



Legislative UPDATE

July 12, 2010
Number 5

ASSAULT ON MUNICIPAL ACCESS LINE REVENUE CONTINUES

Many cities rely on revenue generated by renting municipal rights-of-way to utility providers, and telecommunications companies collect and remit a significant portion of that revenue.

Previous articles in the *TML Legislative Update* have pointed out that some in state government believe that municipal access line fees (the current method by which telecommunications providers compensate cities for the use of municipal rights-of-way) should be reduced or eliminated.

In December 2009, the Public Utility Commission voted to publish a proposed rule for public comment that would make certain “tweaks” to the access line system. The notice was routine in that it asked for comments on the technical aspects of the proposed rules. However, the addition of an unrelated question was not routine: “The commission invites specific comments on the commission’s jurisdiction to affect the total amount that a municipality collects as access line fees.”

The question was posed pursuant to a commissioner’s statements regarding the fees at a September 24, 2009, meeting. The commissioner discussed her concern with the “outrageous” level of fees and stated her opinion that the fees are a “hidden tax...that is coming through [the commission].” Her comments indicated that she may want to reduce the total amount of revenue to cities from the fees.

The commissioner’s statements, combined with the above question, are cause for concern and raise a much larger issue than the recently proposed rules. Over the years, some have incorrectly argued that the compensation for the use of a city’s rights-of-way is a “tax” on telecommunications providers or consumers. In fact, right-of-way fees are a value-based rental of the use of public property.

At a May 14, 2010, Public Utility Commission meeting, the commissioners took no action on the adoption of the technical aspects of the rulemaking. Rather, one commissioner asked for a one-day workshop among the commissioners and interested parties. That workshop has been scheduled for August 13, 2010. The commissioners' comments seem to show that they are not concerned with municipal revenue and would be willing to reduce that revenue. Presumably, the point of the workshop is to set the stage for future legislation that would either reduce – or give the commission the authority to reduce – access line fees. To view the commissioner's comments to this effect, which last about thirteen minutes, please [CLICK HERE](#).

In addition, the commission has asked that the access line compensation issue be added to its biennial “scope of competition report” to the legislature. Municipal compensation has not been a part of that report in the past.

It appears that municipal right-of-way fee compensation will become an important legislative issue next session, perhaps more so than in recent sessions. League staff is working with the Texas Coalition of Cities for Utility Issues, and will monitor and participate as necessary. In fact, a survey regarding each city's compensation may be coming from the League in the near future.

SUNSET COMMISSION MEMBER QUESTIONS MUNICIPAL PARTICIPATION IN ELECTRIC RATE CASES

The Texas Sunset Advisory Commission (Commission), which is made up of legislators and public members, periodically evaluates state agencies to determine if an agency is still needed and what improvements are needed to ensure that state funds are well spent. Based on the recommendations of the Commission, the Texas Legislature ultimately decides whether and how an agency continues to operate into the future.

The Public Utility Commission (PUC) is up for “sunset review” in 2011. At a July 6 hearing, the Commission discussed various issues related to the PUC. About an hour into the meeting, a member of the Commission began questioning why the time to complete electric rate cases sometimes exceeds the statutory deadline of 185 days. The discussion seemed relatively low key, but it is one of great importance to many cities. As is often the case with legislative hearings, the discussion quickly turns to cities. Specifically, the chairman of the PUC explained that the reason many rate cases exceed the statutory deadline is because of “intervenors” who lengthen the process.

Who are the intervenors that the chairman was talking about? They are cities that participate in electric rate cases to protect their citizens by ensuring that rate increases are justified. The costs of attorneys and others who represent cities are usually paid by the electric company as part of the ratemaking process. In his own words, the PUC chairman suggests that the Commission can reduce costs “by not allowing municipal intervenors to recover their legal expenses.”

In response, another member of the Commission cautioned against further attempts at “streamlined ratemaking” (a more simple way to increase rates, presumably without municipal

intervention), and suggested that all the parties should be invited to a hearing to get all the information relating to how municipal intervention (and surpassing the 185-day deadline, in some cases) may ultimately benefit customers.

The result of the hearing was tacit approval of the Commission for the PUC to return to the legislature in February 2010 and make recommendations on how to “streamline” the ratemaking process in terms of time and cost-effectiveness.

To view the relevant portion of the hearing, which lasts about thirty minutes, please. [CLICK HERE](#).

In some cases, cities are the only entities that stand between electric companies and higher rates for customers. Many cases in which cities intervene result in lower rate increases for customers. Cities that participate in electric rate cases should follow this development closely. It is likely that legislation eroding municipal participation will be filed in 2011.

U.S. SUPREME COURT RULES THAT CITY MAY SEARCH EMPLOYEE TEXT MESSAGES UNDER SOME CIRCUMSTANCES

The United States Supreme Court recently held that a police department was allowed to search an officer’s personal text messages that were sent on his city-issued pager. *City of Ontario, California v. Quon*, No. 08-1332 (June 17, 2010). The search arose because the police officer was exceeding his text character limit on the city pager and had been paying the overages himself. The city wanted to determine, by reviewing the content of the text messages, whether the city or the officer should be paying for the text messages. While reviewing the transcripts of the text messages, the city determined that the officer was sending many personal text messages during work hours, and the city disciplined the officer.

The question in front of the Court was whether the text message search violated the constitutional prohibition against unreasonable search and seizures. The Court held that the city’s search of the officer’s text messages was reasonable because the search was motivated by a legitimate work-related purpose of determining who should be paying for the text messages, and the search was not excessive in scope.

To view the opinion, please [CLICK HERE](#).

COMPTROLLER LEADERSHIP CIRCLE REWARDS CITY TRANSPARENCY

The Office of the State Comptroller has established the Comptroller Leadership Circle award program to recognize the efforts of Texas cities that have strived for online fiscal transparency.

The program gives out gold, silver, and bronze level awards to local governments based on a scoring system that gives points to cities that place specific financial documents on their city Web sites for public consumption. In order to receive the gold certificate, cities must make available on their city Web site their city budgets, financial reports, and check registers. Points are also awarded based upon the ease with which a user can access these documents.

As of June 2010, the comptroller had awarded gold certificates to 32 cities, silver certificates to 18 cities, and bronze certificates to 13 cities. Cities that are welcomed into the Leadership Circle receive a digital seal reflecting the level of the award that can be published on the city's Web site.

For more information on the Comptroller Leadership Circle program, including access to the application, please visit the Comptroller's [Web site](#).

ONLINE TRAVEL COMPANIES (OTCs) TAKE THEIR COURT CASES TO CONGRESS

Companies that buy up blocks of hotel rooms and then sell them for a profit have stepped up their efforts to prevent the imposition of city and state hotel occupancy taxes on the retail price of the room billed to online consumers. A federal court decision in November of 2009 found that such companies should have been collecting city hotel occupancy taxes in Texas on the full retail price of the room. Now the companies are fighting back against that decision, and others like it, on multiple fronts.

First, they've recently formed a lobbying group called TravelersFirst.org and are using the group to lash out against a nationwide tide of court decisions finding that the OTCs should have been collecting full hotel taxes all along.

Second, the companies have doubled their efforts to get Congress to overturn state hotel tax laws. The highest priority of the lobbying groups is passage of the so-called Internet Tax Fairness Act (ITTFa), which would prevent the imposition of hotel taxes on the full purchase price to the end user for rooms booked over the Internet, among other things. It is expected that the ITTFa could soon be offered as a Senate amendment to the Small Business Jobs and Credit Act of 2010 (H.R. 5297).

Finally, the OTCs and their "astro-turf" lobbying organizations have resorted to blatantly erroneous rhetoric about their losses in court cases. They blame cities for the "patchwork" of "regulations" that now exist because of state-by-state litigation of the issue, when in fact it was the OTCs wide-spread tax avoidance that gave rise to the need for litigation in the first place. The statutes and ordinances were clear, in other words, but OTCs simply chose not to comply. And here's a quote from a Web site sponsored by one of these organizations: "Congress must step in and prevent localities from increasing my travel costs by taxing the services provided by online travel companies who facilitate hotel bookings! In a time when the government should be helping to support demand-creating businesses in the tourism industry, consumers don't need yet

another tax that makes travel more expensive.” Incredibly, the OTCs are somehow trying to recast their losses in court as a “tax increase” or a “new tax.” This is incredibly misleading.

City officials should not hesitate to discuss this issue with their members of Congress, and to do so quickly.

FEDERALIZED COLLECTIVE BARGAINING BILL PASSES IN THE U.S. HOUSE

H.R. 413, the Public Safety Employer-Employee Cooperation Act of 2009, was passed in the United States House of Representatives as an amendment to the supplemental appropriations bill on July 1st.

This legislation mandates that all cities, counties, and states collectively bargain with public safety employee labor unions over wages, benefits, and working conditions under federal rules to be developed later. This legislation would either require Texas collective bargaining law to be changed to meet the federal bill, or require Texas cities to submit to one-size-fits-all federal rules.

Texas’ delegation split its votes along party lines for and against passage:

Against passage: Louis Gohmert (R); Ted Poe (R); Ralph Hall (R); Jeb Hensarling (R); Joe Barton (R); John Culberson (R); Kevin Brady (R); Michael McCaul (R); K. Michael Conaway (R); Kay Granger (R); William Thornberry (R); Ron Paul (R); Randy Neugebauer (R); Lamar Smith (R); Pete Olson (R); Kenny Marchant (R); Michael Burgess (R); John Carter (R); and Pete Sessions (R).

For passage: Al Green (D); Ruben Hinojosa (D); Silvestre Reyes (D); Thomas Edwards (D); Charles Gonzalez (D); Lloyd Doggett (D); Solomon Ortiz (D); Raymond Green (D); Eddie Johnson (D); Sheila Jackson-Lee (D); and Henry Cuellar (D).

Not voting: Ciro Rodriguez (D); Sam Johnson (R).

The vote occurred in the House without the benefit of any public deliberation about the merits of this unfunded mandate, the need for it, or its constitutionality.

Please contact your representative who voted against the bill to thank them for their vote. If your representative voted for the bill, you may wish to speak with them about the effect of the legislation on your city. For contact information for your representative, please [CLICK HERE](#).

The U.S. Senate has not passed the supplemental appropriations bill but is now back in session following the Fourth of July Holiday. Senators Cornyn and Hutchison have already noted their opposition to federalized collective bargaining.

FEDERAL SEX OFFENDER RESIDENCY ORDINANCE SUIT IS SETTLED

The city of Commerce was sued in federal district court by a John Doe plaintiff challenging the city's sex offender ordinance in February 2008. The ordinance provided that no sex offender could live within one thousand feet of a college, school, daycare facility, park, or playground, and that no child sex offender could knowingly be present in or loiter within 300 feet of those places. The plaintiff challenged the ordinance on the grounds that it was: (1) unconstitutionally vague; (2) in violation of the *ex post facto* clause of the United States Constitution; and (3) in violation of the substantive due process clause of the Fifth Amendment of the U.S. Constitution by impairing the sex offender's property rights.

The case was recently settled out-of-court. The city agreed to remove the provisions regarding colleges and universities, and changed the ordinance to apply to all sex offenders. The city also removed the loitering provisions in order to address the plaintiff's concerns with vagueness. If you have questions regarding sex offender ordinances or this litigation, please contact Lauren Crawford at (512) 231-7400 or lauren@tml.org.

MUNICIPAL COST INFLATION STILL RISING

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 June was 211.6. That's 0.5 percent higher than last month's MCI and an increase of 3.7 percent over the previous twelve months. The June 2009 MCI was 204.0.

TCEQ ADOPTS REVISED WATER QUALITY STANDARDS

Surface water quality in Texas is governed both by Section 303 of the Federal Clean Water Act and Chapter 26, Subchapter D, of the Texas Water Code. Under those statutes, the Texas Commission on Environmental Quality (TCEQ), sometimes under the direction of the U.S. Environmental Protection Agency (EPA), creates rules and standards to monitor and protect surface water quality in Texas. These "Texas Surface Water Quality Standards" are important for cities, especially those with wastewater treatment plants, because those plants affect the levels of certain biological and chemical substances that the city may discharge into surface waters.

On June 30, after a lengthy revisions process, the TCEQ adopted revisions to Texas' surface water quality standards and the accompanying implementation procedures (IPs). These changes include the following:

- The existing contact use categories for surface water bodies were changed. Before the revisions, surface waters were designated by their potential use as either primary contact recreation (high likelihood of recreational use; water must be suitable for ingestion) or non-contact recreation (low likelihood of ingestion; water is unsuitable for recreational use). The revised standards create new categories in between these existing levels: secondary contact recreation 1 and secondary contact recreation 2. These new categories will allow for certain waters that do not have a high likelihood of recreational use or ingestion to have slightly modified water quality standards for certain pollutants. The E.coli standard is the exception to these changes; the commission chose not to adopt the category changes for that standard, leaving the primary and non-contact recreation uses in place for the E.coli standard only.
- Bacteria measurements and limits. These changes govern how standards attainment is calculated and create an exemption in certain cases where water flow is high during collection.
- Current standards and procedures for nutrient testing. This includes changes to how chlorophyll a is used in nutrient standards attainment testing.
- Whole Effluent Toxicity (WET) testing and procedures. The revised standards include stricter requirements for sublethal testing (where organisms survive but fail to reproduce at a specific toxicity level) and subsequent limits. Most of these changes are in the IPs.

The latest information on the adopted revisions is available on the TCEQ's [Web site](#). The rule language is available [here](#) as a PDF, and the IP language is available [here](#).

The rules will be published in the July 16 issue of the Texas Register and will be available online at the Texas Secretary of State's [Web site](#).

If you have basic questions about the surface water quality standard revisions, please contact Lauren Crawford in the TML Legal Department at (512) 231-7400.

FEDERAL APPEALS COURT CONFIRMS MUNICIPAL AUTHORITY OVER GAS TRANSMISSION FACILITIES

The Fifth Circuit Court of Appeals recently upheld a federal district court ruling that allowed the City of Grand Prairie to enforce various land use regulations against a Texas Midstream Gas Services (TMGS) compressor station.

The city code requires a specific use permit, and various other permits, for the construction of a compressor station in certain zoning districts. The code also establishes conditions for the issuance of the permits, including minimum setbacks, roof pitch, building material requirements,

architectural design compatibility with surrounding development, noise limitations, and a “security fence” of at least eight feet in height to enclose the area.

TMGS sued the city, claiming that the federal Pipeline Safety Act (PSA) and state law preempt the city’s requirements. The PSA prescribes safety standards not only for pipelines but also for related structures, including compressor stations.

The court of appeals concluded that, with the exception of the “security fence” requirement, the city code does not address compressor station “safety.” Rather, it relates to general aesthetics and community enhancement and was designed to protect property values:

Our decision today is the first to consider whether the PSA preempts a setback requirement for a compressor station. However, our decision is consistent with PSA preemption jurisprudence from our court and elsewhere... Cases decided under the PSA’s predecessor statutes have uniformly invalidated parochial safety provisions...[but] [n]one of these cases foreclose laws primarily related to aesthetics or non-safety police powers. The PSA preempts safety standards for natural gas pipeline facilities. Grand Prairie’s setback requirement is not a safety standard in letter, purpose, or effect. It may remain in force.

The court of appeals also rejected the TMGS argument that its eminent domain authority should override the city’s police power regulations.

The opinion is a good one for those cities that regulate natural gas compressor stations and other equipment.

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