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Velva L. Price
District Clerk
Travis County
D-1-GN-17-004766
Ruben Tamez

D-1-GN-17-004766
CAUSE NO. _____

CITY OF MCALLEN; CITY OF § IN THE DISTRICT COURT OF
DALLAS; CITY OF IRVING; CITY OF §
BROWNSVILLE; CITY OF SUGAR §
LAND; CITY OF MISSION; CITY OF §
PHARR; CITY OF COPPELL; CITY §
OF WESLACO; CITY OF ALAMO; §
CITY OF MIDLOTHIAN; CITY OF §
HIGHLAND VILLAGE; CITY OF §
SEAGOVILLE; CITY OF ALTON; §
CITY OF BOERNE; CITY OF ROMA; §
CITY OF ROCKPORT; CITY OF LA §
FERIA; CITY OF LUCAS; CITY OF §
BALCONES HEIGHTS; CITY OF §
SOUTH PADRE ISLAND; CITY OF §
SIMONTON; and JIM DARLING, in §
both his official capacity as Mayor of the §
City of McAllen and individual capacity, §

Plaintiffs,

TRAVIS COUNTY, TEXAS

v.

THE STATE OF TEXAS;
GREG ABBOTT, sued in his official
capacity as Governor of the State of
Texas; and KEN PAXTON, sued in his
official capacity as Attorney General of
Texas,

Defendants.

353RD
_____ JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION
AND APPLICATION FOR INJUNCTIVE RELIEF

I. INTRODUCTION

Since the time of its framing in 1876, the Texas Constitution has jealously guarded and preserved the resources and power of the government. This is demonstrated with unmistakable clarity in the Constitution's interrelated prohibitions against gifting public funds or other things of

value to aid the commercial interests of a private enterprise and against the delegation of legislative power to private entities without providing for adequate standards of exercise or oversight.

Notwithstanding these constitutional prohibitions, SB 1004 seeks to require Texas municipalities to forego arm's-length negotiation and instead grant private wireless providers the use of the public right-of-way for a gratuitously-small fraction of the market rate. The legislation also places legislative powers relating to zoning and the management of municipal right-of-way in the hands of private entities without providing guidelines for, or oversight over, the exercise of these essential municipal police powers.

In mandating this result, the Legislature has not only violated the anti-gift and non-delegation provisions of the Texas Constitution, but would make cities and their officials complicit in these transgressions by having them administer and sanction the transfer of wealth of as much as hundreds of millions of dollars from municipal coffers to private telecommunications companies each year and by having them abandon their obligations to the public by relinquishing their responsibilities for implementing effective zoning measures and right-of-way management. Taxpayers in these municipalities have an interest in preventing the unconstitutional transfer of valuable city assets and legislative powers to private corporations. Put to the untenable choice of violating SB 1004 or the state constitution, the named plaintiffs seek a declaration that SB 1004 is unconstitutional and further seek an injunction against its implementation and enforcement because it violates article II, section 1, article III, section 1, article III, section 52, and article XI, section 3, of the Texas Constitution.

II. DISCOVERY CONTROL PLAN

1. Pursuant to Rule 190.4 of the Texas Rules of Civil Procedure, Plaintiffs intend that discovery be conducted under Level 3.

III. PARTIES AND SERVICE OF PROCESS

2. Plaintiff City of McAllen is a duly incorporated home-rule municipality located in Hidalgo County, Texas.

3. Plaintiff City of Dallas is a duly incorporated home-rule municipality located in Dallas, Collin, Denton, Kaufman, and Rockwall Counties, Texas.

4. Plaintiff City of Irving is a duly incorporated home-rule municipality located in Dallas County, Texas.

5. Plaintiff City of Brownsville is a duly incorporated home-rule municipality located in Cameron County, Texas.

6. Plaintiff City of Sugar Land is a duly incorporated home-rule municipality located in Fort Bend County, Texas.

7. Plaintiff City of Mission is a duly incorporated home-rule municipality located in Hidalgo County, Texas.

8. Plaintiff City of Pharr is a duly incorporated home-rule municipality located in Hidalgo County, Texas.

9. Plaintiff City of Coppell is a duly incorporated home-rule municipality located in Dallas and Denton Counties, Texas.

10. Plaintiff City of Weslaco is a duly incorporated home-rule municipality located in Hidalgo County, Texas.

11. Plaintiff City of Alamo is a duly incorporated home-rule municipality located in Hidalgo County, Texas.

12. Plaintiff City of Midlothian is a duly incorporated home-rule municipality located in Ellis County, Texas.

13. Plaintiff City of Highland Village is a duly incorporated home-rule municipality located in Denton County, Texas.

14. Plaintiff City of Seagoville is a duly incorporated home-rule municipality located in Dallas and Kaufman Counties, Texas.

15. Plaintiff City of Alton is a duly incorporated home-rule municipality located in Hidalgo County, Texas.

16. Plaintiff City of Boerne is a duly incorporated home-rule municipality located in Kendall County, Texas.

17. Plaintiff City of Roma is a duly incorporated home-rule municipality located in Starr County, Texas.

18. Plaintiff City of Rockport is a duly incorporated home-rule municipality located in Aransas County, Texas.

19. Plaintiff City of La Feria is a duly incorporated home-rule municipality located in Cameron County, Texas.

20. Plaintiff City of Lucas is a duly incorporated home-rule municipality located in Collin County, Texas.

21. Plaintiff City of Balcones Heights is a duly incorporated General Law Type A municipality located in Bexar County, Texas.

22. Plaintiff City of South Padre Island is a duly incorporated home-rule municipality located in Cameron County, Texas.

23. Plaintiff City of Simonton is a duly incorporated General Law Type A municipality located in Fort Bend County, Texas.

24. Plaintiff Jim Darling is the Mayor of McAllen, Texas. He is a party to this proceeding in his official capacity as mayor and in his individual capacity as a citizen and taxpayer.

25. Defendant State of Texas may be served with process by delivering citation and petition to the Texas Secretary of State at 1019 Brazos Street, Austin, Texas 78701.

26. Defendant Greg Abbott, Governor of the State of Texas, may be served with process by delivering citation and petition to 1100 San Jacinto Blvd., Austin, Texas 78701.

27. Defendant Ken Paxton, Attorney General of the State of Texas, may be served with process by delivering citation and petition to 209 West 14th Street, Austin, Texas 78701.

IV. JURISDICTION AND VENUE

28. The subject matter in controversy is within the jurisdictional limits of this Court, and the Court has jurisdiction over this action pursuant to article V, section 8, of the Texas Constitution and section 24.007 of the Texas Government Code, as well as the Texas Uniform Declaratory Judgments Act. TEX. CIV. PRAC. & REM. CODE § 37.001, *et seq.*

29. This Court has jurisdiction over the parties because all Defendants reside or have their principal place of business in Texas.

30. Plaintiffs seek non-monetary relief.

31. Venue is proper in Travis County because Defendants have their principal office in Travis County. TEX. CIV. PRAC. & REM. CODE § 15.002(a)(3).

V. FACTS

A. The Emergence of Small-Cell and Network-Node Technology

32. Senate Bill 1004, enacted by the 85th Legislature in 2017 and to become effective on September 1, 2017, enacts chapter 284 of the Texas Local Government Code. This new chapter purports to govern the deployment of network nodes in public rights-of-way.

33. A network node is defined in the bill as “equipment at a fixed location that enables wireless communications between user equipment and a communication network.” A network node encompasses multiple pieces of equipment including a radio transceiver, an antenna, a

battery-only backup power supply, and coaxial or fiber-optic cable. The term does not include a pole or tower to which the equipment is attached.

34. Network nodes are a component of small-cell technology, which in turn is part of the cellular network that supports smart phones, tablets, and other mobile devices.

35. Mobile data traffic, driven by increased sales of smart phones, tablets, and similar devices and by usage demanding greater bandwidth, results in significant growth in the use of mobile data networks and requires increased capacity.

36. Emerging technology will greatly accelerate the demand for increased capacity of wireless networks and for additional network nodes. While small cell technology will make possible greater uses of the internet, currently and in the foreseeable future the predominant use of the network is for streaming video.

37. Small-cell wireless networks using network nodes are a way to increase capacity and capabilities above that provided by the familiar cellular technology provided by larger cell towers, often referred to as macro sites. Rather than being located on tall macro towers, a small cell network node may be located on a street sign, on a light pole, on a traffic signal pole, on the side of a building, or on a dedicated pole.

38. Small cells complement the existing macro tower system by providing additional capacity and by increasing coverage in those areas where the signal from the macro tower is weak.

B. Legislative Involvement in Telecommunications Companies' Use of Municipal Right-of-Way

1. Earlier legislation is carefully crafted to avoid being a prohibited gift or grant

39. For many years telecommunications service was provided over land lines and was typically provided in a locality by a single provider. Texas municipalities would grant franchises to that company to permit it to use city rights-of-way. Typically, this would include the right to

construct poles and string wire along the rights-of-way or to bury cable beneath the right-of-way. As the cities were giving the company a valuable property right, the company was required to pay for that right just as it would if it used an easement or other property right of a private landowner.

40. In 1999, in response to the emergence of competition among companies offering local exchange telephone service, the legislature enacted chapter 283 of the Local Government Code. That chapter was designed to encourage competition in the provision of telecommunications services and to ensure that new entrants were not precluded from gaining access to the use of municipal rights-of-way due to pre-existing franchise agreements. TEX. LOCAL GOV'T CODE, § 283.001(a).

41. Among other things, the statute set up a state system of determining the fees to be paid to a municipality for the use of rights-of-way by new entrants to the market place, but did so by basing the fee on the amount each city collected under its existing franchise fees. TEX. LOCAL GOV'T CODE, §§ 283.053, 283.055. In apparent recognition of the constitutional prohibition on a municipality making a gift or grant to a private corporation, the legislature designed the system to provide the cities with the fees they had previously negotiated or imposed while letting new entrants come into the market on the same basis as existing companies. Essentially, the city received and the new entrants were charged what had previously been established as fair-market value for the use of the city rights-of-way.

2. **SB 1004 is designed to transfer municipal property to private companies at a fraction of its fair market value**

42. In 2017, the legislature enacted SB 1004 (chapter 284 of the Texas Local Government Code), which becomes effective on September 1, 2017.

43. In SB 1004 the legislature seeks to encourage and simplify the use of network nodes and small-cell technology by limiting cities' regulatory powers over the placement and design of network nodes and by below-market fees for the use of the public rights-of-way.

44. The Texas legislation is part of a multi-state push by the wireless industry in conjunction with the American Legislative Exchange Council (ALEC) to achieve a more relaxed regulatory environment and to obtain a public subsidy.

45. In sharp contrast to the approach taken in chapter 283 of the Local Government Code, which was crafted to ensure that the fee for the use of public right-of-way was set at fair market value, SB 1004 (chapter 284) imposes maximum charges that are a small fraction of market value, thus, gratuitously, conveying public property to private corporations and providing a public subsidy for a private commercial enterprise.

46. SB 1004 (section 284.053) sets an annual maximum fee for the use of a city's right-of-way at \$250 per network node. TEX. LOCAL GOV'T CODE, § 284.053.

47. By contrast, as reflected in the attached affidavit (Exhibit 1), the standard rate for the use of public right-of-way is between \$1,500 and \$2,500 per network node.

48. The fee schedule established by SB 1004 requires cities to permit use of their rights-of-way in return for only 10 to 16.7 percent of the fair market value of the property interest conveyed.

49. This amounts to a gift or grant to the companies maintaining the network of between \$1,250 and \$2,250 per node per year.

50. While significant numbers of small cell nodes are currently being installed, the number of cells is expected to increase by a factor of five or more as carriers convert to 5G technology.

51. At the time the SB 1004 fee structure was adopted, the legislature had before it the Legislative Budget Board fiscal note prepared for the House of Representatives noting that the bill could result in loss of right-of-way and similar fees to municipalities estimated at more than \$800 million annually.

52. Nevertheless, the legislature passed the bill initiating a significant annual wealth transfer from Texas cities to private telecommunications companies of as much as hundreds of millions of dollars each year.

3. **Earlier legislation is carefully crafted so that municipalities retain legislative powers relating to right-of-way management**

53. Each Texas city is vested with “exclusive control over and under the public highways, streets, and alleys of the municipality.” TEX. LOCAL GOV’T CODE, § 283. This exclusive authority of right-of-way management is consistent with, and an extension of, municipal land-use and zoning authority, which is exercised through a statutory framework that provides for public participation, due process, and oversight. TEX. LOCAL GOV’T CODE, Chapter 211.

54. Chapter 283 of the Local Government Code, which was designed to accommodate and integrate new entrants to the telecommunications system, expressly recognizes that the management of rights-of-way is a delegated legislative function that typically is vested in the municipalities of the state:

It also declares that it is the policy of this state that municipalities:

. . . retain the authority to manage a public right-of-way within the municipality to ensure the health, safety, and welfare of the public . . .

TEX. LOCAL GOV’T CODE § 283.001 (b).

55. Consistent with this fundamental governmental policy, chapter 283 expressly provides that cities retain such powers in their consideration of applications for use of the right-of-way:

A municipality may exercise those police power-based regulations in the management of a public right-of-way that apply to all persons within the municipality. A municipality may exercise police power-based regulations in the management of the activities of certificated telecommunications providers within a public right-of-way only to the extent that they are reasonably necessary to protect the health, safety, and welfare of the public.

TEX. LOCAL GOV'T CODE § 283.056 (c). And,

In the exercise of its lawful regulatory authority, a municipality shall promptly process each valid and administratively complete application of a certificated telecommunications provider for any permit, license, or consent to excavate, set poles, locate lines, construct facilities, make repairs, affect traffic flow, *obtain zoning or subdivision regulation approvals, or for other similar approvals*, and shall make every reasonable effort to not delay or unduly burden that provider in the timely conduct of its business.

TEX. LOCAL GOV'T CODE. § 283.056(d) (emphasis added).

56. Chapter 283 treats the legislative function of right-of-way management and related permitting processes as necessarily entailing three interrelated aspects: (1) Safety of the structure to be placed within municipal right-of-way with respect to the construction required to install the structure and its operational safety, TEX. LOCAL GOV'T CODE. § 283.056; (2) Receipt of compensation for the use of right-of-way, TEX. LOCAL GOV'T CODE. § 283.051; and (3) Determining the suitability of sites for property in or along right-of-way in terms of the health, safety, and welfare of the public through proper land-use controls, TEX. LOCAL GOV'T CODE. § 283.056.

4. **SB 1004, in contrast to past legislative practice, is drafted to transfer municipal legislative authority over right-of-way management to private companies**

57. As with chapter 283 of the Texas Local Government Code, SB 1004 expressly recognizes that the management of right-of-way is a delegated legislative function concerning the health, safety, and welfare of the public that typically is vested in the municipalities of the state. TEX. LOCAL GOV'T CODE §§ 284.001(a)(2); (c)(2).

58. Like chapter 283, SB 1004 recognizes that the legislative function of right-of-way management and related permitting processes necessarily entails three interrelated aspects: (1) Safety of the structure to be placed within municipal right-of-way with respect to the construction required to install the structure and its operational safety, TEX. LOCAL GOV'T CODE §§ 284.102, .108, .110, and 153; (2) Receipt of compensation for the use of right-of-way TEX. LOCAL GOV'T CODE §§ 284.053, .054¹; and (3) Control over zoning and land use, TEX. LOCAL GOV'T CODE §§ 284.001(a)(2), .104, and .105.

59. In contrast with Chapter 283, however, which vests municipalities with authority to apply land-use controls as part of the permitting process, SB 1004 vests decision-making authority with respect to land-use considerations with the telecommunications provider. As shown above, SB 1004 expressly recognizes that land-use controls are an inextricable aspect of right-of-way management. In terms of promoting and preserving the health, safety and welfare of the public, a selection of a site for the placement of telecommunications equipment cannot be made properly without due consideration of the land-use aspects implicated in such site selection. SB 1004 delineates certain land-use-related limitations on site selection, *i.e.*, relative proximity of parks and residential areas, and location within historic or design districts. TEX. LOCAL GOV'T CODE §§ 284.104, .105. Beyond that, however, SB 1004 vests ultimate responsibility for the adequate consideration of the public health, safety, and welfare implications of site selection with the telecommunications providers rather than with the municipalities. This is seen when considering that the providers select their desired sites and that the application review cannot include municipal-zoning review or land-use approvals. TEX. LOCAL GOV'T CODE §§ 284.101(a).

¹ As discussed elsewhere, *see e.g.* ¶¶ 64, 73, *infra*, the chapter 283 system of market-based compensation is replaced in chapter 284 with a system of merely token compensation.

60. In a word, SB 1004 expressly takes the public right and obligation to manage right-of-way with adequate consideration of zoning and land-use needs from the municipality, and vests such decision making with telecommunications providers, whose applications must be approved without analysis of land-use matters from a public perspective. TEX. LOCAL GOV'T CODE §§ 284.101(a).

61. Accordingly, SB 1004 represents an overly broad delegation of legislative authority to private entities, in violation of article II, section 1, and article III, section 1, of the Texas Constitution.

C. Constitutional Framework

1. Prohibition against gifts to private corporations

62. In the period following the Civil War many Texas cities gave financial aid to railroads in order to entice the railroad to come through their community and thus to provide those cities with a commercial advantage. The railroads were not always constructed, and, even if they were, the anticipated advantages to the cities did not always materialize. In response to this situation, and to prevent its reoccurrence, the framers of the 1876 Constitution included article XI, section 3, which provides, in part:

No county, city, or other municipal corporation shall hereafter . . . make any appropriation or donation to [any private corporation or association] . . .

TEX. CONST., art. XI, § 3.

63. Additionally, the framers of the 1876 Constitution adopted article III, section 52, which prohibited the legislature from approving legislation such as SB 1004 that would authorize or direct a city to make a gift or grant to a corporation. That section provides in part:

(a) Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State 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. III, § 52.

64. SB 1004 not only authorizes cities to make a prohibited grant of a thing of value to a private corporation, it requires it. Specifically, the legislation requires cities to permit network providers to use public rights-of-way to locate network nodes, TEX. LOC. GOV'T CODE, § 284.151 (except as permitted by chapter 284, a city may not prohibit, regulate, or charge for the installation or location of network nodes in a public right-of-way and may not institute a moratorium on permitting such nodes), and it limits payment to the city for the use of those rights-of-way to an annual rate of not more than \$250 per node when the negotiated market rate ranges from \$1,500 to \$2,500. In other words, SB 1004 requires Texas cities to permit private corporations to use the public right-of-way for a steeply discounted price that amounts to about between one-tenth and one-sixth of its actual value. This is a grant of public money or thing of value contemplated and prohibited by article III, section 52. Similarly, it is a prohibited donation under article XI, section 3. This amounts to a massive, multi-million-dollar gift to private corporations from the cities of Texas. With the advent of 5G technology and the increased demand for more small cells, the size of the gift may amount to hundreds of millions of dollars. And the gift continues year after year.

65. While cities are prohibited from making a gift to a private corporation, the constitution does not prohibit making purchases of goods or services where the payment from the government is based on the value received. For example, cities purchase all types of goods (*e.g.*, automobiles, street paving material, office supplies, etc.) from vendors at market-value prices.

66. There are instances, though, where the transaction between the government and private enterprise does not clearly fit the standard mode of a purchase at a price that is recognized as reflecting value received. For those instances, Texas law has developed to recognize that some

public benefits to private corporations are constitutionally permitted if they serve a legitimate public purpose and provide a clear public benefit in return. *E.g., Texas Municipal League Intergovernmental Risk Pool v. Texas Workers' Compensation Comm'n*, 74 S.W.3d 377, 383 (Tex. 2002) (“*TML*”). “A three-part test determines if a statute accomplishes a public purpose consistent with [article III.] section 52(a).” *Id.* at 384. “Specifically, the Legislature must: (1) ensure that the statute’s predominant purpose is to accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public’s investment, and (3) ensure that the political subdivision receives a return benefit.” *Id.*

67. SB 1004 does not meet the three-part test that might avoid the constitutional prohibition of article III, section 52. Failure to satisfy any one of the three parts of the test is fatal.

68. SB 1004 does not meet the first prong of the three-part test, which requires that the *predominant* purpose is to accomplish a public purpose rather than to benefit private parties. Section 284.001, enacted by SB 1004, does contain findings that network nodes are instrumental to increasing access to advanced technology and information and that expeditious processes and reasonable terms and conditions for access to the public right-of-way further the interest in having a reliable wireless network. TEX. LOC. GOV'T CODE, § 284.001(1) and (5). While carriers undoubtedly would like to have a statutorily imposed rental rate that is far below fair-market value, there is no legislative finding or evidence that carriers have been prevented from creating their wireless networks by the free-market economy. Indeed, carriers have been installing thousands of cells in cities at the upper end of market rates, which makes it difficult to contend that the necessity of paying fair value is a barrier to the development of the networks. Unless the existing system operates as a barrier, the “predominant” effect, and presumably the purpose, of the establishment of a far-below-fair-market-value is to benefit the private corporations, not the public.

69. Further, while the public right-of-way is a convenient location for network nodes, nodes can generally be placed on private property such as the side of a building located immediately adjacent to the right-of-way. Making a gift of the use of the public right-of-way frees network providers from the operation of the free market and deprives the private property owners of the opportunity to rent space to host network nodes. This public subsidy undermines the free market system and deprives the private landowners of the value of their property, which is not consistent with public policy.

70. The predominant purpose of SB 1004 is to benefit private parties, not to convey a public benefit. Thus, the statute does not meet the first prong of the three-part *TML* test.

71. SB 1004 also does not meet the second prong of the three-part test, which requires that the local government retain control to ensure that the public purpose is accomplished. While the statute directs maximum rates for use of the public right-of-way and specific deadlines for permitting decisions, all of which benefits the network carriers, there is nothing in the statute to mandate continued oversight to ensure that the public purpose is accomplished. The statute provides great detail on the cities' obligations to the wireless providers, but there is nothing in the Act that provides for the cities' or the state's continued oversight of the carriers' actions to ensure that they act for the public's benefit. Even if we are to assume that development of the wireless system is the predominant purpose and represents the benefit to the public, there is nothing in the Act to establish measurable benchmarks for the development of the system, nothing to ensure that underserved areas rather than simply the most profitable areas are served, nothing to ensure that the publicly subsidized nodes are available for the public rather than, in some cases, perhaps being reserved for private users, or anything else to ensure that public purpose is accomplished. In the absence of such statutorily provided oversight, the statute does not satisfy the Supreme Court's test.

72. The third part of the test is to ensure that the political subdivision receives a return benefit. This is often phrased as ensuring that there is adequate consideration. Here, the cities are limited to roughly ten to sixteen percent of market value with no additional benefit to compensate for the lost revenue.

73. SB 1004 finds that the rates imposed by the statute are “fair and reasonable” and in compliance with federal law (47 U.S.C. § 253) that prohibits rates that have the effect of prohibiting the ability of any entity to provide telecommunications service. The SB 1004 rates, though, are not only well below the rates that would be charged in a free market environment, they are also a fraction of the rates the state is free to charge for the same services. The legislature was careful to require cities to provide a major subsidy to these private enterprises, while, at the same time, leaving the state free to charge market rates for the use of its rights-of-way. Presumably, if it is fair and reasonable for the state to charge market rates, it is difficult to understand how limiting cities to a small fraction of those rates can also meet the standard of fairness and reasonableness.

74. SB 1004, so long as it is not enjoined and not declared to be unconstitutional directs city officials, such as Mayor Darling, to give away city resources and, by doing so, to violate article XI, section 3, of the Texas Constitution.

75. Similarly, until SB 1004 is enjoined and declared to be unconstitutional, city taxpayers, such as Jim Darling, in his individual capacity, are injured by the city’s gift of public resources to private corporations. Even if the statute is subsequently declared to be invalid, the cities, their officials, and their taxpayers are irreparably injured. The opportunity to negotiate a market rate prior to the installation of any nodes is lost. Further, even if it is possible to recover the difference between the ultimately determined rental rate and the \$250 per node authorized by SB 1004, the recovery will likely be in a subsequent fiscal year so that the opportunity to have an

immediate favorable impact on the city's finances and on its taxpayers in current fiscal years is lost.

76. SB 1004 by mandating that cities make a gratuitous grant of its property to a private business enterprise violates the Texas Constitution, and, under Texas law, a violation of constitutionally guaranteed rights inflicts irreparable injury warranting injunctive relief.

2. **Prohibition against certain delegations of legislative power to private corporations**

77. In establishing the government of the state, the people delegated the powers of the government to the legislative, executive, and judicial departments:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted

Tex. Const. art. II, § 1.

78. The Legislature is authorized to delegate legislative powers to local governments, administrative agencies, and private entities. As Texas courts have recognized, delegations of legislative power can be both necessary and proper in certain circumstances, such as, for example, with the delegation of power to private entities to promulgate certain industrial and professional standards.

79. By the same token, Texas courts have also recognized that delegations to private entities raise more troubling issues than do delegations to public bodies and that they are therefore subject to more stringent requirements and less judicial deference than public delegations. As the Supreme Court has stated:

[P]rivate delegations clearly raise even more troubling constitutional issues than their public counterparts. On a practical basis, the private delegate may have a personal or pecuniary interest which is inconsistent with or repugnant to the public

interest to be served. More fundamentally, the basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government. Thus, we believe it axiomatic that courts should subject private delegations to a more searching scrutiny than their public counterparts.

Texas Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 469 (Tex. 1997).

80. Texas courts have developed a balancing test containing eight factors to determine whether a particular delegation of legislative power to a private delegate is constitutional. These factors are stated as follows:

1. Are the private delegate's actions subject to meaningful review by a state agency or other branch of state government?
2. Are the persons affected by the private delegate's actions adequately represented in the decision making process?
3. Is the private delegate's power limited to making rules, or does the delegate also apply the law to particular individuals?
4. Does the private delegate have a pecuniary or other personal interest that may conflict with his or her public function?
5. Is the private delegate empowered to define criminal acts or impose criminal sanctions?
6. Is the delegation narrow in duration, extent, and subject matter?
7. Does the private delegate possess special qualifications or training for the task delegated to it?
8. Has the Legislature provided sufficient standards to guide the private delegate in its work?

Texas Boll Weevil Eradication Found. 952 S.W.2d at 472.

81. SB 1004 vests the legislative power of zoning and land use as it applies to right-of-way management with private parties. When considered through the lens of the eight-part balancing test, it is abundantly clear that the delegation to private entities of the legislative authority to manage the right-of-way by making land-use decisions that typically require application of the processes set out in Local Government Code chapter 211, violates article II, section 1, and article III, section 1, of the Texas constitution.

82. Specifically, with respect to the zoning and land-use aspects of right-of-way management:

(a) The actions of the telecommunications providers, as private delegates of legislative authority, are not subject to meaningful review by a state agency or other branch of government;

(b) The members of the public that will be most affected by the private delegates' actions are not adequately represented in the decision-making process;

(c) The private delegate is applying the law to its individual, pecuniary interest rather than making rules of general application;

(d) The private delegates have a pecuniary or other personal interest that may conflict with their public functions;

(e) The delegation is not narrow in duration, extent, or subject matter;

(f) The private delegates do not possess special qualifications or training in municipal land planning or right-of-way management; and

(g) The legislature has not provided sufficient standards to guide the private delegate in its work.

83. SB 1004, so long as it is not enjoined and not declared to be unconstitutional directs city officials, such as Mayor Darling, to relinquish properly delegated municipal authority to

manage the right-of-way for the health, safety, and welfare of the public to private delegates whose pecuniary interests most likely will conflict with the public's interests, and who do not have the expertise to manage public right-of-way for the benefit of the public. As such, SB 1004 directs city officials, such as Mayor Darling, to violate their obligations to promote and preserve the safety of the public under their respective city charters, chapter 211 of the Texas Local Government Code, and chapter 311 of the Texas Transportation Code, and, by doing so, affirmatively participate in the violation of article II, section 1, and article III, section 1 of the Texas Constitution.

84. SB 1004 by mandating that municipalities cede their properly delegated authorities that are necessary for right-of-way management in the interest of public health, safety, and welfare of the public violates the Texas Constitution, and under Texas law, is a violation of constitutionally guaranteed rights that inflicts irreparable injury warranting injunctive relief.

VI. CAUSES OF ACTION

84. Paragraphs 1-84 are incorporated by reference as though fully restated in support of each of the following causes of action.

A. Declaratory Judgment – SB 1004 Violates the Texas Constitution

85. The Uniform Declaratory Judgments Act (“UDJA”) is remedial, and intended to settle and afford relief from uncertainty and insecurity with respect to rights under a statute, and must be liberally construed to achieve that purpose.

86. The UDJA waives the sovereign immunity of the state and its officials in actions that challenge the constitutionality of a statute and that seek only equitable relief.

87. Pursuant to the UDJA, Plaintiffs request a declaratory judgment of the Court, as follows:

- a. That SB 1004, in its requirement set out in section 284.053 of the Texas Local Government Code that cities permit private corporations to use the public

rights-of-way at significantly below market value rates, impermissibly authorizes and requires cities to make a gift or grant in violation of article III, section 52(a), of the Texas Constitution;

- b. Cities complying with the statutory direction will violate article XI, section 3, of the Texas Constitution as they will be making a prohibited donation to a private corporation;
- c. Section 284.053 of the Texas Local Government Code is unconstitutional and unenforceable;
- d. SB 1004, in delegating legislative powers of managing right-of-way through proper zoning and land-use controls to private corporations such that the corporations are entitled to make land-use decisions without meaningful guidance, public process, or oversight is an impermissible delegation of legislative power in violation of article II, section 1, and article III, section 1, of the Texas Constitution;
- e. Cities complying with the statutory direction violate article II, section 1, and article III, section 1, of the Texas Constitution as they will be affirmatively participating in an unconstitutional delegation of municipal legislative authority.
- f. Sections 248.101(a) and 248.154(c) are unconstitutional and unenforceable.

B. Injunction

88. For the reasons set forth in paragraphs 1-84, SB 1004 violates the state constitution.

89. Plaintiffs are entitled to a temporary injunction enjoining enforcement of section 284.053 of the Texas Local Government Code pending a decision on a permanent injunction and declaratory judgment. Section 284.053 is invalid as being enacted in contravention to the express denial of authority to the legislature to permit or require cities to make gifts or grants to private corporations. Accordingly, the statute is void. The state, by enacting SB 1004 and subjecting plaintiffs to its requirements, is directing plaintiffs to violate the Texas Constitution. The forced transfer of property pursuant to an unconstitutional statute is subject to being enjoined without regard to whether there is a legal remedy. Being subjected to, and forced to administer, an unconstitutional statute is necessarily and of itself an irreparable injury. Further, there is irreparable

injury to the cities and their citizens, which potentially face the grossly inadequately compensated use of their property prior to having an opportunity for a merits decision on the constitutionality of the statute. Plaintiffs are therefore entitled to a temporary and ultimately to a permanent injunction against enforcement of the unconstitutional statute.

90. Plaintiffs are entitled to a temporary injunction enjoining enforcement of sections 248.101(a) and 248.154(c) of the Texas Local Government Code pending a decision on a permanent injunction and declaratory judgment. Sections 248.101(a) and 248.154(c) are invalid as being enacted in contravention to the denial of authority to the legislature to make delegations of legislative authority to private actors such that the private delegates are neither constrained before they act by meaningful standards nor made accountable after they act by administrative, judicial, or popular review. Accordingly, the statute is void. The state, by enacting SB 1004 and subjecting plaintiffs to its requirements, is directing plaintiffs to violate the Texas Constitution. The improper delegation of legislative authority pursuant to an unconstitutional statute is subject to being enjoined without regard to whether there is a legal remedy. Being subjected to, and forced to administer, an unconstitutional statute is necessarily and of itself an irreparable injury. Further, there is irreparable injury to the cities and their citizens, which potentially face the substantial and detrimental consequences of the implementation of land-use decisions in public right-of-way which are made by actors who have pecuniary interests that often most likely will conflict with the promotion of the health, safety, and welfare of the public, and which will not be made by persons or entities with specialized knowledge of public right-of-way management, and which will not be subject to meaningful review. Plaintiffs are therefore entitled to a temporary and ultimately to a permanent injunction against enforcement of the unconstitutional statute.

91. Since any injunction will be against the state, which has no pecuniary interest in the suit and can show no monetary damages, the court should set a nominal bond of \$1,000.

Additionally, at least nine of the plaintiffs are home rule cities whose charters exempt them from bond requirements in injunction suits. Accordingly, nothing more than a nominal bond would be appropriate under Rule 684.

92. Plaintiffs ask the court to set its request for a temporary injunction for an expedited hearing and set its request for permanent injunction for an expedited full trial on the merits and, after said trial, issue a declaratory judgment and a permanent injunction and barring the enforcement of Sections 284.053, 248.101(a), and 248.154(c) of the Local Government Code.

VII. CONDITIONS PRECEDENT

93. All conditions precedent have been performed or have occurred.

VIII. ATTORNEY'S FEES

94. As a result of the actions complained of herein, Plaintiffs have had to engage qualified counsel to prosecute this action and has incurred, and will continue to incur, reasonable and necessary attorney's fees. Plaintiffs are therefore entitled to recover these fees pursuant to Chapters 37, of the Texas Civil Practice and Remedies Code.

IX. REQUEST FOR DISCLOSURES

95. Pursuant to Texas Rule of Civil Procedure 194.2, Plaintiffs hereby request that Defendants make the disclosures identified in Tex. R. Civ. P. 194.2(a-i) and (l) within fifty (50) days of the service of this Petition.

PRAYER

FOR THESE REASONS, Plaintiffs request that Defendants be cited to appear and answer and, on final trial that Plaintiffs have judgment against Defendants for:

1. The declaratory relief requested herein;
2. A temporary and permanent injunction;
3. Attorney's fees;

4. Litigation costs;
5. Such other and further relief, at law and in equity, to which the Plaintiffs may show themselves entitled.

Dated: August 31, 2017

Respectfully submitted,

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