

ORDINANCE NO. 11-07

AN ORDINANCE OF THE TOWN OF FORT MYERS BEACH, FLORIDA, CREATING ARTICLE I IN CHAPTER 26 OF THE CODE OF ORDINANCES TO BE ENTITLED "COMMUNICATIONS FACILITIES IN PUBLIC RIGHTS-OF-WAY;" PROVIDING FOR INTENT AND PURPOSE; PROVIDING FOR DEFINITIONS; PROVIDING FOR REGISTRATION WHEN PLACING OR MAINTAINING COMMUNICATIONS FACILITIES IN PUBLIC RIGHTS-OF-WAY; PROVIDING FOR NOTICE OF TRANSFER, SALE OR ASSIGNMENT OF ASSETS LOCATED IN PUBLIC RIGHTS-OF-WAY; PROVIDING FOR PLACEMENT OR MAINTENANCE OF A COMMUNICATIONS FACILITY IN PUBLIC RIGHTS-OF-WAY; PROVIDING FOR SUSPENSION OF PERMITS; PROVIDING FOR APPEALS; PROVIDING FOR INVOLUNTARY TERMINATION OF REGISTRATION; PROVIDING FOR EXISTING COMMUNICATIONS FACILITIES IN PUBLIC RIGHTS-OF-WAY; PROVIDING FOR INSURANCE; PROVIDING FOR INDEMNIFICATION; PROVIDING FOR CONSTRUCTION BOND; PROVIDING FOR ENFORCEMENT REMEDIES; PROVIDING FOR ABANDONMENT OF A COMMUNICATIONS FACILITY; PROVIDING FOR FORCE MAJEURE; PROVIDING FOR RESERVATION OF RIGHTS AND REMEDIES; PROVIDING FOR SEVERABILITY; PROVIDING AN EFFECTIVE DATE.

WHEREAS, Section 337.401, Florida Statutes, states that because federal and state law require the nondiscriminatory treatment of providers of telecommunications services and because of the desire to promote competition among providers of telecommunications services, it is the intent of the Legislature that municipalities treat telecommunications companies in a nondiscriminatory and competitively neutral manner when imposing rules or regulations governing the placement or maintenance of telecommunications facilities in the public roads or rights-of-way; and

WHEREAS, rules or regulations imposed by a municipality relating to telecommunications companies placing or maintaining telecommunications facilities in roads or rights-of-way must be generally applicable to all telecommunications companies and, notwithstanding any other law, may not require a telecommunications company to apply for or enter into an individual license, franchise, or other agreement with the municipality as a condition of placing or maintaining telecommunications facilities in its roads or rights-of-way; and

WHEREAS, Section 337.401, Florida Statutes, was amended to state that because of the unique circumstances applicable to providers of communications services and the fact that federal and state law require the nondiscriminatory treatment of providers of telecommunications services, and because of the desire to promote competition among providers of communications services, it is the intent of the Legislature that municipalities treat providers of communications services in a nondiscriminatory and competitively neutral manner when imposing rules or regulations governing the placement or maintenance of communications facilities in the public roads or rights-of-way; and

WHEREAS, it is the intent of the Town of Fort Myers Beach to exercise the Town's authority over communications services providers' placement and maintenance of facilities in the public rights-of-way; and

WHEREAS, it is the Town of Fort Myers Beach's intent to treat each communications services provider in a nondiscriminatory and competitively neutral manner in exercising such authority; and

WHEREAS, the public rights-of-way subject to the jurisdiction and control of the Town are critical to the travel of persons and the transport of goods and other tangibles in the business and social life of the community by all citizens; are a unique and physically limited resource and proper management by the Town is necessary to maximize efficiency, minimize the costs to the taxpayers of the foregoing uses, and to minimize the inconvenience to and negative effects upon the public from such facilities' placement and maintenance in the public rights-of-way; and are intended for public uses and must be managed and controlled consistently with that intent; and

WHEREAS, it is the intent of the Town to exercise its authority to adopt reasonable rules and regulations to the fullest extent allowed by Federal and State law; and

NOW, THEREFORE, BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH, FLORIDA AS FOLLOWS:

Section 1. The following Article and sections are hereby created and added to Chapter 26 of the Town of Fort Myers Beach Code of Ordinances:

Article I. Communications Facilities In Public Rights-of-Way

Sec. 26-1. Intent and Purpose.

It is the intent of the Town of Fort Myers Beach to promote the public health, safety and general welfare by: providing regulations governing the placement or maintenance of Communications Facilities in the Public Rights-of-Way within the Town of Fort Myers Beach; adopting and administering reasonable rules and regulations not inconsistent with State and Federal law, including Section 337.401, Florida Statutes, as it may be amended, the Town's home-rule authority, and in accordance with the provisions of the Federal Telecommunications Act of 1996 and other Federal and State law; establishing reasonable rules and regulations necessary to manage the placement or maintenance of Communications Facilities in the Public Rights-of-Way by all Communications Services Providers; and minimizing disruption to the Public Rights-of-Way. In regulating its Public Rights-of-Way, the Town shall be governed by and shall comply with all applicable Federal and State laws.

Sec. 26-2. Definitions.

For purposes of this Article, the following terms, phrases, words and their derivations shall have the meanings given. Where not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular number include the plural number. The words "shall" and "will" are mandatory, and "may" is permissive. Words not otherwise defined shall be construed to have their common and ordinary meaning.

"Abandonment" shall mean the permanent cessation of all uses of a Communications Facility; provided that this term shall not include cessation of all use of a Facility within a physical structure where the physical structure continues to be used. By way of example, and not limitation, cessation of all use of a cable within a conduit, where the conduit continues to be used, shall not be "Abandonment" of a Facility in Public Rights-of-Way.

"Town" shall mean the Town of Fort Myers Beach, Florida.

"Communications Services" shall mean the transmission, conveyance or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points, by or through any electronic, radio, satellite, cable, optical, microwave, or other medium or method now in existence or hereafter devised, regardless of the protocol used for such transmission or conveyance.

"Communications Services Provider" shall mean any Person, including a municipality or county, providing Communications Services through the placement or maintenance of a Communications Facility in Public Rights-of-Way. "Communications Services Provider" shall also include any Person, including a municipality or county, that places or maintains a Communications Facility in Public Rights-of-Way but does not provide Communications Services.

"Communications Facility" or "Facility" or "System" shall mean any permanent or temporary plant, equipment and property, including but not limited to cables, wires, conduits, ducts, fiber optics, poles, antennae, converters, splice boxes, cabinets, hand holes, manholes, vaults, drains, surface location markers, appurtenances, and other equipment or pathways placed or maintained or to be placed or maintained in the Public Rights-of-Way of the Town and used or capable of being used to transmit, convey, route, receive, distribute, provide or offer Communications Services.

"FCC" shall mean the Federal Communications Commission.

"In Public Rights-of-Way" or "in the Public Rights-of-Way" shall mean in, on, over, under or across the Public Rights-of-Way.

"Person" shall include any individual, firm, association, joint venture, partnership, estate, trust, business trust, syndicate, fiduciary, corporation, organization or legal entity of any kind, successor, assignee, transferee, personal representative, and all other groups or combinations, and shall include the Town to the extent the Town acts as a Communications Services Provider.

"Place or maintain" or "placement or maintenance" or "placing or maintaining" shall mean to erect, construct, install, maintain, place, repair, extend, expand, remove, occupy, locate or relocate. A Communications Services Provider that owns or exercises physical control over Communications Facilities in Public Rights-of-Way, such as the physical control to maintain and repair, is "placing or maintaining" the Facilities. A Person providing service only through resale or only through use of a third party's unbundled network elements is not "placing or maintaining" the Communications Facilities through which such service is provided. The transmission and receipt of radio frequency signals through the airspace of the Public Rights-of-Way does not constitute "placing or maintaining" Facilities in the Public Rights-of-Way.

"Public Rights-of-Way" shall mean a public right-of-way, public utility easement, highway, street, bridge, tunnel or alley for which the Town is the authority that has jurisdiction and control and may lawfully grant access to pursuant to applicable law, and includes the surface, the air space over the surface and the area below the surface. "Public Rights-of-Way" shall not include private property. "Public Rights-of-Way" shall not include any real or personal Town property except as described above and shall not include Town buildings, fixtures, poles, conduits, facilities or other structures or improvements, regardless of whether they are situated in the Public Rights-of-Way.

"Registrant" shall mean a Communications Services Provider that has Registered with the Town in accordance with the provisions of this Article.

"Registration" or "Register" shall mean the process described in this Article whereby a Communications Services Provider provides certain information to the Town.

Sec. 26-3. Registration for Placing or Maintaining Communications Facilities in Public Rights-of-Way.

(a) A Communications Services Provider that desires to place or maintain a Communications Facility in Public Rights-of-Way in the Town shall first Register with the Town in accordance with this Article. Subject to the terms and conditions prescribed in this Article, a Registrant may place or maintain a Communications Facility in Public Rights-of-Way.

(b) A Registration shall not convey any title, equitable or legal, to the Registrant in the Public Rights-of-Way. Registration under this Article governs only the placement or maintenance of Communications Facilities in Public Rights-of-Way. Other ordinances, codes or regulations may apply to the placement or maintenance in the Public Rights-of-Way of facilities that are not Communications Facilities. Registration does not excuse a Communications Services Provider from obtaining appropriate access or pole attachment agreements before locating its Facilities on the Town's or another Person's facilities. Registration does not excuse a Communications Services Provider from complying with all applicable Town ordinances, codes or regulations, including this Article.

(c) Each Communications Services Provider that desires to place or maintain a Communications Facility in Public Rights-of-Way in the Town shall file a single Registration with the Town which shall include the following information:

- (1) Name of the applicant;
- (2) Name, address and telephone number of the applicant's primary contact person in connection with the Registration, and the person to contact in case of an emergency;
- (3) Evidence of the insurance coverage required under this Article and acknowledgment that Registrant has received and reviewed a copy of this Article, which acknowledgment shall not be deemed an agreement; and
- (4) The number of the applicant's certificate of authorization or license to provide Communications Services issued by the Florida Public Service Commission, the Federal Communications Commission, or other Federal or State authority, if any.
- (5) For an applicant that does not provide a Florida Public Service Commission certificate of authorization number, if the applicant is a corporation, proof of authority to do business in the State of Florida, such as the number of the certificate from or filing with the Florida Department of State.

(d) The Town shall review the information submitted by the applicant. Such review shall be by the Public Works Director or his or her designee. If the applicant submits information in accordance with subsection (c) above, the Registration shall be effective and the Town shall notify the applicant of the effectiveness of Registration in writing. If the Town determines that the

information has not been submitted in accordance with subsection (c) above, the Town shall notify the applicant of the non-effectiveness of Registration, and reasons for the non-effectiveness, in writing. The Town shall so reply to an applicant within thirty (30) days after receipt of registration information from the applicant. Non-effectiveness of Registration shall not preclude an applicant from filing subsequent applications for Registration under the provisions of this Article. An applicant has thirty (30) days after receipt of a notice of non-effectiveness of Registration to appeal the decision as provided in Section 26-8.

(e) A Registrant may cancel a Registration upon written notice to the Town stating that it will no longer place or maintain any Communications Facilities in Public Rights-of-Way within the Town and will no longer need to obtain permits to perform work in Public Rights-of-Way. A Registrant cannot cancel a Registration if the Registrant continues to place or maintain any Communications Facilities in Public Rights-of-Way.

(f) Registration does not in and of itself establish a right to place or maintain or establish priority for the placement or maintenance of a Communications Facility in Public Rights-of-Way within the Town, but shall establish for the Registrant a right to apply for a permit, if permitting is required by the Town. Registrations are expressly subject to any future amendment to or replacement of this Article and further subject to any additional Town ordinances or regulations, as well as any State or Federal laws that may be enacted.

(g) Within thirty (30) days of any change in the information required to be submitted pursuant to subsection (c), a Registrant shall provide updated information to the Town.

(h) In accordance with applicable Town ordinances, codes or regulations, a permit may be required of a Communications Services Provider that desires to place or maintain a Communications Facility in Public Rights-of-Way. An effective Registration shall be a condition of obtaining a permit. Notwithstanding an effective Registration, permitting requirements shall also apply. A permit may be obtained by or on behalf of a Registrant having an effective Registration if all permitting requirements are met.

Sec. 26-5. Notice of Transfer, Sale or Assignment of Assets in Public Rights-of-Way.

If a Registrant transfers, sells or assigns its assets located in Public Rights-of-Way incident to a transfer, sale or assignment of the Registrant's assets, the transferee, buyer or assignee shall be obligated to comply with the terms of this Article. Written notice of any such transfer, sale or assignment shall be provided by such Registrant to the Town within twenty (20) days after the effective date of the transfer, sale or assignment. If the transferee, buyer or assignee is a current Registrant, then the transferee, buyer or assignee is not required to re-Register. If the transferee, buyer or assignee is not a current Registrant, then the transferee, buyer or assignee shall Register as provided in Section 26-3 within sixty (60) days of the transfer, sale or assignment. If permit applications are pending in the Registrant's name, the transferee, buyer or assignee shall notify the Public Works Department that the transferee, buyer or assignee is the new applicant.

Sec. 26-6. Placement or Maintenance of a Communications Facility in Public Rights-of-Way.

(a) A Registrant shall at all times comply with and abide by all applicable provisions of State and Federal law and Town ordinances, codes and regulations in placing or maintaining a Communications Facility in Public Rights-of-Way.

(b) A Registrant shall not commence to place or maintain a Communications Facility in Public Rights-of-Way until all applicable permits, if any, have been issued by the Town or other appropriate authority, except in the case of an emergency. The term "emergency" shall mean a condition that affects the public's health, safety or welfare, which includes an unplanned out-of-service condition of a pre-existing service. Registrant shall provide prompt notice to the Town of the placement or maintenance of a Communications Facility in Public Rights-of-Way in the event of an emergency and may be required to obtain an after-the-fact permit if a permit would have originally been required to perform the work undertaken in Public Rights-of-Way in connection with the emergency. Registrant acknowledges that as a condition of granting such permits, the Town may impose reasonable rules or regulations governing the placement or maintenance of a Communications Facility in Public Rights-of-Way. Permits shall apply only to the areas of Public Rights-of-Way specifically identified in the permit. The Town may issue a blanket permit to cover certain activities, such as routine maintenance and repair activities, that may otherwise require individual permits.

(c) As part of any permit application to place a new or replace an existing Communications Facility in Public Rights-of-Way, the Registrant shall provide the following:

(1) The location of the proposed Facilities, including a description of the Facilities to be installed, where the Facilities are to be located, and the approximate size of Facilities that will be located in Public Rights-of-Way;

(2) A description of the manner in which the Facility will be installed (i.e. anticipated construction methods or techniques);

(3) A maintenance of traffic plan for any disruption of the Public Rights-of-Way;

(4) Information on the ability of the Public Rights-of-Way to accommodate the proposed Facility, if available (such information shall be provided without certification as to correctness, to the extent obtained from other Persons);

(5) If appropriate given the Facility proposed, an estimate of the cost of restoration to the Public Rights-of-Way;

(6) The timetable for construction of the project or each phase thereof, and the areas of the Town which will be affected; and

(7) Such additional information as the Town finds reasonably necessary with respect to the placement or maintenance of the Communications Facility that is the subject of the permit application to review such permit application.

(d) To the extent not otherwise prohibited by State or Federal law, the Town shall have the power to prohibit or limit the placement of new or additional Communications Facilities within a particular area of Public Rights-of Way.

(e) All Communications Facilities shall be placed or maintained so as not to unreasonably interfere with the use of the Public Rights-of-Way by the public and with the rights and convenience of property owners who adjoin any of the Public Rights-of-Way. The use of trenchless technology (i.e., directional bore method) for the installation of Facilities in the Public Rights-of-Way as well as joint trenching or the co-location of facilities in existing conduit is

strongly encouraged, and should be employed wherever feasible. The Public Works Director may promulgate reasonable rules and regulations concerning the placement or maintenance of a Communications Facility in Public Rights-of-Way consistent with this Article and other applicable law.

(f) All safety practices required by applicable law or accepted industry practices and standards shall be used during the placement or maintenance of Communications Facilities.

(g) After the completion of any placement or maintenance of a Communications Facility in Public Rights-of-Way or each phase thereof, a Registrant shall, at its own expense, restore the Public Rights-of-Way to its original condition before such work. If the Registrant fails to make such restoration within thirty (30) days, or such longer period of time as may be reasonably required under the circumstances, following the completion of such placement or maintenance, the Town may perform restoration and charge the costs of the restoration against the Registrant in accordance with Section 337.402, Florida Statutes, as it may be amended. For twelve (12) months following the original completion of the work, the Registrant shall guarantee its restoration work and shall correct any restoration work that does not satisfy the requirements of this Article at its own expense.

(h) Removal or relocation at the direction of the Town of a Registrant's Communications Facility in Public Rights-of-Way shall be governed by the provisions of Sections 337.403 and 337.404, Florida Statutes, as they may be amended.

(i) A permit from the Town constitutes authorization to undertake only certain activities in Public Rights-of-Way in accordance with this Article, and does not create a property right or grant authority to impinge upon the rights of others who may have an interest in the Public Rights-of-Way.

(j) A Registrant shall maintain its Communications Facility in Public Rights-of-Way in a manner consistent with accepted industry practice and applicable law.

(k) In connection with excavation in the Public Rights-of-Way, a Registrant shall, where applicable, comply with the Underground Facility Damage Prevention and Safety Act set forth in Chapter 556, Florida Statutes, as it may be amended.

(l) Registrant shall use and exercise due caution, care and skill in performing work in the Public Rights-of-Way and shall take all reasonable steps to safeguard work site areas.

(m) Upon request of the Town, and as notified by the Town of the other work, construction, installation or repairs referenced below, a Registrant may be required to coordinate placement or maintenance activities under a permit with any other work, construction, installation or repairs that may be occurring or scheduled to occur within a reasonable timeframe in the subject Public Rights-of-Way, and Registrant may be required to reasonably alter its placement or maintenance schedule as necessary so as to minimize disruptions and disturbance in the Public Rights-of-Way.

(n) A Registrant shall not place or maintain its Communications Facilities so as to interfere with, displace, damage or destroy any facilities, including but not limited to, sewers, gas or water mains, storm drains, pipes, cables or conduits of the Town or any other Person's facilities lawfully occupying the Public Rights-of-Way of the Town.

(o) Town makes no warranties or representations regarding the fitness, suitability, or availability of the Town's Public Rights-of-Way for the Registrant's Communications Facilities and any performance of work, costs incurred or services provided by Registrant shall be at Registrant's sole risk. Nothing in this Article shall affect the Town's authority to add, vacate or abandon Public Rights-of-Way, and Town makes no warranties or representations regarding the availability of any added, vacated or abandoned Public Rights-of-Way for Communications Facilities. Vacation of Rights-of-Way is governed by Sections 10-218 through 10-220 of the Town's Land Development Code.

(p) The Town shall have the right to make such inspections of Communications Facilities placed or maintained in Public Rights-of-Way as it finds necessary to ensure compliance with this Article.

(q) A permit application to place a new or replace an existing Communications Facility in Public Rights-of-Way shall include plans showing the location of the proposed installation of Facilities in the Public Rights-of-Way. If the plans so provided require revision based upon actual installation, the Registrant shall promptly provide the Town with revised plans. The plans shall be in a hard copy format or an electronic format specified by the Town, provided such electronic format is maintained by the Registrant. Such plans in a format maintained by the Registrant shall be provided at no cost to the Town.

(r) The Town reserves the right to place and maintain, and permit to be placed or maintained, sewer, gas, water, electric, storm drainage, communications, and other types of facilities, cables or conduit, and to do, and to permit to be done, any underground and overhead installation or improvement that may be deemed necessary or proper by the Town in Public Rights-of-Way occupied by the Registrant. The Town further reserves without limitation the right to alter, change, or cause to be changed, the grading, installation, relocation, or width of the Public Rights-of-Way within the limits of the Town and within said limits as same may from time to time be altered.

(s) A Registrant shall, on the request of any Person holding a permit issued by the Town, temporarily raise or lower its Communications Facilities to permit the work authorized by the permit. The expense of such temporary raising or lowering of Facilities shall be paid by the Person requesting the same, and the Registrant shall have the authority to require such payment in advance. The Registrant shall be given not less than thirty (30) days advance written notice to arrange for such temporary relocation.

(t) A wireless facility that is a portion of a Communication Facility, such as an antenna ("Wireless Facility(ies)"), which is attached to a legally maintained vertical structure in the Public Rights-of-Way, such as a light pole or utility pole ("Vertical Structure(s)"), shall be subject to the following criteria:

(1) Such Wireless Facilities may not extend more than twenty (20) feet above the highest point of the Vertical Structure;

(2) Such Wireless Facilities that are attached to a Vertical Structure located in Public Rights-of-Way that is fifteen (15) feet or less in width and is located adjacent to real property used as a single family residence shall be flush mounted to the Vertical Structure;

- (3) Such Wireless Facilities shall not have any type of lighted signal, lights, or illuminations unless required by an applicable federal, state, or local rule, regulation or law;
- (4) Such Wireless Facilities shall comply with any applicable Federal Communications Commission Emissions Standards;
- (5) The design, construction, and installation of such Wireless Facilities shall comply with any applicable local building codes;
- (6) No commercial advertising shall be allowed on such Wireless Facilities; and
- (7) Any accessory equipment and related housing in the Public Rights-of-Way that are used in conjunction with such a Wireless Facility shall comply with any applicable Town rules, regulations, ordinances, or laws governing the placement and design of such equipment. Vertical structures, such as towers, whose sole purpose is to serve as a mounting device for antennae, are expressly prohibited from being placed in the Public Rights-of-Way unless applicable zoning and land use regulations allow such structures to be placed within the zoning district in which such Public Rights-of-Way are located or to which they are adjacent.

Sec. 26-7. Suspension of Permits.

The Town may suspend a permit for work in the Public Rights-of-Way for one or more of the following reasons, subject to Section 26-8 of this Article:

- (a) Violation of permit conditions, including conditions set forth in the permit, this Article or other applicable Town ordinances, codes or regulations governing placement or maintenance of Communications Facilities in Public Rights-of-Way;
- (b) Misrepresentation or fraud by Registrant in a Registration or permit application to the Town; or
- (c) Failure to properly renew or ineffectiveness of Registration.
- (d) Failure to relocate or remove Facilities as may be lawfully required by the Town. The Public Works Director shall provide notice and an opportunity to cure any violation of (a) through (c) above, each of which shall be reasonable under the circumstances.

Sec. 26-8. Appeals.

Final, written decisions of the Public Works Director or his or her designee suspending or denying a permit, denying an application for a Registration or denying an application for renewal of a Registration are subject to appeal. An appeal must be filed with the Town Manager within thirty (30) days of the date of the final, written decision to be appealed. Any appeal not timely filed as set forth above shall be waived. The Town Council shall hear all such appeals. The appeal hearing shall occur within thirty (30) days of the receipt of the appeal, unless waived by the Registrant, and a written decision shall be rendered within twenty (20) days of the hearing. Upon correction of the grounds that gave rise to a suspension or denial, the suspension or denial shall be lifted.

Sec. 26-9. Involuntary Termination of Registration.

- (a) The Town may involuntarily terminate a Registration if:
- (1) A Federal or State authority suspends, denies, or revokes a Registrant's certification or license to provide Communications Services;
 - (2) The Registrant's placement or maintenance of a Communications Facility in the Public Rights-of-Way presents an extraordinary danger to the general public or other users of the Public Rights-of-Way and the Registrant fails to remedy the danger promptly after receipt of written notice; or
 - (3) The Registrant ceases to use all of its Communications Facilities in Public Rights of-Way and has not complied with Section 26-16 of this Article.
- (b) Prior to termination, the Registrant shall be notified by the Town Manager with a written notice setting forth all matters pertinent to the proposed termination action, including which of (1) through (3) above is applicable and the reason therefore, and describing the proposed action of the Town with respect thereto. The Registrant shall have sixty (60) days after receipt of such notice within which to address or eliminate the reason or within which to present a plan, satisfactory to the Town Manager, to accomplish the same. If the plan is rejected, the Town Manager shall provide written notice of such rejection to the Registrant and shall make a recommendation to the Town Council regarding a decision as to termination of Registration. A Registrant shall be notified by written notice of any decision by the Town Council to terminate its Registration. Such written notice shall be sent within seven (7) days after the decision.
- (c) In the event of termination, the former Registrant shall: (1) Notify the Town of the assumption or anticipated assumption by another Registrant of ownership of the Registrant's Communications Facilities in Public Rights-of-Way; or (2) Provide the Town with an acceptable plan for disposition of its Communications Facilities in Public Rights-of-Way. If a Registrant fails to comply with this subsection 26-9, which determination of non-compliance is subject to appeal as provided in Section 26-8, the Town may exercise any remedies or rights it has at law or in equity, including but not limited to taking possession of the Facilities where another Person has not assumed the ownership or physical control of the Facilities or requiring the Registrant within 90 days of the termination, or such longer period as may be agreed to by the Registrant, to remove some or all of the Facilities from the Public Rights-of-Way and restore the Public Rights-of-Way to its original condition before the removal.
- (d) In any event, a terminated Registrant shall take such steps as are necessary to render safe every portion of the Communications Facilities remaining in the Public Rights-of-Way of the Town.
- (e) In the event of termination of a Registration, this Section does not authorize the Town to cause the removal of Communications Facilities used to provide another service for which the Registrant or another Person who owns or exercises physical control over the Facilities holds a valid certification or license with the governing Federal or State agency, if required for provision of such service, and is Registered with the Town, if required.

Sec. 26-10. Existing Communications Facilities in Public Rights-of-Way.

A Communications Services Provider with an existing Communications Facility in the Public Rights-of-Way of the Town has sixty (60) days from the Effective Date of this Article to comply with the terms of this Article, including, but not limited to, Registration, or be in violation thereof.

Sec. 26-11. Insurance.

(a) A Registrant shall provide, pay for and maintain satisfactory to the Town the types of insurance described herein. All insurance shall be from responsible companies duly authorized to do business in the State of Florida and having a rating reasonably acceptable to the Town. All liability policies shall provide that the Town is an additional insured as to the activities under this Article. The required coverages must be evidenced by properly executed Certificates of Insurance forms. The Certificates must be signed by the authorized representative of the insurance company and shall be filed and maintained with the Town annually. Thirty (30) days advance written notice by registered, certified or regular mail or facsimile as determined by the Town must be given to the Town of any cancellation, intent not to renew or reduction in the policy coverages. The insurance requirements may be satisfied by evidence of self-insurance or other types of insurance acceptable to the Town.

(b) The limits of coverage of insurance required shall be not less than the following:

(1) Worker's Compensation and Employer's Liability Insurance

Worker's Compensation: Florida Statutory Requirements

Employer's Liability: \$ 1,000,000 limit per accident
\$ 2,000,000 limit per each employee

(2) Comprehensive General Liability

Bodily injury and property damage: \$ 1,000,000 combined single limit each occurrence

(3) Automobile Liability: \$ 500,000 combined single limit each accident

Sec. 26-12. Indemnification.

(a) A Registrant shall, at its sole cost and expense, indemnify, hold harmless, and defend the Town, its officials, boards, members, agents, and employees, against any and all claims, suits, causes of action, proceedings, judgments for damages or equitable relief, and costs and expenses incurred by the Town arising out of the placement or maintenance of its Communications System or Facilities in Public Rights-of-Way, regardless of whether the act or omission complained of is authorized, allowed or prohibited by this Article, provided, however, that a Registrant's obligation hereunder shall not extend to any claims caused by the negligence, gross negligence or wanton or willful acts of the Town. This provision includes, but is not limited to, the Town's reasonable attorneys' fees incurred in defending against any such claim, suit or proceedings. Town agrees to notify the Registrant, in writing, within a reasonable time of Town receiving notice, of any issue it determines may require indemnification. Nothing in this Section shall prohibit the Town from participating in the defense of any litigation by its own counsel and at its own cost if in the Town's reasonable belief there exists or may exist a conflict, potential conflict or appearance of a conflict. Nothing contained in this Section shall be construed or interpreted:

(1) as denying to either party any remedy or defense available to such party under the laws of the State of Florida; or

(2) as a waiver of sovereign immunity beyond the waiver provided in Section 768.28, Florida Statutes, as it may be amended.

(b) The indemnification requirements shall survive and be in effect after the termination or cancellation of a Registration.

Sec. 26-13. Construction Bond.

(a) Prior to issuing a permit where the work under the permit will require restoration of Public Rights-of-Way, the Town may require a construction bond or other form of security to secure the restoration of the Public Rights-of-Way. Notwithstanding the foregoing, a construction bond hereunder may only be required to the extent that the cost of the restoration exceeds the amount recoverable against the Security Fund as provided in Section 26-14. Twelve (12) months after the completion of the restoration in Public Rights-of-Way in accordance with the bond, the Registrant may eliminate the bond. However, the Town may subsequently require a new bond for any subsequent work in the Public Rights-of-Way. The construction bond shall be issued by a surety having a rating reasonably acceptable to the Town; shall be subject to the approval of the Town Manager; and shall provide that: "For twelve (12) months after issuance of this bond, this bond may not be canceled, or allowed to lapse, until sixty (60) days after receipt by the Town, by certified mail, return receipt requested, of a written notice from the issuer of the bond of intent to cancel or not to renew."

(b) The rights reserved by the Town with respect to any construction bond established pursuant to this Section are in addition to all other rights and remedies the Town may have under this Article, or at law or equity.

(c) The rights reserved to the Town under this Section are in addition to all other rights of the Town, whether reserved in this Article, or authorized by other law, and no action, proceeding or exercise of a right with respect to the construction bond will affect any other right the Town may have.

Sec. 26-14. Enforcement Remedies.

(a) A Registrant's failure to comply with provisions of this Article shall constitute a violation and shall subject the Registrant to the code enforcement provisions and procedures as provided in Chapter 2, Article V of the Town's Land Development Code. In addition, violation of this Article may be punishable as provided in Section 162.22, Florida Statutes, as it may be amended.

(b) Failure of the Town to enforce any requirements of this Article shall not constitute a waiver of the Town's right to enforce that violation or subsequent violations of the same type or to seek appropriate enforcement remedies.

Sec. 26-15. Abandonment of a Communications Facility.

(a) Upon Abandonment of a Communications Facility owned by a Registrant in Public Rights-of-Way, the Registrant shall notify the Town within ninety (90) days.

(b) The Town may direct the Registrant by written notice to remove all or any portion of such Abandoned Facility at the Registrant's sole expense if the Town determines that the Abandoned Facility's presence interferes with the public health, safety or welfare, which shall include, but shall not be limited to, a determination that such Facility: (a) compromises safety at any time for any Public Rights-of-Way user or during construction or maintenance in Public Rights-of-Way; (b) prevents another Person from locating facilities in the area of Public Rights-of-Way where the Abandoned Facility is located when other alternative locations are not reasonably available; or (c) creates a maintenance condition that is disruptive to the Public Rights-of-Way's use. In the event of (b), the Town may require the third Person to coordinate with the Registrant that owns the existing Facility for joint removal and placement, where agreed to by the Registrant.

(c) In the event that the Town does not direct the removal of the Abandoned Facility, the Registrant, by its notice of Abandonment to the Town, shall be deemed to consent to the alteration or removal of all or any portion of the Facility by the Town or another Person at such third party's cost.

(d) If the Registrant fails to remove all or any portion of an Abandoned Facility as directed by the Town within a reasonable time period as may be required by the Town under the circumstances, the Town may perform such removal and charge the cost of the removal against the Registrant.

Sec. 26-17. Force Majeure.

In the event a Registrant's performance of or compliance with any of the provisions of this Article is prevented by a cause or event not within the Registrant's control, such inability to perform or comply shall be deemed excused and no penalties or sanctions shall be imposed as a result, provided, however, that such Registrant uses all practicable means to expeditiously cure or correct any such inability to perform or comply. For purposes of this Article, causes or events not within a Registrant's control shall include, without limitation, acts of God, floods, earthquakes, landslides, hurricanes, fires and other natural disasters, acts of public enemies, riots or civil disturbances, sabotage, strikes and restraints imposed by order of a governmental agency or court. Causes or events within Registrant's control, and thus not falling within this Section, shall include, without limitation, Registrant's financial inability to perform or comply, economic hardship, and misfeasance, malfeasance or nonfeasance by any of Registrant's directors, officers, employees, contractors or agents.

Sec. 26-18. Reservation of Rights and Remedies.

(a) The Town reserves the right to amend this Article as it shall find necessary in the lawful exercise of its police powers.

(b) This Article shall be applicable to all Communications Facilities placed in the Public Rights-of-Way on or after the effective date of this Article and shall apply to all existing Communications Facilities in the Public Rights-of-Way prior to the effective date of this Article, to the full extent permitted by State and Federal law.

(c) The adoption of this Article is not intended to affect any rights or defenses of the Town or a Communications Service Provider under any existing franchise, license or other agreements with a Communications Services Provider.

(d) Nothing in this Article shall affect the remedies the Town or the Registrant has available under applicable law.

(e) Any Person who uses the Communications Facilities of a Registrant, other than the Registrant that owns the Facilities, shall not be entitled to any rights to place or maintain such Facilities in excess of the rights of the Registrant that places or maintains the Facilities.


Section 2. Severability. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions hereof.

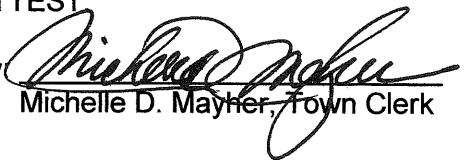
Section 3. Effective Date. This ordinance shall take effect immediately upon adoption by the Town Council.

The foregoing Ordinance was adopted by the Town Council upon a motion by Council Member Mandel and seconded by Councilmember Kosinski and upon being put to a vote, the result was as follows:

Larry Kiker, Mayor	aye	Bob Raymond, Vice Mayor	aye
Joe Kosinski	aye	Jo List	aye
Alan Mandel	aye		

DULY PASSED AND ADOPTED THIS 26 DAY OF SEPTEMBER 2011, BY THE TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH

By: 
Larry Kiker, Mayor

ATTEST:
By: 
Michelle D. Mayher, Town Clerk

Approved as to form and legal sufficiency:

By: 
FOWLER WHITE BOGGS, Town Attorney