



# Legislative UPDATE

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Number 2

## **FCC PREEMPTION OF LOCAL RIGHT-OF-WAY RENTAL FEES?**

A local controversy in New York State may have serious financial implications for cities across the nation, including Texas cities. A company called Level 3 Communications filed a petition with the Federal Communications Commission (FCC) last year seeking to overturn public property and right-of-way fees negotiated in a decade-old contract between Level 3's predecessor and the New York State Thruway Authority (NYSTA). Level 3's predecessor placed hundreds of miles of fiber optic cable in the NYSTA's right-of-way and paid the negotiated fee. Recently, when Level 3 sought to extend the network using federal stimulus dollars, the company claimed that the NYSTA fees for the extensions were "exorbitant."

The company claims that the high NYSTA fees are a barrier to providing service and are thus preempted by the federal Telecommunications Act. Level 3 makes the all-too-familiar argument that municipal right-of-way fees should be based solely on the costs of regulation, rather than being based on the fair market "rental" value for the use of public property by a private company. (Texas cities are required by the Texas Constitution and various state statutes to charge fair market rent for use of public property by private companies. When Congress enacted the federal Telecommunications Act, it made clear that the FCC is not authorized to set the level of local rental payments charged for use of public property.)

Whether the NYSTA fees in the contracts prohibit service or whether the fees are "reasonable" in this particular instance are legal and fact issues that a court, rather than the FCC, should decide as a contract dispute. The problem for Texas cities is that Level 3 filed a "Petition for Declaratory Ruling" with the FCC. An FCC order based on that type of petition could potentially apply to every city in the nation and could attempt to impose a national standard for the reasonableness of fees charged for right-of-way use.

In addition to considering the Level 3 petition, the FCC is in the process of developing a “National Broadband Plan (NBP)” that will “seek to ensure that every American has access to broadband capability.” The plan is part of last year’s federal stimulus bill and is scheduled for release on March 17, 2010. Some telecommunications and cable companies are urging the FCC, as part of the NBP and in conjunction with the Level 3 proceeding, to adopt a unilaterally-imposed, federal standard for compensation for use of public rights-of-way that would limit municipal fees to the actual costs of regulation rather than fair market value rents.

Considering the fact that right-of-way rental fees are almost ten percent of many Texas cities’ general fund revenues, negative FCC action would be a financial disaster. In other words, if the FCC takes action to limit the ability of cities to require market-value rental fees, Texas cities would collectively lose several hundred million dollars in revenue.

The Texas Municipal League’s national partners, including the International Municipal Lawyers Association, the U.S. Conference of Mayors, the National Association of Telecommunications Officers and Advisors, and the National League of Cities, have participated in various ways at the FCC to ensure that local right-of-way authority is not eroded. The League will continue to monitor and support the national associations’ efforts.

## **TCEQ LOCAL GOVERNMENT** **ASSISTANCE PROGRAMS**

The Texas Commission on Environmental Quality (TCEQ) is sometimes considered a “four-letter” word by city officials. That’s often because the only contact city officials have with the agency is during some type of enforcement action against the city.

But the TCEQ also offers valuable assistance to cities through its Small Business and Local Government Assistance (SBLGA) section. The purpose of SBLGA is to help local governments comply with environmental rules prior to any enforcement action. The program gives confidential technical assistance on air, water, waste, and pollution prevention issues without the threat of enforcement.

Local governments can request free, on-site multi-media environmental compliance assessments—and all information remains confidential. Environmental consultants under contract with the TCEQ conduct the voluntary audits for environmental compliance. If the audited site corrects the noted deficiencies and the consultant verifies compliance, the site becomes eligible for the Compliance Commitment (C2) Partnership. Through this partnership, a small local government (a city with a population of 50,000 or less) can earn a one-year exemption from routine TCEQ investigations.

In addition to providing one-on-one assistance, SBLGA offers a number of compliance assistance tools, regulatory guidance documents, and easy-to-follow checklists for various activities, such as operating wastewater treatment systems, public water systems, and fleet-refueling facilities.

SBLGA compliance assistance specialists in one of the TCEQ’s sixteen regional offices are available by phone at 800-447-2827 for free and confidential environmental compliance assistance. For more information on the program and tools, visit SBLGA’s Web site at [www.sblga.info](http://www.sblga.info).

**DON'T FORGET:**  
**CURFEW ORDINANCES NEED REVIEW**

Section 370.002 of the Local Government Code requires that after a city adopts a juvenile curfew ordinance, the city must review and readopt the ordinance **every three years**. The statute requires that a city:

- (1) review the ordinance's effects on the community and on problems the ordinance was intended to remedy;
- (2) conduct public hearings on the need to continue the ordinance; and
- (3) abolish, continue, or modify the ordinance.

**A juvenile curfew ordinance expires if a city does not review and readopt it every three years.**

For more information on this issue, please contact the TML Legal Department at (512) 231-7400 or [legal@tml.org](mailto:legal@tml.org).

**LEAGUE COMPLETES UPDATE OF**  
**TEXAS HOME RULE CHARTER BOOK**

In 1994, the Texas Municipal League published a comprehensive book (authored by Terrell Blodgett) on Texas home rule charters. That year, Texas had 291 home rule cities. Since then, the book has been an invaluable guide to city officials who considered the adoption of home rule status or worked through charter amendments.

The second edition of the book, released in February of 2010, builds upon Mr. Blodgett's outstanding material, including many updated charts that include data from a 2007 survey performed by the League.

The recently-updated book comprehensively reviews and analyzes the origin, evolution, and current status of the now 351 home rule charters in the state. In addition to tracing the historical development of charters, the book offers a current overview of the application and impact of state and federal laws on writing and amending charters.

The easy-to-read format provides an excellent guide for elected officials, administrators, and interested citizens. For more information or to order, please click on "publications" at [www.tml.org](http://www.tml.org) or call 512-231-7400.

## **NOT MUCH ACTIVITY IN STATE CABLE FRANCHISE LAWSUIT**

Senate Bill 5, which authorized a state-issued certificate of franchise authority for cable and video providers, became law in 2005. Some cable companies were opposed to certain provisions of the bill, and they filed a case in federal court a day after the bill's effective date.

In *Texas Cable and Telecommunications Association v. P.U.C. Commissioners*, the Texas Cable and Telecommunications Association (TCTA) challenged the "grandfathering" provision in Senate Bill 5. That provision requires incumbent cable providers to fulfill obligations under existing franchise agreements until those agreements expire.

The lawsuit was filed on September 8, 2005. In 2006, the court dismissed the case on procedural grounds. In 2007, the TCTA appealed the dismissal to the Fifth Circuit Court of Appeals. In 2008, the Fifth Circuit issued its opinion and concluded that the TCTA's claims deserve consideration by the trial court.

The case has since languished in the trial court. However, TCTA recently filed a letter with the judge in an apparent attempt to "get things moving" in the case. The letter cites a recent Texas Public Utility Commission report concerning possible "redlining" by state franchise holders. (Redlining is when a company discriminates against certain geographic, income, or ethnic areas.) The TCTA claims that the report supports its argument that holding its members to existing franchise requirements discriminates against those members.

Motions for summary judgment have been pending in the trial court for more than a year. TML will continue to monitor developments in the case, but it appears almost moot because only a handful of grandfathered cable franchises remain in existence.

## **MUNICIPAL COST INFLATION RISES**

The Municipal Cost Index (MCI), developed exclusively by *American City and County* magazine, shows the effect of inflation on the cost of providing municipal services. The MCI is used to study price trends, make informed government contract decisions, and facilitate sound budget planning.

According to *American City and County* magazine, the MCI for December was 208.4. That's 0.7 percent higher than last month's MCI, and an increase of 1.1 percent over the previous twelve months. The January 2009 MCI was 206.1.

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