

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CITY OF AUSTIN,
Plaintiff,

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v.

NO. _____

STATE OF TEXAS and GREG ABBOTT,
Texas Governor, in his official capacity,
Defendants.

CITY OF AUSTIN’S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF THE COURT:

The City of Austin (“City”) files this Original Complaint seeking declaratory and injunctive relief to prevent implementation of “Senate Bill No. 1004,” a Texas law that frustrates the City’s ability to manage public rights-of-way and require fair and reasonable compensation from companies that use public property to provide private mobile telephone services.

I. SUMMARY

1. Despite the clear mandates of the Federal Telecommunications Act (FTA), 47 U.S.C. §§ 151, *et seq.*, which guarantee the City’s authority to manage public rights-of-way and require fair and reasonable compensation from telecommunications providers who use public property to transmit wireless telephone signals, Texas seeks to enforce a new Chapter 284 of its Local Government Code, which caps certain telecommunications fees at unreasonably low rates while frustrating the City’s ability to safely and efficiently manage public rights-of-way.

2. The City brings this suit to challenge Senate Bill No. 1004¹ (SB 1004) which, beginning September 1, 2017, imposes new regulations that (1) allow “small cell” telecommunications

¹ Codified at TEXAS LOCAL GOVERNMENT CODE, §§ 284.001, *et seq.* (effective Sept. 1, 2017).

providers to obtain permits and use public land at costs far below the City's cost of service and the land's fair market value; (2) impair the City's ability to evaluate permit applications, collaborate across affected agencies, schedule construction to maximize safety and mobility, and ensure that work meets aesthetic standards; and (3) compel the City to grant mobile telecommunications providers with access to private property even if the property owner has not given written consent.

3. As described further below, SB 1004 conflicts with Sections 253(c) and 332(c)(7) of the FTA—which guarantee the City's authority to manage public rights-of-way and require fair and reasonable compensation from telecommunications providers that use public rights-of-way—and thereby violates the Supremacy Clause of the United States Constitution. SB 1004 also unconstitutionally compels the City to take property from private owners who have not consented to the use of small cell facilities on their land. To prevent these impending deprivations, the City requests immediate declaratory and injunctive relief.

II. JURISDICTION AND VENUE

4. The Court has jurisdiction under 28 U.S.C. § 1331 to decide the City's claims under the United States Constitution. The Declaratory Judgment Act, 28 U.S.C. §§ 2201, *et seq.*, provides the Court with further remedial authority.

5. Venue properly lies within the Western District of Texas. The City is situated in this District, and Defendant Governor Abbott resides in this District and maintains offices in this District. 28 U.S.C. §§ 124(d)(1), 1391(b)(1). A substantial portion of the events or omissions giving rise to this action occurred or will occur in this District. 28 U.S.C. § 1391(b)(2).

III. PARTIES

6. Plaintiff City of Austin, appearing and proceeding by and through its City Attorney, is a home-rule municipality and political subdivision of the State of Texas.

7. Defendant State of Texas is responsible for the actions of its officials with regard to state-wide enforcement of its laws and regulations.

8. Defendant Greg Abbott is the elected Governor of the State of Texas. Governor Abbott is sued in his official capacity.

IV. FACTUAL ALLEGATIONS

A. The Telecommunications Act Guarantees City Authority to Manage Rights-of-Way and Require Fair and Reasonable Compensation from Wireless Providers

9. The Federal Telecommunications Act (FTA) is a federal regulatory regime concerning the regulation of interstate communications. 47 U.S.C. §§ 151, *et seq.*

10. Section 253 of the FTA, entitled “Removal of barriers to entry,” categorically bars any state or local statute or regulation that would have the effect of prohibiting any entity from providing telecommunications services. 47 U.S.C. § 253(a).

11. Section 253(b) reserves for States the authority to impose regulations that “preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” *Id.*, § 253(b).

12. Section 253(c) reserves for States and local governments the authority to “manage the public rights-of-way” and “require fair and reasonable compensation from telecommunications providers” for facilities located in the public rights-of-way. *Id.*, § 253(c). Local government authority is subject to the requirement that right-of-way access be provided “on a competitively neutral and nondiscriminatory basis.” *Id.*

13. The purpose of Section 253(c) is to guarantee that local governments such as the City maintain control of public rights-of-way and receive fair and reasonable compensation for use of public property by telecommunications providers.

14. During Senate debate, Senator Hollins described the origin and purpose of 253(c) as being in response to the demands of city mayors. *See* 141 Cong. Rec. S8174 (daily ed. June 12, 1995). As Senator Hollins explained, Section 253(b) was written to address the concern of States that they maintain the authority to protect public safety and welfare. *Id.* And in the same way, Section 253(c) was written to maintain the status quo, that “every mayor must control the rights of way.” *Id.*

15. During House debate, Representative Stupak emphasized that Section 253(c) was passed in order to provide local authorities with the power both to control public rights of way and to be fairly compensated for the use of public property. *See* 141 Cong.Rec.H 8460 (daily ed. Aug. 4, 1995). Rep. Stupak offered an FTA amendment that became Section 253(c). As he stated:

[I]f the Stupak-Barton amendment is not adopted, you will have companies in many areas securing free access to public property. Taxpayers paid for this property, taxpayers paid to maintain this property, and it is simply not fair to ask the taxpayers to continue to subsidize telecommunication companies. In our free market society, the companies should have to pay a fair and reasonable rate to use public property.

141 Cong.Rec.H 8460.

16. In addition to Section 253(c), Section 332(c)(7) of the FTA preserves local zoning authority of public rights of way. 47 U.S.C. § 332(c)(7).

17. Since passage of the FTA, federal courts have expressly noted the authority of local governments to manage rights-of-way and require fair and reasonable compensation from telecommunications providers. *See BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1188-89 (11th Cir. 2001) (citing testimony of Sen. Hollins); *Qwest Communications v. City of Berkeley*, 202 F.Supp.2d 1085, 1093 (N.D.Cal. 2001) (citing testimony of Sen. Hollins and Rep. Stupak).

B. Pursuant to Section 253(c), the City Developed a Pilot Program to Manage its Rights-of-Way and Require Fair and Reasonable Compensation from Wireless Companies Seeking to Install and Operate Small Cell Nodes on Public Property

18. As cellular telephone technology has become widespread, the City has received comment from a variety of sources, including telecommunications providers, concerning the need for a city-wide policy concerning wireless telecommunications installations in public rights-of-way.

19. In 2016, the City formed an interdepartmental task force to develop policy recommendations. This process included gathering feedback from telecommunications providers as well as input and analysis from fifteen City departments including: Transportation, which manages traffic light fixtures and other City right-of-way infrastructure; Planning and Zoning, which implements the City's "Great Streets" Master Plan; and Austin Energy, which manages City utility poles. The City developed standards and specifications for attaching small cell nodes to utility poles, traffic light fixtures, and other public property. The City considered impacts on public safety and welfare and explored how to reconcile wireless installations with existing design policies. The City also researched existing licensing and rental-fee structures at multiple cities across the country, including Dallas, Houston, and San Antonio.

20. Ultimately, the City adopted a pilot program—including new Code provisions and a fee schedule—concerning the procedures and terms for placement of small cell network facilities in downtown Austin rights-of-way using City infrastructure. The City began the pilot program in downtown Austin in March 2017, and intended to take the program city-wide thereafter.

21. As part of an ordinance authorizing fees and rents for small cell node facilities, the City set an application fee of \$1250, an annual use fee of \$1500 per attachment to downtown light signal poles, and an annual fee for underground placement of fiber optic cables which ranges from \$0.32 to \$2.50 per linear foot of trenched conduit. In support of its fee ordinance, the City published

documentation of the cost of administering a small cell node application program as well as the fair market value for use of public rights-of-way in the downtown Austin area.

C. SB 1004 Would Force the City to (1) Accept Application Fees Substantially Below the Cost of Service, (2) Accept Use Fees Far Below Market Value, (3) Grant Free Use of Public Land for Certain Facilities, and (4) Unreasonably Discriminate Against Certain Providers

22. SB 1004 would override the City's fee schedule. Beginning September 1, 2017, permit application fees for small cell nodes are capped as low as \$100 per node. TEX. LOCAL GOV'T CODE § 284.156² (effective Sept. 1, 2017). The City may not charge an annual pole or light signal use fee in excess of \$270 per small cell node, including \$250 for use of the right-of-way and \$20 for attachment to a City service pole. *Id.*, §§ 284.053, 284.056 (effective Sept. 1, 2017). And the City may not charge a use fee for underground placement of fiber optic cables in excess of \$28 per month. *Id.*, § 284.055 (effective Sept. 1, 2017).

23. The application fee cap imposed by SB 1004 sets compensation far below the City's cost of service. The City's cost of service to process an application is approximately \$1,234 per application. This cost includes the time it takes City staff to process license applications, conduct a field assessment, perform an inspection during the connection of new SCN facilities, and conduct a post-installation functionality inspection. These City staff activities are necessary to ensure that installations are performed safely and that the resulting structures do not pose a hazard to persons or property in the rights-of-way.

² "The amount of an application fee charged by a municipality may not exceed the lesser of: (1) the actual, direct, and reasonable costs the municipality determines are incurred in granting or processing an application that are reasonably related in time to the time the costs of granting or processing an application are incurred; or (2) \$500 per application covering up to five network nodes [and] \$250 for each additional network node per application...." TEX. LOCAL GOV'T CODE §§ 284.156(b)(1),(2).

24. The \$250 annual right-of-way use fee cap imposed by SB 1004 sets compensation far below fair market value for use of City property. The City determined that the fair market value of downtown Austin real estate is approximately \$100 per square foot. Under SB 1004, small cell providers may occupy as much as 34 cubic feet per small cell node installation, including small cell node antenna and related equipment. *See* TEX. LOCAL GOV'T CODE § 284.003(a) (effective Sept. 1, 2017). The City's existing ordinance charges \$1,500 annually for use of above-ground public property, which is not the maximum reasonable value for use of public land but still ensures that the public receives fair compensation. Under SB 1004, however, the City can recover only a small fraction of the value of the public property used.

25. The \$28 per node fiber optic rental fee cap sets compensation far below fair market value for use of underground City property.

26. Additionally, the flat fee structure for fiber optic rental fees unreasonably discriminates against telecommunications providers who need a smaller length of cable. As testimony at City hearings revealed, some providers may need less than twenty feet of cable, while others may need as much as two thousand feet of cable. The City set a cable fee structure based upon factors including the width of the conduit used to house the cable; the length of the conduit; whether or not telecommunications providers shared trenches or required their own separate trenches; and whether or not the provider possessed an existing conduit.

27. SB 1004 also grants telecommunications providers the right to use public land without any charge for additional facilities. New Section 284.057 prohibits any other fees on telecommunications providers. TEX. LOCAL GOV'T CODE § 284.057 (effective Sept. 1, 2017). At the same time, new Section 284.157 allows telecommunication providers to increase the size of utility poles and install "micro network nodes" on electric and telecommunications cables without

any charge for use of public rights-of-way. *Id.*, § 284.157 (effective Sept. 1, 2017). Moreover, SB 1004 permits telecommunications providers to construct new node support poles in public rights-of-way without payment of the fair market value for use of public land. *See id.*, § 284.152 (allowing City to impose a permit requirement but not allowing use fees) (effective Sept. 1, 2017); *but see* § 284.104 (allowing City to restrict installation of new node support poles in municipal parks and certain residential areas) (effective Sept. 1, 2017).

D. SB 1004 Will Frustrate the City’s Ability to Manage Public Rights-of-Way

28. SB 1004 contains numerous provisions that frustrates the City’s ability to ensure safe and efficient use of public rights-of-way.

29. New Section 284.151 prohibits any City “moratorium” on issuing permits or other approvals for small cell nodes. *Id.*, 284.151(c) (effective Sept. 1, 2017). This provision will limit the ability of the City to schedule work in public rights-of-way. Presently, the City emphasizes safety and mobility in its management of the rights-of-way. Often, particular conditions require delays in construction. For example, during the annual South by Southwest festival, the City scales back work in the rights-of-way to accommodate the arrival of hundreds of thousands of visitors. The City needs to have scheduling flexibility in order to avoid unnecessary closures of streets and sidewalks, avoid congestion, and mitigate threats to safety and mobility.

30. New Section 284.154 imposes certain time limits on the City’s ability to review permit applications from telecommunications providers seeking to install small cell node facilities. *Id.*, § 284.154 (effective Sept. 1, 2017). These limits, known as “shot clocks,” include a thirty day time limit for review of small cell node permit applications as well as other limitations. These shot clocks inhibit the City’s ability to collaborate across Departments, investigate community concerns, and effectively review each permit application.

31. Further, the combination of the moratorium and shot clock provisions presents the opportunity for telecommunications providers to submit many permit applications at the same time and thus overload the City's capacity to effectively evaluate each new installation in the public rights-of-way. If the City is not able to effectively evaluate each permit application, the placement of new small cell nodes may negatively impact safety, mobility, and the public welfare.

E. SB 1004 Would Also Force the City to Allow Placement of Small Cell Node Facilities on City Utility Poles in Residential Neighborhoods Without the Consent of Private Property Owners and Without Just Compensation for the Use of Property

32. New Section 284.201 requires the City to allow telecommunications providers to place small cell nodes on any City-owned utility poles. TEX. LOCAL GOV'T CODE § 284.201(a) (effective Sept. 1, 2017). The statute reads:

The governing body of a municipally owned utility shall allow collocation of network nodes on municipally owned utility poles on nondiscriminatory terms and conditions and pursuant to a negotiated pole attachment agreement, including any applicable permitting requirements of the municipally owned utility.

Id., § 284.201(a).

33. Many City-owned utility poles are located on private residential properties. The City acquired rights to place poles on these properties subject to specific terms and conditions.

34. In many cases, the City's poles are subject to use conditions including the promise that City poles would only be used for electric or telephone wires that benefit the burdened property or neighboring properties. The installation of small cell node wireless transmission equipment would not be for the benefit of particular properties, however, and would thus be inconsistent with the City's rights of use. Further, SB 1004 provides no compensation to private property owners for the use of their property to transmit private mobile telecommunications signals.

V. CLAIMS

FIRST CAUSE OF ACTION: SUPREMACY CLAUSE

35. The City hereby incorporates by reference the preceding paragraphs 1 through 34.

36. SB 1004 violates the Supremacy Clause of the United States Constitution and obstructs the purposes and objectives of Congress by requiring the City to allow telecommunications providers to utilize public property without paying fair and reasonable compensation. The FTA grants the City authority to manage rights-of-way and require fair and reasonable compensation for the use of public property by telecommunications providers. The compensation caps of SB 1004 obstruct the purposes and objectives of the FTA, as expressed in Section 253(c), by capping small cell node fees at rates far below the cost of service and the fair market value for use of public property.

37. SB 1004 also violates the Supremacy Clause by frustrating the City's ability to manage public rights-of-way. Through its prohibition on any City "moratorium" and through its imposition of "shot clocks" limiting the City's time to evaluate small cell node permit applications, SB 1004 impairs the City's ability to guarantee safety, mobility, and public welfare in regard to use of rights-of-way, in contradiction to the FTA, including Sections 253(c) and 332(c)(7).

38. SB 1004 further violates the Supremacy Clause by requiring the City to set a flat fee structure for use of fiber optic cables in the public rights-of-way, when in practice telecommunications providers will need access to cable of varying lengths and widths. SB 1004 would force the City to discriminate against providers who use smaller and narrower lengths of cable by requiring such providers to pay the same fees as providers who use longer and wider cable lengths. Such discrimination would conflict with the FTA, including Section 253(c), which prohibits states and local authorities from imposing anti-competitive or discriminatory compensation requirements.

SECOND CAUSE OF ACTION: TAKINGS

39. The City hereby incorporates by reference the preceding paragraphs 1 through 38.

40. SB 1004 compels the City to unlawfully take property from Texas residents in violation of the United States Constitution. Specifically, Section 284.201(a) of SB 1004 requires the City to allow telecommunications providers to install small cell node facilities on City utility poles, even if such installation violates the City's agreement with private property owners concerning the scope of the City's use of private land. To the extent that the City has not obtained a right to use private property for transmission of private mobile wireless services, each installation of a small cell node on a City utility pole located on private land will constitute a taking of private property without just compensation.

PRAYER FOR RELIEF

The City seeks relief including:

- A. A declaration that SB 1004 is unconstitutional;
- B. A preliminary and permanent injunction barring defendants from enforcing SB 1004; and
- C. Any further relief that the Court deems fit and proper.

Respectfully submitted,

ANNE L. MORGAN, CITY ATTORNEY
MEGHAN L. RILEY, CHIEF, LITIGATION

/s/ Michael Siegel

MICHAEL SIEGEL
State Bar No. 24093148
michael.siegel@austintexas.gov
Telephone: (512) 974-2888
City of Austin – Law Department
P. O. Box 1546
Austin, Texas 78767-1546
Facsimile: (512) 974-1311

ATTORNEYS FOR PLAINTIFF