



Legislative UPDATE

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Stalemate Continues at Capitol

The Texas Legislature remains in a standstill after a majority of Texas House democrats left the state for Washington, D.C. in an effort to break quorum over voting legislation. There have been reports that some democrats have returned to Austin; however, their presence is not enough for a quorum in the House. Under House rules, no business can be conducted during a lack of quorum except to compel the attendance of absence members. The House democrats have stated they will not return until after the first called special session ends on August 6.

The Senate has passed most items included on the governor's call, but none can be considered in the House due to the lack of quorum.

Broadband Legal Update: FCC and Federal and State Court Proceedings

The League's last general update on the status of various broadband actions affecting cities was in March of this year. The switch in party control at the federal level typically leads to FCC

appointees who tend to push back at industry attempts to preempt municipal right-of-way and other authority related to cellular and broadband deployment.

That seems to be happening now after the President's appointment of a new FCC chairwoman early in 2021. However, federal courts have consistently ruled against cities base on appeals of previously-adopted FCC orders in most of the following proceedings:

- **Federal Small Cell Order Lawsuit:** Early in 2019, the FCC issued its “Declaratory Ruling and Third Report and Order” relating to state and local management of small cell wireless infrastructure deployment. It preempts cities in many areas, but the most significant provisions are: (1) “shot clocks” for small cell wireless facility siting review; (2) limits on recurring fees for small cells in the rights-of-way, such as rights-of-way access 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; and (3) limits allowable local aesthetic requirements, including minimum spacing requirements.

Shortly after the order became effective, a nationwide coalition of cities and state leagues, including TML, filed a lawsuit to overturn it. In 2020, the U.S. Court of Appeals for the Tenth Circuit denied the coalition’s motion to postpone implementation of the order while the lawsuit advances.

After the case was transferred for procedural reasons, a three-judge panel of the Ninth Circuit Court of Appeals issued its opinion in *City of Portland v. the United States of America/Federal Communications Commission*. The opinion was a mixed bag for cities, with most issues decided in favor of the cellular industry. The most important issue involved the cap on right-of-way rental (a.k.a., “franchise”) fees for small cell deployment. The panel upheld the provision limiting a city’s right-of-way fees to “an amount needed to recover administrative costs.” After several intermediate steps, the coalition appealed the federal order to the U.S. Supreme Court on March 22, 2021. On June 28, the Court rejected the appeal, making the appeals court decision final.

- **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 another coalition of cities that filed comments on the proposal, filed a motion for stay at the FCC, and filed a lawsuit in September of 2019 in federal court to halt the implementation of the rules.

Following the President’s appointment of the new chair, the FCC asked the Sixth Circuit court to delay oral argument in the case, which is scheduled for April 15, 2021, to allow further review of the issue. The court rejected the request on March 19. On May 26, the

Sixth Circuit issued its opinion in *City of Eugene et al. v. Federal Communications Commission*. While the court upheld the FCC's order concluding that a provider may deduct in-kind obligations from its franchise fee payment, the court reversed the way in which that amount is calculated in a way that could greatly lessen the financial impact on some cities.

- **FCC Collocation Petitions for Declaratory Ruling:** In September 2019, 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.

TML 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. The litigation was moving forward in the Ninth Circuit Court of Appeals, but the FCC also requested an abeyance in this case to allow its staff more time to study the issue. In this case, the court granted that request and stayed all proceedings until July 2021. However, the FCC has asked for another 120 days, and the court will likely grant that request.

- **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](#). 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 in 2019. That bill, [S.B. 1152](#) 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 still pending in state district court, is so important to Texas cities. The coalition filed a motion for summary judgment on June 2. The City of Houston, which is not a coalition member, but which has intervened in the lawsuit, filed a similar motion.

League staff will continue to participate in these proceedings and report on future activity.

Post-Session Update: Response to Winter Storm Uri

After Winter Storm Uri in mid-February, the Texas Legislature shifted some of its focus to respond to the electricity and water issues Texans experienced during the storm. In an effort to address those issues, it passed a number of bills, including S.B. 2, S.B. 3, and H.B. 4492. All three of these bills are effective immediately.

S.B. 2 – Public Utility Commission and ERCOT Reform

[S.B. 2](#) requires the presiding officer of the Public Utility Commission (PUC) and all members of the Electric Reliability Council of Texas (ERCOT) board to be residents of Texas. It replaces the ERCOT board with political appointees and involves the PUC more closely in ERCOT's regulations. It also changes the members of the ERCOT board from mostly electric industry members to members with executive-level experience in areas such as finance, business, engineering, trading, risk management, law, or electric market design.

S.B. 3 – Utility Preparedness

[S.B. 3](#) is the omnibus utility weatherization bill for certain electric, gas, and water utilities. Most importantly, it requires electric generation facilities, electric transmission and distribution facilities, and certain natural gas pipeline facilities and wells to implement measures to operate during a weather emergency. The bill also: (1) creates an alert system to be activated when the power supply in Texas may be inadequate to meet demand; (2) requires the Railroad Commission (RRC) and the PUC to designate certain natural gas facilities as critical infrastructure during energy emergencies so the electricity generators can still get fuel to produce power; and (3) establishes the Texas Energy Reliability Council to: (a) ensure that the energy and electric industries in Texas meet high priority human needs and address critical infrastructure concerns; and (b) enhance coordination and communication in the energy and electric industries in Texas.

Except in Harris County or in a county with a population of 550,000 or more adjacent to Harris County, the bill requires municipally owned water utilities to: (1) ensure the emergency operation of its water system during an extended power outage at a minimum water pressure of 20 pounds per square inch, or at a water pressure level approved by the Texas Commission on Environmental Quality (TCEQ), as soon as safe and practicable following the occurrence of a natural disaster;

and (2) by March 1, 2022, adopt and submit to TCEQ for its approval: (a) an emergency preparedness plan that demonstrates the utility's ability to provide the emergency operations described by (2); and (b) a timeline for implementing the plan. Cities with a municipally owned water utility should take a look at the bill to ensure they comply with the requirements.

Even though the bill has an immediate effective date, it requires TCEQ, the RRC, and the PUC to adopt rules to implement most of its provisions. These agencies will need time to adopt their rules, so many of the provisions of the bill won't actually be in operation until sometime in the future.

H.B. 4492 – Financing for the Electric Market

[H.B. 4492](#) provides two financing mechanisms to address extraordinary costs incurred by ERCOT and market participants because of Winter Storm Uri. The first mechanism utilizes an \$800 million dollar loan from the state's rainy day fund to address the non-payments of market participants. This allows ERCOT to "clear the market" by using these funds to pay the market participants that ERCOT owes. The loan to ERCOT will be paid by the assessment of a charge to remaining market participants which will eventually be paid by their customers over a period of time not to exceed 30 years. The second financing mechanism addresses the ancillary charges that were assessed to certain market participants during the storm. It allows market participants who choose to participate to utilize securitization financing to spread their cost over a period of time not to exceed 30 years in order to lessen the immediate impact on customers. This mechanism is also backed by a customer charge and it includes a provision that benefits received by a provider will be passed along to any customer who has paid for the assessment. This fund is capped at \$2.1 billion.

Post-Session Update: Statewide Broadband Office

[H.B. 5](#) was signed by the governor on June 15, 2021 and is effective immediately. This bill establishes a State Broadband Development Office (SBDO) within the Comptroller's office and requires the SBDO, in developing a statewide broadband plan, to consult with political subdivisions to explore state and regional approaches to broadband deployment.

The bill would also:

1. require the governor's broadband development council to: (a) research and monitor the progress of: (i) deployment of broadband statewide; (ii) purchase of broadband by residential and commercial customers; and (iii) patterns and discrepancies in access to broadband; and (b) study industry and technology trends in broadband and the detrimental impact of pornographic or other obscene materials on residents of this state and the feasibility of limiting access to those materials;
2. for purposes of the broadband development office, defines "broadband service" as internet service with the capability of providing: (a) a download speed of 25 megabits per second or faster; and (b) an upload speed of three megabits per second or faster;
3. authorizes the comptroller by rule to adjust the threshold speeds for broadband services defined in Number 3, above, if the Federal Communications Commission adopts upload or download threshold speeds for advanced telecommunications capability that are different from those listed in Number 2, above;

4. requires the broadband development office to: (a) serve as a resource for information regarding broadband service and digital connectivity in the state; (b) engage in outreach to communities regarding the expansion, adoption, affordability, and use of broadband service and the programs administered by the office; and (c) serve as an information clearinghouse in relation to federal programs providing assistance to local entities with respect to broadband service and addressing barriers to digital connectivity;
5. requires the broadband development office to create, update annually, and publish on the comptroller's website a map classifying each designated area in the state as: (a) an eligible area, if fewer than 80 percent of the addresses in the designated area have access to broadband service and the federal government has not awarded funding under a competitive process to support the deployment of broadband service in the designated area; or (b) an ineligible area, if 80 percent or more of the addresses in the designated area have access to broadband service or the federal government has awarded funding under a competitive process to support the deployment of broadband service to addresses in the designated area;
6. requires the map described in Number 5, above, to display: (a) the number of broadband service providers that serve each designated area; (b) for each eligible area, an indication of whether the area has access to Internet service that is not broadband service, regardless of the technology used to provide the service; and (c) each public school in the state and an indication of whether the area has access to broadband service;
7. provides that if information available from the Federal Communications Commission is not sufficient for the broadband development office to create or update the map, the office may request the necessary information from a political subdivision or broadband service provider, and the subdivision or provider may report the information to the office;
8. establishes a petition process, under which a political subdivision or broadband service provider may petition the broadband development office to reclassify a designated area on the map as an eligible area or ineligible area;
9. requires the broadband development office to establish a program to award grants, low-interest loans, and other financial incentives to applicants for the purpose of expanding access to, and adoption of, broadband service in designated areas determined to be eligible areas;
10. requires the broadband development office to establish and publish eligibility criteria for award recipients under Number 9, above;
11. provides that the broadband development office may not award a grant, loan, or other financial incentive to a noncommercial provider of broadband service for an eligible area if a commercial provider of broadband service has submitted an application for the eligible area;
12. provides that an award granted under the broadband development program does not affect distributions received by a broadband provider from the state universal service fund;
13. requires the broadband development office to prepare, update, and publish on the comptroller's Internet website a state broadband plan that establishes long-term goals for greater access to and adoption, affordability, and use of broadband service in Texas;
14. establishes the broadband development account in the state's general revenue fund consisting of: (a) appropriations of money to the account by the legislature; (b) gifts, donations, and grants, including federal grants; and (c) interest earned on the investment of the money in the account; and

15. establishes the broadband development office board of advisors to provide guidance to the broadband development office regarding the expansion, adoption, affordability, and use of broadband service and the programs administered by the office.

The SBDO is required to establish and annually update a map that designates the eligibility of each census block. The bill requires the SBDO to develop a state broadband plan by **September 1, 2022**, and the map will need to be published by the SBDO on its website by **January 1, 2023**.

Post-Session Update: Middle Mile Broadband Service

[H.B. 3853](#), signed by the governor on June 15, 2021 and effective immediately, allows an electric utility to provide broadband facilities for Internet Service Providers to use and provide broadband services to end-use customers. This process would require an electric utility that plans to deploy middle mile broadband to submit a detailed written plan to the Public Utility Commission (PUC). The PUC would be required to approve, modify, or reject a plan no later than 181 days from the date the plan is submitted.

This bill also: (1) authorizes certain electric utilities, not including a municipally owned utility, to own, construct, maintain, and operate fiber optic cables and other facilities for providing middle mile broadband service in unserved and underserved areas; (2) provides that if a city is already collecting a charge or fee from the electric utility for the use of the public rights-of-way for the delivery of electricity to retail electric customers, the city may not require a franchise, an amendment to a franchise, or an additional charge, fee, or tax from the electric utility for the use of the public rights-of-way for middle mile broadband service; and (3) provides that if a city or local government is not already collecting a charge or fee from the electric utility for the use of the public rights-of-way, the city may impose a charge on the provision of middle mile broadband service, but the charge may not be greater than the lowest charge that the city or local government imposes on other providers of broadband service for use of the public rights-of-way in its jurisdiction.

City-Related Bills

Property Tax

[1H.B. 300 \(Middleton\)](#) – **Homestead Exemption**: would increase the maximum percentage of a local option homestead exemption from 20 percent of the appraised value of an individual's residence homestead to 100 percent of an individual's residence homestead. (See [1H.J.R. 28](#), below.)

[1H.J.R. 28 \(Middleton\)](#) – **Property Tax Exemption**: would amend the Texas Constitution to authorize the governing body of a political subdivision to exempt up to 100 percent of the market value of a residence homestead. (See [1H.B. 300](#), above.)

Community and Economic Development

1H.B. 297 (Oliverson) – **Land Development Applications:** would provide that, unless specifically authorized by state law, a municipal planning commission or the governing body of the municipality may not: (1) require a person to fulfill any prerequisites or conditions or obtain any approvals before the person files a copy of a plan or plat with the municipal planning commission or governing body; (2) delay the starting date for calculating any applicable timeframe to approve or disapprove a plan or plat by not considering the date the plan or plat was filed as the starting date; or (3) refuse to accept, acknowledge, process, or act on a filed copy of the plan or plat. (Companion bill is **1S.B. 75** by Hughes.)

Elections

1H.B. 295 (Noble) – **Cancelled Ballots by Mail:** would, among other things: (1) provide that a person: (a) may cancel an application to vote by mail by returning the person's ballot and then voting by personal appearance; or (b) whose ballot is cancelled in any other manner may cast a provisional ballot; (2) require the early voting clerk and presiding election judge to keep a log of returned ballots and provide a copy of the list to the early voting ballot board to ensure that the cancelled ballot is not counted in the election; and (3) require the election officer to electronically submit a record to the secretary of state of each application canceled in a primary, a runoff primary, a general election, or any special election ordered by the governor on the day the application is canceled.

1H.B. 299 (Noble) – **Early Voting by Mail:** would: (1) require that the following be signed using ink on paper: (a) an application for an early voting ballot to be voted by mail by the applicant; (b) certificate on the official carrier return envelope by the applicant; and (c) carrier envelope by a person, other than the voter, who assists a voter by: (i) depositing the carrier envelope in the mail with a common or contract carrier; or (ii) who obtains the carrier envelope for that purpose; and (2) provide that an electronic signature or photocopied signature is not permitted for any document referenced in (1).

1H.B. 301 (Noble) – **Ballot by Mail:** would require: (1) the early voting clerk to deliver to the early voting ballot board: (a) copies of the applications for ballots to be voted by mail for each ballot voted by mail received; and (b) copies of the voter's signature from the voter's application for voter registration; (2) before reviewing a carrier envelope certificate, the early voting ballot board to review each application for a ballot to be voted by mail that correlates with the carrier envelope to determine if the signature on the ballot application was executed by a person other than the voter, unless the application was signed by a witness; (3) the early voting clerk to make available for review signatures for each applicant for a ballot to be voted by mail from the previous six years; and (4) the early voting clerk to have software available to display all electronically available signatures together.

COVID-19 Update (No. 196)

All pandemic-related updates, including information about the American Rescue Plan's city-related provisions, will be in the [Legislative Update Newsletter](#) from now on.

- **Governor's Order GA-38 Related to Mask Mandates and Vaccine Passports:** On July 29, the governor issued [Executive Order GA-38](#), which basically restates previously-ordered limitations on local governments' and certain business owners' ability to require proof of COVID-19 vaccines, as well as restating previous limitations on local governments' ability to require face-coverings. The portions of this Order related to vaccines and "vaccine passports" mirror [Executive Order GA-35](#) from April, and the portions of this Order related to face coverings mirror [Executive Order GA-36](#) issued in May. Details are below:
 - **Mask Mandates:** Under this order, no governmental entity or governmental official may require any person to wear a face covering. No local governmental entity or official may limit business activities, or legal proceedings for COVID-19-related reasons. Any limitations imposed by a local government or official could be subject to a fine up to \$1,000. Exempt from this portion of the order are state-supported living centers, government-owned or operated hospitals, Texas Department of Criminal Justice facilities, Texas Juvenile Justice Department facilities, and county and municipal jails.
 - **COVID-19 Vaccines:** No governmental entity can compel any individual to receive a COVID-19 vaccine, and no political subdivision shall adopt any order, ordinance, policy, regulation, rule or similar measure that requires an individual to provide documentation regarding that individual's COVID-19 vaccination status as a condition to receiving any service or entering any place. Any public or private entity that is receiving or will receive public funds through any means, shall not require a consumer to provide documentation regarding their COVID-19 vaccination status as a condition of receiving any service or entering any place. Exempt from this portion of the order are nursing homes, state supported living centers, assisted living facilities, and long-term care facilities.

Additionally, this Order contains requirements for any entity conducting COVID-19 tests to report results to the Department of State Health Services and for all hospitals to report their available bed capacity to DSHS as well.

League attorneys interpret the order (like the previous orders) to prohibit a city from requiring: (1) citizens to wear masks anywhere, including on city property; and (2) its employees to wear masks or be vaccinated, unless they fall under a stated exception. As always, each city should consult local legal counsel on these issues.

- **American Rescue Plan Act Funds DEADLINE APPROACHING:** August 2, 2021 is a state deadline for "non-entitlement units of local government" (NEUs are generally cities under 50,000 population) to register with the Texas Division Emergency Management to receive ARPA funds. TDEM updated its [Coronavirus Local Fiscal Recovery Fund FAQ](#).

NEUs should pay special attention to *Question 13: How does my NEU receive funding?* The answer includes a link to the [CLFRF Timeline Check-in document](#) with step-by-step instructions on registering your city with the [TDEM Grant Management System](#), which is a critical step to receiving funds.

Registration with the TDEM GMS and completion of the TDEM Timeline steps must be completed by August 2, 2021 to receive this funding.

- **CDC Updated Health Precautions:** Given the sharp rise in COVID-19 cases due to the Delta-variant of the virus, on July 27, 2021, the Centers for Disease Control and Prevention (CDC) updated their [guidance related to health precautions for fully-vaccinated individuals](#). To reduce the risk of being infected with the Delta variant and possibly spreading it to others, the CDC recommends wearing a mask indoors in public if the individual is in an area of substantial or high transmission, even if the person is fully-vaccinated.

The [CDC recommendations for unvaccinated individuals](#) remains substantially unchanged, including recommendations to get vaccinated, maintain physical distance from others, wear masks, and avoid crowds.

- **Counties Across Texas Seeing Rise in COVID-19 Threat Levels:** Over the last few weeks, the counties of [Harris](#), [Dallas](#), [Bexar](#), [Tarrant](#), [Travis](#), [El Paso](#), [Nueces](#), [Williamson](#), and [many more](#) have all moved back into “very high,” “high,” “extreme,” or “significant” COVID-19 threat levels.
- **Emergency Orders Issued by Texas Supreme Court:** On July 19, 2021, the Supreme Court of Texas issued Emergency Order 39 and Emergency Order 40.

[Emergency Order 39](#) renews the [Texas Eviction Diversion Program](#) for tenants and landlords under a statewide rental assistance program intended to avoid evictions for tenants behind on rent. The order allows an eviction proceeding to be abated by agreement for 60 days, requires courts (including county courts hearing trials de novo on appeal from a justice court) to provide tenants with information about the program, and makes court records for participants confidential while eviction cases are delayed. The order also outlines procedure for reinstating evictions. Without such reinstatement, eviction cases will be subject to dismissal.

[Emergency Order 40](#) permits courts to modify or suspend deadlines and procedures through October 1, 2021; permits courts to continue to use reasonable efforts to hold proceedings remotely; permits all courts to hold in-person proceedings, including jury trials; encourages the adoption of minimum standard health protocols and an in-person schedule; terminates locally adopted plans and minimum standard health protocols unless readopted by local officials on or before September 1, 2021; and permits courts to hold virtual jury proceedings in certain cases with technology provided to certain prospective jurors.

- **Open Meetings Act Reminder:** In March 2020, as Texans worked to mitigate the spread of COVID-19, Governor Abbott’s office granted the attorney general’s request to suspend certain open-meeting statutes. The temporary suspension allows, among other things, for telephonic or videoconference meetings of governmental bodies that are accessible to the public in an effort to reduce in-person meetings that assemble large groups of people.

On June 30, 2021, [the governor’s office approved a request by the attorney general to lift those suspensions](#). The suspensions will lift at 12:01 a.m. on September 1, 2021. Thus, as of September 1, 2021, all provisions of the Open Meetings Act will be effective and all Texas governmental bodies subject to the Open Meetings Act must conduct their meetings in full compliance with the Open Meetings Act as written in state law.

This could change, given the rising numbers of COVID-19 cases across the state, but as of now, plan for the September 1 expiration.

- **No ARPA Funds Received by Texas:** On July 26, 2021, the U.S. Treasury updated its “Status of Payments to States for Distribution to Non-Entitlement Units of Local Government” chart reflecting payments made to states under the American Rescue Plan Act for distribution to non-entitlement units of local government. A non-entitlement unit of local government is typically a city or town which serves fewer than 50,000 people, and their portions of the ARPA funds are sent to the state and should be distributed by the state to the individual cities within 30 days of receipt. Texas remains one of only 7 states to have received no funding through the ARPA. Whether the Governor has made the required application to the Treasury Department is unclear. The complete chart, updated weekly, can be found [here](#).
- **ARPA FAQs:** The U.S. Treasury Department’s Coronavirus State and Local Fiscal Recovery Funds FAQ contains a number of questions and answers related to eligibility for recovery funds and eligible uses of recovery funds. The entire FAQ can be accessed [here](#).

The National League of Cities also maintains an ARPA-related FAQ which can be found [here](#).

Reminder: TML Coronavirus materials are archived by date [here](#) and by subject [here](#).

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