Texas Municipal League Legislative UPDATE

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Broadband Legal Update: FCC and Federal and State Court Proceedings Affect Cities

The federal and state governments continue to kowtow to industry attempts to preempt municipal right-of-way and other authority related to cellular and broadband deployment. The truth is that right-of-way authority, public property rental fees, and other regulations represent only one, tiny cost of doing business for such companies.

According to some observers, the focus on reducing or eliminating one (relatively marginal) cost of doing business does not solve the challenging economics of broadband deployment and serves only to obscure the true challenges. Assume as true a Federal Communications Commission (FCC) claim that right-of-way fee caps will save the industry $2 billion. That amount is around one percent of what the FCC and industry claim is the necessary new investment needed for next-generation network deployments, and therefore is not likely to have a significant impact.

Nevertheless, the onslaught against cities continues. The volume of information is dizzying. This not-so-brief update shows what's going on and where cities stand.

- **State Court Franchise Fee Lawsuit:** This lawsuit claims that small cell rental fees, and the elimination of video franchise fees or telephone access line fees, violates the Texas Constitution's "donations" provisions.

In 2017, the City of McAllen and a coalition of around 40 cities sued the state to challenge the unconstitutionally low right-of-way rental fees in S.B. 1004 by Kelly Hancock (R – North Richland Hills). That bill, passed during the 2017 regular session, requires a city to allow access for cellular antennae and related equipment ("small cell nodes") in city rights-of-way, and it also entitles cell companies and others to place equipment on city light poles, traffic poles, street signs, and other poles.

The bill gives cities limited authority over placement, and it caps a city's right-of-way rental fee at around $250 per small cell node. The artificially low price per node is a taxpayer subsidy to the cellular industry because it allows nearly free use of taxpayer-owned rights-of-way and facilities. The bill does precisely what the Texas Constitution prohibits: It is an action by the legislature forcing cities to give away their valuable assets to a private company. That lawsuit was recently amended to add a claim based on S.B. 1152, the "franchise fee elimination" bill passed earlier this year.

Passed in 2019, S.B. 1152 (also authored by Senator Hancock) authorizes a cable or phone company to stop paying the lesser of its state cable franchise or telephone access line fees, whichever is less for the company statewide. Because it also requires an unconstitutional gift of use of cities' rights of way, the pleadings in the small cell lawsuit were amended to include that bill.

These bills, if left unchecked, could lead the way to the complete elimination of all franchise fees in future sessions. That is why the lawsuit to prove that they are unconstitutional, which is pending in state district court, is so important to Texas cities.

Interested city officials who want to discuss joining the lawsuit against both S.B. 1004 (2017) and S.B. 1152 (2019) can get further details or join the coalition by emailing Kevin Pagan, city attorney for McAllen.

- **Federal Small Cell Order Lawsuit:** Early in 2019, the FCC's "Declaratory Ruling and Third Report and Order" relating to state and local management of small cell wireless infrastructure deployment became effective. The order enacts substantial new limits on wireless siting review. It preempts cities in many areas, but the most significant provisions are as follows:

    1. It creates two new categories of "shot clocks" for small cell wireless facility review. Local governments will have 60 days to complete review of applications for collocated small cells and 90 days for small cells on new structures. These time periods are shorter than the Texas small cell legislation passed in 2017, meaning the federal periods control.
    2. It limits recurring fees for small cells in the rights-of-way, such as rights-of-way access fees or lease fees, to a "reasonable approximation" of the city's "objectively reasonable costs" for maintaining the rights-of-way or a structure within the rights-of-way, which must be no higher than fees for similar actors. The FCC finds a presumptively reasonable recurring fee to be $270 per site, per year. Cities are expressly prohibited from recovering any cost not directly related

to rights-of-way maintenance, charging fees above cost recovery, or recovering "unreasonable" costs, such as excessive contractor or consultant fees.

3. It limits allowable local aesthetic requirements, including minimum spacing requirements, to those that "are: (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) published in advance." The FCC notes that undergrounding requirements for all wireless facilities would constitute an illegal prohibition of service by a city, but it does not clarify whether local governments may require auxiliary equipment for small cell sites, such as equipment cabinets and fiber backhaul, to be underground.

Shortly after the order became effective, a nationwide coalition of cities and state leagues, including the Texas Municipal League, filed a lawsuit to overturn it. Some of the key arguments against the order are as follows:

1. The order violates the Tenth Amendment to the U.S. Constitution, which reserves to the states powers not given to the federal government. The argument is particularly relevant in this case because the FCC isn't merely preempting state laws. Rather, the federal government is actually appropriating state property (municipal rights-of-way and facilities) for private use by cell phone providers. According to one court, the order is nothing less than "[a] forced transfer of property that is in principle no different from a 'congressionally compelled subsidy from state governments'" to cell phone companies.
2. The federal government can't deprive a state (and its cities) from its authority as a proprietor (i.e, owner) of property. In other words, cities aren't acting as regulators over companies that want to place their facilities on city equipment. Instead, the city is an owner of that equipment. As such, the FCC has no power to tell a city how to use it.
3. The lawsuit makes other arguments, including that the order: (1) violates a city's due process rights by imposing unreasonable "shot clocks" within which installations must be approved; (2) goes beyond the authority granted to the FCC by the federal Telecommunications Act; and (3) ignores evidence in the record submitted by local governments, including evidence related to fair market value of public rights-of-way.

The U.S. Court of Appeals for the Tenth Circuit denied the coalition's motion to postpone the order while the lawsuit advances. The denial came on the heels of the FCC's denial of a similar request at the agency level. In better news, the Tenth Circuit court agreed to transfer the proceedings to the Ninth Circuit for litigation on the merits. The Ninth Circuit is generally considered a more city-friendly venue for this type of dispute.

The complex litigation will likely take some time to work its way through the courts. Cities that expect small cell installations may want to consider participating in the coalition. To do so, contact Gerard "Gerry" Lederer, partner at Best Best and Krieger LLP in Washington, D.C. by email at Gerard.lederer@bbklaw.com.

- **FCC Cable In-Kind Order and Lawsuit:** In 2018, the FCC released a "Second Further Notice of Proposed Rulemaking" that will allow cable companies to deduct the fair market value of a wide range of franchise obligations, including public, educational, and governmental (PEG) channel capacity and other PEG-related franchise requirements, from their existing franchise fee payments. If the FCC's proposed new rules are adopted, cities that operate PEG channels will see reductions in franchise fee payments from cable operators.

  The League is participating in a coalition of cities that filed comments on the proposal, filed a motion for stay at the FCC, and filed a lawsuit in September of this year in federal court to halt the implementation of the rules.

- **FCC Collocation Petitions for Declaratory Ruling:** In September of this year, the Wireless Industry Association (WIA) and the Communications Technology Industry Association (CTIA) filed petitions with the FCC to further limit local oversight of wireless towers and pole attachments.

  The FCC requested comments on the proposals and whether it should expand the scope of an existing federal law (Section 6409 of the Middle-Class Tax Relief and Job Creation Act of 2012) that already preempts certain municipal regulations relating to wireless towers. If enacted, the proposals from WIA and CTIA would substantially limit the authority of local governments to manage large wireless towers in their communities, as well as further limiting the control that pole owners, such as municipal utilities, have over pole attachments.

  The petitions request that the FCC expand existing federal rules to preempt local regulations governing modifications to existing wireless facilities. TML has joined a coalition consisting of the National League of Cities, the Texas Coalition of Cities for Utilities Issues, and several cities to file comments in opposition to the proposal.

As is obvious, the telecommunications industry sees cities as "on the ropes," and they continue to seek preemptive action at the FCC. Unfortunately, litigation appears to be the best option to get cities a seat at the table.

In related news, the FCC released a public notice this month announcing the reauthorization of its Intergovernmental Advisory Committee and soliciting nominations for memberships on the committee. Applications must be received no later than 5:00 pm on December 6, 2019. Applications may be submitted via email to IAC2020@fcc.gov. Please contact Kamala Hart, IGA Intergovernmental Affairs Outreach Specialist, at 202.418.1765 or Kamala.Hart@fcc.gov with questions.

Federal Government Seeks Data Advisory Committee Members

Earlier this year, the U.S. Department of Commerce finalized a plan that aims to improve the Federal government's ability to gather insights from data over the next decade. The plan, called

the "Federal Data Strategy," lays out expectations for every federal agency to develop ethical governance processes, design programs to plan for data use, and promote continuous learning and improvements in federal agencies.

As a part of the strategy, the Department is looking for stakeholders to serve on the *Advisory Committee on Data for Evidence Building*. At least 10 of the committee's members will be appointed from non-federal sources, including local government, with expertise in government data policy, privacy, technology, transparency policy, and evaluation and research methodologies.

City officials can apply for consideration until December 4, 2019.