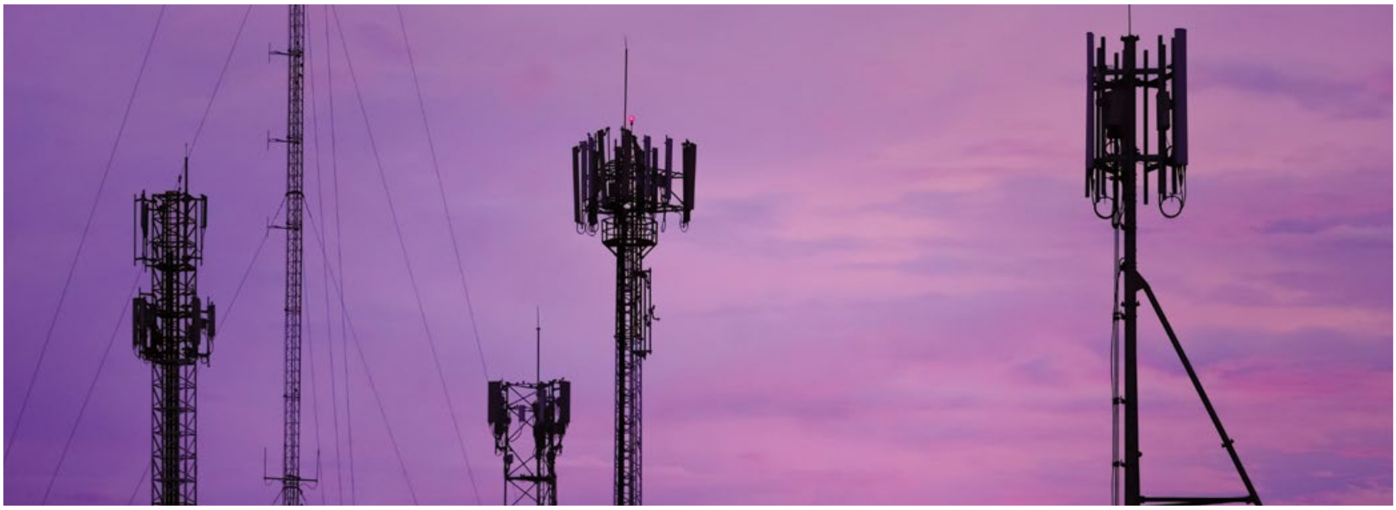

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Texas Right-of-Way Legislation: Half Payments for Right-of-Way Use

Recently enacted Texas legislation significantly reduces right-of-way fees paid to Texas cities by companies that provide telecommunications and cable services. This legislation could influence right-of-way compensation laws in other states, which would reduce the revenue of municipalities nationwide.

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Companies that provide telecommunications (telecom) and cable services install their infrastructure in the public right-of-way, including:

- Small cell antennas and support equipment.
- Utility poles and lines.
- Cabling or fiber for cable, phone, and small cell backhaul.
- Boxes, sheds, and other enclosures used to house equipment.

Telecom and cable companies have traditionally paid for the use of the public right-of-way to install poles and hang or bury network lines and equipment in the public right-of-way.

In response to pressure from telecom and cable providers, Texas passed Senate Bill 1152 (SB 1152). This legislation amends the two state codes that regulate the fees that municipalities charge these companies for use of the right-of-way. SB 1152 took effect on September 1, 2019 and will severely reduce the right-of-way fees paid to Texas municipalities by requiring telecom and cable providers to pay Texas cities only the higher of their bill for use as a telecom provider or cable provider, as reflected on a state-wide basis, not in any particular jurisdiction.

Previous Texas legislation on cable franchising and small cell deployment which impacts right-of-way fees has been used as a model in other states. SB 1152 could also influence other states.

Against this background, this article explores:

- The legislative background of SB 1152.
- Key provisions of SB 1152.
- Criticisms of SB 1152 and implications for other states.

Search Telecom Facility Issues for State and Local Government Toolkit for resources to assist state and local government attorneys in handling telecom matters and regulating telecom facilities.

LEGISLATIVE BACKGROUND

SB 1152 amends two statutes:

- Chapter 283 of the Texas Local Government Code.
- Chapter 66 of the Texas Utilities Code.

Chapter 283 was enacted in 1999 and eliminated the requirement of a municipal franchise for use of the right-of-way for landline telecom companies. Under Chapter 283, telecom companies could use the right-of-way without municipal permission. Telecom fees were to be paid quarterly and determined through an access line fee formula designed to mirror the gross amount paid to each city prior to the legislation's effective date (Tex. Loc. Gov't Code Ann. §§ 283.051 to 283.055).

Chapter 66 was enacted in 2005 and similarly eliminated the requirement of a municipal franchise for use of the right-of-way for cable companies. Under Chapter 66, cable companies could apply for and receive a state-wide franchise from the Public Utility Commission to provide cable services and occupy municipal rights-of-way. Under Chapter 66, cable companies pay a quarterly cable fee of 5% of gross receipts to each city where they offered services (Tex. Util. Code Ann. § 66.005). Chapter 66 also provides for a 1% fee for public-educational-governmental capital expense or to offset certain in-kind franchise obligations, such as service to government buildings (Tex. Util. Code Ann. § 66.006).

In theory, though perhaps not in practice, both bills were designed to maintain existing compensation levels for right-of-way use. By contrast, Senate Bill 1004 (SB 1004) (Texas Local Government Code Chapter 284) passed in 2017 and did not attempt to maintain existing compensation levels for right-of-way use. This law:

- Mandated access to public right-of-way and municipally owned vertical infrastructure (city-owned street lights, traffic signals, and signs) for small cells without municipal permission.
- Reduced the fees paid to what the legislature claimed would cover costs for cities.
- Limited fees for applications and annual rent to what the legislature asserted would cover the cities' costs.

Many believe that SB 1004 is the model on which the Federal Communications Commission's Small Cell Order is based.

SB 1152: KEY PROVISIONS

SB 1152 passed in the 2019 session. This bill potentially halves the right-of-way fees paid to cities because it allows companies that offer both telecom and cable services to only pay the amount that is the higher state-wide of the right-of-way fees owed under Chapters 283 and 66. It does so by adding subsections to both chapters. The new subsections mirror each other and create a system that operates as follows:

- Each year, the company determines the amount of right-of-way fees that were charged in the preceding year (from July 1 to June 30).
- If, in the preceding year:
  - the telecom fees charged were greater than the cable fees charged state-wide, the company will pay the telecom fees for the current year; and
  - the cable fees charged were greater than the telecom fees charged state-wide, the company will pay the cable fees for the current year.
- By October 1 of each year, the company files an annual written notification with each city the company serves, which notifies the city which right-of-way fee the company determined it will pay.

The determination of which right-of-way fee is higher is based on the amounts paid by a company (and its affiliated group) state-wide, not on the amounts paid to individual cities. An individual city may not receive the higher amount paid in that city. For example, while a particular company may have had a higher cable fee bill in Houston, if the combined state-wide bill was higher for telecom fees, the company will owe Houston only telecom fees.

CRITICISMS AND IMPLICATIONS

One of the biggest criticisms of SB 1152 is that while telecom and cable providers will be saving substantially under the new legislation, they are not required to pass that savings on to customers. Another criticism is that there is no reduction in the use of the right-of-way by these companies. The companies could continue to use the same amount of space, or even more of this finite valuable asset, and still pay a lot less.

Additionally, aside from the significant reduction in revenue, SB 1152 presents practical and administrative challenges for cities, including:

- **Budget planning concerns.** Given the payment structure and timing, cities with a fiscal year that begins on October 1 may not have information on the right-of-way fees that will actually be paid by the time the budget process is complete and the new budget has begun.

The concerns raised by SB 1152 should extend beyond Texas cities, as previous Texas right-of-way legislation has been used as a model for right-of-way legislation in other states.

- **Audit concerns.** It may be difficult for cities to audit the correct payment amounts, because the choice of which right-of-way fee is paid is based on state-wide payments collected in the prior year.
- **A lack of safeguards.** SB 1152 does not provide safeguards against manipulation of amounts attributable to right-of-way fees. For example, companies offering both services could decide how to categorize the amounts collected. That is, fees for telecom services in the prior year would not have to be attributed to telecom services in the next year, if that is the fund used to pay the right-of-way rent.

The concerns raised by SB 1152 should extend beyond Texas cities, as previous Texas right-of-way legislation has been used as a model for right-of-way legislation in other states.

State-wide cable franchising legislation similar to Chapter 66 passed in 23 other states, including:

- California.
- Indiana.
- Kansas.
- New Jersey.
- North Carolina.
- South Carolina.
- Virginia.

In 2017, Texas Local Government Code Chapter 284 was enacted, allowing small cell providers to use the right-of-way with reduced compensation and limited municipal oversight. As of press time, similar legislation has passed in 25 states and continues to pass in more states (for example, new legislation recently passed in Georgia).