

ORDINANCE NO. _____, SERIES 2018

AN ORDINANCE AMENDING LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT CODE OF ORDINANCES SECTION 116.01(J) AND REPEALING AND REPLACING SECTION 116.03(D)(2) REGARDING COMMUNICATION SERVICES (AS AMENDED).

SPONSORED BY: COUNCIL MEMBER HOLLANDER, KRAMER, AND MULVIHILL

WHEREAS, Louisville/Jefferson County Metro Government Code Of Ordinances (“LMCO”) Chapter 116, Communications Service, was adopted on May 29, 2018;

WHEREAS, the Council finds that definitions in LMCO § 116.01(J) need to be amended or created to continue Louisville Metro Government’s efforts to streamline and improve our communication franchising structure; and

WHEREAS, the Council finds that LMCO § 116.03(D)(2) needs to be repealed and replaced because Louisville Metro Government wishes to continue to maintain its position at the forefront of communications technology opportunities.

NOW, THEREFORE, BE IT ORDAINED BY THE LEGISLATIVE COUNCIL OF THE LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT AS FOLLOWS:

SECTION I: The following definitions in LMCO § 116.01(J) are amended as follows:

ATTACHER. Any person, corporation, or other Person or their agents or contractors seeking to permanently or temporarily fasten or affix any type of ~~equipment, antenna, line or f~~Facility of any kind to a utility pole in the Rights-of-Way or its adjacent ground space.

ATTACHMENT APPLICATION. The application made by an ~~a~~Attacher to a ~~p~~Pole ~~e~~Owner for attachment of ~~equipment, antenna, line or a~~fFacility of any kind to a utility pole.

FACILITIES. Any portion of a ~~s~~System located in, along, over, upon, under, or through the Rights-of-Way.

MAKE-READY COSTS. The costs incurred by an ~~a~~New aAttacher ~~or a~~Pre-Existing Attacher associated with the relocation, rearrangement, transfer, or alteration of the ~~f~~Facilities, antenna, lines or equipment of a ~~p~~Pre-eExisting Attacher~~third party user,~~

undertaken by ~~attacher~~ to enable New Attacher's attachment to the utility pole or similar structure, including, but not limited to, all costs and expenses related to pre-construction inspections, engineering, construction, and post-construction inspections and remediation.

POLE OWNER. A person having ownership of a pole or similar structure in the Rights-of-Way to which utilities, including without limitation, electric and Communications Facilities, are located or may be located whether such ownership is in fee simple or by franchise.

~~PRE-EXISTING ATTACHER~~ ~~THIRD PARTY USER.~~ The owner of any currently operating ~~existing~~ facilities, antenna, lines or equipment on a pole or its adjacent ground space in the Rights-of-Way.

SYSTEM. Any and all equipment, structures, materials or tangible components located in the Rights-of-Way and used to provide Communications Service, including without limitation all plant (whether inside or outside), cabinets, surface location markers, fiber strands, electronic equipment, amplification equipment, optic equipment, transmission and distribution structures, Antennae, lines, pipes, mains, conduit, ducts, regenerators, repeaters, vaults, pedestals, manholes, handholds, pull boxes, splice closures, wires, cables, towers, wave guides, and anything else designed and constructed for the purpose of producing, receiving, amplifying or distributing Communications Service.

SECTION II: The following newly created definitions are added to LMCO § 116.01(J) as follows:

APPLICABLE STANDARDS. The affected Pole Owner's standards or other relevant standards governing the design, engineering, installation, maintenance, and operation of Facilities, including the requirements and specifications of the National Electrical Safety Code, the National Electrical Code, the Kentucky Department of Transportation, the Occupational Safety and Health Act, the Society of Cable Television Engineer's Recommended Practices for Coaxial Cable Construction and Testing and for Optical Fiber Cable Construction, and the standards to which a New Attacher and/or Pre-Existing Attacher are subject under their applicable pole attachment agreements.

NEW ATTACHER. An Attacher seeking to attach, fasten, or affix a new Facility to a utility pole.

SECTION III: LMCO § 116.03(D)(2) regarding Third Party Facilities is repealed and replaced in its entirety as follows:

(2) Existing Facilities.

(a) Notwithstanding any provision of this chapter to the contrary, the provisions of § 116.03(D)(2) shall not apply to (i) Facilities located in or above the “Communication Worker Safety Zone” as such term is defined in the National Electrical Safety Code, or (ii) any electric supply Facilities wherever located. Make-Ready Costs that are to be paid by New Attacher include, without limitation, all costs and expenses to relocate, rearrange, transfer, or alter the attachments or Facilities of any Pre-Existing Attacher as may be necessary to accommodate New Attacher’s attachment.

(b) Upon the Pole Owner’s approval of an Attachment Application, New Attacher shall notify an affected Pre-Existing Attacher of the need to relocate, rearrange, transfer, or alter the attachments or Facilities of such Pre-Existing Attacher as may be necessary to accommodate New Attacher’s attachment, specifying the work to be performed. Upon request from the New Attacher, a Pole Owner shall provide to the New Attacher any existing information the Pole Owner has with respect to all Existing Attachers’ contact information.

(c) For purposes of this subsection, a relocation, rearrangement, transfer, or alteration that would cause or would reasonably be expected to cause a service outage to a Pre-Existing Attacher (taking into account the amount of available slack or tension on its lines and the impact on its Facilities during any relocation, including specifically the need for adherence to safety principles outlined under Applicable Standards) includes any work that requires the cutting, splicing, or other disconnection of a Pre-Existing Attacher’s Facilities; work on Facilities that cross an interstate (i.e., a roadway that comprises the Dwight D. Eisenhower National System of Interstate and Defense Highways and other interstates as designated by the U.S. Secretary of Transportation) or a non-interstate roadway with access points limited to on-ramp and off-ramp locations and directional travel lanes usually separated by a physical barrier; work on Facilities that cross a railroad; work on Facilities that are located on a bridge; or work involving vertical risers, power supplies, double framed poles, or locations that would not allow access to Pre-Existing Attacher’s Facilities for maintenance or installation after the work is complete.

(d) For purposes of this subsection, a Pre-Existing Attacher shall maintain a list of approved contractors, and shall make the list available to New Attachers within five (5) days of New Attacher’s written request for such list. A Pre-Existing Attacher shall not unreasonably restrict the number of contractors it approves, or unreasonably refuse to approve a contractor a New Attacher requests to be approved. A New Attacher seeking approval of a contractor shall identify the contractor and request it be approved at the time it provides the notice required by § 116.03(D)(2)(b). The Pre-Existing Attacher shall approve or deny approval of the New Attacher’s proposed contractor within twenty (20) days of such notice. If the Pre-Existing Attacher denies approval of the proposed contractor, it shall identify its reasons for doing so in writing. The fact that the Pre-Existing Attacher does not have a contract with the New Attacher’s proposed contractor shall not, without more, be a reasonable basis for refusing to approve a New Attacher’s proposed contractor.

(e) Upon notice from a New Attacher described in § 116.03(D)(2)(b), the all Pre-Existing Attachers shall have thirty (30) days, running concurrently, from receipt of such notice either to (i) relocate, rearrange, transfer, or alter its Facilities, (ii) authorize the New Attacher to relocate, rearrange, transfer, or alter its Facilities using contractors approved by the Pre-Existing Attacher, or (iii) provide a written response stating that the work will cause a service outage and why, or stating any other reason why its Facilities cannot be reasonably relocated, rearranged, transferred, or altered. In the event any affected Pre-Existing Attacher does not perform such work or provide a written response within thirty (30) days, New Attacher may perform the work using contractors approved by the Pre-Existing Attacher.

(f) If Pre-Existing Attacher provides a written response stating that the work will cause a service outage or stating any other reason why its Facilities cannot be reasonably relocated, rearranged, transferred, or altered pursuant to § 116.03(D)(2)(c), the Pre-Existing Attacher shall have sixty (60) days, running concurrently, from receipt of the notice required by § 116.03(D)(2)(b) either to relocate, rearrange, transfer, or alter its Facilities, or otherwise coordinate with New Attacher to effectuate the relocation, rearrangement, transfer, or alteration of its Facilities. In the event any affected Pre-Existing Attacher does not perform such work or coordinate with New Attacher within sixty (60) days for such work to be completed, New Attacher may perform the work using contractors approved by the Pre-Existing Attacher, provided, however, that with respect to make-ready work on the Pre-Existing Attacher's Facilities that would cause or would reasonably be expected to cause a service outage, New Attacher shall provide a minimum of ten (10) days' prior notice identifying with specificity where and when it will perform such work.

(g) For large projects where the New Attacher will attach to poles involving a Pre-Existing Attacher where the average rate of new Attachment installations will be 100 poles or more per week, the New Attacher must notify all Pre-Existing Attachers affected by the project at the same time the New Attacher submits to a Pole Owner its first Attachment Application related to the project, and must reach mutual agreement with each Pre-Existing Attacher on a timeline for relocating, rearranging, transferring, or altering the Pre-Existing Attacher's Facilities. In the event the parties are unable to reach mutual agreement prior to the notice required by § 116.03(D)(2)(b), the procedures described in § 116.03(D)(2)(f) shall apply to such work, except that the Pre-Existing Attacher shall have one hundred and five (105) days, running concurrently, from receipt of the notice required by § 116.03(D)(2)(b) either to relocate, rearrange, transfer, or alter its Facilities.

(h) Within thirty (30) days of the completion of any relocation, rearrangement, transfer, or alteration performed by the New Attacher, New Attacher will send notice of the move and as-built reports to the Pre-Existing Attacher, the Pole Owner, and the owner(s) of any other structures on which such work was performed. The as-built reports will include a unique field label identifier, and an address or coordinates. Upon receipt of the as-built reports, the Pre-Existing Attacher and Pole Owner or other structure owner(s) may conduct an inspection within thirty (30) days. New Attacher will

pay the actual, reasonable, and documented expenses incurred by the Pre-Existing Attacher and Pole Owner or structure owner(s) for the inspection. If any such relocation, rearrangement, transfer, or alteration results in the Facilities of the Pre-Existing Attacher on the pole or other structure failing to conform with Applicable Standards, the Pre-Existing Attacher will notify New Attacher within seven (7) days of the inspection. In the notice, the Pre-Existing Attacher will elect to either (i) perform the correction itself and bill the New Attacher for the actual, reasonable, and documented costs of the correction, or (ii) instruct the New Attacher to correct such conditions at New Attacher's expense, using contractors approved by the affected Pre-Existing Attacher. Any post-inspection corrections performed by the New Attacher must be completed within seven (7) days of such notification.

(i) Nothing in this subsection shall be construed to limit or preempt liability under applicable law for damages suffered by any party as a result of work performed pursuant to this subsection that does not conform with Applicable Standards.

(j) As a condition of exercising the ability to relocate, rearrange, transfer, or alter a Pre-Existing Attacher's Facilities pursuant to § 116.03(D)(2), New Attacher shall indemnify, defend, and hold harmless the affected Pre-Existing Attacher and the Pole Owner or other structure owner(s) on which such relocation, rearrangement, transfer, or alteration takes place, the Affiliates of such Pre-Existing Attacher and Pole Owner or other owners, and the officers, directors, and employees of such Pre-Existing Attacher and Pole Owner or other owners and their Affiliates (each an "Indemnitee") from and against all third party damage, loss, claim, demand, suit, liability, penalty, or forfeiture of every kind and nature, including, but not limited to, costs and expenses of defending against the same, payment of any settlement or judgment therefor and reasonable attorney's fees that are actually and reasonably incurred by an Indemnitee by reason of any claim arising from such relocation, rearrangement, transfer, or alteration.

(k) In the event New Attacher fails to pay Pre-Existing Attacher's Make-Ready Costs, fails to correct non-compliant work according to the time frames specified in § 116.03(D)(2)(h), fails to compensate Pre-Existing Attacher for damage caused by New Attacher's work, or otherwise fails to meet its obligations to the Pre-Existing Attacher in this subsection, Pre-Existing Attacher shall have the right to refuse New Attacher's requests to relocate, rearrange, transfer, or alter the Pre-Existing Attacher's Facilities until such time as New Attacher complies with its obligations under this subsection.

(l) A Pre-Existing Attacher and New Attacher may mutually agree to modify any of the rights and obligations specified herein, and shall work in good faith to modify any time periods specified herein to account for unforeseen circumstances, including, but not limited to, weather events and high volumes of make-ready work.

SECTION IV: This Ordinance shall take effect upon its passage and approval.

H. Stephen Ott
Metro Council Clerk

David James
President of the Council

Greg Fischer
Mayor

Approval Date

APPROVED AS TO FORM AND LEGALITY:

Michael J. O'Connell
Jefferson County Attorney

By: _____

Ordinances/Franchise Ordinance-Amendments/O-469-18 - Amend and Add Definitions to LMCO 116.01(J) and Repeal 116.03(D)(2) (as amended)(2-26-19).docx (jd)