SPECIFICATIONS |
| 4.0 | ELECTRICAL DETAILS |
| 5.0 | GROUNDING DETAILS |
| 6.0 | EQUIPMENT & SAFETY LABELS |
| 6.1 | TRAFFIC CONTROL PLAN |
| 6.2 | TRAFFIC CONTROL PLAN |
| 6.3 | TRAFFIC CONTROL PLAN |
| GN-1 | GENERAL NOTES |
| GN-2 | GENERAL NOTES |


THESE DRAWINGS ARE BASED ON SITE INFORMATION PROVIDED TO KMB. KMB HAS NOT PERFORMED FIELD VERIFICATION.

## ARCHITECT/ENGINEER


KMB DESIGN GROUP, LLC
1800 ROUTE 34, SUITE 209
WALL, NJ 07719
FOR QUESTIONS EMAIL: designteam@kmbdg.com
TEL: (732) 280-5623
FAX: (732) 280-3980
www.KMBDG.com


mobilitie

| | |
|---|---|
| PROJECT NO: | 9TXB008013 |
| DRAWN BY: | RC |
| CHECKED BY: | SJB |

| | | |
|---|---|---|
| A | 06-20-16 | FOR CLIENT REVIEW |

KMB DESIGN GROUP, LLC

Stephen A. Bray
PROFESSIONAL ENGINEER

PRELIMINARY
NOT FOR CONSTRUCTION

TX LICENSE: 101593 6/20/16


IT IS A VIOLATION OF THE LAW FOR ANY PERSON, UNLESS THEY ARE ACTING UNDER THE DIRECTION OF A LICENSED PROFESSIONAL ENGINEER, TO ALTER THIS DOCUMENT


DA90XSBM2A

W CHESTNUT ST & S FANNIN AVE
DENISON, TX 75020

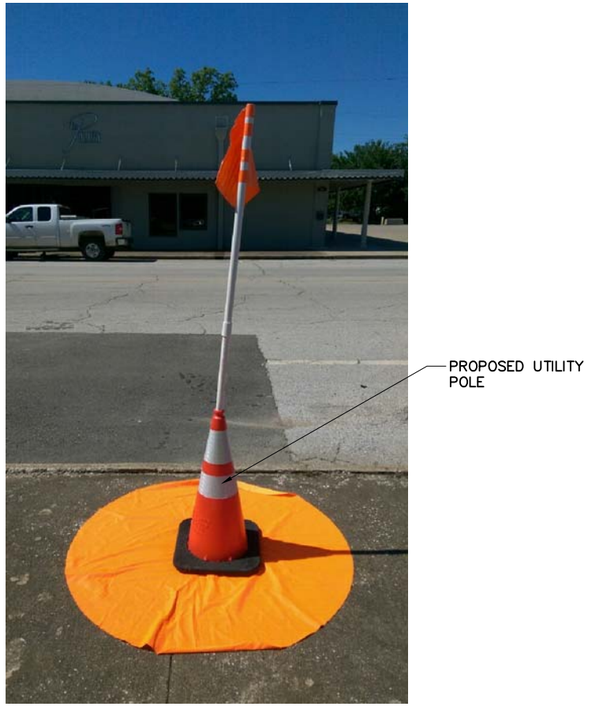
UTILITY POLE

SHEET TITLE

TITLE SHEET

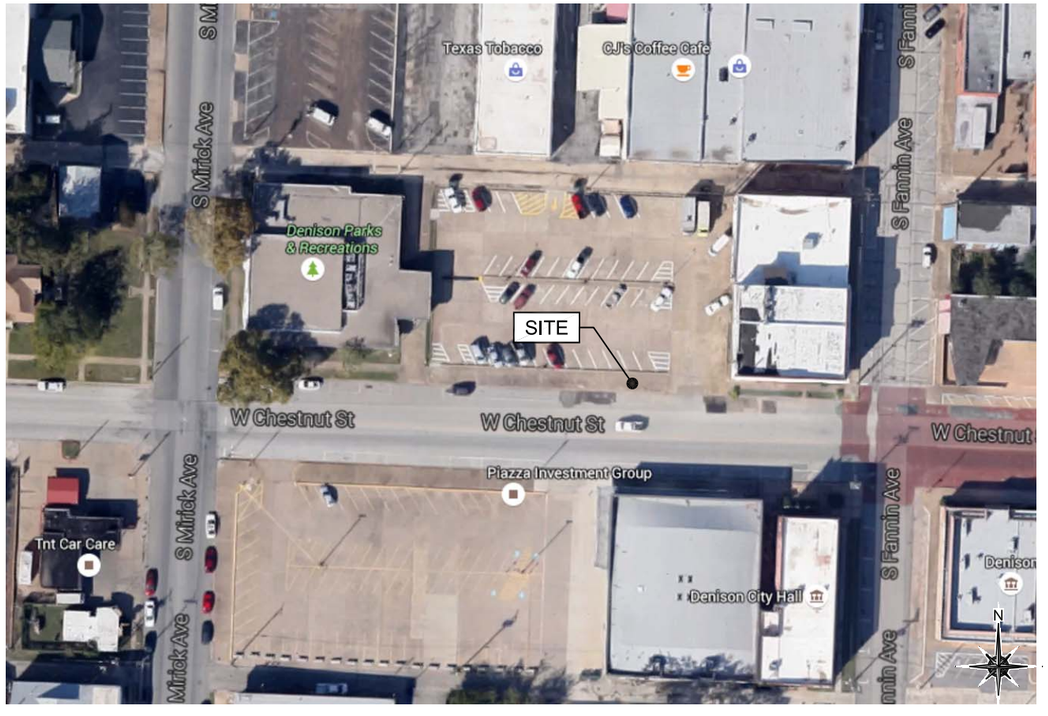
SHEET NUMBER

0.0



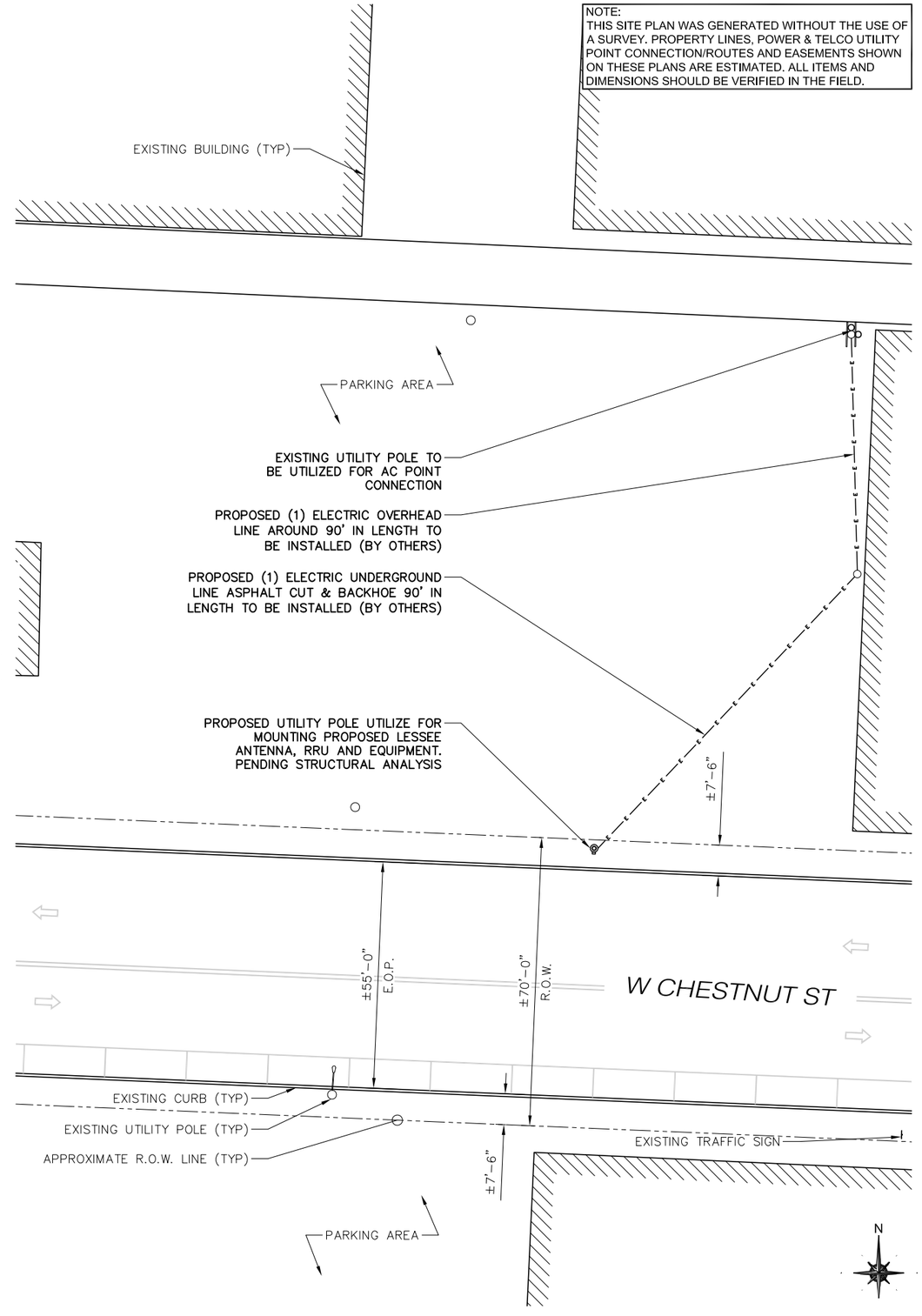

1 **EXHIBIT PHOTO**

**SCALE: NTS**




2 **AERIAL SITE LOCATION**

**SCALE: NTS**




3 **ENLARGED SITE PLAN**

**11x17 SCALE: 1/32" = 1'-0"** **24x36 SCALE: 1/16" = 1'-0"**

mobilitie

| | |
|---|---|
| PROJECT NO: | 9TXB008013 |
| DRAWN BY: | RC |
| CHECKED BY: | SJB |

| | | |
|---|---|---|
| A | 06-20-16 | FOR CLIENT REVIEW |

KMB DESIGN GROUP, LLC

Stephen A. Bray
PROFESSIONAL ENGINEER

PRELIMINARY
NOT FOR CONSTRUCTION

TX LICENSE: 101593 6/20/16

IT IS A VIOLATION OF THE LAW FOR ANY PERSON, UNLESS THEY ARE ACTING UNDER THE DIRECTION OF A LICENSED PROFESSIONAL ENGINEER, TO ALTER THIS DOCUMENT

DA90XSBM2A

W CHESTNUT ST & S FANNIN AVE
DENISON, TX 75020

UTILITY POLE

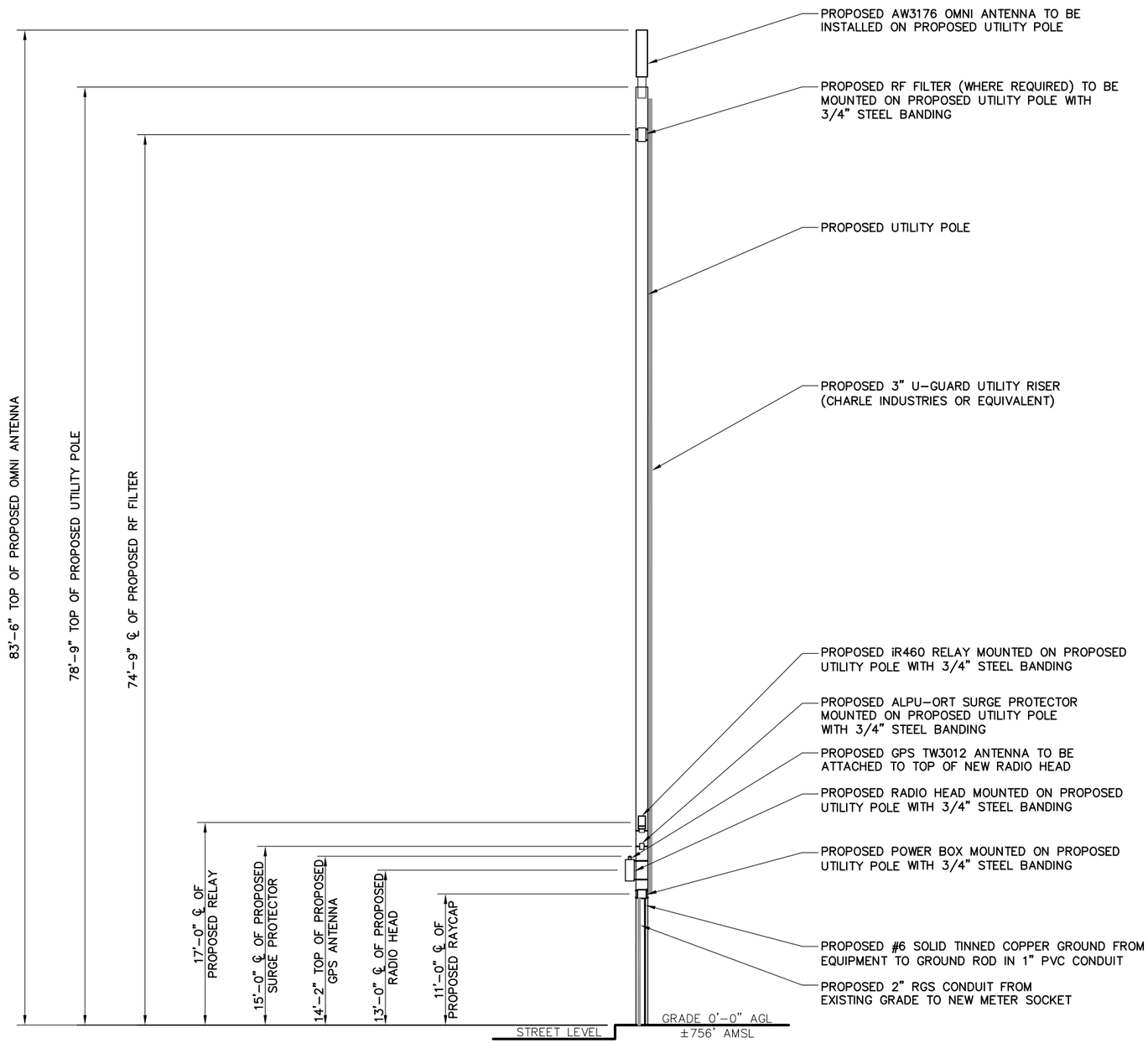
SHEET TITLE

SITE PLAN & EXHIBIT PHOTO

SHEET NUMBER

1.0

NOTE:
KMB DESIGN GROUP, LLC HAS NOT PERFORMED A FULL STRUCTURAL ANALYSIS ON THE POLE AND MOUNTS AS PART OF THIS SUBMITTAL. STRUCTURAL ANALYSIS REPORT TO BE PROVIDED UNDER SEPARATE COVER AND OBTAINED BY CONTRACTOR PRIOR TO CONSTRUCTION.




1 **EAST ELEVATION**

**11x17 SCALE: 3/32" = 1'-0"** | **24x36 SCALE: 3/16" = 1'-0"**

mobilitie

| | |
|---|---|
| PROJECT NO: | 9TXB008013 |
| DRAWN BY: | RC |
| CHECKED BY: | SJB |

| | | |
|---|---|---|
| A | 06-20-16 | FOR CLIENT REVIEW |

KMB DESIGN GROUP, LLC

Stephen A. Bray
PROFESSIONAL ENGINEER

PRELIMINARY
NOT FOR CONSTRUCTION

TX LICENSE: 101593 6/20/16

IT IS A VIOLATION OF THE LAW FOR ANY PERSON, UNLESS THEY ARE ACTING UNDER THE DIRECTION OF A LICENSED PROFESSIONAL ENGINEER, TO ALTER THIS DOCUMENT

DA90XSBM2A

W CHESTNUT ST & S FANNIN AVE
DENISON, TX 75020

UTILITY POLE

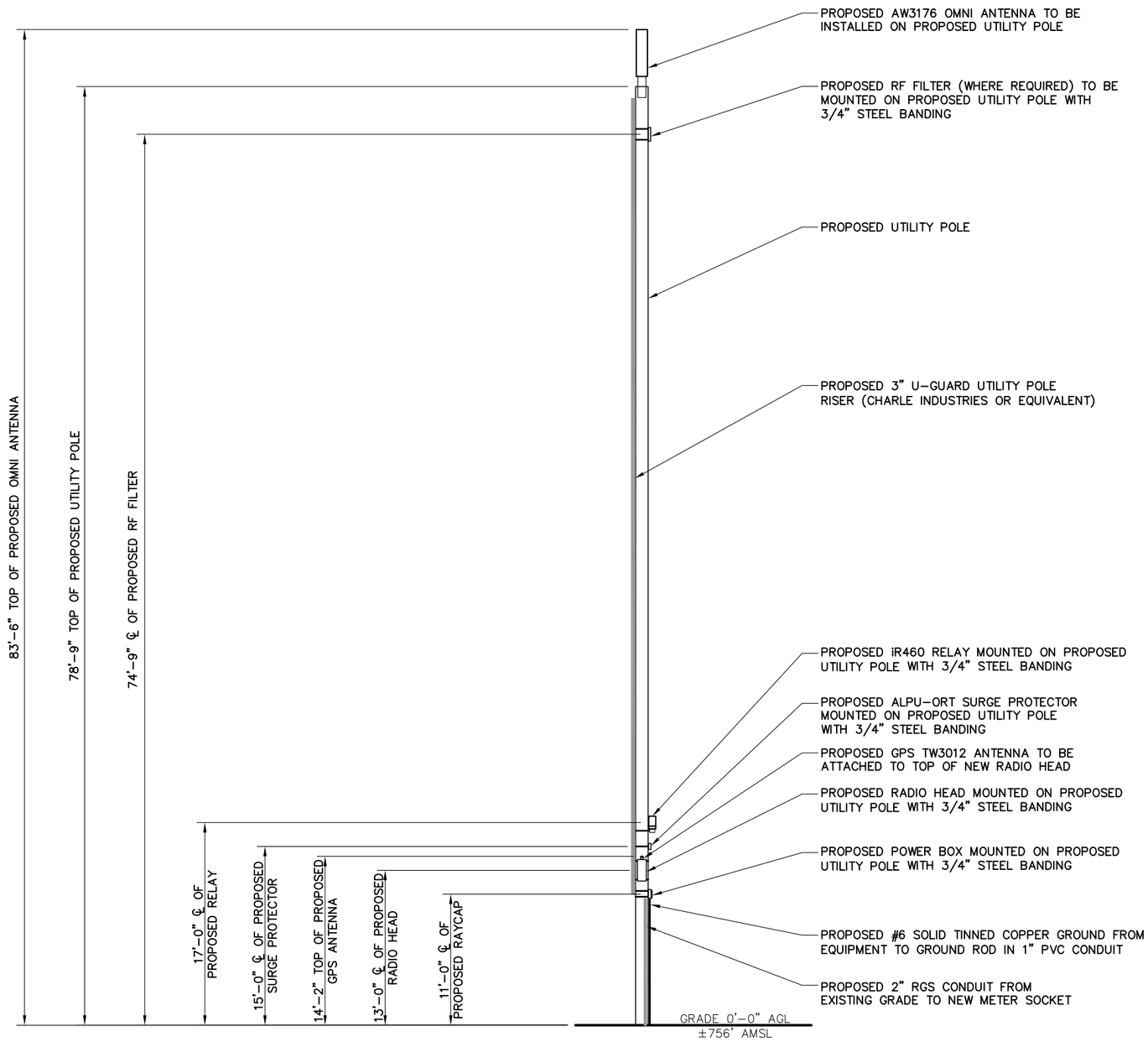
SHEET TITLE

POLE ELEVATION

SHEET NUMBER

2.0

NOTE:
KMB DESIGN GROUP, LLC HAS NOT PERFORMED A FULL STRUCTURAL ANALYSIS ON THE POLE AND MOUNTS AS PART OF THIS SUBMITTAL. STRUCTURAL ANALYSIS REPORT TO BE PROVIDED UNDER SEPARATE COVER AND OBTAINED BY CONTRACTOR PRIOR TO CONSTRUCTION.




1 **SOUTH ELEVATION**

**11x17 SCALE: 3/32" = 1'-0"** | **24x36 SCALE: 3/16" = 1'-0"**

mobilitie

| | |
|---|---|
| PROJECT NO: | 9TXB008013 |
| DRAWN BY: | RC |
| CHECKED BY: | SJB |

| | | |
|---|---|---|
| A | 06-20-16 | FOR CLIENT REVIEW |

KMB DESIGN GROUP, LLC

Stephen A. Bray
PROFESSIONAL ENGINEER

PRELIMINARY
NOT FOR CONSTRUCTION

TX LICENSE: 101593 6/20/16

IT IS A VIOLATION OF THE LAW FOR ANY PERSON, UNLESS THEY ARE ACTING UNDER THE DIRECTION OF A LICENSED PROFESSIONAL ENGINEER, TO ALTER THIS DOCUMENT

DA90XSBM2A

W CHESTNUT ST & S FANNIN AVE
DENISON, TX 75020

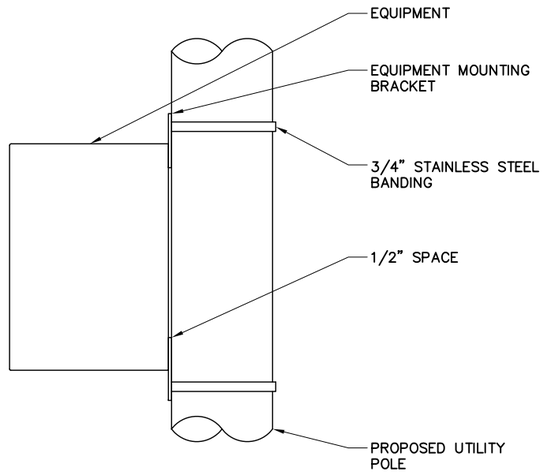
UTILITY POLE

SHEET TITLE

POLE ELEVATION

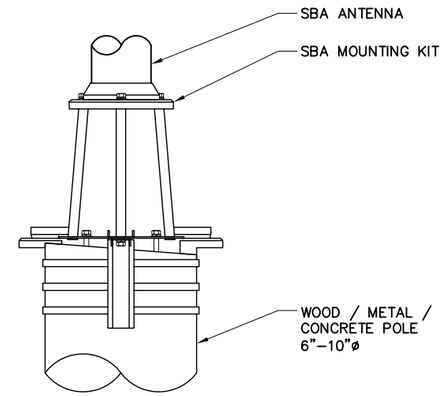
SHEET NUMBER

2.1



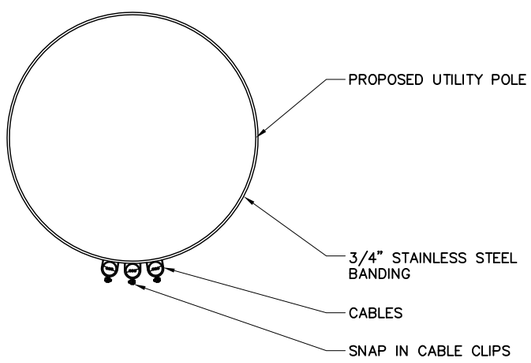

1 **EQUIPMENT CONNECTION DETAIL**

**SCALE: NTS**




2 **ANTENNA MOUNTING DETAIL**

**SCALE: NTS**




3 **CABLE ROUTING DETAIL**

**SCALE: NTS**

mobilitie

| | |
|---|---|
| PROJECT NO: | 9TXB008013 |
| DRAWN BY: | RC |
| CHECKED BY: | SJB |

| | | |
|---|---|---|
| A | 06-20-16 | FOR CLIENT REVIEW |

KMB DESIGN GROUP, LLC

Stephen A. Bray
PROFESSIONAL ENGINEER

PRELIMINARY
NOT FOR CONSTRUCTION

TX LICENSE: 101593 6/20/16

IT IS A VIOLATION OF THE LAW FOR ANY PERSON, UNLESS THEY ARE ACTING UNDER THE DIRECTION OF A LICENSED PROFESSIONAL ENGINEER, TO ALTER THIS DOCUMENT

DA90XSBM2A

W CHESTNUT ST & S FANNIN AVE
DENISON, TX 75020

UTILITY POLE

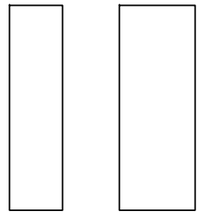
SHEET TITLE

ANTENNA & EQUIPMENT MOUNTING DETAILS

SHEET NUMBER

3.0

AH1000
RADIO HEAD
21.6" x 5.6" x 9.0", ±29.3 lbs




1 **EQUIPMENT SPECIFICATIONS**

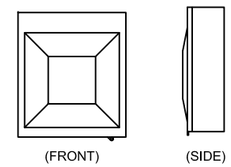
**SCALE: NTS**

TW3012
GPS ANTENNA
0.8" x 2.6"Ø, ±0.3 lbs

2 **EQUIPMENT SPECIFICATIONS**

**SCALE: NTS**

RSTAC-3112-P-120
AC POWER PANEL
9.25" x 9.50" x 3.81




3 **EQUIPMENT SPECIFICATIONS**

**SCALE: NTS**

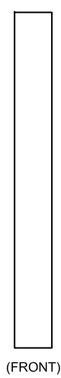
4 **EQUIPMENT SPECIFICATIONS**

**SCALE: NTS**

5 **EQUIPMENT SPECIFICATIONS**

**SCALE: NTS**

AW3176-S
OMNI ANTENNA
47.2" x 11.2"Ø, ±22 lbs



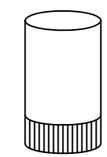

6 **EQUIPMENT SPECIFICATIONS**

**SCALE: NTS**

7 **EQUIPMENT SPECIFICATIONS**

**SCALE: NTS**

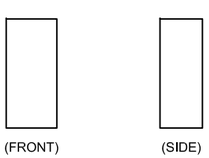
iRELAY 460
BACKHAUL ANTENNA
13.0" x 7.9"Ø, ±9.9 lbs



8 **EQUIPMENT SPECIFICATIONS**

**SCALE: NTS**

ALPU-ORT
SURGE PROTECTOR
6.1" x 4.5" x 2.5"




9 **EQUIPMENT SPECIFICATIONS**

**SCALE: NTS**

mobilitie

| | |
|---|---|
| PROJECT NO: | 9TXB008013 |
| DRAWN BY: | RC |
| CHECKED BY: | SJB |

| | | |
|---|---|---|
| A | 06-20-16 | FOR CLIENT REVIEW |

KMB DESIGN GROUP, LLC

Stephen A. Bray
PROFESSIONAL ENGINEER

PRELIMINARY
NOT FOR CONSTRUCTION

TX LICENSE: 101593 6/20/16

IT IS A VIOLATION OF THE LAW FOR ANY PERSON, UNLESS THEY ARE ACTING UNDER THE DIRECTION OF A LICENSED PROFESSIONAL ENGINEER, TO ALTER THIS DOCUMENT

DA90XSBM2A

W CHESTNUT ST & S FANNIN AVE
DENISON, TX 75020

UTILITY POLE

SHEET TITLE

ANTENNA & EQUIPMENT SPECIFICATIONS

SHEET NUMBER

3.1

## UTILITY NOTES

WORK INCLUDES:
THESE NOTES AND ACCOMPANYING DRAWINGS COMPLEMENT THE PROVISIONS AND INSTALLATIONS BY THE ELECTRICAL CONTRACTOR, OF ALL LABOR, MATERIALS AND EQUIPMENT REQUIRED TO INSTALL THE ELECTRICAL WORK COMPLETE IN CONNECTION WITH THIS UTILITY SITE AND SHALL INCLUDE, BUT NOT BE LIMITED TO THE FOLLOWING:
1. THE PROVISIONS, INSTALLATION AND CONNECTION OF A GROUNDING ELECTRODE SYSTEM COMPLETE WITH SECONDARY GROUNDING, AND CONNECTIONS TO THE INCOMING ELECTRICAL DISTRIBUTION EQUIPMENT.
2. THE PROVISION AND INSTALLATION OF AN OVERHEAD ELECTRICAL SERVICE OR UNDERGROUND ELECTRICAL SERVICE AND ALL ASSOCIATED WIRE AND CONDUIT AS REQUIRED AND/OR INDICATED ON PLANS.
3. THE PROVISION AND INSTALLATION OF CONDUIT AND CONNECTIONS FOR LOCAL FIBER SERVICE.
4. THE FURNISHING AND INSTALLATION OF THE ELECTRICAL SERVICE ENTRANCE CONDUCTORS, CONDUITS, METER SOCKET, AND CONNECTIONS TO THE SERVICE EQUIPMENT.
5. ALL CONDUITS SHOULD BE LEFT WITH NYLON PULL CORD FOR FUTURE USE.
6. EXCAVATION, TRENCHING, AND BACKFILLING FOR CONDUIT(S), CABLE(S) AND EXTERNAL GROUNDING SYSTEM.

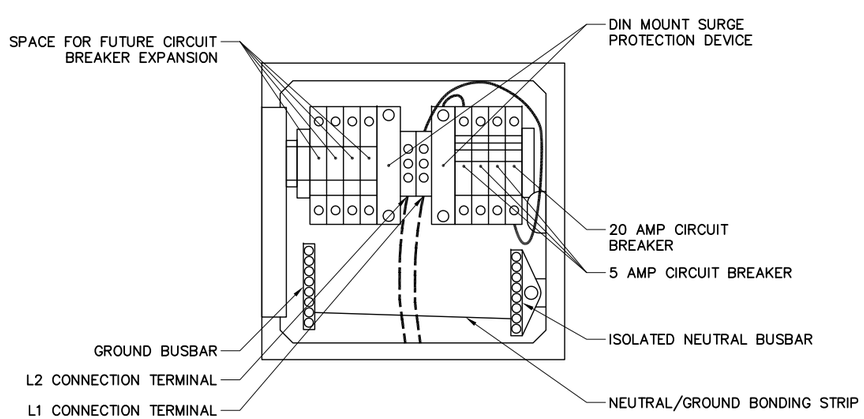
CODES, PERMITS AND FEES:
1. ALL REQUIRED PERMITS, LICENSES, INSPECTIONS AND APPROVALS SHALL BE SECURED AND ALL FEES FOR SAME PAID BY CONTRACTOR.
2. THE INSTALLATION SHALL COMPLY WITH ALL APPLICABLE CODES: STATE, LOCAL AND NATIONAL AND THE DESIGN, PERFORMANCE CHARACTERISTICS AND METHODS OF CONSTRUCTION OF ALL ITEMS AND EQUIPMENT SHALL BE IN ACCORDANCE WITH THE LATEST ISSUE OF THE VARIOUS APPLICABLE STANDARD SPECIFICATIONS OF THE FOLLOWING AUTHORITIES:
   - N.E.C. NATIONAL ELECTRICAL CODE
   - A.N.S.I. AMERICAN NATIONAL STANDARDS INSTITUTE
   - I.E.E.E. INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS
   - A.S.T.M. AMERICAN SOCIETY FOR TESTING MATERIALS
   - N.E.M.A. NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION
   - U.L. UNDERWRITERS LABORATORIES, INC.
   - N.F.P.A. NATIONAL FIRE PROTECTION ASSOCIATION

RACEWAYS AND WIRING:
1. WIRING OF EVERY KIND MUST BE INSTALLED IN CONDUIT, UNLESS NOTED OTHERWISE, OR AS APPROVED BY THE ARCHITECT/ENGINEER.
2. UNLESS OTHERWISE SPECIFIED, ALL WIRING SHALL BE COPPER (CU) TYPE THWN, SIZED IN ACCORDANCE WITH THE NATIONAL ELECTRICAL CODE AND LOCAL CODES.
3. RACEWAYS SHALL BE GALVANIZED STEEL, SIZED IN ACCORDANCE WITH THE NATIONAL ELECTRICAL CODE AND LOCAL CODES UNLESS OTHERWISE NOTED. ALL RACEWAYS SHALL BE APPROVED FOR THE INSTALLATION.
4. PULL OR JUNCTION BOXES SHALL BE PROVIDED AS REQUIRED TO FACILITATE INSTALLATION OF RACEWAYS AND WIRING. PROVIDE JUNCTION AND PULLBOXES FOR CONDUIT RUNS WITH MORE THAN (360) DEGREES OF BENDS.
5. PROVIDE A COMPLETE RACEWAY AND WIRING INSTALLATION, PERMANENTLY AND EFFECTIVELY GROUNDED IN ACCORDANCE WITH ARTICLE 250 OF THE NATIONAL ELECTRICAL CODE AND LOCAL CODES.
6. ALL STEEL CONDUIT SHALL BE BONDED AT BOTH ENDS WITH GROUNDING BUSHING.

GENERAL NOTES:
SEE DETAILS, SCHEDULES AND SPECIFICATIONS FOR ADDITIONAL REQUIREMENTS AND INFORMATION. CHECK ARCHITECTURAL, STRUCTURAL, AND OTHER MECHANICAL AND ELECTRICAL DRAWINGS FOR SCALE, SPACE LIMITATIONS, COORDINATION, AND ADDITIONAL INFORMATION, ETC. REPORT ANY DISCREPANCIES, CONFLICTS, ETC. TO ARCHITECT/ENGINEER BEFORE SUBMITTING BID. ALL EQUIPMENT FURNISHED BY OTHERS (FBO) SHALL BE PROVIDED WITH PROPER MOTOR STARTERS, DISCONNECTS, CONTROLS, ETC. BY THE ELECTRICAL CONTRACTOR UNLESS SPECIFICALLY NOTED OTHERWISE. THE ELECTRICAL CONTRACTOR SHALL INSTALL AND COMPLETELY WIRE ALL ASSOCIATED EQUIPMENT IN ACCORDANCE WITH MANUFACTURER'S WIRE DIAGRAMS AND AS REQUIRED FOR A COMPLETE OPERATING INSTALLATION. ELECTRICAL CONTRACTOR SHALL VERIFY AND COORDINATE ELECTRICAL CHARACTERISTICS AND REQUIREMENTS OF (FBO) EQUIPMENT PRIOR TO ROUGH-IN OF CONDUIT AND WIRING TO AVOID CONFLICTS.

COORDINATION WITH UTILITY COMPANY:
THE ELECTRICAL CONTRACTOR SHALL COORDINATE COMPLETE ELECTRICAL SERVICE WITH LOCAL UTILITY COMPANY FOR A COMPLETE OPERATIONS SYSTEM, INCLUDING TRANSFORMER CONNECTIONS, CONCRETE TRANSFORMER PADS, IF REQUIRED, METER SOCKETS, PRIMARY CABLE RACEWAY REQUIREMENTS, SECONDARY SERVICE, ETC. PRIOR TO SUBMITTING BID TO INCLUDE ALL LABOR AND MATERIALS. THE ELECTRICAL CONTRACTOR SHALL INCLUDE IN THE BID ANY OPTIONAL OR EXCESS FACILITY CHARGES ASSOCIATED WITH PROVIDING ELECTRICAL SERVICE FROM LOCAL UTILITY COMPANY. VERIFY BEFORE BIDDING TO INCLUDE ALL COSTS. THE ELECTRICAL CONTRACTOR SHALL VERIFY THE AVAILABLE FAULT CURRENT WITH THE LOCAL UTILITY COMPANY PRIOR TO SUBMITTING BID. ADJUST A.I.C. RATINGS OF ALL OVER CURRENT PROTECTION DEVICES IN DISTRIBUTION EQUIPMENT AS REQUIRED TO COORDINATE WITH AVAILABLE FAULT CURRENT FROM LOCAL UTILITY COMPANY.

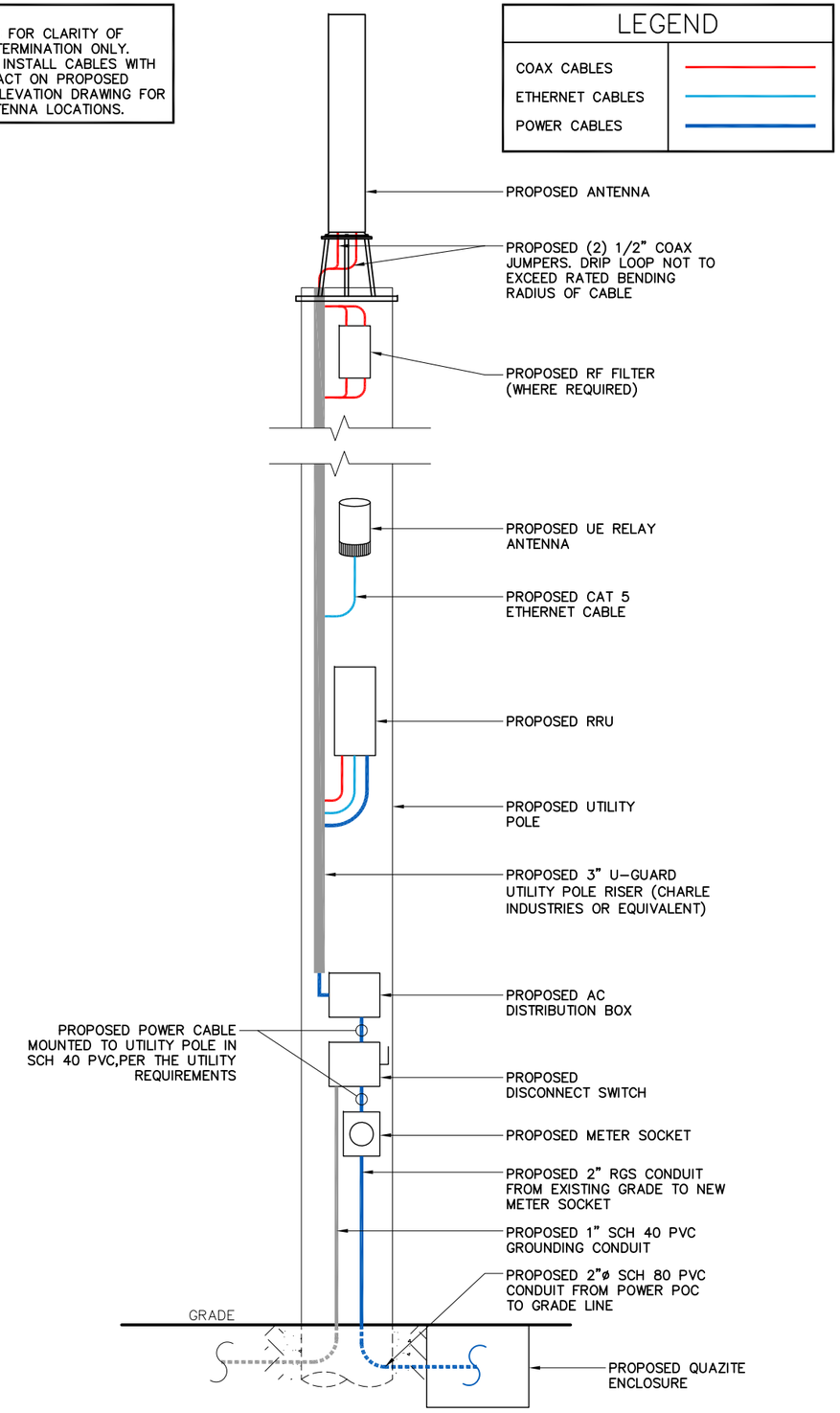
1 **NOTES**




2 **AC DISTRIBUTION PANEL**

SCALE: NTS

NOTE:
CABLING DIAGRAM IS FOR CLARITY OF CABLE ROUTE AND TERMINATION ONLY. CONTRACTOR SHALL INSTALL CABLES WITH MINIMAL VISUAL IMPACT ON PROPOSED UTILITY POLE. SEE ELEVATION DRAWING FOR EQUIPMENT AND ANTENNA LOCATIONS.




3 **CABLE DIAGRAM**

SCALE: NTS

mobilitie

| | |
|---|---|
| PROJECT NO: | 9TXB008013 |
| DRAWN BY: | RC |
| CHECKED BY: | SJB |

| | | |
|---|---|---|
| A | 06-20-16 | FOR CLIENT REVIEW |

KMB DESIGN GROUP, LLC

Stephen A. Bray
PROFESSIONAL ENGINEER

PRELIMINARY
NOT FOR CONSTRUCTION

TX LICENSE: 101593 6/20/16

IT IS A VIOLATION OF THE LAW FOR ANY PERSON, UNLESS THEY ARE ACTING UNDER THE DIRECTION OF A LICENSED PROFESSIONAL ENGINEER, TO ALTER THIS DOCUMENT

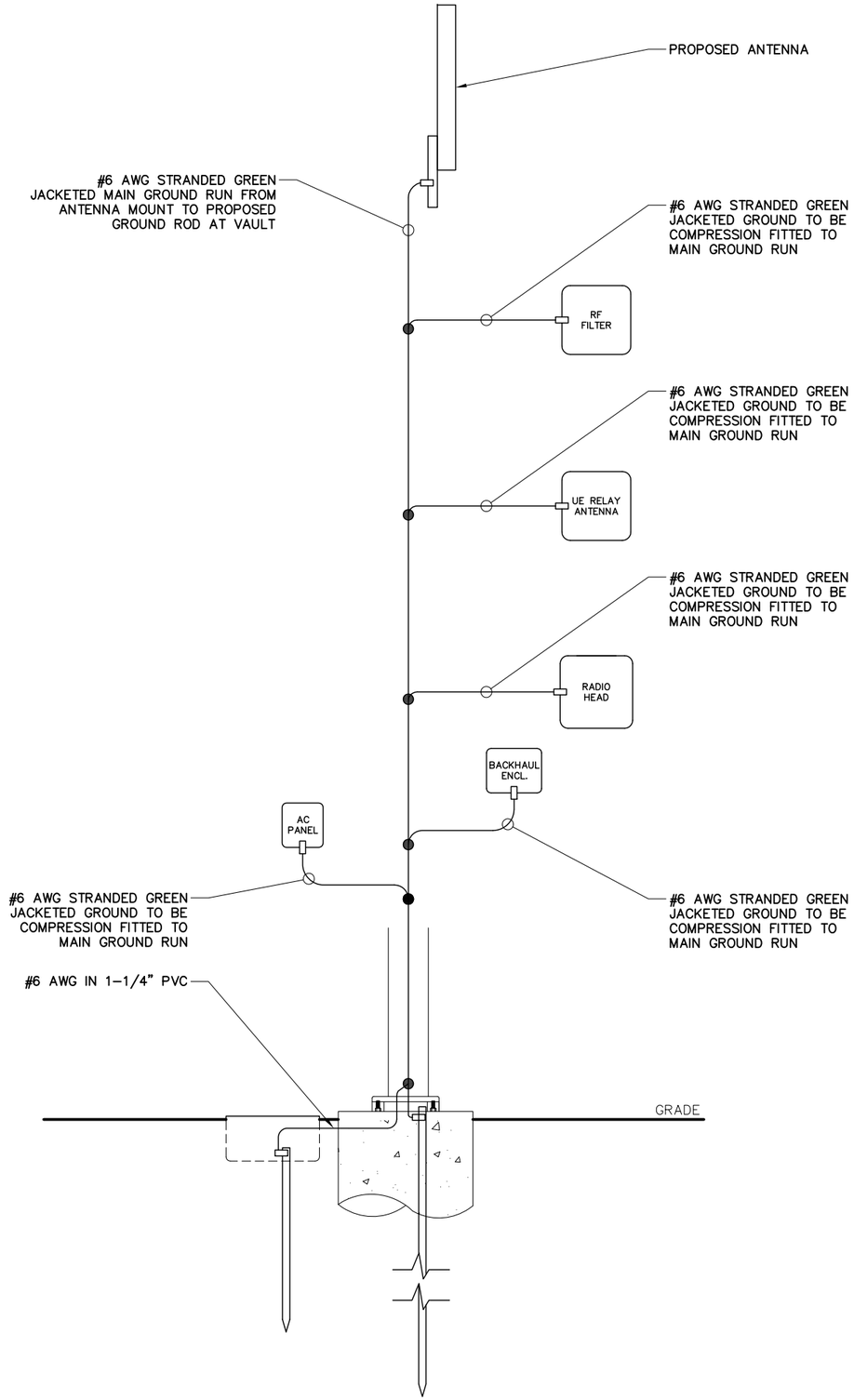
DA90XSBM2A

W CHESTNUT ST & S FANNIN AVE
DENISON, TX 75020

UTILITY POLE

SHEET TITLE
ELECTRICAL DETAILS

SHEET NUMBER
4.0




LEGEND
- ■ CADWELD CONNECTION
- ▭ MECHANICAL CONNECTION
- ● COMPRESSION CONNECTION

NOTE:
GROUNDING RISER FOR DIAGRAMMATIC PURPOSES ONLY. SEE ELEVATION DRAWING FOR EQUIPMENT AND ANTENNA LOCATIONS.

1 **GROUNDING DETAILS**

**SCALE: NTS**

mobilitie

| | |
|---|---|
| PROJECT NO: | 9TXB008013 |
| DRAWN BY: | RC |
| CHECKED BY: | SJB |

| | | |
|---|---|---|
| A | 06-20-16 | FOR CLIENT REVIEW |

KMB DESIGN GROUP, LLC

Stephen A. Bray
PROFESSIONAL ENGINEER

PRELIMINARY
NOT FOR CONSTRUCTION

TX LICENSE: 101593 6/20/16

IT IS A VIOLATION OF THE LAW FOR ANY PERSON, UNLESS THEY ARE ACTING UNDER THE DIRECTION OF A LICENSED PROFESSIONAL ENGINEER, TO ALTER THIS DOCUMENT

DA90XSBM2A

W CHESTNUT ST & S FANNIN AVE
DENISON, TX 75020

UTILITY POLE

SHEET TITLE

GROUNDING DETAILS

SHEET NUMBER

5.0

TRAFFIC CONTROL NOTES

1. Prior to any road construction, traffic control signs and devices shall be in place.
2. Traffic control devices for lane closures including signs, cones, barricades, etc. shall be placed as shown on plans. Signs shall not be placed without actual lane closures and shall be immediately removed upon removal of the closures.
3. Fencing & gates subject to adjustments during construction.
4. Selection, placement, maintenance, and protection of traffic shall be in accordance with the Manual of Uniform Traffic Control Devices - Part VI "Standards and Guides for Traffic Control for Street and Highway Construction, Maintenance, Utility, and Incident Management Operations", and the State Department of Transportation Standards and Specifications, unless otherwise noted in the plans and specifications, and shall be approved by the appropriate highway authority having jurisdiction.
5. Tapers shall be located to maximize the visibility of their total length.
6. Advance warning signs, distances, and taper lengths may be extended, at direction of the Engineer, to adjust or reduced visibility due to horizontal and vertical curvature of the roadway.
7. All existing road signs, pavement markings and/or plowable pavement reflectors which conflict with the proposed traffic control plan shall be covered, removed, or relocated as directed by the Engineer and then restore to match pre-construction conditions.
8. Conflicting or non-operating signal indications on either the existing, temporary, or proposed traffic signal systems shall be bagged or covered.
9. Contractor shall contact local applicable highway jurisdiction and provide additional "flagmen" or police supervision as they deem appropriate.
10. All excavated areas within or adjacent to the roadway shall be backfilled and placed on a minimum 6h:1v slope prior to the end of each work day. Other excavated areas within the clear zone are to be either backfilled or precast concrete curb construction barrier set temporarily in place to shield vehicular and pedestrian traffic.
11. Where required, the contractor shall make provisions for maintaining pedestrian crossing locations and type, in accordance with all applicable codes and osha requirements.
12. Construction zone speed limit will be determined by the regional traffic engineer at the time of or during construction, as requested by the resident engineer.
13. Bituminous concrete placed during the various construction stages shall be transitioned on a minimum 20h:1v slope to meet the adjacent existing grade at the longitudinal and transverse limits of the stage construction areas unless otherwise noted on the stage construction plans.
14. All excavated areas within or adjacent to the roadway shall be backfilled and placed on at least 6h:1v slope before the end of each work day. Other excavated area within the clear zone shall be backfilled.
15. Cones may be substituted for drums and installed upon the approval of the Engineer.
16. There shall be no workers, equipment, or other vehicles in the buffer space or the roll ahead space.
17. Driveways and/or side streets entering the roadway after the first advance warning sign shall be provided with at least one WZO-1F sign (road work ahead) as a minimum.
18. Moving work areas in a lane closure require a trailer mounted illuminated flashing arrow to remain at the end of the taper, the traffic control truck with mounted crash cushion that shall move with the work areas to keep a 70 foot max buffer in advance of each work area.

## 1 TRAFFIC CONTROL NOTES

**SCALE: NTS**

SYMBOLS

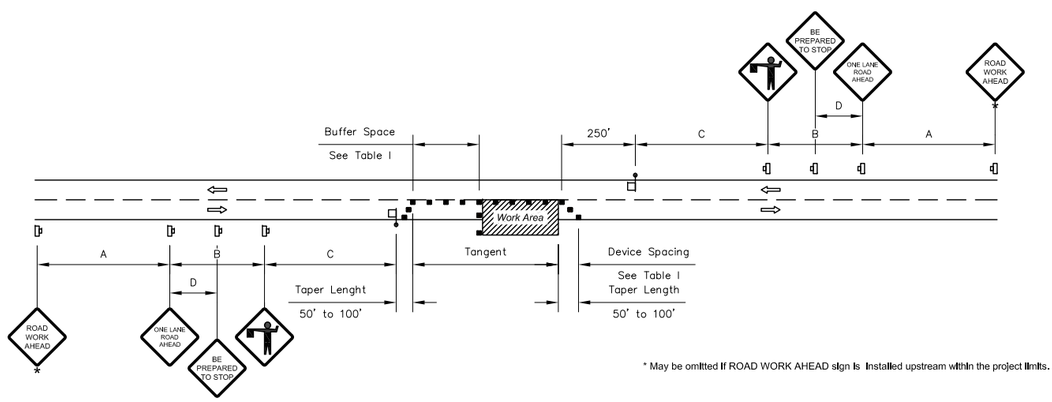
- Work Area
- Channelizing Device
- Work Zone Sign
- Flagger
- Automated Flagger Assistance Devices (AFAD), With Gate
- Lane Identification + Direction of Traffic

For single lane traffic flow see General Note 12

TABLE I

| Posted Speed | Maximum Spacing of Cones or tubular Markers | | Maximum Spacing of Type I or Type II Barricades/Panels/Drums | | Distance Between Signs | | | | Buffer Space |
|---|---|---|---|---|---|---|---|---|---|
| | On a Taper | On a Tangent | On a Taper | On a Tangent | A | B | C | D | |
| 25 | 20' | 50' | 20' | 50' | 200' | 200' | 200' | 100' | 155' |
| 30 | 20' | 50' | 20' | 50' | 200' | 200' | 200' | 100' | 200' |
| 35 | 20' | 50' | 20' | 50' | 200' | 200' | 200' | 100' | 250' |
| 40 | 20' | 50' | 20' | 50' | 200' | 200' | 200' | 100' | 305' |
| 45 | 20' | 50' | 20' | 50' | 350' | 350' | 350' | 175' | 360' |
| 50 | 20' | 50' | 20' | 100' | 500' | 500' | 500' | 250' | 425' |
| 55 | 20' | 50' | 20' | 100' | 2640' | 1500' | 1000' | 500' | 495' |
| 60 | 20' | 50' | 20' | 100' | 2640' | 1500' | 1000' | 500' | 570' |
| 65 | 20' | 50' | 20' | 100' | 2640' | 1500' | 1000' | 500' | 645' |
| 70 | 20' | 50' | 20' | 100' | 2640' | 1500' | 1000' | 500' | 730' |
| 75 | 20' | 50' | 20' | 100' | 2640' | 1500' | 1000' | 500' | 820' |

CONDITIONS - Where any vehicle, equipment, workers or their activities encroach the area between the centerline and a line 2' outside the edge of travel way.




* May be omitted if ROAD WORK AHEAD sign is installed upstream within the project limits.

GENERAL LAYOUT

General Notes:

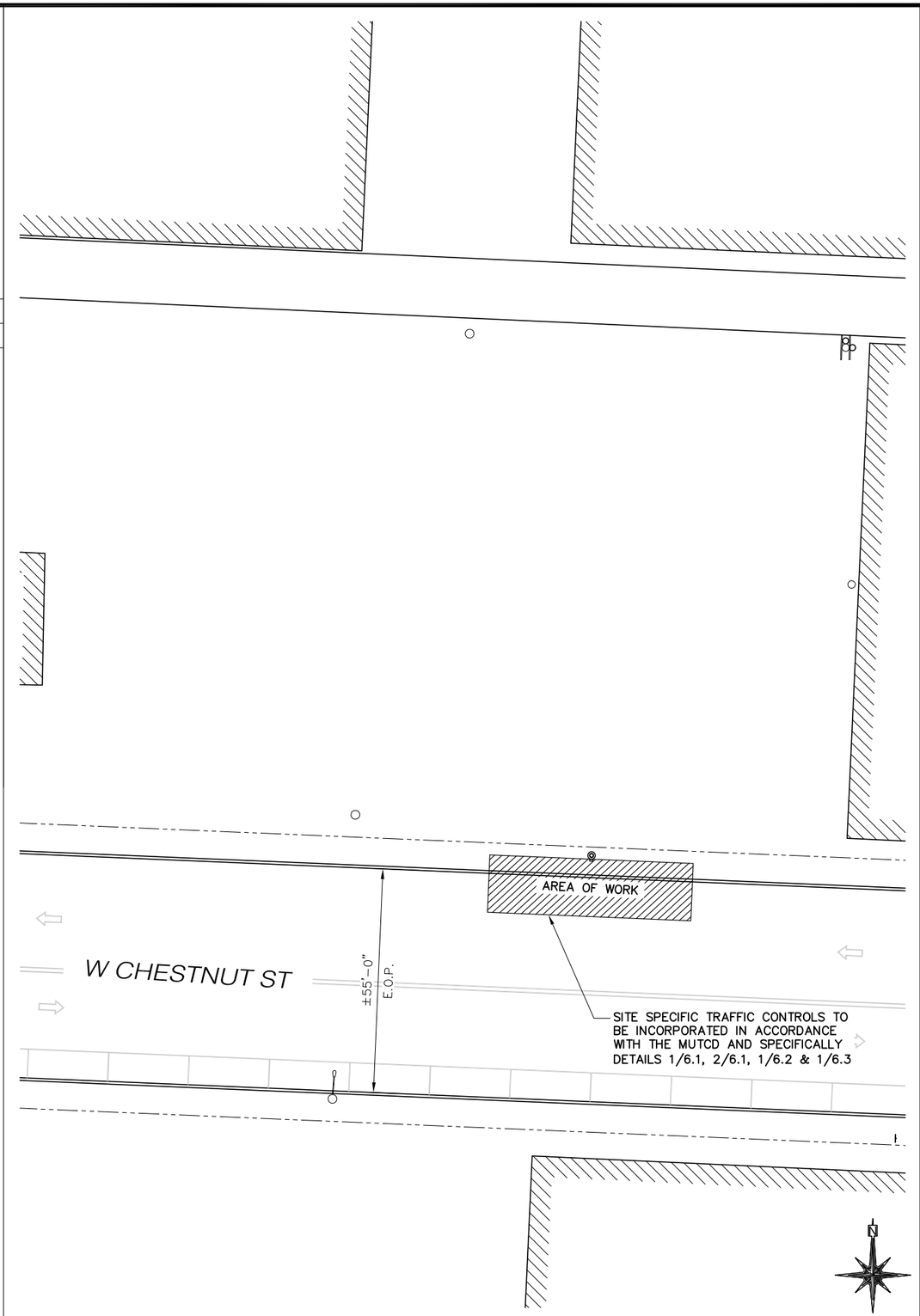
1. Special Conditions may be required in accordance with these notes and the following sheets.
2. If the Work Area encroaches on the Centerline, use the Layout for Temporary Lane Shift to Shoulder on Sheet 2 only if the Existing Paved Shoulder width is sufficient to provide for an 11' lane between the Work Area and the Edge of Existing Paved Shoulder. Reduce the posted speed when appropriate.
3. Temporary Raised Rumble Strips:
   a. Use when both of the following conditions are met concurrently:
      i. Existing Posted Speed is 50 mph or greater;
      ii. Work duration is greater than 60 minutes.
   b. Use a consistent Strip color throughout the work zone.
   c. Place each Rumble Strip Set transversely across the lane at locations shown.
   d. Use Option 1 or Option 2 as shown on Sheet 2. Use only one option throughout work zone.
4. Additional one-way control may be provided by the following means:
   a. Flag-carrying vehicle;
   b. Official vehicle;
   c. Pilot vehicles;
   d. Traffic signals.

When flaggers are the sole means of one-way control, the flaggers must be in sight of each other or in direct communication at all times.

5. When a side road intersects the highway within the TTC zone, place additional TTC devices in accordance with other applicable MUTCD guidelines.
6. The two channelizing devices directly in front of the work area may be omitted provided vehicles in the work area have high-intensity rotating, flashing, oscillating, or strobe lights operating.
7. When Buffer Space cannot be attained due to geometric constraints, use the greatest attainable length, not less than 200 ft.
8. Railroad Crossings:
   a. If an active railroad crossing is located closer to the Work Area than the queue length plus 300 feet, extend the Buffer Space as shown on Sheet 2.
   b. If the queuing of vehicles across an active railroad crossing cannot be avoided, provide a uniformed traffic control officer or flagger at the highway-rail grade crossing to prevent vehicles from stopping within the highway-rail grade crossing, even if automatic train warning devices are in place.
9. ROAD WORK AHEAD and the BE PREPARED TO STOP signs may be omitted if all of the following conditions are met:
   a. Work operations are 60 minutes or less.
   b. Speed limit is 45 mph or less.
   c. There are no sight obstructions to vehicles approaching the work area for a distance equal to the Buffer Space shown in Table 1.
   d. Vehicles in the work area have high-intensity, rotating, flashing, oscillating, or strobe lights operating.
   e. Volume and complexity of the roadway has been considered.
   f. If a railroad crossing is present, vehicles will not queue across rail tracks.
   g. AFADs are not in use.
10. For general TCZ requirements and additional information, refer to MUTCD.
11. Automated Flagger Assistance Devices (AFADs) may be used in accordance with the Notes on Sheet 3.
12. For single lane traffic flow, the contractor shall utilize the general layout detailed above and shall comply with the local highway authority having jurisdiction to ensure that sufficient clearance is provided to allow vehicles to pass safely. Contractor shall notify the Engineer if a road closure is deemed necessary.

## 2 TWO LANE, TWO WAY, WORK WITHIN THE TRAVEL WAY

**SCALE: NTS**




## 3 SITE SPECIFIC TRAFFIC CONTROL PLAN

**11x17 SCALE: 1/32" = 1'-0"** **24x36 SCALE: 1/16" = 1'-0"**

mobilitie

| | |
|---|---|
| PROJECT NO: | 9TXB008013 |
| DRAWN BY: | RC |
| CHECKED BY: | SJB |

| | | |
|---|---|---|
| A | 06-20-16 | FOR CLIENT REVIEW |

KMB DESIGN GROUP, LLC

Stephen A. Bray
PROFESSIONAL ENGINEER

PRELIMINARY
NOT FOR CONSTRUCTION

TX LICENSE: 101593 6/20/16

IT IS A VIOLATION OF THE LAW FOR ANY PERSON, UNLESS THEY ARE ACTING UNDER THE DIRECTION OF A LICENSED PROFESSIONAL ENGINEER, TO ALTER THIS DOCUMENT

DA90XSBM2A

W CHESTNUT ST & S FANNIN AVE
DENISON, TX 75020

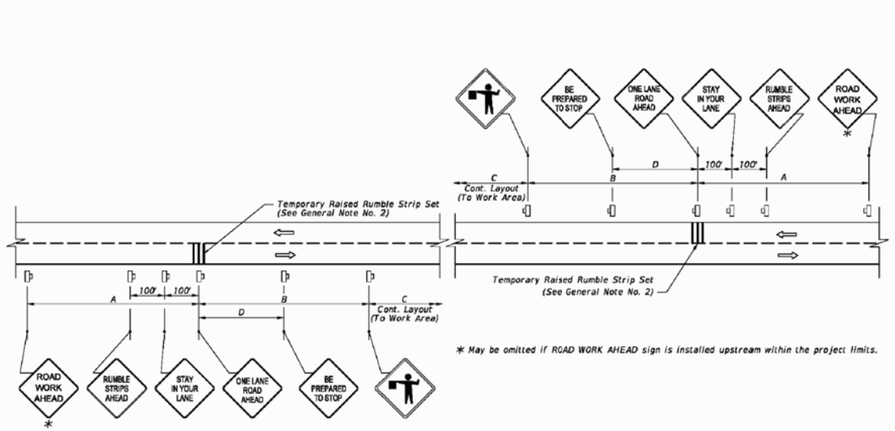
UTILITY POLE

SHEET TITLE

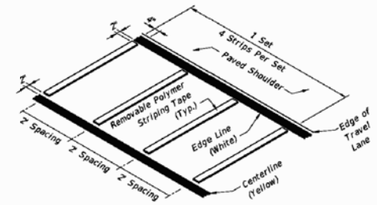
TRAFFIC CONTROL PLAN

SHEET NUMBER

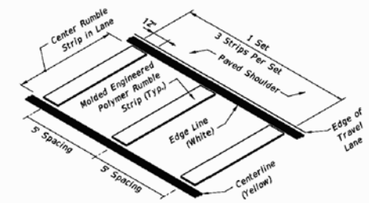
6.1




LAYOUT FOR TEMPORARY RAISED RUMBLE STRIPS
WHEN REQUIRED WITH ADDITIONAL SIGNS




OPTION 1 - REMOVABLE POLYMER STRIPING TAPE
RUMBLE STRIP SET

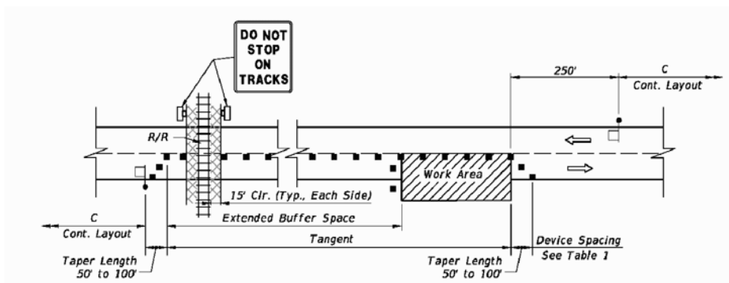



OPTION 2 - MOLDED ENGINEERED POLYMER
RUMBLE STRIP SET

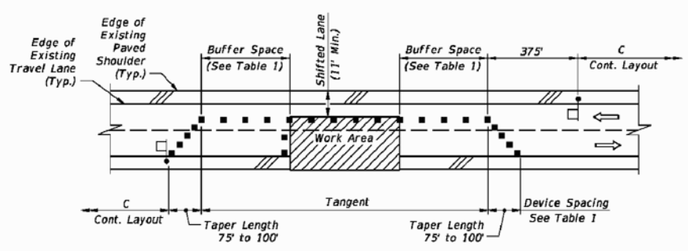
TEMPORARY RAISED RUMBLE STRIPS

| 1 | TEMPORARY RAISED RUMBLE STRIPS |
|---|---|

SCALE: NTS




LAYOUT FOR RAILROAD CROSSING
BUFFER SPACE EXTENSION

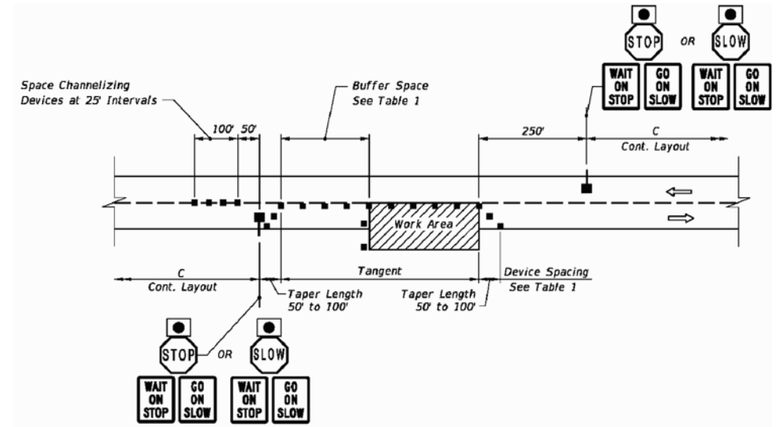



LAYOUT FOR TEMPORARY LANE SHIFT TO SHOULDER
WHEN WORK AREA ENCROACHES ON THE CENTERLINE

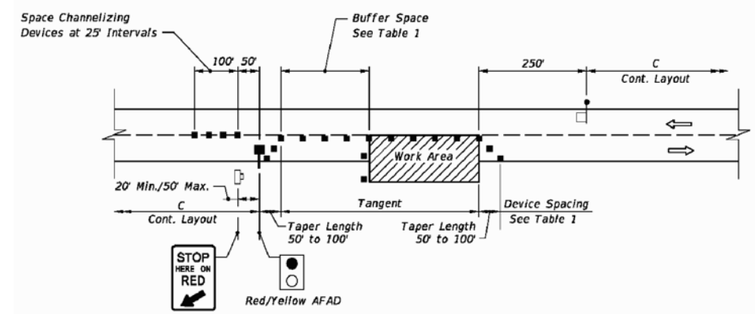
SPECIAL CONDITIONS

| 2 | SPECIAL CONDITIONS |
|---|---|

SCALE: NTS




LAYOUT FOR STOP/SLOW AFAD
METHOD 1 - 2 AFAD's




LAYOUT FOR RED/YELLOW AFAD
METHOD 2 - 1 AFAD & FLAGGER

AUTOMATED FLAGGER ASSISTANCE DEVICES (AFADs)

*AUTOMATED FLAGGER ASSISTANCE DEVICES NOTES*

*1.Illuminate the flagging station when the AFAD is used at nighttime.*

*2.When the AFAD is not in use, remove or cover signs and move AFAD device outside the clear zone or shield it with a barrier or crash cushion.*

*3. Only qualified flaggers who have been trained in the operation of the AFAD may operate the AFAD. When in use, each AFAD must be in view of and attended at all times by the flagger operating the device. Use two flaggers and one of the following methods in the deployment of AFAD's:*
*Method 1:Place an AFAD at each end of the temporary traffic control zone.*
*Method 2:Place an AFAD at one end of the temporary traffic control zone and a flagger at the opposite end.*

*4. A single flagger may simultaneously operate two AFAD's (Method 1) or may operate a single AFAD on one end of the temporary traffic control zone while being the flagger at the opposite end of the temporary traffic control zone (Method 2) if all four of the following conditions are present:*
*a. The flagger has an unobstructed view of the AFAD(s);*
*b. The flagger has an unobstructed view of approaching traffic in both directions;*
*c. For Method 1, the AFAD's are less than 800 ft apart. For Method 2, the AFAD and the flagger are less than 800 ft apart.*
*d. Two trained flaggers are available on-site to provide normal flagging operations should an AFAD malfunction.*

| 3 | AUTOMATED FLAGGER ASSISTANCE DEVICES (AFADs) |
|---|---|

SCALE: NTS

mobilitie

| | |
|---|---|
| PROJECT NO: | 9TXB008013 |
| DRAWN BY: | RC |
| CHECKED BY: | SJB |

| | | |
|---|---|---|
| A | 06-20-16 | FOR CLIENT REVIEW |

KMB DESIGN GROUP, LLC

Stephen A. Bray
PROFESSIONAL ENGINEER

PRELIMINARY
NOT FOR CONSTRUCTION

TX LICENSE: 101593 6/20/16

IT IS A VIOLATION OF THE LAW FOR ANY PERSON, UNLESS THEY ARE ACTING UNDER THE DIRECTION OF A LICENSED PROFESSIONAL ENGINEER, TO ALTER THIS DOCUMENT

DA90XSBM2A

W CHESTNUT ST & S FANNIN AVE
DENISON, TX 75020

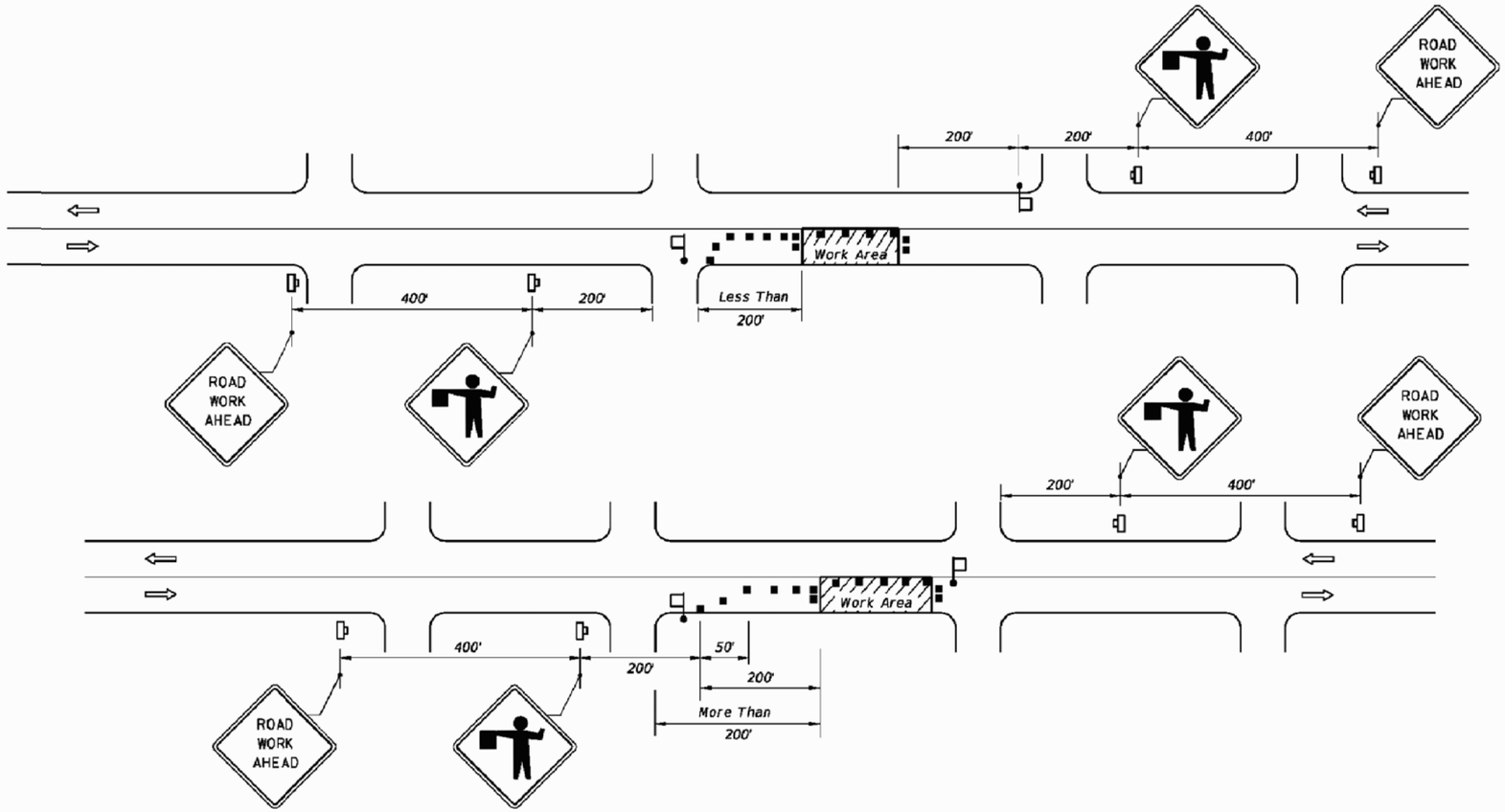
UTILITY POLE

SHEET TITLE

TRAFFIC CONTROL PLAN

SHEET NUMBER

6.2




### CONDITIONS

WHERE ANY VEHICLE, EQUIPMENT, WORKERS OR THEIR ACTIVITIES ENCROACH ON THE PAVEMENT REQUIRING THE CLOSURE OF ONE TRAFFIC LANE, FOR WORK AREAS LESS THAN 200' DOWNSTREAM FROM AN INTERSECTION FOR A PERIOD OF MORE THAN 60 MINUTES.

### CONDITIONS

WHERE ANY VEHICLE, EQUIPMENT, WORKERS OR THEIR ACTIVITIES ENCROACH ON THE PAVEMENT REQUIRING THE CLOSURE OF ONE TRAFFIC LANE, FOR WORK AREAS 200' OR MORE DOWNSTREAM FROM AN INTERSECTION FOR A PERIOD OF MORE THAN 60 MINUTES.

### SYMBOLS

- Work Area
- Channelizing Device
- Work Zone Sign
- Flagger
- Lane Identification + Direction of Traffic

### GENERAL NOTES

1. Work operations shall be confined to one travel lane, leaving the opposing travel lane open to traffic.
2. When vehicles in a parking zone block the line of sight to TCZ signs or when TCZ signs encroach on a normal pedestrian walkway, the signs shall be post mounted and located in accordance with MUTCD.
3. If work area is confined to an outside auxiliary lane, the work area shall be barricaded and the FLAGGER signs replaced by ROAD WORK AHEAD signs. Flaggers are not required.
4. Flaggers shall be in sight of each other or in direct communication at all times.
5. The FLAGGER legend sign may be substituted for the symbol sign.
6. The maximum spacing between devices shall be no greater than 25.'
7. For general TCZ requirements and additional information, refer to MUT(
8. The two channelizing devices directly in front and directly at the end of t area may be omitted provided vehicles in the work area have high-intensi flashing, oscillating, or strobe lights operating.
9. Use Temporary Raised Rumble Strips in accordance with Index 603. P. of Rumble Strips and additional signs should begin at FLAGGER sign loc

### DURATION NOTES

1. ROAD WORK AHEAD sign may be omitted if all of the following conditions are met:
   a. Work operations are 60 minutes or less.
   b. Speed is 45 mph or less.
   c. No sight obstructions to vehicles approaching the work area for a distance of 600 feet.
   d. Vehicles in the work area have high-intensity, rotating, flashing, oscillating, or strobe lights operating.
   e. Volume and complexity of the roadway has been considered.

1 **TWO LANE, TWO WAY, WORK NEAR INTERSECTION**

**SCALE: NTS**

mobilitie

| | |
|---|---|
| PROJECT NO: | 9TXB008013 |
| DRAWN BY: | RC |
| CHECKED BY: | SJB |

| | | |
|---|---|---|
| A | 06-20-16 | FOR CLIENT REVIEW |

KMB DESIGN GROUP, LLC

Stephen A. Bray
PROFESSIONAL ENGINEER

PRELIMINARY
NOT FOR CONSTRUCTION

TX LICENSE: 101593 6/20/16

IT IS A VIOLATION OF THE LAW FOR ANY PERSON, UNLESS THEY ARE ACTING UNDER THE DIRECTION OF A LICENSED PROFESSIONAL ENGINEER, TO ALTER THIS DOCUMENT

DA90XSBM2A

W CHESTNUT ST & S FANNIN AVE
DENISON, TX 75020

UTILITY POLE

SHEET TITLE

TRAFFIC CONTROL PLAN

SHEET NUMBER

6.3

# GENERAL

THE CONSTRUCTION DOCUMENT DRAWINGS ARE INTERRELATED. WHEN PERFORMING THE WORK, EACH CONTRACTOR MUST REFER TO ALL DRAWINGS. COORDINATION IS THE RESPONSIBILITY OF THE GENERAL CONTRACTOR.

# GENERAL REQUIREMENTS

PART 1 – GENERAL

1. OBTAIN AND SUBMIT RELEASES ENABLING THE OWNER UNRESTRICTED USE OF THE WORK AND ACCESS TO SERVICES AND UTILITIES; INCLUDE OCCUPANCY PERMITS, OPERATING CERTIFICATES AND SIMILAR RELEASES.
2. SUBMIT RECORD DRAWINGS, DAMAGE OR SETTLEMENT SURVEY, PROPERTY SURVEY, AND SIMILAR FINAL RECORD INFORMATION.
3. COMPLETE FINAL CLEAN UP REQUIREMENT, INCLUDING TOUCH–UP PAINTING. TOUCH UP AND OTHERWISE REPAIR AND RESTORE MARRED EXPOSED FINISHES.

PART 2 – FINAL CLEANING

1. COMPLETE THE FOLLOWING CLEANING OPERATIONS BEFORE REQUESTING INSPECTION FOR CERTIFICATION ON COMPLETION.
   - A. CLEAN THE PROJECT SITE, YARD AND GROUNDS IN AREAS DISTURBED BY CONSTRUCTION ACTIVITIES, INCLUDING LANDSCAPE DEVELOPMENT AREA, OF RUBBISH, WASTE MATERIALS, LITTER AND FOREIGN SUBSTANCES. SWEEP PAVED AREAS BROOM CLEAN. REMOVE PETRO–CHEMICAL SPILLS, STAINS AND OTHER FOREIGN DEPOSITS. RAKE GROUNDS THAT ARE NEITHER PLANTED NOR PAVED, TO A SMOOTH EVEN–TEXTURED SURFACE.
   - B. REMOVE TOOLS, CONSTRUCTION EQUIPMENT, MACHINERY AND SURPLUS MATERIAL FROM THE SITE.
   - C. REMOVE SNOW AND ICE TO PROVIDE SAFE ACCESS TO THE SITE AND EQUIPMENT ENCLOSURE.
   - D. CLEAN EXPOSED EXTERIOR HARD SURFACED FINISHES TO A DIRT–FREE CONDITION, FREE OF STAINS, FILMS AND SIMILAR FOREIGN SUBSTANCES. AVOID DISTURBING NATURAL WEATHERING OF EXTERIOR SURFACES.
   - E. REMOVE DEBRIS FROM LIMITED ACCESS SPACES, INCLUDING HANDHOLES, MANHOLES, AND SIMILAR SPACES.
   - F. REMOVE LABELS THAT ARE NOT PERMANENT LABELS.
   - G. TOUCH UP AND OTHERWISE REPAIR AND RESTORE MARRED EXPOSED FINISHES AND SURFACES. REPLACE FINISHES AND SURFACES THAT CANNOT BE SATISFACTORILY REPAIRED OR RESTORED, OR THAT SHOW EVIDENCE OF REPAIR OR RESTORATION. DO NOT PAINT OVER "UL" AND SIMILAR LABELS, INCLUDING ELECTRICAL NAME PLATES.
   - H. LEAVE THE PROJECT CLEAN AND READY FOR OCCUPANCY.
   - I. DUST OFF ALL EQUIPMENT AND ITEMS WITHIN EQUIPMENT ENCLOSURE.
2. REMOVAL OF PROTECTION: REMOVE TEMPORARY PROTECTION AND FACILITIES INSTALLED DURING CONSTRUCTION TO PROTECT PREVIOUSLY COMPLETED INSTALLATIONS DURING THE REMAINDER OF THE CONSTRUCTION PERIOD.

# SITE WORK

PART 1 – GENERAL

1. WORK INCLUDED: SEE SITE PLAN.
2. DESCRIPTIONS: IF APPLICABLE, LEASE AREA, AND UNDERGROUND UTILITY EASEMENTS ARE TO BE CONSTRUCTED TO PROVIDE A WELL DRAINED, EASILY MAINTAINED, EVEN SURFACE FOR USE AND ACCESS.
3. QUALITY ASSURANCE
   - A. APPLY SOIL STERILIZER IN ACCORDANCE WITH MANUFACTURER'S RECOMMENDATIONS (AS NEEDED).
   - B. APPLY AND MAINTAIN GRASS SEED AS RECOMMENDED BY THE SEED PRODUCER (IF REQUIRED).
   - C. PLACE AND MAINTAIN VEGETATION LANDSCAPING, IF INCLUDED WITHIN THE CONTRACT, AS RECOMMENDED BY NURSERY INDUSTRY STANDARDS.
4. SEQUENCING
   - A. CONFIRM SURVEY STAKES AND SET ELEVATION STAKES PRIOR TO ANY CONSTRUCTION.
   - B. CONSTRUCT TEMPORARY CONSTRUCTION AREA. DESIGNATED AREA TO BE APPROVED BY CONSTRUCTION MANAGER AND LOCAL AUTHORITIES.
   - C. APPLY SOIL STERILIZER PRIOR TO PLACING BASE MATERIALS.
   - D. GRADE, SEED, FERTILIZE, AND MULCH ALL AREAS DISTURBED BY CONSTRUCTION (INCLUDING UNDERGROUND UTILITY EASEMENTS) IMMEDIATELY AFTER BRINGING LEASE AREA TO BASE COURSE ELEVATION, WATER TO ENSURE GROWTH.
   - E. AFTER APPLICATIONS OF FINAL SURFACES, APPLY SOIL STERILIZER TO STONE SURFACES.
5. SUBMITTALS
   - A. BEFORE CONSTRUCTION: IF LANDSCAPING IS APPLICABLE TO THE CONTRACT, SUBMIT TWO COPIES OF THE LANDSCAPE PLAN ON NURSERY LETTERHEAD. IF A LANDSCAPE ALLOWANCE WAS INCLUDED IN THE CONTRACT, PROVIDE AN ITEMIZED LISTING OF PROPOSED COSTS ON NURSERY LETTERHEAD
   - B. AFTER CONSTRUCTION
     - MANUFACTURER'S DESCRIPTION OF PRODUCT AND WARRANTY STATEMENT ON SOIL STERILIZER.
     - MANUFACTURER'S DESCRIPTION OF PRODUCT ON GRASS SEED AND FERTILIZER.
     - LANDSCAPING WARRANTY STATEMENT
1. WARRANTY
   - A. IN ADDITION TO THE WARRANTY ON ALL CONSTRUCTION COVERED IN THE CONTRACT DOCUMENTS, THE CONTRACTOR SHALL REPAIR ALL DAMAGE AND RESTORE AREA AS CLOSE TO ORIGINAL CONDITION AS POSSIBLE AT SITE AND SURROUNDINGS.
   - B. SOIL STERILIZATION APPLICATION TO GUARANTEE VEGETATION FREE AREAS FOR ONE YEAR FROM DATE OF FINAL INSPECTION.
   - C. DISTURBED AREA WILL REFLECT GROWTH OF NEW GRASS COVER PRIOR TO FINAL INSPECTION.
   - D. LANDSCAPING, IF INCLUDED WITHIN THE SCOPE OF THE CONTRACT, WILL BE GUARANTEED FOR ONE YEAR FROM DATE OF FINAL INSPECTION.

PART 2 – PRODUCTS

1. MATERIALS
   - A. SOIL STERILIZER SHALL BE EPA–REGISTERED, PRE–EMERGENCE LIQUID:

| | |
|---|---|
| TOTAL KILL<br>PRODUCT 910<br>EPA 10292–7<br>(313) 563–8000 | PHASAR CORPORATION<br>P.O. BOX 5123<br>DEARBORN, MI 48128 |
| AMBUSH HERBICIDE<br>EPA REGISTERED<br><br>(800) 526–4924 | FRAMAR INDUSTRIAL PRODUCTS<br>1435 MORRIS AVE.<br>UNION, NJ 07083 |

   - B. ROAD AND SITE MATERIALS SHALL CONFORM TO STATE AND LOCAL DOT SPECIFICATIONS FILL MATERIAL (UNLESS OTHERWISE NOTED) – ACCEPTABLE SELECT FILL SHALL BE IN ACCORDANCE WITH STATE DEPARTMENT OF HIGHWAY AND TRANSPORTATION STANDARD SPECIFICATIONS.
   - C. SOIL STABILIZER FABRIC SHALL BE MIRAFI 500X.

PART 3 – EXECUTION

1. INSPECTIONS: LOCAL BUILDING INSPECTORS SHALL BE NOTIFIED NO LESS THAN 48 HOURS IN ADVANCE OF CONCRETE POURS, UNLESS OTHERWISE SPECIFIED BY JURISDICTION
2. PREPARATION
   - A. CLEAR BRUSH AND DEBRIS FROM LEASE AREA AND UNDERGROUND UTILITY EASEMENTS AS REQUIRED FOR CONSTRUCTION.
   - B. UNLESS OTHERWISE INSTRUCTED BY LESSEE, TRANSPORT ALL REMOVED TREES, BRUSH AND DEBRIS FROM THE PROPERTY TO AN AUTHORIZED LANDFILL.
   - C. PRIOR TO PLACEMENT OF FILL OR BASE MATERIALS, ROLL THE SOIL.
   - D. WHERE UNSTABLE SOIL CONDITIONS ARE ENCOUNTERED, LINE THE AREAS WITH STABILIZER MAT PRIOR TO PLACEMENT OF FILL OR BASE MATERIAL.
3. INSTALLATION
   - A. CLEAR EXCESS SPOILS, IF ANY, FROM JOB SITE AND DO NOT SPREAD BEYOND THE LIMITS OF PROJECT AREA UNLESS AUTHORIZED BY PROJECT MANAGER AND AGREED TO BY LANDOWNER.
   - B. PLACE FILL OR STONE IN SIX INCH (6") MAXIMUM LIFTS, AND COMPACT BEFORE PLACING NEXT LIFT.
   - C. APPLY SEED, FERTILIZER, AND STRAW COVER TO ALL OTHER DISTURBED AREAS, DITCHES, AND DRAINAGE SWALES, NOT OTHERWISE RIPRAPPED.
   - D. APPLY SEED AND FERTILIZER TO SURFACE CONDITIONS WHICH WILL ENCOURAGE ROOTING. RAKE AREAS TO BE SEEDED TO EVEN THE SURFACE AND LOOSEN THE SOIL.
   - E. SOW SEED IN TWO DIRECTIONS IN TWICE THE QUANTITY RECOMMENDED BY THE SEED PRODUCER.
   - F. ENSURE GROWTH OF SEEDED AND LANDSCAPED AREA, BY WATERING, UP TO THE POINT OF RELEASE FROM THE CONTRACT. CONTINUE TO REWORK THE BARE AREAS UNTIL COMPLETE COVERAGE IS OBTAINED.
4. FIELD QUALITY CONTROL: COMPACT SOILS TO MAXIMUM DENSITY IN ACCORDANCE WITH ASTM D–1557. AREAS OF SETTLEMENT WILL BE EXCAVATED AND REFILLED AT CONTRACTOR'S EXPENSE. INDICATE PERCENTAGE OF COMPACTION ACHIEVED ON AS–BUILT DRAWINGS.
5. PROTECTION
   - A. PROTECT SEEDED AREAS FROM EROSION BY SPREADING STRAW TO A UNIFORM LOOSE DEPTH OF 1–2 INCHES, STAKE AND TIE DOWN AS REQUIRED. USE OF EROSION CONTROL MESH OR MULCH NET WILL BE AN ACCEPTABLE ALTERNATE.
   - B. PROTECT ALL EXPOSED AREAS AGAINST WASHOUTS AND SOIL EROSION. PLACE STRAW BALES AT THE INLET APPROACH TO ALL NEW OR EXISTING CULVERTS. WHERE THE SITE OR ROAD AREAS HAVE BEEN ELEVATED IMMEDIATELY ADJACENT TO THE RAIL LINE, STAKE EROSION CONTROL FABRIC FULL LENGTH IN THE SWALE TO PREVENT CONTAMINATION OF THE RAIL BALLAST. ALL EROSION CONTROL METHODS SHALL CONFORM TO APPLICABLE BUILDING CODE REQUIREMENTS.

mobilitie

| | |
|---|---|
| PROJECT NO: | 9TXB008013 |
| DRAWN BY: | RC |
| CHECKED BY: | SJB |

| | | |
|---|---|---|
| A | 06-20-16 | FOR CLIENT REVIEW |

KMB DESIGN GROUP, LLC

Stephen A. Bray
PROFESSIONAL ENGINEER

PRELIMINARY
NOT FOR CONSTRUCTION

TX LICENSE: 101593 6/20/16

IT IS A VIOLATION OF THE LAW FOR ANY PERSON, UNLESS THEY ARE ACTING UNDER THE DIRECTION OF A LICENSED PROFESSIONAL ENGINEER, TO ALTER THIS DOCUMENT

DA90XSBM2A

W CHESTNUT ST & S FANNIN AVE
DENISON, TX 75020

UTILITY POLE

SHEET TITLE

GENERAL NOTES

SHEET NUMBER

GN-1

# ELECTRICAL

1. CONTRACTOR SHALL REVIEW THE CONTRACT DOCUMENTS PRIOR TO ORDERING THE ELECTRICAL EQUIPMENT AND STARTING THE ACTUAL CONSTRUCTION. CONTRACTOR SHALL ISSUE A WRITTEN NOTICE OF ALL FINDINGS TO THE ARCHITECT/ENGINEER LISTING ANY DISCREPANCIES OR CONFLICTING INFORMATION.
2. ELECTRICAL PLANS, DETAILS AND DIAGRAMS ARE DIAGRAMMATIC ONLY. VERIFY EXACT LOCATIONS AND MOUNTING HEIGHTS OR ELECTRICAL EQUIPMENT WITH OWNER PRIOR TO INSTALLATION.
3. EACH CONDUCTOR OF EVERY SYSTEM SHALL BE PERMANENTLY TAGGED IN EACH PANELBOARD, PULLBOX, JUNCTION BOX, SWITCH BOX, ETC. THE TYPE OF TAGGING METHODS SHALL BE IN COMPLIANCE WITH OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (O.S.H.A.)
4. ALL MATERIALS AND EQUIPMENT SHALL BE NEW AND IN GOOD WORKING CONDITION WHEN INSTALLED AND SHALL BE OF THE BEST GRADE AND OF THE SAME MANUFACTURER THROUGHOUT FOR EACH CLASS OR GROUP OF EQUIPMENT. MATERIALS SHALL BE LISTED "U.L." WHERE APPLICABLE. MATERIALS SHALL MEET WITH APPROVAL OF ALL GOVERNING BODIES HAVING JURISDICTION. MATERIALS SHALL BE MANUFACTURED IN ACCORDANCE WITH APPLICABLE STANDARDS ESTABLISHED BY ANSI, NEMA, NBFU AND "U.L." LISTED.
5. ALL CONDUIT SHALL HAVE A PULL CORD.
6. PROVIDE PROJECT MANAGER WITH ONE SET OF COMPLETE ELECTRICAL "AS INSTALLED" DRAWINGS AT THE COMPLETION OF THE JOB, SHOWING ACTUAL DIMENSIONS, ROUTINGS, AND CIRCUITS.
7. ALL CIRCUIT BREAKERS, FUSES AND ELECTRICAL EQUIPMENT SHALL HAVE AN INTERRUPTING SHORT CIRCUIT CURRENT TO WHICH THEY MAY BE SUBJECTED, AND A MINIMUM OF 10,000 A.I.C.
8. THE ENTIRE ELECTRICAL INSTALLATION SHALL BE GROUNDED AS REQUIRED BY IBC, NEC AND ALL APPLICABLE CODES.
9. PATCH, REPAIR AND PAINT ANY AREA THAT HAS BEEN DAMAGED IN THE COURSE OF THE ELECTRICAL WORK.
10. PLASTIC PLATES FOR ALL SWITCHES, RECEPTACLES, TELEPHONE AND BLANKED OUTLETS SHALL HAVE ENGRAVED LETTERING WHERE INDICATED ON THE DRAWINGS. WEATHERPROOF RECEPTACLES SHALL HAVE SIERRA #WPD-8 LIFT COVERPLATES.

## SERVICE AND DISTRIBUTION

1. WIRE AND CABLE CONDUCTORS SHALL BE COPPER, 600V, TYPE THHN OR THWN, WITH A MIN. SIZE OF #12 AWG, COLOR CODED.
2. METER SOCKET AMPERES, VOLTAGE, NUMBER OF PHASES SHALL BE NOTED ON THE DRAWINGS. MANUFACTURED BY MILBANK OR APPROVED EQUAL, AND SHALL BE UTILITY COMPANY APPROVED.
3. CONDUIT:
   - A. RIGID CONDUIT SHALL BE U.L. LABEL GALVANIZED ZINC COATED WITH GALVANIZED ZINC INTERIOR AND SHALL BE USED WHEN INSTALLED IN OR UNDER CONCRETE SLABS, IN CONTACT WITH THE EARTH, UNDER PUBLIC ROADWAYS, IN MASONRY WALLS OR EXPOSED ON BUILDING EXTERIOR. RIGID CONDUIT IN CONTACT WITH EARTH SHALL BE 1/2 LAPPED WRAPPED WITH HUNTS WRAP PROCESS NO. 3.
   - B. FLEXIBLE METALLIC CONDUIT SHALL HAVE U.L. LISTED LABEL AND MAY BE USED WHERE PERMITTED BY CODE. FITTINGS SHALL BE "JAKE" OR "SQUEEZE" TYPE. ALL FLEXIBLE CONDUITS SHALL HAVE FULL LENGTH GROUND WIRE.
   - C. IT IS REQUIRED AND WILL BE THE RESPONSIBILITY OF THE ELECTRICAL CONTRACTOR TO NOTIFY 811 OR OTHER SUCH UTILITY LOCATING AGENCY 3 DAYS BEFORE DIGGING.
4. CONTRACTOR TO COORDINATE WITH UTILITY COMPANY FOR CONNECTION OF TEMPORARY AND PERMANENT POWER TO THE SITE. THE TEMPORARY POWER AND ALL HOOKUP COSTS ARE TO BE PAID BY THE CONTRACTOR.
5. ALL ELECTRICAL EQUIPMENT SHALL BE LABELED WITH PERMANENT ENGRAVED PLASTIC LABELS WITH WHITE ON BLUE BACKGROUND LETTERING (MINIMUM LETTER HEIGHT SHALL BE ONE FOURTH INCH (1/4"). NAMEPLATES SHALL BE FASTENED WITH STAINLESS STEEL SCREWS, NOT ADHESIVE.
6. UPON COMPLETION OF WORK, CONTINUITY, SHORT CIRCUIT, AND FALL POTENTIAL GROUNDING TESTS BY AN INDEPENDENT TESTING SERVICE ENGAGED BY THE CONTRACTOR SHALL BE SUBMITTED FOR APPROVAL. SUBMIT TEST REPORTS TO PROJECT MANAGER. CLEAN PREMISES OF ALL DEBRIS RESULTING FROM WORK AND LEAVE WORK IN A COMPLETE AND UNDAMAGED CONDITION.
7. GROUNDING ELECTRODE SYSTEM
   - A. PREPARATION
     1. SURFACE PREPARATION: ALL CONNECTIONS SHALL BE MADE TO BARE METAL. ALL PAINTED SURFACES SHALL BE FIELD INSPECTED AND MODIFIED TO ENSURE PROPER CONTACT. NO WASHERS ARE ALLOWED BETWEEN THE ITEMS BEING GROUNDED. ALL CONNECTIONS ARE TO HAVE A NON-OXIDIZING AGENT APPLIED PRIOR TO INSTALLATION.
     2. IF CONDUCTORS MUST RUN THROUGH CONDUIT, BOTH ENDS OF CONDUIT SHALL BE GROUNDED. SEAL BOTH ENDS OF CONDUIT WITH SILICONE CAULK.
   - B. EXTERNAL CONNECTIONS

1. ALL BURIED GROUNDING CONNECTIONS SHALL BE MADE BY THE EXOTHERMIC WELD PROCESS. CONNECTIONS SHALL INCLUDE ALL CABLE TO CABLE, SPLICES, TEE'S, CROSSES, ETC. ALL CABLE TO GROUND RODS, GROUND ROD SPLICES AND LIGHTNING PROTECTION SYSTEMS ARE TO BE AS INDICATED. ALL MATERIALS USED (MOLDS, WELDING METAL, TOOLS, ETC.) SHALL BE BY "ULTRAWELD" AND INSTALLED PER MANUFACTURER'S RECOMMENDED PROCEDURES.
2. ALL ABOVE GRADE GROUNDING AND BONDING CONDUCTORS SHALL BE CONNECTED BY TWO HOLE CRIMP TYPE (COMPRESSION) CONNECTIONS (EXCEPT FOR THE ACEG AND GROUND ROD). MECHANICAL CONNECTIONS, FITTINGS OR CONNECTIONS THAT DEPEND SOLELY ON SOLDER SHALL NOT BE USED. ALL CABLE TO CABLE CONNECTIONS SHALL BE HIGH PRESSURE DOUBLE CRIMP TYPE CONNECTIONS. CONNECTIONS TO STRUCTURAL STEEL SHALL BE EXOTHERMIC WELDS.

- C. GROUND RODS: ALL GROUND RODS SHALL BE 5/8-INCH DIAMETER X 10'-0" LONG "COPPERWELD" OR APPROVED EQUAL, OF THE NUMBER AND LOCATIONS INDICATED. GROUND RODS SHALL BE DRIVEN FULL LENGTH VERTICAL IN UNDISTURBED EARTH.
- D. GROUND CONDUCTORS: ALL GROUND CONDUCTORS SHALL BE STANDARD TINNED SOLID BARE COPPER ANNEALED, AND OF SIZE INDICATED ON DRAWINGS UNLESS OTHERWISE NOTED.
- E. LUGS
  - LUGS SHALL BE 2-HOLE, LONG BARREL, STRAND COPPER UNLESS OTHERWISE SPECIFIED IN THE CONTRACT DOCUMENTS. LUGS SHALL BE THOMAS AND BETTS SERIES #54___BE OR EQUIVALENT

A. 535 MCM DLO 54880BE
B. 262 MCM DLO 54872BE
C. #1/0 DLO 54862BE
D. #4/0 THWN AND BARE 54866BE
E. #2/0 THWN 54862BE
F. #2 THHN 54207BE
G. #6 DLO 54205BE

- WHEN THE DIRECTION OF THE CONDUCTOR MUST CHANGE, IT SHALL BE DONE GRADUALLY. THE CURVATURE OF THE TURN SHALL BE DONE IN ACCORDANCE WITH THE FOLLOWING CHART:

| GROUNDING CONDUCTOR SIZE | MINIMUM BENDING RADIUS TO INSIDE EDGE |
|---|---|
| NO. 6 AWG TO NO. 4 AWG | 6 INCHES |
| NO. 2 AWG TO NO 1/0 AWG | 8 INCHES |
| NO. 2/0 AWG TO 4/0 AWG | 12 INCHES |
| 250 MCM TO 750 MCM | 24 INCHES |

8. GROUNDING RESISTANCE TEST REPORT: UPON COMPLETION OF THE TESTING FOR EACH SITE, A TEST REPORT SHOWING RESISTANCE IN OHMS MUST BE SUBMITTED. TWO (2) SETS OF TEST DOCUMENTS FROM THE INDEPENDENT TESTING SERVICE ARE TO BE BOUND AND SUBMITTED WITHIN ONE (1) WEEK OF WORK COMPLETION.

## POLES, POSTS, AND STANDARDS (SINGLE MAST AND SELF SUPPORTING TOWERS)

1. GENERAL
   - A. LIGHTNING ROD AND EXTENSION PIPE INCLUDING ALL APPURTENANCES, TO BE FURNISHED BY OWNER, IF REQUIRED.
   - B. GROUNDING: GROUND METAL POLES WITH A MINIMUM OF #2 AWG TINNED SOLID BARE COPPER CONDUCTOR CADWELDED TO TOWER BASE PLATE.

## TELECOMMUNICATIONS WIRING COMPONENTS (COAXIAL ANTENNA CABLE)

1. GENERAL
   - A. ALL MATERIALS, PRODUCTS OR PROCEDURES INCORPORATED INTO WORK SHALL BE NEW AND OF STANDARD COMMERCIAL QUALITY.
   - B. ALL MATERIALS AND PRODUCTS SPECIFIED IN THE CONTRACT DOCUMENTS SHALL BE SUPPLIED BY THE CONTRACTOR UNLESS NOTED OTHERWISE.
2. MATERIALS:
   - A. COAXIAL CABLE:
     - INSTALL COAXIAL CABLE AND TERMINATIONS BETWEEN ANTENNAS AND EQUIPMENT PER MANUFACTURER'S RECOMMENDATIONS WITH COAXIAL CABLES SUPPORTED AT NO MORE THAN 3'-0" O.C. WEATHERPROOF ALL CONNECTORS BETWEEN THE ANTENNA AND EQUIPMENT PER MANUFACTURER'S REQUIREMENTS. TERMINATE ALL COAXIAL CABLE THREE FEET (3') IN EXCESS OF EQUIPMENT LOCATION UNLESS OTHERWISE STATED.
     - LENGTHS LESS THAN OR EQUAL TO 100 FEET SHALL BE 7/8".
3. ANTENNA AND COAXIAL CABLE GROUNDING
   - A. ALL COAXIAL CABLE GROUNDING KITS ARE TO BE INSTALLED ON STRAIGHT RUNS OF COAXIAL CABLE (NOT WITHIN BENDS)
4. COAXIAL CABLE IDENTIFICATION
   - A. TO PROVIDE EASY IDENTIFICATION AND UNIFORM MARKING OF ANTENNA CABLING, PLASTIC TAGS SHALL BE USED AT THE FOLLOWING LOCATIONS:
     - FIRST LOCATION IS AT THE END OF THE COAX NEAREST THE ANTENNA (WHERE THE COAXIAL CABLE AND JUMPER ARE CONNECTED).
     - SECOND LOCATION IS AT END OF THE COAX NEAREST THE EQUIPMENT.
   - B. USE ANDREW CABLE TIES (PT.# 27290) TO SECURE IDENTIFICATION TAGS.
     - TESTING: LESSEE SHALL PROVIDE AN INDEPENDENT TESTING AGENCY TO PERFORM THE COAXIAL SWEEP TEST & REPORT. THE CONTRACTOR IS TO PROVIDE ONE LIMBER/QUALIFIED PERSONNEL TO ASSIST IN ANY REPAIRS AND WEATHERPROOFING ONCE THE TEST IS COMPLETE. THE CONTRACTOR IS TO PROVIDE LESSEE WITH A MINIMUM OF 48 HOURS NOTICE PRIOR TO THE TIME OF THE SWEEP TEST.

mobilitie

| | |
|---|---|
| PROJECT NO: | 9TXB008013 |
| DRAWN BY: | RC |
| CHECKED BY: | SJB |

| | | |
|---|---|---|
| A | 06-20-16 | FOR CLIENT REVIEW |

KMB DESIGN GROUP, LLC

Stephen A. Bray
PROFESSIONAL ENGINEER

PRELIMINARY
NOT FOR CONSTRUCTION

TX LICENSE: 101593 6/20/16

IT IS A VIOLATION OF THE LAW FOR ANY PERSON, UNLESS THEY ARE ACTING UNDER THE DIRECTION OF A LICENSED PROFESSIONAL ENGINEER, TO ALTER THIS DOCUMENT

DA90XSBM2A

W CHESTNUT ST & S FANNIN AVE
DENISON, TX 75020

UTILITY POLE

SHEET TITLE

GENERAL NOTES

SHEET NUMBER

GN-2

**Attachment 2**

**Texas Historical Commission (THC) February 16, 2017, Letter concerning installation of a tower on Chestnut Street, Denison Texas within an historic district for which no NHPA Section 106 Notice was provided.**

February 16, 2017

Stephen J. Blazenko
GSS Inc.
1904 Industrial Blvd, Ste 107
Colleyville, TX 76034

Re: *Project Review under Section 106 of the National Historic Preservation Act of 1966, D16182-TX-15 Mobilitie 9TXX000695 Monopole Tower, .01 mi SW of N Armstrong Ave & W Morton St., Denison, Grayson County (FCC/106 # 201703825)*

Dear Stephen Blazenko:

This letter represents the comments of the State Historic Preservation Officer, the Executive Director of the Texas Historical Commission (THC), pursuant to review under Section 106 of the National Historic Preservation Act.

The Texas Historical Commission received a letter from the City of Denison's legal representation informing agency staff of two additional monopole towers developed by Mobilitie, LLC on Chestnut St. and Coffin St. that our records do not show were submitted for the required Section 106 review process. The agency is particularly concerned about the monopole reportedly installed on Chestnut St. within the Denison Commercial National Register Historic District. The agency asks that GSS Inc continue to work with Mobilitie LLC, the Texas Historical Commission, and City of Denison to regard these regulatory concerns.

We look forward to further consultation with your office and hope to maintain a partnership that will foster effective historic preservation. Thank you for your cooperation in this review process, and for your efforts to preserve the irreplaceable heritage of Texas. If you have any questions concerning our review or if we can be of further assistance, please contact Alexander Toprac at (512) 463-6183 or alexander.toprac@thc.texas.gov.

Sincerely, Alex Toprac

Alexander Toprac, North Texas Regional Reviewer
For: Mark Wolfe, State Historic Preservation Officer

Cc: Teddie Ann Salmon, Grayson County Historical Commission, Chair
Helen Eller, Grayson County Historical Commission, Secretary (via email)
Julie Fort, City of Denison, City Attorney (via email)
Clarence West (via email)

MW/at

Before the
Federal Communications Commission
Washington, DC 20554

| | | |
|---|---|---|
| **In the Matter of Streamlining Wireless infrastructure deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies Mobilitie, LLC Petition for Declaratory Ruling** | **§ § § §** | **WC Docket No. 16-421** |

**TEXAS MUNICIPAL LEAGUE (TML) REPLY COMMENTS**

Clarence A. West, Attorney
4001 Lob Cove
Austin, Texas 78730
Telephone: (512) 401-3486
Email: cawest@cawestlaw.com
ATTORNEY FOR TEXAS MUNICIPAL LEAGUE

**Submitted: April 7, 2017**

Before the
Federal Communications Commission
Washington, DC 20554

| | | |
|---|---|---|
| **In the Matter of Streamlining Wireless infrastructure deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies** | **§ § § §** | **WC Docket No. 16-421** |
| **Mobilitie, LLC Petition for Declaratory Ruling** | | |

**TEXAS MUNICIPAL LEAGUE (TML) REPLY COMMENTS**

**Table of Contents**


**I. TML Complied with the FCC's Public Notice requested "Factual Record" for a "Data-Driven Evaluation." ..... 3**

**II. Overview to TML Reply Comments. ..... 5**

**III. Reply to Crown Castle on Legal Issues as to Municipalities' Acting in a Proprietary Role as Land Owner/Manager of Right-of-Way under Texas Law. ..... 5**

**IV. TML Reply Comments to Industry Assertions concerning Texas Cities. ..... 9**

**A. AT&T: ..... 9**

**B. Crown Castle: ..... 10**

**C. NTCH: ..... 13**

**D. Sprint. ..... 14**

**E. Wireless Infrastructure Association (WIA): ..... 14**

**F. ExteNet, Mobilitie, Verizon: ..... 15**

**CONCLUSION…….. 15**

Before the
Federal Communications Commission
Washington, DC 20554

| | | |
|---|---|---|
| **In the Matter of Streamlining Wireless infrastructure deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies** | **§ § § §** | **WC Docket No. 16-421** |
| **Mobilitie, LLC Petition for Declaratory Ruling** | | |

**TEXAS MUNICIPAL LEAGUE (TML) REPLY COMMENTS**

COMES NOW the Texas Municipal League (TML) ("Texas Cities or "TML"")[1] and files these Reply Comments in the Federal Communications Commission's (hereinafter "FCC") Public Notice for Comment *In the Matter of Streamlining Wireless infrastructure deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling*.[2]

**I. TML Complied with the FCC's Public Notice requested "Factual Record" for a "Data-Driven Evaluation."**

[1] Texas Municipal League is an unincorporated affiliation of 1,151 Texas cities. See more about TML at: https://www.tml.org/

Many of TML member cities are also members of Texas Coalition for Utility Issues and as such associates itself with the filing of the "Smart Communities" that is being filed contemporaneously with this filing. TML endorse the legal arguments and research provided in that filing.

[2] *In the Matter of Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling, DA* 1427, WC Docket No. 16-421, Public Notice for Comment (Dec. 22, 2016). ("PN"); *See* Mobilitie, LLC Petition for Declaratory Ruling, *Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way* (filed Nov. 15, 2016) (Mobilitie Petition).

The PN clearly set out that Comments were requested to assist the FCC in developing a "factual record" for a "*data-driven evaluation"*[3] based on specific facts. Many of the general allegations or even anecdotal examples submitted by industry commenters are probably not representative of the state of things, and certainly don't respond appropriately to the PN:

> Commenters should *provide specific information and detailed explanations* and, to the extent possible, should quantify any such effects. We will accord *greater weight to systematic data than merely anecdotal evidence*.[4]

In compliance with the PN's directives, TML provided specific, detailed facts in its March 8, 2017 filing. TML provided specific examples in Dallas, Houston, San Antonio, McAllen, and Austin. Those Texas cities have negotiated fair and reasonable master license agreements to allow wireless facilities in the rights of way.[5] TML also provided a specific example in Denison, Texas. In Denison, the delay in placement of wireless facilities in the right-of-way was due to incomplete or misleading information provided by a specifically-named wireless infrastructure company. The failure of that same company to comply with National Historic Preservations Act Section 106 Notice requirements led to the delay.[6]

Unfortunately, the industry comments were seldom as specific as the TML Comments. Many industry commenters provided at best only unsubstantiated allegations against unnamed cities (for which it is impossible to reply to correct the record). Such general, unsubstantiated allegations that do not name a city (allowing that city to respond to correct the record) should be given little, if any, weight in this proceeding.

Based on the above, TML's Comments are limited to responses to the three named Texas cities that were named in the March 8, 2017 Comments (out of 1,215 Texas cites). TML cannot

---

[3] "We are issuing this public notice to develop a *factual record* that will help us assess whether and to what extent the process of local land-use authorities' review of siting applications is hindering, or is likely to hinder, the deployment of wireless infrastructure. In turn, such a *data-driven evaluation* will make it possible to reach well-supported decisions on which further Commission actions, if any, would most effectively address any problem, while preserving local authorities' ability to protect interests within their purview." PN, at 2. (Italics added)

[4] PN, at 9. (Italics added)

[5] TML Comments, March 8, 2017, at 18-19.

[6] TML Comments, March 8, 2017, at 20.

respond to unsubstantiated claims about unnamed cities or general comments about areas of the state because there is no basis for which to do so.

## II. Overview to TML Reply Comments.

TML would note that seven Texas cities were named in industry comments. Four cities were described in very complementary terms: Little Elm, The Colony, Texas City, and Houston.[7] Particular praise was given to Houston by Sprint on its Super Bowl 2017 DAS deployment.[8] Out of the over twenty industry comments filed, three other Texas cities were mentioned in a less favorable light:[9] Austin, Sugar Land( allegedly not allowing wireless facilities in the rights-of-ways indiscriminately) and El Paso ( alleged high rates).

On the array of legal arguments raised by industry filing, those will be addressed in some detail by others, including the Smart Communities Siting Coalition Comments of April 7, 2017. However, one legal issue raised by Crown Castle – the applicability of FCC rules to a municipality when it is acting in its proprietary capacity as a landowner and not a regulator[10] - will be addressed in these Comments in the context of Texas cities accommodating this new "indispensable" technology of small cells and Distributed Antenna Systems ("DAS").

## III. Reply to Crown Castle on Legal Issues as to Municipalities' Acting in a Proprietary Role as Land Owner/Manager of Right-of-Way under Texas Law.

Crown Castle raised the applicability of FCC rules to a municipality acting in its proprietary capacity as a landowner, not a regulator. TML reviewed these issues in some detail in its March 8, 2017, Comments.[11] In this Reply, we once again review the salient legal arguments

[7] Crown Castle Comments, March 8, 2017, at i-ii, and 8-9.

[8] Sprint Comments, March 8, 2017, at iii, and 4, 7, 45-46.

[9] Crown Castle Comments, March 8, 2017, at 18. (Austin and Sugar Land, Texas)' NTCH Comments, March 8, 2017, at 10 (El Paso).

[10] Crown Castle Comments, March 8, 2017, at 26-27

[11] TML Comments, March 8, 2017, at 6-7.

in light of Crown Castle Comments, particularly in the context of Texas law and prior FCC Orders and federal and state case law.

Crown Castle ignored the FCC's recent discussion of this issue in 2014. The FCC cited long-held case law stating that certain federal timelines and other requirements (including Section 6409, 47 C.F.R. § 1.40001, et seq.) do not apply when a governmental entity is acting as a landowner in a proprietary capacity, rather than a regulator, to wit:

> …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][12]

The sole case that Crown Castle cited,[13] *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 417-21 (2d Cir. 2002), does not support its position. The case was actually cited by the FCC as indicated above, in footnote 446, of the 2014 FCC Order, for the contrary position that there was no preemption. *Sprint* involved a school lease and conditions concerning radio frequency (RF) levels. The cellular company unsuccessfully argued that RF levels were regulated by the FCC

---

[12] *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); See also FCC "Shot Clock", see *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14020, para. 67 (2009) (2009 Declaratory Ruling), *aff'd, City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd,* 133 S. Ct. 1863 (2013).

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")

[13] Crown Castle Comments, March 8, 2017, at 26-27, cited in n. 44.

and thus the school district was preempted from setting different levels. The Court disagreed, finding that the school district was acting in its proprietary capacity, and not as a regulator. The language of the court is broad, concluding that a governmental entity acting in a proprietary capacity is not preempted:

> First, we see nothing in the TCA [Telecommunications Act of 1996, 47 U.S.C. § 151 et seq., "TCA" "Telecommunications Act" or "Act"] to suggest that Congress meant to preempt a governmental entity's conduct that does not amount to regulation; and the structure and language of the TCA suggest precisely the contrary intent. To begin with, the structure of § 332(c)'s paragraph (7) indicates that *Congress meant preemption to be narrow and preservation of local governmental rights to be broad,* for subparagraph (A) states that "nothing" in the FCA is to "limit or affect" local governmental decisions "[e]xcept as provided in this paragraph." 47 U.S.C. § 332(c)(7)(A) (emphases added). Thus, unless a limitation is provided in § 332(c)(7), we must infer that Congress's intent to preempt did not extend so far.
>
> Further, the language of paragraph (7) suggests that *Congress did not mean to eliminate the distinction between acts that are regulatory and those that are proprietary*, for the language in subparagraph (7)(A), preserving to local governmental entities authority except as limited in paragraph (7), refers broadly to governmental "decisions," whereas the prohibition set out in subparagraph (B)(iv) refers only to regulations. The latter states the limitation that, to the extent that a facility complies with FCC standards governing RF emissions, "[n]o State or local government or instrumentality thereof may regulate" facility construction, placement, or modification. 47 U.S.C. § 332(c)(7)(B)(iv) (emphasis added). The contrasting terms used in (A) and (B)(iv) reveal that the preemption provision with respect to RF emissions expressly provided by Congress in (B)(iv) carves out of subparagraph (A) only such decisions as constitute "regulat[ion]."
>
> Thus, the language and structure of the *TCA implicitly recognize that some governmental decisions are not regulatory and reveal that Congress meant "nothing" in the FCA to limit or affect the authority of a governmental entity "over decisions" as to the construction, placement, or modification of personal wireless service facilities on the basis of RF emissions "[e]xcept" to the extent that those decisions constitute "regulat[ion]."* …… [Page 421]
>
> Further, *a private party who has the right to refuse outright to lease his property also has the right to decline to lease the property except on agreed conditions* (assuming those conditions would not violate law or public policy). …. To the same extent, the School District as a public entity, sought out by the company only in the District's capacity as property owner, is permitted to do the same. And if the property owner, public or private, declines to enter into a lease without such a condition, the communications company is faced with a choice: the company may agree to the requested condition, or, if it is unwilling to do so, it may seek a lease

> elsewhere from a property owner who does not insist on such a condition. There is nothing in the conduct of the School District here that prevents Sprint from negotiating a lease on other property whose owner does not request conditions on emissions. …...
>
> In sum, *we conclude that the Telecommunications Act does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity* …[14]

The *Sprint* 2nd Cir. Court cited as authority two U.S. Supreme Court decisions:

> In determining whether such local action constitutes forbidden regulation, or instead constitutes permissible proprietary action, we find the Supreme Court's decisions in *Boston Harbor* [*Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc*., 507 U.S. 218, 224 (1993) (The Supreme Court found that when a state or municipality acts as a participant in the market and does so in a narrow and focused manner consistent with the behavior of other market participants, such action does not constitute regulation subject to preemption.)] and *Wisconsin Department of Industry, Labor and Human Relations v. Gould Inc*., 475 U.S. 282, 286 (1986) ("*Gould*"), both of which involved the preemptive reach of the National Labor Relations Act ("NLRA"), to be instructive.[15]

Texas municipalities control the underlying rights-of-way on which light poles and utility poles are located.[16] They hold the public property in trust, as fiduciaries, to protect the public's

---

[14] *Id*. Pp. 420-21(Italic emphasis added). With the 2nd Cir. Citing as authority two U.S. Supreme Court decisions, at, 417-18, "In determining whether such local action constitutes forbidden regulation, or instead constitutes permissible proprietary action, we find the Supreme Court's decisions in *Boston Harbor* [*Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc*., 507 U.S. 218, 224 (1993) (The Supreme Court found that when a state or municipality acts as a participant in the market and does so in a narrow and focused manner consistent with the behavior of other market participants, such action does not constitute regulation subject to preemption.)] and *Wisconsin Department of Industry, Labor and Human Relations v. Gould Inc*., 475 U.S. 282, 286 (1986) ("*Gould*"), both of which involved the preemptive reach of the National Labor Relations Act ("NLRA"), to be instructive."; and also citing *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999) (No preemption).

[15] *Id*. at 417-18 (Italic emphasis added).2nd Cir. also citing *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999) (No preemption).

[16] In 1875 Texas cities were given "the *exclusive control and power over the streets, alleys and public grounds and highways of the city*…" Acts 1875, 14th Leg., 2nd C.S., p. 113, § 32. Recodified many times, now codified in the Tex. Transp. Code, §§ 311.001 [home rule city] and 311.002 [general law city]; and see also, Tex. Civ. Stat. art. 1175 [home rule city] "A home-rule municipality has the following powers …. [t]o prohibit the use of any street, alley, highway or

interest.[17] TML's Comments focused on a city acting in its proprietary capacity. In other words, as the owner of its rights-of-way. As such an owner, a Texas city is entitled, in its discretion, to determine if and when private entities may use the rights-of-ways—and set conditions for that use, just as the school district did on RF levels in *Sprint*.

## IV. TML Reply Comments to Industry Assertions concerning Texas Cities.

### A. AT&T:

AT&T's March 8, 2017, Comment made only general allegations concerning Texas cities, contrary to the request of the PN for specificity.[18] Accordingly, AT&T's Comments should be given little, if any weight in this proceeding.

AT&T did not name a single municipality in Texas. Therefore, TML cannot reply with any specificity. AT&T's general allegations are without merit, and are at best unrepresentative characterizations of what has occurred in Texas, as discussed below.

AT&T Comments at p. 7 refer to a Texas city that has a moratorium, but do not name it. With over 1,200 cities in Texas, it could not be determined if this claim has any merit. At page 8, AT&T asserts that Texas, as a jurisdiction, generally prohibits facilities in the rights-of-way. This is false on its face, as TML's March 8, 2017 Comments noted on pages 18-21, Austin, Dallas, Houston. San Antonio, and an array of smaller cities either have wireless faculties in the rights-of-way or are implementing agreements to allow them. San Antonio has allowed Verizon wireless facilities in its rights-of -way since at least 2014. AT&T has over 100 sites in Dallas alone.

---

grounds of the city by any …. telephone…. company…. without first obtaining the consent of the governing authorities … and upon paying such compensation as may be prescribed ….”; Tex. Util. Code, § 54.205. “Municipality's Right to Control Access.” *See also, Southwestern Bell v. City of El Paso and the El Paso County Water Improvement District, Number 1,* 168 Fed. Supp. 2nd 640, 648 (2001) a city, unlike the water district, is “not limited in terms of their ability to “control and receive compensation for access to the municipality's public streets…” citing Tex. Util. Code § 54.205.

[17] *Texas Dept. of Transp. v. City of Sunset Valley,* 146 S.W.3d 637,645 (Tex. 2004) “As the State's agent or trustee, a municipality does possess a superior interest in its public roads vis-a-vis private citizens. the Legislature may grant cities and towns "exclusive dominion" over the public ways within their corporate or municipal boundaries. …. as has been delegated to them by the Home Rule Amendment to the Texas Constitution, art. 11, § 5, or by the legislature…. ".

[18] PN, at 9. (Italics added)

AT&T complains of "high fees" at p. 19, but does not acknowledge that, under the Texas Constitution, value-based fees are required for private use of public property. Governmental entities (e.g., cities) are prohibited from making "gifts of public property."[19] By law, such rental fees must be non-discriminatory. (TML March 8, 2017 Comments, pp. 7-15.)

**B. Crown Castle:**

Crown Castle asserts that two Texas cities, Austin and Sugar Land, generally prohibit deployment of small cells in their rights-of-way. Not only does Crown Castle incorrectly assert that Austin prohibits small cells, they essentially contradict themselves when they acknowledge that Austin allows small cells built by or contracted to be built for a CMRS provider. They state that Austin has "adopted an ordinance prohibiting any entity that is not a CMRS provider from deploying wireless equipment in public rights-of-way, flatly prohibiting network providers from placing their own facilities unless they partner with a CMRS provider." [20]

After going through an exhaustive stakeholder process, Austin's administrative program (not an ordinance) allow small cells to locate in the rights-of-way in an orderly, prudent way. Austin allows not only CMRS providers to use the rights-of-way, but also third party neutral host

---

[19] The constitutional requirement for value-based compensation for the private use of public property arises directly from the 1876 Texas Constitution, art. III, § 52 (a) and art. XI, § 3. Tex. Const. art. III, § 52 (a) "the Legislature shall have no power to authorize any …. city, town … to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever ..." Tex. Const. art. XI, § 3 "No … city, or other municipal corporation shall hereafter … make any appropriation or donation to the same, or in anywise loan its credit…." These constitutional provisions were a direct response to prevent a repeat of the dire financial consequences to local governments that had improvidently granted use of public property without value-based compensation to the then nascent railroad industry in the 1860s and 1870s. Moreover, in 1913, the Texas Legislature adopted the statutory enabling act for the Home Rule Amendment to the Texas Constitution, Tex. Civ. Stat. art. 1175, detailing a home rule city's police powers and authority to receive rights-of-way rental compensation.

In construing a similar prohibition applicable to the State, the Texas Supreme Court stated: "a gift or loan of the credit of the state … amounts to a grant of public money in violation of Article III, Section 51. The purpose of this section and of Article XVI, Section 6, of the Constitution is to prevent the application of public funds to private purposes; in other words, to prevent the gratuitous grant of such funds to any individual or corporation whatsoever …" *State v. City of Austin*, 331 S.W.2d 737,742 (1960).

[20] Crown Castle Comments, at 18.

providers or any other agent of a CMRS a license for rights-of-way traffic signal pole use when they are seeking a use on behalf of a CMRS provider. This ensures that there is no land speculation on prime locations. Austin's program emphasizes that its grant of private use of public property requires a public purpose and ensures that there must be a direct connection to the public (arguably the customers of CMRS are the public). The program is competitively neutral to all CMRS providers and their contractors.

Crown Castle also complains that Sugar Land generally prohibits deployment of small cells in the rights-of-way. As noted above, where the city is acting in its proprietary capacity in managing the rights-of-way, any use of the public rights-of-ways by wireless providers in Texas requires a separate express agreement by the city. A city *is not required to lease city property*, facilities, infrastructure to a wireless provider.[21] Therefore, no time lines or "delays" can be imputed for "failure"' to process applications in a "timely" manner, as claimed by Crown Castle, at least not in Texas. However, once permission has been granted to one provider, other providers must be treated similarly.

Crown Castle wanted to install wireless facilities in and around Sugar Land's Town Square development. It sought new towers or installation on "designer" street lights where all other wired facilities are underground. Sugar Land offered use of city water towers where space was available to install wireless facilities or collocate with existing wireless facilities. That alternative was rejected by Crown Castle.

Crown Castle mischaracterizes a pending administrative case before the Public Utility Commission of Texas ("PUC") when it states that "utility commissions have issued Crown Castle entities certificates to provide its wholesale transport services. However, the status of these service offerings has recently come into question in Texas …",[22] referring to *Complaint of Extenet Network Sys., Inc. Against the City of Houston for Imposition of Fees for Use of Public Right of Way*, Proposal for Decision, SOAH Docket No. 473-16-1861, PUC Docket No. 45280 (Tex/ State

---

[21] *Omnipoint Commc'ns Enters., L.P. v. Township of Nether Providence*, 232 F. Supp. 2d 430, 433-435 (E.D. Pa. 2002). "…Township's refusal to lease its own property does not constitute an exercise of zoning or regulatory powers, the Township had no duty under the TCA to negotiate or ultimately to lease portions of municipal property to Omnipoint for the purpose of installing an antenna."

[22] Crown Castle Comments, at 3, n. 7

Office of Admin. Hearings Feb. 24, 2017). The issue in that pending case is not the status of Crown Castle's certificate to provide service, but rather the principal issues in *ExteNet* is whether it may take advantage of a 1999 state law to place wireless facilities in the rights-of-way, which the Proposal for Decision that Crown Castle attached to its Comments details. Crown Castle also mischaracterizes the key aspect of that Proposal for Decision by the administrative judges as a "finding that unswitched point-to-point transport service to retail CMRS providers is not a wireless service…." Rather, the key aspect to that Proposal for Decision was a determination that *ExteNet could use the rights-of-ways under the 1999 law*. As TML noted in its March 8, 2017, Comments, that Proposal for Decision is preliminary and is being vigorously contested.[23]

It is the city's and TML's position in that litigation that the legislative grant to use the public-rights of ways in Tex. Loc. Gov. Code Chapter 283 is only allowed by certain defined entities that provide wireline services. These entities are certificated by the PUC to *offer* local exchange telephone service, and are termed "Certificated Telecommunication Providers" ("CTPs").[24] Wireless providers, including those with DAS facilities, even those that are federal "commercial mobile services providers"[25] (i.e., cellular telephone), are not included in Chapter 283 and they have no state legislative grant to use the rights-of-way. Therefore, a wireless commercial mobile service providers' request to use city property, be it for a tower, a small cell, or a DAS, must first have *separate* city authority to use city property or to install its facilities in the rights-of-way.

The non-discrimination provisions of Tex. Utilities Code, Sec. 54.204 (a) and (b) (1)[26] apply to CTPs. More broadly applicable is Tex. Utilities Code Sec. 54.204 (c), which sets the

---

[23] TML Comments, at 16, with oral arguments set for April 13, 2017 before the full, three member PUC.

[24] Tex. Local Gov. Code., Sec. 283.002. Definitions. (2) "*Certificated telecommunications provider*" means a person who has been issued a certificate …by the commission to offer local exchange telephone service or a person who provides voice service.

[25] 47 USC § 332 (d)

[26] Tex. Util. Code, Sec. 54.204. Discrimination by Municipality Prohibited. (Italics added)

(a) "…a municipality or a municipally owned utility may not discriminate against a certificated telecommunications provider regarding: (1) the authorization or placement of a facility in a public right-of-way; (2) access to a building; or (3) a municipal utility pole attachment rate or term." (b)

maximum municipal conduit and pole attachments rates for "any entity" under "rules adopted by the Federal Communications Commission under 47 U.S.C. Section 224(e) … [and a municipality] shall charge a single, uniform pole attachment or underground conduit rate to all entities."

The non-discrimination provisions of private and *public* property owners in Tex. Utilities Code Sec. 54.259 applies to a "*telecommunications utility*,"[27] which is a broader term that CTP. Likewise, Tex. Utilities Code Sec. 54.260 (a) provides that private and *public* property owners may not "(3) discriminate against such a utility regarding installation, terms, or compensation of a telecommunications service facility to a tenant on the owner's property; (4) demand or accept an unreasonable payment of any kind from a tenant or the utility for allowing the utility on or in the owner's property."

**C. NTCH:**

NTCH complains of high rights-of-way rates for the City of El Paso, claiming they are $5,000.[28] TML contacted the City, and no one can determine where or how NTCH came up with that amount. El Paso has no specific fees for wireless facilities in the rights-of-way. It has only provisions in ordinances that have been applied to landline fiber runs in the rights-of-way. While the City of El Paso may have been contacted by a wireless provider concerning rates, there is no specific record of that inquiry as to rates, and there have been no complaints about or request for the City to revise or even revisit its rates for use of the rights-of-way in El Paso.

All public property in Texas that is used by private entities is rented for an amount equal to the value of the property, as is required by the Texas Constitution.[29] Therefore all users of the public rights-of-ways in Texas municipalities pay a value based fee (e.g., telecommunication

---

"In granting consent, a franchise, or a permit for the use of a public street, alley, or right-of-way within its municipal boundaries, a municipality or municipally owned utility may not discriminate in favor of or against a certificated telecommunications provider regarding: (1) municipal utility pole attachment … rates or terms."

[27] Tex. Util. Code, § 54.002. Definitions (11) of "telecommunication utility" does not include a provider of "commercial mobile service", although subsection (E) of the definition includes a "communication carrier" broadly, which arguably could include a wireless provider.

[28] NTCH Comments, March 8, 2017, at 10.

[29] TML's Comments, at 7-13.

providers pay an access line fee under Texas Local Gov't Code, Chapter 283; cable providers pay a 5% gross revenue fee, Texas Utilities Code, Chapter 66, § 66.005 (a); electric providers pay a kwh fee based on the former gross revenue fee or an agreed to fee, Texas Utilities Code § 33.008; gas utilities pay at least a 2% of gross revenue fee (most pay 4%-5% by agreement), Texas Tax Code § 182.025 (c). To do otherwise would be discriminatory in violation of state law, cited above.

**D. Sprint.**

Sprint mentioned only one Texas City, and that was with praise to Houston on working with Verizon on the Super Bowl 2017 DAS deployment.[30]

**E. Wireless Infrastructure Association (WIA):**

The Wireless Infrastructure Association (WIA) comments are contrary to the request of the PN for specificity, rather they are general allegations.[31] Accordingly, WIA's Comments should be given little, if any, weight in this proceeding. As WIA did not name a single municipality in Texas, TML cannot reply with any specificity. WIA's general allegations are without merit, and are at best unrepresentative characterizations of what has occurred in Texas, as discussed in TML's Comments.

WIA Comments at p. 13 and 17 generally refer to a Texas city that has what they characterized as a moratorium, which was discussed above in the context of Sugar Land. At page 19, they also generally refer to "high" fees, or fees for "occupations" of the rights-of-ways being value-based. All public property in Texas that is used by private entities is rented for an amount equal to the value of the property, as is required by the Texas Constitution.[32] It would be discriminatory not to charge value-based rental fees for use of the rights-of-way to wireless providers when all other users in Texas pay a value-based fee.

[30] Sprint Comments, March 8, 2017, at iii, and 4, 7, 45-46.

[31] PN, at 9. (Italics added)

[32] TML's Comments, at 7-13.

**F. ExteNet, Mobilitie, Verizon:**

While not a reply, *per se*, TML would note that several industry comments that are particularly relevant to Texas did not complain of Texas or Texas cities. ExteNet, which has the two PUC administrative cases pending, did not mention them. Perhaps indicating that the only issues they have is the proper application of state law—a legal dispute over interpretation. Mobilitie, the petitioner, did not mention any Texas cities, although they are quite active in the state. Lastly, Verizon did not mention any Texas city, perhaps in part is because they have had an agreement with San Antonio since for nearly three years which allowed them to install wireless facilities in San Antonio, including in and around the Riverwalk area of San Antonio, near the Alamo. This absents of specific complaints is telling.

## CONCLUSION

Texas cities, as are cities across the country, are revising city codes and negotiating reasonable license agreements to accommodate wireless facilities in the rights-of-ways. However, what is done to accommodate placement of wireless facilities rights-of-way in the plains of Nebraska versus rights-of-ways on the Texas coast, subject to hurricanes, are different. The conditions are different, so treatment should be different. Respectfully, TML would ask that the FCC review the best practices nationwide and share those, while accommodating, on a case by case basis, different terms and conditions in different locales.

Respectfully submitted,

Clarence A. West, Attorney

By: /s/ Clarence A. West

Clarence A. West
Texas Bar No. 21196300

4001 Lob Cove
Austin, Texas 78730
Telephone: (512) 401-3468
Email: cawest@cawestlaw.com
ATTORNEY FOR TEXAS MUNICIPAL LEAGUE