



Legislative UPDATE

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FCC DENIES RECONSIDERATION OF CELL TOWER ORDER

In July of 2008, CTIA, the national association of cell phone providers, filed a “petition for declaratory ruling” with the Federal Communications Commission (FCC). The petition asked the FCC to preempt local zoning of wireless phone tower locations.

CTIA complained that local zoning procedures have the effect of limiting competition in the provision of wireless phone service. Many city ordinances, pursuant to state law, require various notices and hearings to determine whether a particular location is appropriate for a wireless tower.

In 2009, the FCC unanimously adopted an order on CTIA’s petition. The order is similar to previous orders regarding cable franchises, which essentially preempted city authority in states that don’t have a state-issued franchise. While not as burdensome as some feared, the order did the following:

- Set presumptive deadlines of 90 days (for co-location applications) and 150 days (for all other wireless siting applications) within which a city must act on wireless applications.
- Concluded that a city that denies a tower-siting application solely because “one or more carriers serve a given geographic market” has engaged in unlawful regulation that “prohibits or ha[s] the effect of prohibiting the provision of personal wireless services” within the meaning of the Act. In other words, the fact that another carrier or carriers provide service to an area is an inadequate defense for denying a new carrier’s application.
- Rejected CTIA’s request that the FCC preempt any variance procedure under a city’s ordinance. The FCC concluded that whether a variance procedure is too burdensome depends on the city’s actual process.

The order is troubling because it preempts certain aspects of local zoning authority and to some extent makes the FCC a “national zoning board.”

Shortly following the order, the National League of Cities, joined by the National Association of Telecommunications Officers and Advisors, the National Association of Counties, the United States Conference of Mayors, and the American Planning Association, filed a Petition for Reconsideration with the FCC. Finally acting last month, the FCC denied the petition.

Shortly after the FCC issued its order in 2009, the City of Arlington challenged the FCC’s authority to issue the order by appealing to the Fifth Circuit Court of Appeals. That judicial appeal had been stayed pending the outcome of the FCC’s reconsideration. The appeal will now move forward in the courts.

City officials should consult with local legal counsel to determine whether the order affects their cell-tower-siting process.

HEALTH AND HUMAN SERVICES ISSUES MODEL **BOARDING HOME RULES**

Legislation enacted in 2009 directs the Health and Human Services Commission (HHSC) to develop and adopt model standards for the operation of boarding home facilities. The model standards apply to homes that are not considered statutory assisted living facilities under the Texas Health and Safety Code. Cities may enforce the model standards if they so choose.

The model standards prepared by the HHSV address the following issues relating to boarding homes:

- Construction and remodeling of boarding homes.
- Sanitary and related conditions.
- The reporting and investigation of injuries, incidents, and unusual accidents and the establishment of policies and procedures to ensure resident health and safety.
- Assistance with self-administering medication.
- Requirements for in-service education of the facility's staff.
- Criminal history record checks.
- Assessment and periodic monitoring to ensure that a resident does not require personal care, nursing, or other services and is capable of self-administering medication.

The proposed model standards will be published in the August 27, 2010, edition of the *Texas Register*, which may be accessed at: <http://www.sos.state.tx.us/texreg/index.shtml>. (In addition, the final boarding house model standards have been posted on the HHSC Web site at: <http://www.hhsc.state.tx.us/BHMS.shtml>.)

Interested cities may wish to comment on the proposed model standards.

MANDATORY COLLECTIVE BARGAINING **DEAD, FOR NOW**

by Carolyn Coleman

Recent efforts to pass mandatory federal collective bargaining legislation (H.R. 413/S.1611/S. 3194) failed. The “one-size-fits-all” bill would require that every state, county, city and town collectively bargain with their police officers, firefighters, emergency medical technicians, and corrections officers, regardless of state and local laws. TML, other state municipal leagues, and the National League of Cities (NLC) have opposed this legislation since it was first introduced 15 years ago.

Last month, the House included the legislation in an amendment to its version of the supplemental appropriations bill (H.R. 4899), which contained much-needed funding for the Iraq and Afghanistan wars. The amendment also contained billions of dollars in domestic funding.

When the bill returned to the Senate for consideration, the Senate rejected the House's amendment largely because of the additional funding and returned its original version back to the House for consideration. The House eventually passed the Senate version of the bill, which the President signed into law on July 29, 2010.

“NLC will continue to oppose this legislation on behalf of cities and towns on the grounds that it interferes with state and local laws, violates principles of federalism, and may be unconstitutional,” said NLC Executive Director Donald J. Borut.

In a House subcommittee hearing earlier this year, North Carolina League of Municipalities Executive Director Ellis Hankins testified on behalf of NLC and urged the committee not to fix what isn't broken.

“For centuries, states and local governments have developed procedures for addressing the needs of their employees, taxpayers and citizens,” Hankins testified. “They have done so with and without collective bargaining, through laws that are designed to provide their workers with excellent working conditions, competitive salaries, excellent health and pension benefits, and a working environment that is safe and appropriate.” He added that this bill would put the federal government in charge of what has been a state and local function for no compelling reason.

Citing the Constitution, Supreme Court decisions, and existing law, Hankins noted that this bill disregards and disrespects the democratic decision making process employed by states and localities to decide how best to interact with their employees.

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THE LATEST ON THE MUNICIPAL ACCESS LINE SAGA

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 telephone 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. At a May 14, 2010, 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 took place on August 13.

Clarence West, an attorney who represents the Texas Coalition of Cities for Utility Issues (TCCFUI), testified on behalf of TCCFUI and the Texas Municipal League. Mr. West, along with TML staff, participated in the enactment and drafting of the original 1999 access line bill and he has been active in the PUC projects implementing the bill since 1999. He explained to the commission that – contrary to what some have alleged – municipal access line fees in most cities have been in decline for several years. That decline is attributable to various factors, not the least of which is the “migration” of many consumers to wireless phone service.

Lubbock Mayor Tom Martin also provided testimony. Mayor Martin’s comments focused on the right-of-way management problems faced by the city. Telecommunications companies have not been the best stewards of the rights-of-way in Mayor Martin’s city. His position was that, in addition to providing rental income for public property, access line fees are absolutely necessary to fix damage done to streets and other public property by telecommunications providers. Mayor Martin showed several real-world examples of the destruction to his city’s streets by telephone providers. He also explained that his city’s revenue from access line fees, like many other cities, has been dropping.

The City of San Antonio and various telecommunications providers also testified. Some of those providers advocated changes to the current system, but it appears that there is no agreement on how that should be done.

It appears that municipal right-of-way fee compensation will become an important legislative issue next session. League staff will continue to work with TCCFUI and individual cities to ensure that this important revenue source is not eroded, and that city rights-of-way are respected.

NLC SEEKS TO EXCLUDE SPECIFIC
TELECOMMUNICATIONS TAX FROM MAIN STREET
FAIRNESS ACT

by Lars Etzkorn

Last week, NLC called for an amendment to the Main Street Fairness Act (H.R. 5660) to explicitly exclude taxes and fees unique to communication services from the legislation, including right-of-way fees, franchise fees, 911 fees, gross receipt taxes, universal service funds, local utility user taxes, and excise taxes.

The bill, introduced in early July by Rep. Bill Delahunt (D-Mass.), would place Internet retailers on par with their brick-and-mortar counterparts regarding the collection of sales taxes. Internet retailers typically collect sales taxes only in states where they have a physical presence.

In a July 1 statement, Delahunt said the bill “will help state and local governments balance their budgets without raising any new taxes and will not cost the federal government a dime. States estimate that \$18.6 billion in sales taxes will go uncollected in 2010 and, by 2012, the states will be losing at least \$23 billion annually.

“From 2009-2012, this amounts to a loss of approximately \$55 billion. In some cases, these revenue losses can comprise up to one half of a state's budget shortfall,” Delahunt said.

Upon introduction, NLC and other state and local government organizations expressed support for the bill in order to allow for the collection of taxes on all internet purchases.

However, following a recent meeting of the Telecommunications Task Force of the Streamline Sales Tax Governing Board, NLC grew concerned with assertions made by telecommunications industry representatives that H.R. 5660 could be interpreted to cover all state and locally imposed taxes on communications, rather than just sales and use taxes.

NLC did not support versions of the bill introduced in prior sessions specifically because they would have interfered with the ability of local governments to impose and collect communication specific taxes and fees on communications providers and services.

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RED LIGHT CAMERA REPORTS DUE

The 2010 notification of reporting requirements for Photographic Traffic Signal Enforcement Systems and Municipal Reporting of Traffic Crashes was published in the Texas Register on Friday, July 2, 2010. The required reports are due to the Texas Department of Transportation (TxDOT) by October 29, 2010. Please see page 348 at: <http://www.sos.state.tx.us/texreg/pdf/currview/index.shtml>.

The detailed reporting requirements and the required report forms are available on the TxDOT website at: http://www.txdot.gov/safety/red_light_cameras.htm.

The completed reports are to be submitted via e-mail to the address provided (TRF_RLC_Reports@dot.state.tx.us).

Questions regarding the reporting requirements or report forms should be directed to (512) 416-3118.

SUNSET COMMISSION RELEASES REPORT ON COMMISSION ON STATE EMERGENCY COMMUNICATIONS

The Commission on State Emergency Communications (CSEC) governs 911 service in Texas and provides the service in rural areas. In its Staff Report, the Sunset Commission recently recommended that: (1) the CSEC should continue to operate for the next twelve years; (2) the commission should be authorized to develop, implement, and manage an interconnected state-level 911 network; and (3) the commission should be required to establish an advisory committee for the development, implementation, and management of the state's 911 system.

Currently, the commission provides the delivery of 911 calls to public safety answering centers in rural areas. The CSEC does not answer or dispatch calls. The commission contracts with the 24 Regional Planning Commissions (RPCs) to provide 911 service to rural areas covering about one-third of the Texas population. Emergency communications districts and municipal emergency communications districts provide service to the rest of the state.

The Sunset Commission's recommendation is that the CSEC be given statewide authority to coordinate the current 911 system and develop and implement an interconnected 911 network. The Sunset report seeks to have the legislature "clarify" its intent to recognize the commission as the "state's authority on emergency communications". These recommendations could, TML staff believes, lead to mandatory regulation of all 911

communications providers. If mandatory regulation by the commission were implemented, it would affect the way cities provide 911 service to their citizens.

The report also recommends the establishment of an advisory committee for the development, implementation, and management of a new 911 network that would allow access through text messages, images, video, and data to the 911 network. Expanding technology that could contact 911 could be beneficial to all entities that provide 911 service.

Finally, the Sunset report recommends that the commission develop a policy allowing for negotiated rulemaking and alternative dispute resolution so that more interested individuals and entities can be involved in rulemakings.

To read the full report, please go to http://www.sunset.state.tx.us/82ndReports/CSEC/CSEC_DEC.pdf.

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