

ORDINANCE NO. O2018-019

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF YUMA, ARIZONA, AMENDING TITLE 9 OF THE YUMA CITY CODE, CHAPTER 92, *TELECOMMUNICATIONS*, BY AMENDING SECTIONS 02, 04, 05, 15 THROUGH 20, 30, 32, 40 THROUGH 44, AND 99 RELATED TO OCCUPYING AND USING PUBLIC HIGHWAYS FOR TELECOMMUNICATION SERVICES; AND PROVIDING PENALTIES FOR VIOLATIONS THEREOF

WHEREAS, the City of Yuma ("City") has a non-delegable duty to keep its public highways reasonably safe; and,

WHEREAS, providers of telecommunications services desire to use the public highways of local governments to install facilities such as small cells, microcells, WiFi radio equipment as well as poles and towers; and,

WHEREAS, federal and state statutes and regulations require the City to issue licenses to providers of telecommunications services to install, maintain, and operate certain facilities in the public highways if certain terms and conditions are met; and,

WHEREAS, the City may still exercise its police and land use powers before issuing a license or permit to a telecommunications provider; and,

WHEREAS, as the U.S. Congress, federal agencies, and the Arizona legislature promulgate new laws and regulations regarding telecommunications and communications providers and use of City rights-of-way, the City must update Yuma City Code, Title 9, Chapter 92, *Telecommunications*, to comply with changes to the federal and state laws and regulations; and,

WHEREAS, to maintain and protect the safety and welfare of the public and citizens through the City's police and land use powers.

NOW, THEREFORE BE IT ORDAINED by the City Council of the City of Yuma as follows:

SECTION 1: Yuma City Code, Title 9, Chapter 92, Section 02 is amended to delete the following crossed-out text and add the following underlined text in the definitions section:

Section 92-02. Definitions.

COMMERCIAL MOBILE RADIO SERVICE. Two-way voice commercial mobile radio service as defined by the Federal Communications Commission in 47 Code of Federal Regulations Section 20.3, as amended ~~47 United States Code Section 157.~~

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FACILITIES. The plant, equipment, and property, including but not limited to poles, wires, pipe, conduits, pedestals, antenna, and other appurtenances placed in, on, or under highways and not owned by the city and used in the provision of telecommunications

services.

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NON-FACILITIES BASED RESELLER. Any person that provides telecommunications service over a facility located in whole or in part in the public ~~rights-of-way~~ highways but who does not own, lease, or have an indefeasible right to use the underlying facility used for the transmission, does not place any facilities in the public ~~rights-of-way~~ highway itself, and is not responsible for the operation, installation or maintenance of facilities in the public ~~rights-of-way~~ highways under any arrangement; and resells a transmission service provided by the owner of the facility.

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WIRELESS SERVICES. Any services that are provided to the public and that use licensed or unlicensed spectrum, whether at a fixed or mobile location using wireless facilities.

SECTION 2: Yuma City Code, Title 9, Chapter 92, Section 04, Subsection B, and Section 05 are amended to delete the following strikethrough text and add the following underlined text:

Section 92-04 City Police Power; Continuing Jurisdiction.

(B) The city shall have continuing jurisdiction and supervision over any facilities located within or on city ~~rights-of-way~~ public highways. However, it is recognized that the daily administrative, supervisory, and enforcement responsibilities of the provisions of this chapter shall be delegated and entrusted to the City ~~Manager~~ Administrator or designee to interpret, administer, and enforce the provisions of this chapter, and to promulgate standards regarding the construction, reconstruction, relocation, maintenance, dismantling, abandonment, or use of the facilities within the city ~~rights-of-way~~ public highways.

Section 92-05 Violation.

From and after the effective date of this chapter, it shall be unlawful for any provider to occupy the ~~streets and~~ public ~~rights-of-way~~ highways unless the provider is in compliance with the provisions of this chapter. The city may pursue any remedy at law, including but not limited to, injunctive relief, civil or criminal trespass, criminal misdemeanor, and withholding other city permits and authorizations until the provider complies with this chapter. These remedies are cumulative and may be pursued in the alternative.

SECTION 3: The headers before Yuma City Code, Title 9, Chapter 92, Sections 15, 30, and 40 are amended to delete the following strikethrough text and add the underlined text to read as follows:

Before Section 92-15: **License or Franchise to Occupy Public Highways ~~Rights-of-Way~~**

Before Section 92-30: **Rental Fees for use of Public Highways ~~Rights-of-Way~~**

Before Section 92-40: **Location and Relocation of Facilities in Public Highways ~~Rights-of-Way~~**

SECTION 4: The titles of Yuma City Code, Title 9, Chapter 92, Sections 15 and 16 are amended to add the underlined text to read as follows:

Section 92-15 License Required by Telecommunications Corporations.

Section 92-16 Telecommunications Corporation License Proposal.

SECTION 4: Yuma City Code, Title 9, Chapter 92, Section 16 is amended to delete subsections D through G as shown in the following crossed-out text:

~~—(D) As a condition of issuing or renewing a license to use the public highways to construct, install, operate and maintain telecommunication facilities, the city may require that:~~

~~—(1) The applicant shows that it has received a certificate of public convenience and necessity from the Arizona Corporation Commission; except that this requirement shall not apply to a telecommunication corporation that provides solely interstate telecommunication services within this state;~~

~~—(2) Requirements that the city may establish from time to time the applicant agrees to comply with the highway use time;~~

~~—(3) The applicant agrees to provide and maintain accurate maps showing the location of all the facilities it will use in the highways within the city, and to comply with such other mapping requirements as the city may establish from time to time;~~

~~—(4) The applicant obtains the insurance, and provides proof of insurance as required by the city; posts the performance bonds and security fund required by the city; agrees to fully indemnify the city, its officers, agents, boards and commissions, in a form satisfactory to the city; and agrees that it shall have no recourse against the city for monetary damages as a result of any damage that may result from the city's exercise of its rights under the license, or applicable provisions of law.~~

~~—(5) The applicant agrees to comply with and be bound by the administrative and enforcement provisions as may be prescribed from time to time by the city which may include:~~

~~—(a) Provisions covering assignment~~

~~—(b) The right to inspect records to determine compliance by the licensee~~

~~—(c) Provisions for renewal~~

~~—(d) Fees and charges contemplated by A.R.S. § 9-582(c) may be charged by the city pursuant to Chapter 210 of the City Code~~

~~(E) Any license granted by the city pursuant to this chapter shall commence upon adoption of the license and acceptance of the license by the provider. The license shall be for a term of five years, and subject to the conditions and restrictions provided in the instrument and this chapter.~~

~~(F) Every licensee shall be subject to the city's exercise of such police, regulatory and other powers as the city now has or may later obtain, and a license may not waive the application of the same, and must be exercised in strict conformity therewith. Every license shall be subject to revocation if the licensee fails to comply with the terms and conditions of the license or applicable law. Provided, however, that a license shall not be revoked unless the licensee is given written notice of the defect in performance and fails to cure the defect within 60 days of the notice, except where the city finds that the defect in performance is due to intentional misconduct, is a violation of criminal law, or is part of a pattern of violations where the licensee has already had notice and opportunity to cure. A hearing shall be held before a license is revoked or not renewed if the licensee requests a hearing.~~

~~(G) The issuance of a license by the city is not a representation or warranty that such license is a legally sufficient substitute for a franchise and is not a representation or warranty that a franchise is not required.~~

SECTION 5: Yuma City Code, Title 9, Chapter 92, Sections 17 through 20, 30, 32, 40 through 44, and 99 are amended to delete the following strikethrough text and add the following underlined text as follows to the cited section or subsections:

Section 92-17. License or Franchise Terms.

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(B) *Length of license or franchise.* Any license or franchise granted by the city pursuant to this chapter shall commence upon adoption of the license or franchise and acceptance of the license or franchise by the provider. The license or franchise shall be effective for a period determined by the City Council, but in the case of a license to a telecommunications corporation to construct, install, operate or maintain telecommunications facilities, the period shall ~~not exceed~~ be five (5) years. Each license or franchise is subject to the conditions and restrictions provided in the instrument and this chapter. The city may terminate a license or franchise in accord with its terms and conditions if the licensee or franchisee is in default thereunder, subject to § 92-20.

(C) *License or franchise agreement.* The city reserves the right, at its discretion, to require providers seeking a license or franchise under this chapter to execute a binding agreement setting forth all terms and provisions of the contractual relationship between the city and the provider regarding the presence of telecommunications facilities within city ~~rights-of-way~~ public highways. Such agreements may be amended only in writing subject to the mutual consent of the parties, and in the case of agreements relating to franchises, with the concurrence of the electorate at an election.

(D) *No warranty.* Providers may choose between requesting a license or franchise under this section. ~~The city makes no warranty or representation to providers about~~

~~which form of authorization meets their business and legal needs.~~ The issuance of a license by the city is neither a representation nor a warranty that such license is a legally sufficient substitute for a franchise and is neither a representation nor a warranty that a franchise is not required.

(E) As a condition of issuing or renewing a license or franchise ~~to use the public highways,~~ pursuant to this chapter, applicant must:

(1) Show, in the case of a telecommunications corporation seeking a telecommunications license or franchise, that the applicant has and maintains a valid certificate of convenience and necessity from the Arizona Corporation Commission or the Federal Communications Commission or the successor of either, as the case may be and in other cases, applicant must demonstrate that it is qualified to hold a license or franchise; except that this requirement shall not apply to a telecommunication corporation that provides solely interstate telecommunication services within Arizona;

(2) Agree to conform to public highway use requirements that the city may establish from time to time;

(3) Agree to provide and maintain accurate locational maps and drawings of ~~the all of applicant's~~ facilities as proposed and as built in the public highway as set forth in Article 3 hereof, and to comply with such other mapping requirements as the city may establish from time to time;

(4) Satisfy insurance, bonding, and security fund requirements established pursuant to § 92-41(H); fully indemnify the city, its Mayor and Councilmembers, employees, officers, agents, boards and commissions, in a form satisfactory to the city; and agree that ~~it~~ applicant shall have no recourse against the city for monetary damages as a result of any damage that may result from the city's exercise of its rights under the license, or applicable provisions of law; and

(5) Agree to comply with and be bound by the administrative and enforcement provisions set forth ~~herein~~ in this chapter and as may be prescribed from time to time by the city consistent with state law-, which may include:

(a) Provisions covering assignment

(b) The right to inspect records to determine compliance by the licensee

(c) Provisions for renewal

(d) Fees and charges contemplated by A.R.S. § 9-582(C), as amended, may be charged by the city pursuant to Chapter 210 of the City Code.

(F) Nothing herein shall be read to prevent the city from considering other matters or establishing additional conditions. Except as prohibited by state law, nothing herein shall be read to require the city to issue or renew a license if the applicant has previously had a license or permit revoked, or for any other reason permitted under Arizona law. Every licensee shall be subject to the city's exercise of such police, regulatory and other powers as the city now has or may later obtain, and a license may not waive the application of the same, and must be exercised in strict conformity therewith.

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Section 92-18. Limited Communications Provider Licenses Authorized; Fees.

The license and proposal requirements set forth in §§ 92-15, 92-16, and 92-17 shall also apply, with necessary changes, to communications providers that are not telecommunications corporations. The City Council may issue limited, non-exclusive licenses under the following circumstances:

(A) *De minimus license.* The City Council may issue a limited license to authorize placement of interstate fiber-optic telecommunications facilities within city ~~rights-of-way~~ public highways in the event the facilities do not exceed ten lineal miles in total length of installation and connect only to interstate telecommunication carrier points of presence, and to no other connection within the city. Said license shall provide for quarterly payments to the city of a public highway ~~right-of-way~~ occupancy fee for each lineal foot of installation on the ~~bases~~ basis of fair market value and cost, as determined by the City Council at the time of the granting of the license and adjusted periodically thereafter at the city's discretion. The license may also contain such additional terms and conditions as the City Council may approve consistent with the purposes and findings in this chapter and applicable law.

(B) ~~Transmitting~~ Transitting traffic license. The City Council may issue a limited license to authorize use of the city's ~~rights-of-way~~ public highways solely for the purpose of providing telecommunications service where no sale or exchange of service originates or terminates in the city. Said license shall provide for quarterly payments to the city of a public highway ~~right-of-way~~ occupancy fee for each lineal foot of installation on the ~~basis~~ bases of fair market value and cost, as determined by the City Council at the time of the granting of the license and adjusted periodically thereafter at the discretion of the city. The license may also contain such other terms and conditions as the City Council may approve consistent with the purposes and findings in this chapter and applicable law.

(C) *Wireless services facilities license.* The City Council may issue a limited license to authorize the installation, operation, ~~or~~ maintenance, or use of wireless services ~~telecommunication~~ facilities, such as antennas, within the city's ~~rights-of-way~~ public highways. Unless no fee is allowed by law, ~~Said~~ license shall provide for quarterly payments to the city of a ~~right-of-way~~ public highway occupancy fee for each site or installation on the basis of fair market value and cost, as determined

by the City Council at the time of granting the license and adjusted periodically thereafter at the discretion of the city. The license may contain such other terms and conditions as the City Council may approve consistent with the purposes and findings in this chapter and applicable law.

Section 92-19. Right-of-Way Permit.

The City Engineer shall not issue an ~~an right-of-way construction~~ encroachment permit or other authorization for a provider to construct or install communications facilities, or facilities for which a license or franchise is required under this chapter, unless the provider has first obtained ~~any~~ all licenses or franchises required to occupy the city's ~~rights-of-way public highways~~ under this chapter, and, if applicable, has obtained any wireless application approvals required by Section 154-19.09. No permit issued shall be valid if the required license or franchise has not been obtained.

Section 92-20 Revocation; Refusal to Renew.

The city may revoke or refuse to renew any license or franchise issued or granted under this chapter for failure to comply with the material terms and conditions of the license or franchise or applicable law. A license or franchise may be revoked only if the licensee or franchisee has been given written notice of the defect or defects in performance and the defect is not or the defects are not cured within 60 days of the notice, unless the city finds that the defect is due to intentional misconduct, is a violation of criminal law, or is part of a pattern of violations if the licensee or franchisee has already had notice and opportunity to cure. If the licensee requests a hearing, a hearing shall be held before a license is revoked or not renewed.

Section 92-30 Fees and Costs.

(A) In addition to the application fee set forth in § 92-16, a telecommunication corporation, including a telecommunications corporation ~~provider~~ not required to obtain a license pursuant to the exemption provided by § 92-15, shall pay an ~~an construction~~ encroachment permit fee for the issuance of an ~~an construction~~ encroachment permit to place telecommunication facilities in the public highway.

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Section 92-32 Non-Facilities-Based Providers Resellers.

A telecommunications licensee or franchisee may enter into contracts for the use of its telecommunications facilities within the public ~~rights-of-way~~ highways to provide telecommunications services. ~~Any Persons~~ person using such licensee's or franchisee's facilities must ~~themselves~~ obtain a separate telecommunications license or franchise for his or herself, if such person constructs, installs, operates or maintains telecommunications facilities within the public highway of the city. If the persons using such licensee's or franchisee's facilities ~~does~~ not construct, operate or maintain telecommunications facilities within the public highway of the city, such person need not obtain a separate license or franchise but the telecommunications licensee or franchisee must disclose the identity of such persons to the city. Each telecommunications licensee or franchisee shall report to the city on a current basis all other providers with whom it

contracts to use its lines in the public ~~rights-of-way~~ highways within the city to provide telecommunications services.

Section 92-40 Registration.

Providers using or planning to use the city's ~~rights-of-way~~ public highways must register with the city on a form prescribed by the city and must include the following information: the provider's name, address and telephone number; a description of the services provided and to be provided; a description of the facilities used or to be provided by provider; and a description of the location of the facilities. A provider shall file a proposed amendment to the registration before it makes any change that would render the registration information incomplete or inaccurate. A change of the provider's name or address must be filed at least 60 days prior to the date the change becomes effective; a change in the telephone number must be filed ~~ten~~ 10 days before the change becomes effective; in the case of change in facilities (by addition, subtraction or modification or movement) the change in facilities must be filed at least 60 days before work commences on the facilities unless the relocation was ordered by the city. In the case of a change in services, the change must be noticed 30 days before the earlier of the date the service commences, or provider begins marketing the service.

Section 92-41 Location and Relocation of Facilities in ~~Rights-of-Way~~ Public Highway.

(A) Each provider is responsible for ensuring that its facilities are installed, constructed and maintained in strict accordance with the city code; that all required licenses, franchises and permits are applied for and obtained before any work commences; and that the terms and conditions thereof are strictly followed. Where a facility has more than one provider, each provider is fully responsible for ensuring that all requirements are satisfied. Facilities shall be installed, constructed and maintained so that no additional costs are imposed upon the city, and so that the facility does not interfere with other uses or users of the public ~~rights-of-way~~ highways. Without limiting the requirement of any other provision of the city code, or the provisions of any license, permit, or franchise issued by the city, this shall require, at a minimum, compliance with the provisions of this chapter.

(B) The facilities to be constructed, installed, operated, and maintained by the provider shall be so located or relocated as to interfere as little as possible with traffic or other authorized uses over, under, or through the ~~rights-of-way~~ public highways. Those phases of construction relating to traffic control, backfilling, compaction, and paving, as well as the location or relocation of said facilities shall be subject to regulation by the City Council.

(C) The provider shall keep accurate installation records of the location of all facilities in the ~~rights-of-way~~ public highways and furnish ~~them~~ the installation records to the city upon request or at such periodic intervals as the city may require. Upon completion of new or relocation construction of underground facilities in the ~~rights-of-way~~ public highways, the provider shall provide the city, if requested or as required, with installation

records in a format compatible with the then-current city mapping format showing the location of the underground and above ground facilities.

(D) Whenever the provider shall cause any opening or alteration whatever to be made for any purpose in any ~~rights-of-way~~ public highways, the work shall be completed within the time specified in the license, permit, or franchise, or if no time is specified then within a reasonable time. ~~In addition, the provider shall, without expense to the city and upon the completion of such work, restore the property disturbed in a manner consistent with the city's duly adopted standards, or as required by its permits, licenses, or franchises.~~

(E) The installation, use, and maintenance of the provider's facilities within the ~~rights-of-way~~ public highways authorized herein shall be in such a manner as not to interfere with the city's placement, construction, use, and maintenance of its ~~rights-of-way~~ public highways, street lighting, water pipes, drains, sewers, traffic signal systems, or other city systems that have been, or may be, installed, maintained, used or authorized by the city. Upon the city's request, provider's facilities will be relocated at provider's expense, unless state law expressly requires otherwise. Upon the city's request, by a time specified by the city, if the provider fails to move its facilities, the city may do so and will bill the provider the costs therefor and the provider shall pay those costs within 30 days after its receipt of the invoice ~~therefor~~. Further, the provider shall reimburse the city any additional cost the city incurs due to the location or relocation of the provider's facilities, including all design and construction costs.

(F) The provider shall not install, maintain, or use any of its facilities in such a manner as to damage or interfere with facilities of another provider located within the ~~rights-of-way~~ public highways of the city.

(G) All facilities shall be installed per plans approved by the city. Provider may install facilities on existing utility poles or in existing conduit where permission is granted by owner of the utility pole or conduit, except where those same poles are scheduled to be replaced with buried facilities. The city may require the provider to prove that it has such permission from the owner to use the owner's facilities. No new poles, or ~~longer~~ taller poles, will be permitted in the ~~rights-of-way~~ public highways for any new facilities, without the express written permission of the city. If provider installs facilities on existing poles as provided herein, the provider shall bury its facilities when such poles are removed and not replaced in kind for any reason. If the provider makes use of existing conduit of another provider, the provider shall be subject to the provisions of this chapter in the use of such conduit in the ~~rights-of-way~~ public highways.

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Section 92-42 Conflicts with City Projects.

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(B) The city reserves the prior and superior right to lay, construct, erect, install, use, operate, repair, replace, remove, relocate, regrade, widen, realign, or maintain any ~~rights-of-way~~ public highways, aerial, surface, or subsurface improvements, including, but not limited to, water mains, traffic control conduits, cable and devices, sanitary or storm sewers, subways, tunnels, bridges, viaducts, or any other public construction within the ~~rights-of-way~~ public highways of the city.

(C) When the city invokes its prior superior right to the ~~rights-of-way~~ public highways, the provider shall move its facilities located in the ~~rights-of-way~~ public highways, at its own cost, to such a location as the city directs.

...

Section 92-43 Damage to City ~~Rights-of-Way~~ Public Highways and Facilities.

(A) If, in the installation, use, relocation, repair, or maintenance of its facilities, the provider damages, alters, or disturbs the surface or subsurface of any ~~rights-of-way~~ public highways or adjoining public property, or the public improvement located thereon, therein, or thereunder, the provider shall promptly, at its own expense, and in a manner acceptable to the city, restore the surface or subsurface of the ~~rights-of-way~~ public highways or public property, or repair or replace the public improvement thereon, therein, or thereunder, in as good a condition as before such damage or disturbance in a manner consistent with the city's duly adopted standards, or as required by its permits, licenses, or franchises. If such restoration, repair, or replacement of the surface, subsurface, or any structure located thereon, therein, or thereunder is not completed within a reasonable time, or such repair or replacement does not meet duly adopted standards, or requirements of its permits, licenses, or franchises, the city shall have the right to perform the necessary restoration, repair, or replacement, either through its own forces, or through a hired contractor, and the provider shall pay the city for its expenses in so doing within 30 days after its receipt of the invoice ~~therefor.~~

(B) The provider shall reimburse the city for all costs arising from the reduction in the service life of any public ~~road~~ highway or pavement damage, to the extent required by any other provision of this code, resulting from pavement cuts of the provider. The provider shall pay such costs within 30 days from the date of issuance of an invoice from the city.

Section 92-44 Relocation of Facilities.

(A) The city shall not bear any cost of relocating existing facilities, irrespective of the function served, where city facilities or other facilities occupying the ~~rights-of-way~~ public highways under authority of a city permit, license, or franchise which must be relocated, are already located in the ~~rights-of-way~~ public highways and the conflict between the provider's potential facilities and the existing facilities can only be resolved expeditiously as determined by the city by the movement of the existing city or other approved facilities.

(B)(1) ...

(2) The city and the provider shall accept or reject findings of the dispute resolution board in writing within 30 days after receipt of the findings. If both the city and the provider accept the findings of the dispute resolution board in writing and damages are assessed by the dispute resolution board, the provider shall pay the city within 30 days of receipt of an invoice. Late charges of five percent and interest charges of one and one-half percent per month shall be added for late payment.

...

Section 92-99 Penalty

Among other penalties that may apply, any person, firm or corporation that violates any provision of this chapter shall be guilty of a class 1 misdemeanor. Upon conviction persons shall be punished by a fine not to exceed \$2,500, or by imprisonment for a period not to exceed six months, or by both such fine and imprisonment. Upon conviction, firms or corporations shall be punished by a fine not to exceed \$20,000. Each day of violation continued shall be a separate offense, punishable as described above.

SECTION 6: Among other penalties that may apply, any person, firm, or corporation that violates any provision of this Ordinance shall, among other penalties that may apply, be guilty of a class 1 misdemeanor. Upon conviction persons shall be punished by a fine not to exceed \$2,500, or by imprisonment for a period not to exceed six months, or by both such fine and imprisonment. Upon conviction, firms or corporations shall be punished by a fine not to exceed \$20,000. Each day of violation continued shall be a separate offense, punishable as described above.

SECTION 7: If any part or portion of this Ordinance is found invalid or unconstitutional by the decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining Ordinance.

ADOPTED THIS ____ day of _____, 2018.

Douglas J. Nicholls
Mayor

ATTESTED:

Lynda L. Bushong
City Clerk

APPROVED AS TO FORM:

Richard W. Files
City Attorney