

Don Knight
Senior Assistant City Attorney
City of Dallas

Design Manual Best Practices for Meeting State and Federal Requirements for Small Cells

20th Annual Public Works Roundup
NCTCOG
May 21, 2019

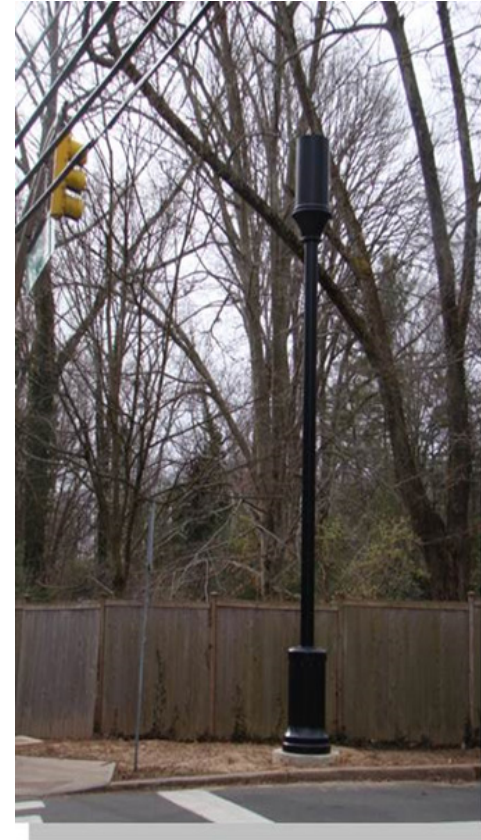
LGC Chapter 284

- Chapter 284 of the Local Government Code - effective Sept. 1, 2017.
- Allows network nodes to be in the right-of-way without a grant of authority from the local government.



What is a Network Node?

What is a Network Node?

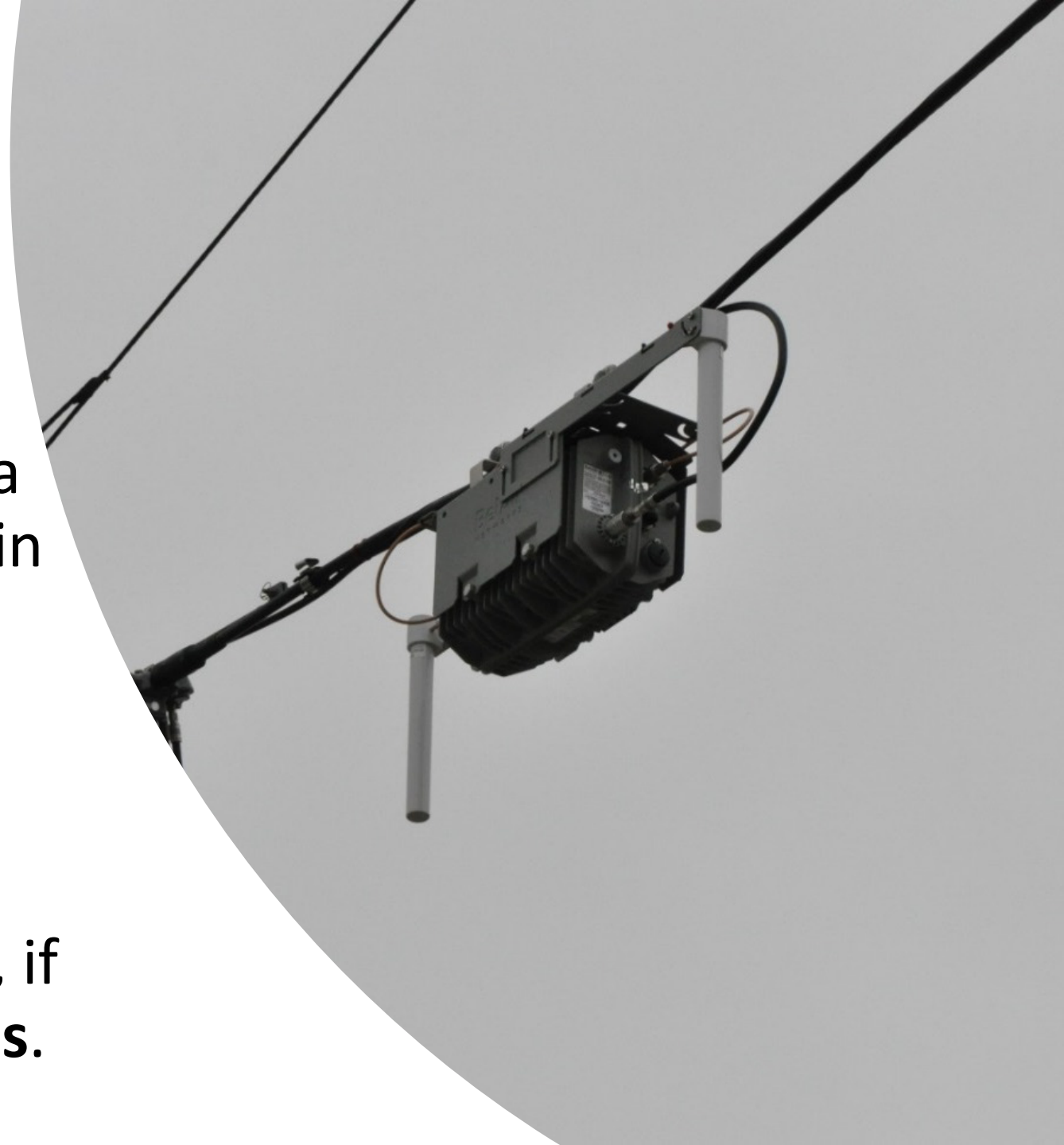




What is a Network Node?

What is a Microcell?

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



What you cannot do per Chapter 284

- Forbid the installation of network nodes within the public right-of-way;
- Forbid the installation of network nodes on city structures in the public right-of-way (although you can require an agreement);
- Institute a moratorium;

What you cannot do per Chapter 284

- Take longer to review than allowed by statute – there are very strict review times – see LGC section 284.154;
- Require a permit for routine maintenance, replacing or upgrading a network node or for the installation of a micro network node.

The Question of Fees

- Statute says maximum network node fee is \$250 annually
- The Texas Constitution says:

Sec. 52. RESTRICTIONS ON LENDING CREDIT OR MAKING GRANTS BY POLITICAL CORPORATIONS OR POLITICAL SUBDIVISIONS...

(a) ... the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State ... to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever....

The Question of Fees

- With cities everywhere charging more than \$250 dollars, often 10 to 20 times that amount, how do you reconcile Chapter 284 with the Texas Constitution?
- Short answer: You can't! Being forced to turn over public property for a 10th or a 20th of what it is worth is an unconstitutional gift

What you can do

- Require that the construction does not “obstruct, impede, or hinder the usual travel or public safety;”
- Require that the installation not obstruct the legal use by other utility providers;
- Enforce applicable codes (which have to be passed first);

What you can do

- Enforce “publicly disclosed public right-of-way design specifications;” (which you have to legislate and publicly disclose first);
- Require that the installation does not violate the Americans with Disabilities Act;

What you can do

- Require that poles not exceed the lesser of ten feet above the tallest existing pole or 55 feet above ground level;
- Disallow installation (without specific nondiscriminatory consent from the city) in right-of-way that is adjacent to a street that is more than fifty feet wide and adjacent to a residential area;
- Disallow installation (without specific nondiscriminatory consent from the city) in right-of-way that is located within a park.

What you can do

- a municipality can enforce:
 - right-of-way requirements,
 - applicable codes, and
 - design specifications

Design Manual

- The Design Manual has to be “publicly available”
- Some cities are putting it in their right-of-way management ordinance – since ordinances are always publicly available
- Some cities are opting to just put on their website

Designate districts – Historic district

- Section 284.105
- A city may require “reasonable design or concealment measures for the new network nodes or new node support poles.”

Designate districts – Design district continued

- In addition, in order to take advantages of the protections of section 284.105, **the design district has to have decorative poles**. In a design district with decorative poles, a city can require, as with a historical district, “reasonable design or concealment measures for the new network nodes or new node support poles.”

Areas subject to additional requirements

Residential areas and Parks

Sec. 284.104. INSTALLATION IN MUNICIPAL PARKS AND RESIDENTIAL AREAS

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

Agreements, Applications, Permits, Registration and **Deadlines!**

- **Deadlines – Section 284.154 – strict, short deadlines for processing applications**
- Agreements may be required when providers attach to city facilities. This is called a pole attachment agreement.

Agreements, Applications, Permits, Registration and **Deadlines!**

- Applications, Permits and Registration
- Applications will be required for permits and for registration
- You will need to decide if you want to have a registration process
- Applications need to be developed for both permits and registration

What else can cities do?

- If electric distribution poles are limited to antennas only you could be looking at “ground furniture” i.e. boxes and pedestals in the ROW, you will need to consider that when developing regulations and provide rules.
- Just because network nodes can't be prohibited next to Parks doesn't mean you can't have appropriate public health and safety regulations that apply to all users of the right-of-way, like no ground furniture where it could block motorists view of children crossing the street to enter a park or playground

The FCC Small Cell Order

- What does it mean for Texas cities already subject to Chapter 284?
- Must a city comply with both?
- **Can** a city comply with both?
- Didn't the FCC say they weren't preempting state small cell laws?

Didn't the FCC say they weren't preempting state small cell laws?

- Yes – in fact they crafted their rules around the Texas state law, so as not to conflict
- But the shot clocks are different how do I comply with both when the rules are different for when the shot clock runs?

How do I make sense of this mess?

- The FCC rules are specific examples they have declared to meet the standards they promulgated under two principles found in Sections 253 and 332 of the Communications Act (47 U.S.C. § 253; 47 U.S.C. § 332)
- The FCC has redefined:
 - “Fair and reasonable compensation”
 - “Effectively prohibiting service”

How do I make sense of this mess?

- “Fair and Reasonable Compensation” provided for under Sections 253 and 332 of the Communications Act (47 U.S.C. § 253; 47 U.S.C. § 332) when applied to small wireless facilities must be a reasonable approximation of costs related to deploying wireless facilities, which includes costs to:
 - maintain the right-of-way and maintain structures within the right-of-way;
 - process application permits.

How do I make sense of this mess?

- The fees must be
 - Based on objectionably reasonable costs
 - Nondiscriminatory.

How do I make sense of this mess?

These requirements apply to the following types of fees:

- Right-of-way access fees.
- Application fees.
- Fees to attach small wireless facilities to public infrastructure, such as traffic lights, light poles, or utility poles.

More on the Question of Fees

- Can the Federal Government set how much a city can charge to use the right of way it holds in trust for its taxpayers?
- Short answer: No! Being forced by the federal government to turn over state or local public property for private use is just as much a violation of the Fifth Amendment as taking private property without compensation for the governments use.

The FCC Small Cell Order v. Chapter 284

Metric	Chapter 284	FCC Small Cell Order
Application Fee for up to 5 nodes	\$500/\$250 for additional	\$500/\$100 for additional
Application Fee for new pole	\$1000	\$1000
Recurring annual node fee	\$250	\$270
Recurring annual pole attachment fee	\$20	Included in \$270 above
Result of failure to meet shot clock	Deemed granted	Creates presumption/Not deemed granted
Batched applications must be accepted	Up to 30	No limit but number can be factor to rebut shot clock presumption
Days to determine complete	10 for transport/30 for node or new pole	10
Days to review small cell – existing structure	60	60
Days to review small cell – new pole	150	90
Days to review transport facility permit	21	NA

The FCC Small Cell Order v. Chapter 284

- The good news is that the FCC patterned their order after Texas Chapter 284 right down to the \$270 annual node fee which was arrived at by adding the Texas node fee of \$250 to the Texas pole attachment fee of \$20 to get \$270
- If you comply with Texas law you shouldn't have to worry about the FCC order, which is, after all, only a "safe harbor" and not an outright requirement
- So, if you don't do exactly what the rules say is "ok" you can still argue that you have met the statutory standards, you just won't have the blessing of the FCC that you are correct

Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012

- **IN GENERAL.**—Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104–104) or any other provision of law, **a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.**

Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012

- ELIGIBLE FACILITIES REQUEST.—For purposes of this subsection, the term “eligible facilities request” means any request for modification of an existing wireless tower or base station that involves—(A) collocation of new transmission equipment; (B) removal of transmission equipment; or (C) replacement of transmission equipment.

What Applies Where?

Where & What	Texas Chapter 284	Small Cell Rules	Sec. 6409(a)
Private Property & Zoning	X	✓*	✓
ROW (City as Owner) & ROW Permits	✓	✓	X

*At least as to Permit Application Fees

Take Away

Since Texas cities have had the decision to allow tens of thousands of new cell sites in the public right of way made for them, consideration of Chapter 284 and the FCC' Small Cell Order should be part of the development process and the design of new public roadways and the communities they serve.

Appropriate Compensation for that use of the public right-of-way will ultimately be determining by the courts.

Don Knight

Dallas City Attorney's Office

Dallas, Texas

don.knight@dallascityhall.com

214.670.3224

Questions?