

SPECIAL MEETING OF THE CITY COUNCIL
COUNCIL CHAMBERS, CITY HALL
MITCHELL, SOUTH DAKOTA

December 26, 2018
11:30 A.M.

PRESENT: Marty Barington, John Doescher, Kevin McCardle, Steve Rice, Dan Sabers,
Jeffrey Smith, Susan Tjarks

ABSENT: Dan Allen

PRESIDING: Mayor Bob Everson

CONSIDER APPROVAL:

Moved by Tjarks, seconded by Smith, to approve the bills, and authorize payment of recurring and other expenses in advance as approved by the Finance Officer. Motion carried.

RESOLUTION:

Moved by Tjarks, seconded by Rice, to approve Resolution #R2018-67, Contingency Transfers as follows:

**RESOLUTION #R2018-67
CONTINGENCY TRANSFER**

WHEREAS, the City of Mitchell has included in the 2018 Annual Budget a contingency item which may be appropriated by resolution of the governing board to any other appropriation amount that is deemed insufficient during the year, and

WHEREAS, the budget item for the following is insufficient and it was deemed necessary that appropriation be transferred for the 2018 budget, as follows:

**GENERAL FUND
MUNICIPAL BUILDINGS**

101-41920-42520	Repair-City Hall	\$18,400.00
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TRAFFIC

101-42130-42530	Traffic Lights Maintenance	\$9,000.00
101-42130-42810	Utilities-Traffic Lights	\$3,000.00
101-42130-42835	Utilities-Street Lights	\$20,000.00

FIRE

101-42200-41100	Salaries	\$7,400.00
101-42200-41700	Compensated Absences	\$5,500.00

OTHER FINANCING USES

101-49000-51101	Transfer out to Park	\$30,000.00
101-49000-51105	Transfer out to Corn Palace	\$50,000.00

COMMUNITY SERVICES
JVCC

218-45180-42800	Utilities	\$4,000.00
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NOW THEREFORE, BE IT RESOLVED, that the transfer from contingency be approved.

Motion carried and resolution declared duly adopted.

ORDINANCE:

Moved by Rice, seconded by McCardle, to place Ordinance #O2018-18, Adopting a New Chapter Regulating Small Cell Facilities on second reading. Motion carried. Moved by Rice, seconded by Barington, to adopt Ordinance #O2018-18, as follows:

ORDINANCE NO. O2018-18

AN ORDINANCE ADOPTING A NEW CHAPTER REGULATING SMALL CELL FACILITIES.

BE IT ORDAINED BY THE CITY OF MITCHELL, SOUTH DAKOTA AS FOLLOWS:

Section 1. That the following provisions of this Section are hereby ADOPTED and shall be codified as a NEW CHAPTER of the Mitchell City Code entitled Chapter 9-9: Small Cell Facility Regulations.

9-9-1. Purpose

The provisions of this Chapter shall be known as the Small Cell Facilities Regulations. It is the purpose of these provisions to develop standards and siting criteria, and to establish removal procedures. It is further the purpose of these provisions:

- (a) To establish regulations and siting standards for small cell wireless communication facilities (SCFs), whether in the public right-of-way or on other public or private property, in a manner that will protect the public's health, safety, and welfare and maintain the aesthetic integrity of the community;

- (b) To facilitate the provision of wireless communication services;
- (c) To provide regulations which are specifically not intended to, and shall not be interpreted or applied to: (1) prohibit or effectively prohibit the provision of wireless services; (2) unreasonably discriminate among functionally equivalent service providers; or (3) regulate wireless communication facilities and wireless transmission equipment on the basis of the environmental effects of radio frequency emissions to the extent that such emissions comply with the standards established by the Federal Communications Commission.

9-9-2. Definitions

As used in this Chapter, the following terms shall have the meanings set forth below:

Antenna. Any communications equipment that transmits or receives electromagnetic radio frequency signals used in the provision of wireless services. This definition does not include broadcast radio or television antennas, antennas designed for amateur radio use, or satellite dishes for residential or household purposes.

Applicant. Any person who submits an application as or on behalf of a Wireless Provider.

City. The city of Mitchell, South Dakota.

Collocation. The mounting or installation of an antenna or a small cell facility on a pre-existing Utility Pole or SCF Support Structure and/or modifying a Utility Pole or SCF Support Structure for the purpose of mounting or installing an antenna or SCF on that Utility Pole or SCF Support Structure in order to transmit and/or receive radio frequency signals for communications purposes.

Department. The Department of Public Works of the City.

Director. The director of the Department.

FCC. The Federal Communications Commission.

Height. The vertical distance measured from the base of the structure at grade to the highest point of the structure, including the antenna.

Network Interface Device. The telecommunications demarcation and test point separating the wireless facility and the wireline backhaul facility.

Person. An individual, corporation, limited liability company, partnership, association, trust, or other entity or organization, including the City.

Public Right-of-Way or Right-of-Way or ROW. The surface and space above and below any street, sidewalk, avenue, boulevard, alley, lane, easement, right-of-way, highway or thoroughfare open for public use in which the city has an interest in law or equity, whether held in fee, or other estate or interest, or as a trustee for the public.

Small Cell Facility or SCF. A Wireless Facility that either meets both of the following qualifications or is within a Stealth Design that is consistent with the design guidelines:

1. Each antenna is located inside an enclosure of no more than three cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all of its exposed elements could fit within an enclosure of no more than three cubic feet; and
2. Each provider's equipment enclosures shall be no larger than 28 cubic feet in volume. The following associated equipment may be located outside of the primary equipment enclosure and, if so located, is not included in the calculation of equipment volume: electric meters, concealment measures, Network Interface Device, underground enclosures, back-up power systems, grounding equipment, power transfer switch, cut-off switches, cable, conduit, and vertical cable runs for the connection of power and other services, and any equipment concealed from public view within or behind an existing structure or concealment.
3. The facility is mounted (i) on a Utility Pole or SCF Support Structure 50 feet or less in height including antennas; (ii) on a Utility Pole or SCF Support Structure no more than 10 percent taller than other adjacent structures of substantially similar design; or (iii) on an existing Utility Pole or SCF Support Structure where the facility does not extend the height of the Utility Pole or SCF Support Structure on which it is to be located to a height of more than the greater of either 50 feet or the height of such Utility Pole or SCF Support Structure plus 10 percent.

Small Cell Facility Permit. A permit authorizing the installation, construction, and maintenance of a Small Cell Facility.

Small Cell Facility Support Structure or SCF Support Structure. A structure, such as a monopole; tower, either guyed or self-supporting; billboard; building; or other existing or proposed structure designed to support or capable of supporting SCFs. Such term does not include a Utility Pole.

Stealth Design. Any SCF that is integrated as an architectural feature of a Utility Pole or changes a support structure design so that the purpose of the Utility Pole or SCF Support Structure for providing wireless services is not as readily apparent. This includes the ability of SCFs to blend into the neighborhood environment at a given location and camouflage or conceal the SCF subject to applicable law.

Utility Pole. A pole or similar structure that is or may be used in whole or in part to facilitate telecommunications, electric distribution, lighting, traffic control, signage, or to carry lines, cables, or other similar function, or for location or collocation of Small Cell Facilities. Such term does not include a SCF Support Structure.

Wireless Facility. Equipment at a fixed location that enables Wireless Services between user equipment and a communications network, including (i) equipment associated with wireless communications; (ii) radio transceivers; (iii) antennas; (iv) coaxial or fiber optic cable located on a

Utility Pole or SCF Support Structure or immediately adjacent to the Utility Pole or SCF Support Structure or directly associated with equipment located on the Utility Pole or SCF Support Structure; (v) regular and backup power supplies and rectifiers; and comparable equipment, regardless of technological configuration. The term includes SCFs but does not include (i) the structure or improvements on, under, or within which the equipment is collocated; or (ii) wireline backhaul facilities.

Wireline Backhaul Facility. An above-ground or underground wireline facility used to transport communications data from a wireless facility network interface device to a network.

Wireless Infrastructure Provider. A person that builds or install wireless facilities or Utility Poles or SCF Support Structures, but not a Wireless Provider.

Wireless Provider. A Wireless Infrastructure Provider or a Wireless Services Provider.

Wireless Services. Any services, using licensed or unlicensed spectrum, including the use of WiFi, whether at a fixed location or mobile, provided to the public.

Wireless Services Provider. A person who provides wireless services.

9-9-3. Applicability

- A. Permit Processing: For all SCF installation types, including new and replacement Utility Poles and SCF Collocations to existing SCF Support Structures or existing Utility Poles, the Department shall issue permits in accordance with the terms and procedures set forth in this Chapter.
- B. Zoning Exemption: All SCF installations shall be exempt from general zoning restrictions unless a provision of such zoning code is explicitly cited by a section of this Chapter.
- C. Exempt Activities: This Chapter shall not apply to: (i) routine maintenance; or (ii) the replacement of an SCF, Utility Pole, or SCF Support Structure which was previously approved pursuant to this Chapter with another SCF, Utility Pole, or SCF Support Structure that is the same or substantially similar.

9-9-4. Siting and Collocation Criteria

- A. SCFs shall:
 - (i) be located on existing structures, such as Utility Poles or SCF Support Structures;
or
 - (ii) be located on public property and structures if the controlling public entity agrees to the placement.

- B. Applications to collocate SCFs at locations other than those listed in Section 9-9-4(A) may not be approved administratively. However, if an Applicant certifies that it is not technically feasible, economically feasible, or places an undue burden to collocate an SCF at a location designated in Section 9-9-4(A), the Applicant may request a Special Review of the application as provided under Section 9-9-5(C)(2). Such certification shall include a written statement indicating the reasons why said location is not feasible.

9-9-5. Small Cell Facility Permits

- A. **Permit Required.** An SCF Permit shall be required to install any SCF, Utility Pole, or SCF Support Structure. Applications for an SCF Permit shall be considered and approved pursuant to the provisions of this Section. An SCF Permit shall be deemed to include all other municipal permits which may be necessary to place and construct an SCF, Utility Pole, or SCF Support Structure as represented in an approved application. The granting of an SCF Permit pursuant to this Chapter is not a grant of any franchise. All applications shall first be reviewed administratively and then, if not eligible for administrative approval, may be considered via the Special Review process.

B. General Review Provisions

1. **Review Period:** The Department must approve or deny all SCF Permit applications pursuant to this Chapter (i) within ninety (90) days after the date an application is filed for an SCF Permit Application to place a new Utility Pole or SCF Support Structure, or (ii) within sixty (60) days after the date an application is filed for collocation of an SCF. If approved, the permit shall be issued on or before day ninety (90) or sixty (60).
2. **Tolling of Review Period:** An Applicant and the Department can mutually agree in writing to toll the applicable review period at any time.
3. **Final Decision.** By the end of the applicable review period, the City must advise the applicant in writing of its final decision. If the final decision is to deny the application, the final decision shall state the basis for denial, including specific code provisions on which the denial is based.
4. **Nondiscrimination:** The Department shall process all applications under this Chapter in a nondiscriminatory manner. Aesthetic requirements shall be (i) reasonable, (ii) no more burdensome than for other types of infrastructure deployments, and (iii) objective and published in advance.

C. Small Cell Facility Permit Process

1. **Administrative Review Process:** An application submitted pursuant to this subsection shall be reviewed as follows:

- a. Submission of Application: Applicant shall submit a complete SCF Application accompanied by any corresponding application fee to the Department.
- b. Review for Completeness: The Department shall review the application for completeness following submittal. The Department must provide a written notice of incompleteness to the Applicant within ten (10) days of receipt of the SCF Permit Application, clearly and specifically delineating all missing information. Information specified in a notice of incompleteness shall be limited to that which is relevant to the approval or denial of an Application under this Chapter. Applicant shall then submit all information specified in the notice of incompleteness. The applicable review period shall restart at zero on the date the Applicant provides the missing information to complete the application. For subsequent determinations of incompleteness, the applicable review period shall be tolled if the Department provides written notice within ten (10) days that the supplemental submission did not provide the information identified in the original notice delineating missing information.
- c. An application may not be approved via the Administrative Review Process unless the proposed SCF, Utility Pole, or SCF Support Structure meets all applicable location and design requirements of this Chapter. An application shall be approved via the Administrative Review Process if the proposed SCF, Utility Pole, or SCF Support Structure meets all applicable location and design requirements of this Chapter.

2. Special Review Process:

- A. An Applicant may request a Special Review of an application which is not eligible for administrative approval due to not meeting the applicable location or design requirements of this Chapter and where compliance with said requirements is not technically feasible, economically feasible, or poses an undue burden.
- B. Special Reviews shall be conducted by the Planning and Zoning Commission in a public meeting. Notice of such meeting shall comply with SDCL 1-25-1.1. The review hearing and final decision shall take place within the applicable sixty (60) or (90) day review period which shall begin on the date a complete application is submitted to the Department.
- C. The Planning and Zoning Commission must approve, by majority vote of all members, an SCF application upon finding that the proposed installation has no reasonable alternative which better fits the location and design requirements of this Chapter. The Commission shall deny an application which does have a reasonable alternative which better fits the location and design requirements of this Chapter. For an alternative to be reasonable, the

alternative must be technically feasible, economically feasible, and must not impose an undue burden.

- D. After the Planning and Zoning Commission has made a determination on an SCF application, the Department shall issue an SCF permit if the application was approved. If denied, the Department shall provide a notice of final decision including the grounds upon which the Planning and Zoning Commission denied the application.

D. Small Cell Facility Permit Applications

1. Application Form: The Director shall designate or develop an Application Form for an SCF Permit. An Application may include requests for new or replacement Utility Poles or SCF Support Structures. The Director shall allow for Applications to be consolidated pursuant to this Section. Each Applicant must submit a complete Application for each permit desired.
2. Consolidated Applications: Each SCF Permit request in a Consolidated Application shall be considered individually.
3. All Applications for the placement of an SCF, including modification or construction of a Utility Pole or SCF Support Structure, submitted under this Chapter shall include the following:
 - a. Photo Simulations. A photo simulation of a reasonably representative installation type that includes to-scale visual simulations that show unobstructed before-and-after construction daytime views from at least two angles, together with a map that shows the location of the proposed installation, including all equipment. A separate set of such materials shall be required for any design which is materially different.
 - b. Noise Study. A noise study for the SCF if (i) requested by the city, (ii) the proposed site is within twenty (20) feet of a residential structure, and (iii) the application proposes to utilize equipment which may produce a persistent or chronic audible tone at such distance.
 - c. Radio Frequency (RF) Emissions Compliance. Whereas the FCC has exclusive jurisdiction to establish radio frequency emission safety standards, the City may only require a written report or statement, signed and sealed by a South Dakota licensed engineer or signed by a competent employee of the applicant, which explains compliance with the RF emissions limits established by the FCC.
 - d. Utility Pole or SCF Support Structure Inspection: For Collocations or modifications to existing Utility Pole or SCF Support Structure, Applicant shall inspect the structure to which a proposed SCF would be attached and

determine, based on a structural engineering analysis by a South Dakota registered professional engineer, the suitability of the Pole or structure for the Applicant's purposes. The structural engineering analysis shall be submitted to the Department and shall certify that the Utility Pole or SCF Support Structure can reasonably support the proposed SCF.

- e. New and Replacement Utility Poles and SCF Support Structures. For new and replaced Utility Poles and SCF Support Structures, Applicant shall submit foundation drawings demonstrating the foundation and new or replacement Utility Pole or SCF Support Structure can reasonably support the SCF.
- f. Design Justification. A clear and complete written analysis that explains how the proposed design complies with the applicable design standards under this Section. A complete design justification must identify all applicable design standards under this Chapter and provide a factually detailed reason why the proposed design either complies or cannot feasibly comply.
- g. Site Plan. A site plan clearly indicating the location, type, height and width of the proposed pole, on-site land uses and zoning, adjacent land uses and zoning, distances to nearby objects, structures, and property lines, adjacent roadways, proposed means of access, utility runs, and other information which may uniquely impact the SCF's fitness for a particular site.
- h. Aesthetic Compliance Summary. An explanatory statement of aesthetic considerations and requirements factored into Applicant's design such as stealthing, finishing, fencing, landscaping, or other elements which may impact the visual appeal of the SCF.
- i. A clear and complete written statement of purpose which shall minimally include: (i) a description of the technical objective to be achieved; (ii) a to-scale map that identifies the proposed site location and the targeted service area to be benefited by the proposed project; and (iii) full-color signal propagation maps.

E. General Standards

- 1. Utility Pole Design: An existing Utility Pole may be replaced or extended to accommodate Small Cell Facilities subject to the following requirements:
 - a. Replacement and New Utility Poles: Replacement Utility Poles shall be substantially similar to the width, color, and material of the original or adjacent Utility Poles. The City may approve minor deviations up to the minimum additional height needed to allow for the required clearance from electrical wires to accommodate an antenna or antennas and may also

approve minor deviations up to fifty percent (50%) of the pole width at its base, not to exceed thirty inches (30"), when housing equipment is placed within the pole base. Replacement Utility Poles shall be located as close as possible to the existing Utility Pole, and the replaced Utility Pole shall be removed. Replacement street lights and poles shall conform to the adopted streetscape design standard for the zoning district. New Utility Poles shall mimic the design of a Replacement Utility Pole that is most suitable for the proposed location.

- b. Replacement and Existing Utility Pole Height: The height of any antennas at the top of an existing Utility Pole or any pole extender, shall be no higher than the greater of either 50 feet or the height of such Utility Pole or SCF Support Structure plus 10 percent.
- c. Equipment Concealed: Whenever technically feasible, antennas, cabling, and equipment shall be fully concealed within a Pole, or otherwise camouflaged to appear to be an integrated part of a Pole.
- d. Flush-Mounting and Pole-top Antennas: When technically feasible, antennas will be flush-mounted on a Pole, which means either: (1) mounted directly to the pole with no gap other than that which may be required for screws, bolts, or similar hardware; (2) located at the top of the Pole; or side mounted by mounted arm as needed for required clearance. Canisters attached to the top of a Pole shall not exceed the diameter of the Pole, unless technically required, and then shall not be more than fifty percent (50%) greater than the diameter of the Pole at the point of attachment or up to 16" in diameter, whichever is greater.
- e. Antenna Design: Each antenna shall be located in an enclosure of no more than three (3) cubic feet in volume, or in case of an antenna that has exposed elements, the antenna and all of its exposed elements could fit within an enclosure of no more than three (3) cubic feet.
- f. No Illumination: Small Cell Facilities shall not be illuminated except for small status LEDs installed by the manufacturer. Such LEDs may not be of a nature which is likely to distract a vehicle or pedestrian due to brightness, size, blinking, other similar condition, or any combination thereof.
- g. Generators and Battery Backup: Generators are not permitted for Small Cell Facilities. A battery backup may be permitted if it is concealed consistent with the provisions of this Chapter.
- h. Cabinet Location and Dimensions: Any equipment cabinet for a Small Cell Facility shall utilize the smallest cabinet enclosure that is technically feasible to enclose the equipment. Disconnect switches may be located outside of the primary equipment cabinet.

- i. **Painting, Coating, or Finish Material:** The exterior of an SCF shall be painted, coated, or be of a material which draws minimal attention from an observer. For example, an SCF painted in blaze orange or safety green is highly likely to draw attention and be distracting. An SCF finished with polished aluminum is more likely to be distracting than an SCF finished with matte grey paint.
2. **Ground-Mounted Equipment:** To allow full use of the Public Right-of-Ways by pedestrians, bicyclists, and other users, all ground-mounted equipment, excluding antennas, shall, to the extent feasible, be either (i) undergrounded, (ii) incorporated into street furniture, or (iii) concealed in the base of a Pole, and in all cases shall comply with the Americans with Disabilities Act (ADA), City construction standards, and any applicable State or federal regulations in order to provide clear and safe passage within the Public Right-of-Ways. The location of any ground-mounted equipment shall also comply with the Americans with Disabilities Act (ADA), City Construction Standards, and any applicable State or federal regulations in order to provide clear and safe passage within the Public Right-of-Ways.
3. **Building-Mounted Small Cell Facilities:** Antennas may be mounted to a building if the antennas do not interrupt the building's architectural theme.
 - a. **Balanced Design:** Small Cell Facilities attached to the side or roof of buildings shall employ a symmetrical, balanced design for all façade-mounted antennas. Subsequent deployments on a structure's exterior will be required to ensure consistent design, architectural treatment and symmetry with any existing Small Cell Facilities on the same side of the structure.
 - b. **Architectural Preservation:** The interruption of architectural lines or horizontal or vertical reveals is prohibited unless demonstrated to be unavoidable.
 - c. **Complementary Architecture:** New architectural features, such as columns, pilasters, corbels, or other ornamentation that conceal an antenna or antennas, may be used only if the new feature complements the architecture of the existing building.
 - d. **Mounting Brackets:** Small Cell Facilities shall utilize the smallest mounting brackets necessary in order to provide the smallest offset from the building.
 - e. **Concealment:** Skirts or shrouds shall be utilized on the sides and bottoms of antennas in order to conceal mounting hardware, create a cleaner appearance, and minimize the visual impact of the antennas. Exposed conduit, cabling and wiring is prohibited.

- f. Matching Paint: Small cell facilities, and all visible mounting hardware, shall be painted and textured to match adjacent building surfaces.
 - g. Permission: All installations of a Small Cell Facility shall have permission from the Utility Pole or SCF Support Structure owner to install the Small Cell Facility on such Utility Pole or SCF Support Structure. Nothing in this Section affects the need for an Applicant seeking to place a Small Cell Facility on a Utility Pole or SCF Support Structure that is not owned by the City to obtain from the owner of the Utility Pole or SCF Support Structure any necessary authority to place the Small Cell Facility, nor shall any provision of this Section be deemed to affect the rates, terms, and conditions for access to or placement of a Small Cell Facility on a Utility Pole or SCF Support Structure not owned by the City. This Section does not affect any existing agreement between the Department and an entity concerning the placement of Small Cell Facilities on any City-owned Utility Pole or SCF Support Structure.
- 4. Preferred Projecting or Marquee Sign: Small Cell Facilities replicating a projecting or marquee sign must comply with the City's sign regulations. All antennas shall be completely screened by the façade of the sign. All cables and conduit to and from the sign shall be routed from within a building wall. Cable coverings may be allowed on the exterior of the building wall in limited circumstances and in situations where the coverings are minimally visible and concealed to match the adjacent building surfaces.
 - 5. Parking Lot Lighting: Small Cell Facilities are permitted as attachments to or replacements of existing parking lot light fixtures. The design of the parking lot light fixture shall be in accordance with applicable Municipal Code and Construction Standards, except that a pole extender up to five (5) feet in height may be utilized.
 - 6. Purely Aesthetic Standards: To the extent that a requirement is purely aesthetic, an SCF applicant shall not be required to meet a more burdensome standard than other users of the right-of-way. Other users of the right-of-way shall meet the purely aesthetic standards of this Chapter for new or replacement deployments to the extent which is technically and economically feasible.

9-9-6. Permit Conditions

- A. A permittee shall comply with all applicable law, including, but not limited to, applicable historic preservation ordinances of the City and utility undergrounding requirements.
- B. Issuance of any permit pursuant to this Chapter shall not confer any ownership rights in the Public Right-of-Way.

- D. No permittee may construct, operate, place, locate, or maintain any Small Cell Facility so as to interfere with the use of the Public Right-of-Way by the City, the general public, or any other persons authorized to use or be present in or upon the Public Right-of-Way.
- E. No permittee or affiliate thereof shall take any action or cause any action to be done which may impair or damage any ROW, or other property located in, on or adjacent thereto. Any and all Public Right-of-Way, public property, or private property that is disturbed or damaged by the permittee or affiliate thereof during the construction, operation, maintenance, or repair of a Small Cell Facility shall be promptly repaired by permittee. In the event permittee fails to make such repairs within a reasonable time period, the City may complete or cause to be completed the repair work and bill the actual and reasonable costs to the permittee. Public property, private property, and Public Right-of-Way must be restored to as good a condition as before the disturbance or damage occurred to the reasonable satisfaction of the City.
- F. In the event of an unexpected repair or emergency, the owner of a Small Cell Facility may commence such repair and emergency response work as required under the circumstances, provided it shall notify the City promptly before such repair or emergency work, or the next day thereafter if advance notice is not practicable.
- G. Each permittee shall maintain its facilities in good and safe condition and in a manner that complies with all applicable federal, state, and local requirements. Permittee shall be responsible for all electrical or other utility costs associated with operating each installed SCF.
- H. Every Small Cell Facility shall be subject to the right of periodic inspection by the City, after notification to the Small Cell Facility owner. Each operator must respond to requests for information regarding its system and plans for the system as the City may from time to time issue, including requests for information regarding its plans for construction, operation and repair of the Public Right-of-Way.
- I. The City retains the right and privilege, after notifying the Small Cell Facility owner, to move any Small Cell Facility located within the Public Right-of-Way as the City may determine to be necessary, in response to any public health or safety emergency.
- J. To the extent permitted by South Dakota law, the City shall not be liable for any damage to any Small Cell Facility within the Public Right-of-Way as a result of or in connection with any public works, public improvements, construction, excavation, grading, filling, or work of any kind in the Public Right-of-Way by or on behalf of the City, except to the extent such damage is due to or caused by the City's negligence or willful misconduct.
- K. Restoration shall comply with the following:
 - 1. When a permittee, or any person acting on its behalf, does any work in or affecting any Public right-of-way, it shall, at its own expense, promptly remove any obstructions therefrom and restore such right-of-way or property to the same, or

better than the, condition which existed before the work was undertaken. As used in this section, "promptly" shall mean as soon as required by the City in the reasonable exercise of the City's discretion.

2. If weather or other conditions do not permit the complete restoration required hereunder, the permittee shall temporarily restore the affected right-of-way or property. Such temporary restoration shall be at the permittee's sole expense, and the permittee shall promptly undertake and complete the required permanent restoration when the weather or other conditions no longer prevent such permanent restoration.
 3. A permittee or other person acting on its behalf shall use suitable barricades, flags, flagmen, lights, flares and other measures as required for the safety of all members of the general public and to prevent injury or damage to any person, vehicle or property by reason of such work in or affecting the right-of-way.
 4. Restoration and repair work shall be the responsibility of the permittee for two (2) years after completion thereof. Such work shall be limited to further restoration or repairs arising out of deficient completion of the initial work but shall not include further restoration or repairs arising out of events not related to the initial completion of the work.
- L. The site and Small Cell Facilities and SCF Support Structures, including all landscaping, fencing and related transmission equipment must be maintained at all times in a neat and clean manner and in accordance with all approved plans. This includes, but is not limited to, mowing, weeding and trimming.
- M. All graffiti on Small Cell Facilities must be removed at the sole expense of the permit holder after notification by the City to the owner or operator of the small cell facilities.
- N. Certificate of Completion
1. A certificate of completion will only be granted upon satisfactory evidence that the SCF was installed in substantial compliance with the approved plans and photo simulations.
 2. If it is found that the SCF installation does not substantially comply with the approved plans and photo simulations, the applicant shall make any and all such changes required to bring the SCF installation into compliance within the timeframe established by the municipality. Failing to obtain a Certificate of Completion within the applicable timeframe shall cause a permit to be revoked.
- O. Compliance: All Small Cell Facilities must comply with all standards and regulations of the FCC and any State or other federal government agency with the authority to regulate small cell facilities.

P. Applicant Insurance

Each applicant shall secure and maintain liability insurance policies, as accepted by the City, insuring the applicant and including the City, and its elected and appointed officers, officials, boards, commissions, agents, representatives and employees as additional insureds, as their interest may appear under this section except workers compensation and employer's liability, which insurance shall be maintained during and for one (1) years after termination of the permit. Expected coverage shall be the same or substantially similar to the following:

1. General liability insurance with limits of:
 - a. \$5,000,000 per occurrence for bodily injury (including death); and
 - b. \$2,000,000 for property damage resulting from any one accident; and
 - c. \$5,000,000 general aggregate including premise-operations, products/completed operations, and explosion, collapse and underground hazards.
2. Automobile liability for owned, non-owned and hired vehicles in the amount of \$2,000,000 combined single limit for each accident for bodily injury and property damage
3. Worker's compensation within State statutory limits and employer's liability insurance with limits of \$1,000,000 each accident/disease/policy limit.

Upon receipt of notice from its insurer(s) Applicant shall provide City with thirty (30) days prior written notice of cancellation of any required coverage.

The applicant shall obtain, furnish to the City replacement insurance policies meeting the requirements of this Section.

Q. Financial Assurance

Upon the approval of an SCF application, the permittee shall post a bond, letter of credit, or other form of surety acceptable to the City.

1. The purpose of such financial assurance shall be to:
 - a. Provide for the removal of abandoned or improperly maintained SCFs, including those that the City determines need to be removed to protect public health, safety, or welfare;
 - b. Restoration of the ROW in connection with removals as provided for in this Chapter; or
 - c. Recoup rates or fees that have not been paid by the permittee in over 12 months, so long as the permittee has received reasonable notice from the City of any of the non-compliance listed above and an opportunity to cure.

2. The amount of the financial assurance shall be \$200 per approved SCF permit. For permittees with multiple SCFs within the City, the total amount of financial assurance across all facilities may not exceed \$10,000, which amount may be combined into one surety instrument.

9-9-7. Relocation

All small cell facilities shall be constructed and maintained so as not to obstruct or hinder the usual travel on or safety of the public right-of-way or obstruct any legal use of the City's right-of-way or uses of the right-of-way by utilities or other providers. If, in the reasonable determination of the City, a small cell facility needs to be relocated for reasons of public health, safety or welfare, or ROW maintenance or construction projects, then the small cell facility shall be relocated at the owner's or operator's expense. If the owner or operator of the small cell facility fails to complete any relocation as required by the City within ninety (90) days of mailing of written notice, the City may commence and complete the relocation and charge the owner or operator of the small cell facility for the actual and reasonable costs of the relocation, including reasonable any attorneys' fees and expenses.

9-9-8. Removal of Abandoned Small Cell Facilities, Utility Poles, and Other SCF Support Structures

Any SCF, Utility Pole or other SCF Support Structure that is not operated for a continuous period of twelve (12) months or is no longer authorized by a Small Cell Facility Permit or other permit shall be considered abandoned, and the owner of such SCF, Utility Pole or other SCF Support Structure shall so notify the City in writing and remove the same within ninety (90) days of giving notice to the City of such abandonment. Failure to remove an SCF, Utility Pole, or other SCF Support Structure within said ninety (90) days shall be grounds for the City to remove the SCF, Utility Pole, or SCF Support Structure, at the owner's expense, including all costs and reasonable attorneys' fees. If there are two (2) or more users of a single Utility Pole or SCF Support Structure, then these provisions shall not become effective until all users cease using the Utility Pole or SCF Support Structure.

9-9-9. General Indemnification

In addition to and distinct from the insurance requirements of this Chapter, each applicant hereby agrees to defend, indemnify and hold harmless the City and its officers, officials, boards, commissions, employees, agents and representatives from and against any and all damages, losses, claims and expenses, including reasonable attorneys' fees and costs of suit or defense, arising out of, resulting from or alleged to arise out of or result from the acts, omissions, failure to act or misconduct of the applicant or its affiliates in the construction, installation, operation, maintenance, repair, removal or replacement of the SCF. This Section shall not require the Applicant to indemnify or hold harmless the City for any losses, claims, damages, and expenses arising out of or resulting from the negligence or willful misconduct of the City.

9-9-10. Appeal Process

If a permit is denied in the administrative review process, then the applicant may appeal that decision to the Planning Commission for further consideration. If that same permit or a request for a Conditional Use Permit is denied by the Planning Commission, then the applicant may appeal that decision to the City Council for further consideration.

9-9-11. Application Fees and Rates

- A. **Application Fees.** A permit for SCF including a Utility Pole or SCF structure shall be limited to \$500 for up to five SCFs, and \$100 for each additional SCF on the application.
- B. **Recurring Fees.** A wireless provider authorized under this Chapter to place SCFs and any related Utility Pole or SCF Support Structure in the ROW shall pay to the City a ROW access fee of up to \$270 per site per year to cover all recurring fees, including the cost of ongoing monitoring of each site for compliance with the terms of this Chapter and for the health, safety, and welfare of the general public, and for the attachment of SCF's to City-owned or controlled Utility Poles or SCF Support Structures. Recurring fees shall be paid annually on or before January 15th of each year beginning the calendar year after installation. The City Council shall establish and adjust recurring fee rates by resolution.
- C. The application fee and the recurring fees under this Section shall be the sole compensation that the Wireless Provider shall be required to pay the City. However, the rates of either the application fee or the recurring fees may be increased due to extreme circumstances but in no case may such fees exceed a reasonable approximation of the City's actual and reasonable costs.

9-9-12. Severability

The various parts, sentences, paragraphs, sections and clauses of this Chapter are hereby declared to be severable. If any part, sentence, paragraph, section or clause is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this Chapter shall not be affected thereby.

9-9-13. Conflict

These Small Cell Facilities Regulations are in addition to other regulations in the Municipal Code. In case of a conflict between regulations, the more restrictive provisions shall apply.

Section 2. All ordinances and parts of ordinances in conflict herewith are hereby repealed.

Section 3. The City Finance Officer shall cause notice of adoption of this ordinance to be published in the official newspaper and twenty (20) days after the completed publication, unless the referendum is invoked, this ordinance shall become effective.

Members present voting aye: Barington, Doescher, McCardle, Rice, Sabers, Smith, Tjarks.
Members present voting nay: none. Motion carried and ordinance declared duly adopted.


EXECUTIVE SESSION:

Moved by Rice, seconded by McCardle, to go into Executive Session as permitted by SDCL 1-25-2 (3) Consulting with legal counsel or reviewing communications from legal counsel about proposed or pending litigation or contractual matters. Motion carried.

Mayor Everson declared the board out of executive session at 12:25 p.m. and the City Council to reconvene in regular session at 12:26 p.m.

ADJOURN:

There being no further business to come before the meeting, Mayor Everson adjourned the meeting.



Michelle Bathke
Finance Officer

Published once at the approximate cost of _____.