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# Franchise Fee Study for Various Utilities Occupying Pima County Rights-of-Way

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Purpose: The purpose of this report is to determine the legal authority for right-of-way compensation for utilities and the basis for this compensation. See Exhibit “A”

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# Franchise Fee Study for Various Utilities Occupying Pima County Rights-of-Way

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Survey of other Jurisdictions

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## **Exhibit A**

### **Scope of Work – Franchise/License Fee Study**

Numerous utilities occupy Pima County Right-of-Way (ROW) under license or franchise agreement. The utility companies range from electric, water, and gas to telecommunications and cellular companies. Pima County incurs costs related to occupancy of the ROW by these utilities. We understand that there are a variety of authorizations allowing a jurisdiction to recoup costs. Pima County has an existing franchise fee for CLEC providers. However, additional data to identify opportunities to recoup costs from other utility providers and establish the appropriate cost basis. Below are issues identified that need additional data.

1. Statutory Authority
  - a. Identify which agencies provide the statutory authority to counties to collect fees for the purposes of occupying ROW and erecting facilities. Ex: ARS, FCC, ACC
  - b. Identify which utilities are covered under each authority. Ex: ACC provides authority for electric providers
  
2. Establish Cost Basis for Fees by Utility Type
  - a. How are fees determined? Ex: percent of gross revenues, per lineal foot of space occupied, actual costs
  - b. Provide an industry analysis to determine what other jurisdictions locally, regionally and nationally are collecting.
  - c. List the various fees already being charged to utilities, such as application fees, permit fees, relocation fees, etc.
  - d. Is there a standard term for the fee (5 years, 10 years, etc.)?
  - e. Can the fee be tied to inflation?

#### **Deliverables:**

1. Provide 10 copies of the printed report, including all tables or reprinted material.
2. Provide the report and all associated data via CD in reproducible format.

**Term:** 30 days from written Notice to Proceed

#### **Contact:**

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[TAB 1]

**A. Background**

Pima County is the second largest county in Arizona in terms of area at 9,186.27 square miles and 946,326 people (2006 census estimate). It is larger in area than six different states, including New Hampshire at 8,968.10 square miles; Massachusetts at 7,840.02 square miles; Hawaii at 6,422.62 square miles; Connecticut at 4,844.80 square miles; Delaware at 1,953.56 square miles; and Rhode Island at 1,044.93 square miles. Pima County is larger in population than six other states, including Montana at 944,632; Delaware at 853,476; North Dakota at 635,867; South Dakota at 781,919; Vermont at 623,908; and Wyoming at 515,004 people respectively.

Arizona has a population of 6,166,318 based on the 2006 census estimate. The unincorporated population is 1,243,866 or 20.2 %. Excluding Pima County, the unincorporated population is 902,205 or 17.3 %. The unincorporated population of Pima County is 341,661 or 36.1 %. If unincorporated Pima County was a city it would be the fourth largest city in the State. Pima County is the primary provider of urban government services to these people with the majority of funding coming from property taxes. Another source of funding is user fees for the use of the Right-of-Way and other County property.

The Right-of-Way is occupied by the incumbent phone company Qwest, long distance companies, competitive local exchange carriers (3), cable companies (3), Tucson Electric Power, TELCO, Potable Water (3), Reclaimed Water, Pima County Sewer, and Cell Phone Companies.

## Arizona Census Population by County 2006

COUNTY	POPULATION	Less: Cities & Towns	Unincorporated County Population	Percentage Unincorporated
Apache	71,118	11,265	59,853	84.2%
Cochise	127,757	71,130	56,627	44.3%
Coconino	124,953	100,785	24,168	19.3%
Gila	52,209	30,051	22,158	42.4%
Graham	33,660	15,995	17,665	52.5%
Greenlee	7,738	3,408	4,330	56.0%
La Paz	20,256	6,880	13,376	66.0%
Maricopa	3,768,123	3,571,225	196,898	5.2%
Mohave	193,035	121,585	71,450	37.0%
Navajo	111,399	38,345	73,054	65.6%
<b>Pima</b>	<b>946,362</b>	<b>604,701</b>	<b>341,661</b>	<b>36.1%</b>
Pinal	271,059	95,504	175,555	64.8%
Santa Cruz	43,080	22,750	20,330	47.2%
Yavapai	208,014	105,583	102,431	49.2%
Yuma	187,555	123,245	64,310	34.3%
<b>Total</b>	<b>6,166,318</b>	<b>4,922,452</b>	<b>1,243,866</b>	<b>20.2%</b>
Excluding Pima County	5,219,956	4,317,751	902,205	17.3%



City and town Name	Apache	Cochise	Coconino	Gila	Graham	Greenlee	La Paz	Maricopa	Mohave	Navajo	Pima	Pinal	Santa Cruz	Yavapai	Yuma
Tollison								6,498							
Youngtown								6,163							
Wickenburg								6,077							
South Tucson											5,630				
Guadalupe								5,555							
Holbrook										5,425					
Snowflake										4,935					
Cave Creek								4,766							
Benson		4,750													
Thatcher					4,550										
Litchfield Park								4,528							
Eagar	4,435														
Pinetop-Lakeside										4,165					
Taylor										4,100					
Colorado City									4,080						
Dewey-Humboldt														4,030	
Willcox		3,885													
St. Johns	3,865														
Carefree								3,684							
Clarkdale														3,680	
Quartsite							3,600								
Parker							3,280								
Superior												3,254			
Williams			3,145												
Clifton						2,596									
Kearny												2,249			
Pima					2,085										
Springerville	2,965														
Star Valley				2,006											
Gila Bend								1,980							
Wellton															1,790
Miami				1,955											
Huachuca City				1,830											
Mammoth												1,762			
Tombstone		1,610													
Fredonia			1,110												
Patagonia													920		
Hayden				892											
Duncan						812									
Winkelman				443											
Jerome														343	
TOTAL	11,265	71,130	100,785	30,051	15,995	3,408	6,880	3,571,225	121,585	38,345	604,701	95,504	22,750	105,583	123,245

## **Rights-of-Way**

Pima County owns and manages substantial amounts of public rights-of-way, which many providers want to use extensively to construct their own networks. These are valuable local government real estate assets worth millions of dollars that are held in trust by Pima County to benefit the local community.

Federal and state governments recognize the authority of local governments to protect the public investment, to balance competing demands on this public resource and to require fair and reasonable compensation from providers for use of the public rights-of-way on a nondiscriminatory (but not necessarily identical) basis.

In order to use the right-of-way, private companies should be required to enter into agreements with Pima County which sets the terms and conditions of such use/access. Pima County must be able to require universal services that include nondiscriminatory pricing and equal access to all its citizens as a requirement for granting a franchise. Like services should be treated alike. **(Authority: PC Board of Supervisors Policy F54.3; Administrative Procedure No. 54-4)**

Because disruption to streets and businesses can have a negative impact on public safety and industry, Pima County should have control over allocation of the rights-of-way and be able to ensure that there is neither disruption to other “tenants” or transportation nor any diminution of the useful life of the right-of-way. Pima County must have the right to analyze the legal, financial, and technical qualifications of any communications provider wanting to use the public right-of-way and shall have the right not to issue a franchise to an unqualified applicant.

Pima County has the right to recover its cost of acquiring, maintaining, managing and administrating all the costs associated with providing rights of way to utilities. **(Authority: Board of Supervisors Ordinance No. 2004-19;**

### **Definitions**

**A public right-of-way** is a right of way which permits the public to travel over it, such as a street, road sidewalk, or footpath.

**Right(s)-of-way** is a strip of land over which a public road, an electric power line, etc. passes.

**Rights-of-Way** - A right-of-way is a type of easement that gives someone the right to travel across property owned by another person.

### **Can easements affect property values?**

It's possible.

- Several easements on a tract of land might seriously limit the choice of building sites.
- High tension power lines running through an easement near an otherwise great building site can be unsightly. Resale values may be affected since many people feel that living too close to power lines is a health risk.
- Buyers may simply not like the idea that others have a right to use the land in some way.

## [TAB 2 LEGAL AUTHORITIES]

### 42-6110. [County use tax on electricity](#)

A. A county with a population of less than one million five hundred thousand persons according to the most recent United States decennial census, on a unanimous vote of the board of supervisors, may levy, and if levied, the department shall collect, a county use tax on electricity purchased by an electricity customer from an electricity supplier, as defined in section 42-5151, and used or consumed in the county.

B. The use tax levied pursuant to this section shall be at a rate applied as a percentage of the use tax rate imposed by chapter 5, article 4 of this title, not to exceed ten per cent.

C. Notwithstanding section 42-6102, the use tax levied pursuant to this section shall be administered subject to chapter 5, article 4 of this title.

D. At the end of each month the state treasurer shall transmit the net revenues collected pursuant to this section to the treasurer of the county levying the tax. The county shall use these revenues to support and enhance countywide services.

### 42-6111. [County capital projects tax](#)

A. The board of supervisors of a county with a population of less than two million persons, on a unanimous vote, may submit a proposed county capital projects tax for approval at a countywide special election or at a general election. If a majority of the qualified electors voting on the proposition approves the tax, the board of supervisors may levy and the department shall collect a tax, in addition to all other taxes, at a rate that, by itself or together with any tax imposed pursuant to section 42-6106 or 42-6107, does not exceed ten per cent of the transaction privilege tax rate prescribed by section 42-5010, subsection A applying, as of the date of its initial levy, to each person engaging or continuing in the county in a business taxed under chapter 5, article 1 of this title.

B. If a tax is levied under subsection A of this section, a tax shall also be levied on the use or consumption of electricity or natural gas by retail electric or natural gas customers in the county who are subject to use tax under section 42-5155 at a rate equal to the transaction privilege tax rate under subsection A of this section applying to persons engaging or continuing in the county in the utilities transaction privilege tax classification.

C. The tax shall be levied under this section beginning on January 1 or July 1, whichever date first occurs at least forty-five days after the election. The tax may be in effect for a period of not more than twenty years.

D. The state treasurer shall deposit the net revenues collected pursuant to this section in a fund designated as that county's transportation and capital projects fund. The state treasurer shall hold the monies in the fund as trustee for the county. The county has the beneficial interest in the fund. The state treasurer shall invest the monies in the county transportation and capital projects fund and shall credit to the fund all interest and other income earned from investments.

E. Each month the state treasurer shall distribute the monies in the transportation and capital projects fund to the county in a manner prescribed by the board of supervisors. The county may only use the revenues for capital projects and to purchase, construct and lease buildings, structures, facilities, roads, highways and other real and personal property, including open space and development rights, for the use or benefit of the county.

F. The ballot in the election described in subsection A of this section shall list each project to be financed with the tax collected and the estimated costs of each project. The tax terminates if and when the total amount of estimated costs for all of the projects has been raised.

**Arizona Constitution** - <http://www.azleg.gov/Constitution.asp>

**Article 12 - Counties**

C. Notwithstanding article IX, section 1, if proposed and approved in the charter, a charter county may levy and collect:

E. If the authority to tax pursuant to subsection C, paragraph 2 of this section is approved for inclusion in the charter, any new tax proposed by the county under subsection C, paragraph 2 of this section shall be voted on by the qualified electors of the specially designated area. The tax must be ratified by a majority vote of the qualified electors voting at the election.

G. All taxes levied under subsection F of this section shall not exceed an aggregate rate of two per cent when combined with existing taxes levied pursuant to title 42, chapter 8.3.

H. If approved in the charter, **a charter county may adopt fees and fee schedules** for any county products and county service delivery it provides in the conduct of any official business. Notwithstanding any fee schedules or individual charges provided by state law, the governing body of **a charter county may adopt an alternate fee schedule or individual charge. Any fee or charge established pursuant to this section shall be attributable to and defray or cover the current or future costs of the product or service delivery for which the fee or charge is assessed.**

**Article 15 of the Arizona Constitution establishes the Arizona Corporation Commission**

**3. Power of commission as to classifications, rates and charges, rules, contracts, and accounts; local regulation**

Section 3. The corporation commission shall have full power to, and shall, prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected, by public service corporations within the state for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the state, and may prescribe the forms of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of such corporations; **Provided, that incorporated cities and towns may be authorized by law to exercise supervision over public service corporations doing business therein, including the regulation of rates and charges to be made and collected by such corporations; Provided further, that classifications, rates, charges, rules, regulations, orders, and forms or systems prescribed or made by said corporation commission may from time to time be amended or repealed by such commission.**

11-201. Powers of county

A. The powers of a county shall be exercised only by the board of supervisors or by agents and officers acting under its authority and authority of law. It has the power to:

1. Sue and be sued.

**2. Purchase and hold lands within its limits.**

3. Make such contracts and purchase and hold such personal property as may be necessary to the exercise of its powers.

**4. Make such orders for the disposition or use of its property as the interests of the inhabitants of the county require.**

5. Levy and collect taxes for purposes under its exclusive jurisdiction as are authorized by law.

6. Determine the budgets of all elected and appointed county officers enumerated under section 11-401 by action of the board of supervisors.

C. Section 11-251.05, subsection A, paragraph **1 does not authorize a county to levy and collect taxes for any purposes beyond those otherwise specifically authorized by statute.**

11-251.05. Ordinances

A. The board of supervisors may:

B. Ordinance authority under subsection A of this section shall be in addition to and preemptive of ordinance, rule making or regulatory authority of any other county board or county commission. **A county may not impose taxes except as otherwise provided by law and as specified in section 11-251.**

11-251.08. County fee for service authority; alternate fee schedule; fee limits; adoption procedures

A. In addition to any other county power or **authority the board of supervisors may adopt fee schedules for any specific products and services the county provides to the public. Notwithstanding fee schedules or individual charges in statute, a board of supervisors may adopt an additional charge or separate individual charge.**

11-256. Lease or sublease of county lands and buildings; exceptions

**A. The board may lease or sublease, for a term not to exceed twenty-five years plus an option to renew for an additional period not exceeding twenty-five years, any land or building owned by or under the control of the county.**

Corporation Commission – Title 40 – Public Utilities and Carriers

<http://www.keytlaw.com/az/ars/arstitle40.htm>

40-355. Franchises, charters and ordinances of local governments not affected

The provisions of this article shall be supplemental and cumulative of existing rights, laws, local charters, ordinances and franchises and shall not be deemed to abrogate or modify the provisions of any franchise granted to public service corporations by any local government or to abrogate or modify in any way existing rights, laws, charters or ordinances of any local government.

40-283. Transmission lines; use of public streets for utility right-of-way; notice; election

**B. A board of supervisors in granting a license or franchise, or at any time after it is granted, may impose restrictions and limitations upon the use of the public roads as it deems best for the public safety or welfare.**

40-202. Supervising and regulating public service corporations; telecommunications promotion; competitive electricity market; rules; duty to comply; exemptions for electric generation; unlawful practice

A. The commission may supervise and regulate every public service corporation in the state and do all things, whether specifically designated in this title or in addition thereto, necessary and convenient in the exercise of that power and jurisdiction. In supervising and regulating long-distance telecommunications corporations, the commission shall encourage competition and growth in the telecommunications industry and promote economic development and investment in new telecommunications technologies, infrastructure and services. In furtherance of this policy, the commission shall establish procedures and standards for identifying and regulating competitive long-distance telecommunications markets. When the commission determines that a long-distance telecommunications market is competitive, it shall establish appropriate supervisory and regulatory treatment for competitive long-distance telecommunications markets as distinguished from noncompetitive telecommunications markets. In imposing any assessments or other charges on mobile telecommunications service providers, the commission shall comply with the requirements of the mobile telecommunications sourcing act (P.L. 106-252; 114 Stat. 626; 4 United States Code sections 116 through 126).

40-207. Electricity suppliers; rules

A. An electricity supplier shall obtain a certificate from the commission before offering electricity for sale to retail electric customers in this state.

40-208. Service territories; open competition

After December 31, 2000 service territories established by a certificate of convenience and necessity shall be open to electric generation service competition for all retail electric customers for any electricity supplier that obtains a certificate from the commission pursuant to section 40-207 or any public power entity.

40-209. Franchises; electric generation suppliers; limitations

Regulation of electricity suppliers providing electric generation service is a matter of statewide concern. Cities, including charter cities, towns and counties shall not require franchises for electricity suppliers to provide electric generation service within its jurisdiction and shall not impose rents, charges or taxes on the use of public streets, roads and alleys on electricity suppliers for the provision of electric generation service within its jurisdiction, **except that a fee equal to the franchise fee of the electric distribution utility may be charged to the electricity supplier on any portion of a retail electricity sale not otherwise subject to a franchise fee made using electric distribution facilities in service territories that are franchised as of the effective date of this section. Nothing in this subsection affects the authority of cities, including charter cities, towns and counties to require franchises for electricity suppliers providing electric distribution service within their jurisdiction.**

40-251. Hearings on valuation of property of public service corporations; notice; introduction of evidence; written findings of fact required; admissibility in evidence; effect; exception

A. Any person engaged in transportation or transmission business within the state may construct and operate lines connecting any points within the state and connect at the state boundary with like lines, except that within the confines of municipal corporations the use and occupancy of streets shall be under rights acquired by franchises according to law or licenses pursuant to title 9, chapter 5, articles 1.1 and 4, and subject to control and regulation by the municipal authorities. **The use of highways, except state highways, by public utilities not within any incorporated city or town shall be regulated by the board of supervisors of the county by license or franchise.**

40-342. Petitions of owners for cost study establishing an underground conversion service area

E. In the event the petitioners desire to convert any facilities used or intended to be used for the transmission of electric energy at nominal voltages in excess of twenty-five thousand volts, or having a current capacity in excess of twelve thousand kva, the petition shall so state, and the joint report of the public service corporation or public agency serving such area by overhead electric or communication facilities shall state separately the costs of conversion of such facilities to underground service.

40-343. Petition of owners and petition of public service corporation or public agency for establishment of underground conversion service area; notice of proposed lien

40-344. Hearing on petition; notice

40-352. Relocation of underground facilities; public service corporation or public agency to be reimbursed for cost thereof

40-354. No extension of corporation commission jurisdiction to public agencies or cable television systems

40-360.29. Charters and ordinances of governments not affected; preemption

Title 9 - Cities and Towns - <http://www.keytlaw.com/az/ars/arstitle09.htm>

9-505. Definitions

In this article, unless the context otherwise requires:

1. "Area of jurisdiction" means that part of a city or town, or that part of the unincorporated area of a county, or both when applied to a cable television system within parts of more than one jurisdiction, for which a license is issued.

9-506. [Authority to issue license; limitations](#)

New Legislation:

A. For the purpose of authorizing and regulating the construction, operation and maintenance of cable television systems, the licensing authority of a city, including a charter city, or town for an incorporated area, **or the licensing authority of the county for unincorporated areas, either individually or jointly by intergovernmental contract, may issue a license to any person to use public streets, roads and alleys and shall impose conditions, restrictions and limitations upon the use of public streets, roads and alleys and upon the construction, operation and maintenance of cable television systems.**

C. **Other than the license fee on gross revenues** authorized by this article and transaction privilege taxes as provided in this subsection, a licensing authority may not levy a tax, rent, fee or charge, however denominated, on a cable operator for the use of the public streets, roads or alleys to provide cable service or levy a tax, fee or charge on the privilege of engaging in the business of providing cable service in the area of jurisdiction. Taxes, rents, fees and charges include all access channel support except for in-kind services or payments as provided in subsection D of this section, rental, application, construction, permit, inspection, inconvenience and other fees and charges related to a cable operator's use of the public streets, roads and alleys. In addition, the following apply:

1. Any transaction privilege taxes otherwise authorized by law to be levied on the business of providing cable service or in relation to use of the public streets, roads or alleys to provide cable service may be levied on a cable operator if the taxes are levied only on gross revenues and the rate of the taxes is subject to paragraph 3 of this subsection. This subsection does not authorize the imposition of transaction privilege taxes on interstate telecommunications services.

2. **The license fee and any transaction privilege taxes levied on gross revenues constitute a franchise fee within the meaning of 47 United States Code section 542(g)(1).**

3. **Under no circumstances may the total of the rates of the license fee** and of any transaction privilege taxes on gross revenues levied or assessed by a licensing authority for the privilege of providing cable service and related use of the public streets, roads or alleys to provide **cable service exceed a rate of five per cent**, except during the transition period for certain licenses as provided in subsection H of this section.

4. A cable operator shall pass on to subscribers any reduction in the amount of fees, taxes or other charges paid by a cable operator and itemized to subscribers that results from the implementation of the amendment to this section effective on September 21, 2006.

D. A licensing authority may not require a cable operator to provide in-kind services, make in-kind payments or pay a fee in addition to the monetary license fee levied or assessed as provided in this section as part of or as a condition of issuing a license to provide cable service, except that:

1. A licensing authority may require a cable operator to provide channel capacity to transmit programming over which the cable operator exercises no editorial control except as authorized by 47 United States Code section 531(e). The channel capacity shall be limited to not more than two channels of public, educational or governmental access programming in the basic service tier of the cable television system and not more than two channels of noncommercial governmental programming, at least one of which may be programmed by the federal government, in the digital programming tier of the cable television system. If channel capacity is required, the programming shall be specified in the license and the cable operator may require that the channels regularly display an unobtrusive logo or other suitable identifier of the cable operator as set forth in the license.

2. A licensing authority may require a cable operator to incur costs and expenses to provide, maintain and operate facilities and equipment of the cable television system, including facilities and equipment for signal carriage, processing, reformatting and interconnection:

(a) To connect the cable television system, as it may be relocated from time to time, to transmit programming to and from existing locations of public, educational or governmental access facilities and to allow monitoring of access programming at the facilities.

(b) To transmit public, educational and governmental access channels to subscribers with the same prevailing quality, functionality and identification as other channels.

3. A licensing authority may require a cable operator to provide the basic service tier of cable service at no monthly service charge to offices and facilities of the licensing authority.

4. The value of any channel capacity provided pursuant to paragraph 1 of this subsection, the costs and expenses incurred pursuant to paragraph 2 of this subsection and the value of basic service provided pursuant to paragraph 3 of this subsection may not be offset against the license fee levied or assessed under this section.

E. This section does not prohibit a cable operator from agreeing to provide in-kind services or make in-kind payments in the area of jurisdiction that are prohibited by subsection D of this section if the agreement with the licensing authority is not part of, or entered into as a condition of being issued, a new, renewed or amended license to provide cable service. An agreement that requires in-kind cable service or payments shall set forth the total annual fair market value of the in-kind cable service and payments, which shall be less than or equal to and offset against the license fee levied or assessed annually pursuant to this section. The license shall authorize the cable operator to retain license fees and taxes collected from its subscribers in the amount of this offset. In-kind cable services and payments include any channel capacity and all capital costs and charges for or in support of the use of any channel capacity that the cable operator agrees to provide under this subsection.

F. Notwithstanding subsection C of this section, a licensing authority may require that a cable operator:

1. Bear reasonable costs that are associated with damage caused to public streets, roads and alleys by construction, maintenance and operation of its facilities in the public streets, roads and alleys and that are imposed on a competitively neutral and nondiscriminatory basis in relation to costs borne by telecommunications corporations under section 9-582, subsection C.
2. Pay fines, fees, charges or damages for breach of the terms and conditions of the license.

#### 9-507. Application for license; hearing; terms; conditions

A. Any person desiring to obtain a license to construct, operate and maintain a cable television system from a licensing authority shall make application to such licensing authority in the form specified by the licensing authority and shall comply with requirements specified by the licensing authority.

#### 9-581. Definitions

In this article, unless the context otherwise requires:

1. "Commercial mobile radio service" means two-way voice commercial mobile radio service as defined by the federal communications commission in 47 United States Code section 157.
2. "Political subdivision" means a city, town or county, or a special district of a city, town or county.
3. "Public highway" or "highway" means all roads, streets and alleys and all other dedicated public rights-of-way and public utility easements of this state or a political subdivision.
4. "Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received. The term does not include commercial mobile radio services, pay phone services, interstate services or cable services.
5. "Telecommunications corporation" means any public service corporation to the extent that it provides telecommunications services in this state.
6. "Telecommunications services" means the offering of telecommunications for a fee directly to the public, or to such users as to be effectively available directly to the public, regardless of the facilities used.

9-582. Taxes and other charges; telecommunications facilities; limitations

A. A political subdivision shall not levy a tax, rent, fee or charge on a telecommunications corporation, including a telecommunications corporation that provides interstate services as described in section 9-583, subsection C, for the use of a public highway to provide telecommunications services, or levy a tax, fee or charge upon the privilege of engaging in the business of providing telecommunications services within that political subdivision other than:

1. Any transaction privilege tax authorized by law on the business of providing telecommunications services, except that this section does not allow the imposition of a transaction privilege tax on the business of providing interstate telecommunications services. Any transaction privilege tax authorized by law on the business of providing commercial mobile radio service shall not exceed the tax rate levied on the business of providing telecommunications services.

**2. A telecommunications application fee for the issuance of a telecommunications license or franchise if the application fee applies on a competitively neutral and nondiscriminatory basis** to all telecommunications corporations that use the public highways to provide telecommunications services. A political subdivision may require only one application fee and one license or franchise for each telecommunications corporation whether the telecommunications corporation provides local services only or local and long-distance services, including intrastate or interstate services. An application fee is not required for a telecommunications corporation described in subsection E of this section.

3. A telecommunications construction permit fee for the issuance of a construction permit to place telecommunications facilities in the public highways if the permit fee applies on a competitively neutral and nondiscriminatory basis to all telecommunications corporations that place telecommunications facilities in the political subdivision's public highways to provide telecommunications services. Political subdivisions shall establish a nonbinding outside arbitration procedure to attempt to resolve disputes over recovery of reasonable, proportionate and attributable costs of construction permit fees pursuant to this paragraph and other fees pursuant to this article before the disputes are submitted to a court for resolution.

4. A fee under section 9-583, subsection C.

**B. All application fees, permit fees and charges levied by a political subdivision on telecommunications corporations pursuant to subsection A, paragraphs 2 and 3 of this section shall be levied on a competitively neutral and nondiscriminatory basis and directly related to the costs incurred by the political subdivision in providing services relating to the granting or administration of applications or permits. These fees and charges also shall be reasonably related in time to the occurrence of the costs.**

C. Notwithstanding subsections A and B of this section, **a political subdivision may require a telecommunications corporation to bear all of the reasonable costs associated with**

**construction, maintenance and operation of its facilities in the public highway used to provide telecommunications services, including bearing reasonable costs associated with damage caused to public highways.**

D. Notwithstanding subsections A and B of this section, in a license or franchise, a political subdivision and a telecommunications corporation may agree to in-kind payments for use of the public highways different from those specified in subsection A or B of this section. The license or franchise shall be structured so that the in-kind payments made for use of the public highways to provide interstate telecommunications services under the license or franchise are less than or equal to and are offset against any linear foot charge owed pursuant to section 9-583, subsection C, paragraphs 2 and 3. The license or franchise shall be structured so that the in-kind payments made under the license or franchise pursuant to subsection A, paragraph 1 of this section are less than or equal to and are offset against any transaction privilege license tax on the business of providing telecommunications services. The valuation of any in-kind benefits shall be set forth in such agreements. The in-kind facilities that are used to offset any or all payments in this subsection are limited to the costs of the in-kind facilities and shall remain in possession and ownership of the political subdivision after the term of the existing license or franchise expires. In-kind facilities may be offset for either payments of intrastate transaction privilege taxes or for interstate linear foot charges but shall not be offset for any combination of intrastate and interstate charges. However, a political subdivision shall not require a telecommunications corporation to provide in-kind services, make in-kind payments or pay a fee in addition to the fees described in subsections A through C of this section as a condition of consent to use a highway to provide telecommunications services.

E. Notwithstanding subsection D of this section, any telecommunications corporation that was providing telecommunications service within this state on November 1, 1997 pursuant to a grant made to it or its lawful predecessors prior to the effective date of the Arizona Constitution may continue to provide telecommunications service pursuant to that state grant until it is lawfully repealed, revoked or amended. Such telecommunications corporation shall require no additional grant from any political subdivision to provide telecommunications services.

F. Nothing in this article shall be deemed to affect the terms or conditions of any franchise, license or permit issued by a political subdivision prior to November 1, 1997, or to release any party from its obligations thereunder. Those franchises, licenses or permits shall remain fully enforceable in accordance with their terms. A political subdivision may lawfully enter into agreements with franchise holders, licensees or permittees to modify or terminate an existing franchise, license or agreement.

G. A political subdivision may not discriminate against a cable operator in its provision of telecommunications services if that cable operator complies with requirements applicable to telecommunications corporations. Nothing in this subsection limits the authority of any political subdivision to license cable systems and to establish conditions on those licenses consistent with federal law.

9-583. Issuance of license or franchise; use of public highways; limitations

A. A political subdivision shall not adopt any ordinance that may prohibit or have the effect of prohibiting the ability of any telecommunications corporation to provide telecommunications service. Nothing in this section affects the authority of a political subdivision to manage the public highways within its jurisdiction or to exercise its police powers.

B. The governing board of a political subdivision may issue to a telecommunications corporation a license or franchise to use the public highways within the political subdivision to construct, install, operate and maintain telecommunications facilities. The political subdivision shall issue licenses or franchises on a competitively neutral and nondiscriminatory basis to persons subject to this section, within a reasonable period of time after application. As a condition of issuing a license or franchise to use the public highways to construct, install, operate and maintain telecommunications facilities, or a renewal thereof, a political subdivision may impose reasonable, competitively neutral and nondiscriminatory requirements on applicants which may include only:

1. Proof that the applicant has received a certificate of convenience and necessity from the Arizona corporation commission.
2. Public highway use requirements.
3. Mapping requirements.
4. Insurance, performance bonds, indemnification or similar requirements.
5. Enforcement and administrative provisions, consistent with this section.

C. A political subdivision may require a telecommunications corporation that will place underground facilities in the public highways, exclusive of facilities used by the local network and the portion of the interstate network that carries intrastate calls, for interstate telecommunications services to pay a fee as provided in this subsection and, subject to section 9-582, subsection A, paragraph 2, to obtain a license or franchise under this subsection to use the public highways to construct, install, operate and maintain facilities for these services. Subsections A, B, D and E of this section apply except:

**1. The requirement provided in subsection B, paragraph 1 of this section does not apply to a telecommunications corporation that provides solely interstate telecommunications services within this state.**

2. A political subdivision may require a telecommunications corporation operating under this subsection to pay an annual fee based on the number of linear feet of trench in the public highways in which the telecommunications corporation has placed facilities that carry interstate traffic between and among the telecommunications corporation's interstate points of presence exclusive of facilities used by the local network and the portion of the interstate network that carries intrastate calls.

**3. The rate per linear foot used in paragraph 2 of this subsection shall not exceed the highest rate per linear foot a political subdivision in this state charged any licensee or franchisee on or before December 31, 1999. The rate per linear foot shall not be increased in any calendar year by more than the increase in the average consumer price index as published by the United States department of labor, bureau of labor statistics.**

D. A telecommunications licensee or franchisee may enter into contracts for use of the licensee's or franchisee's facilities within the public highways to provide telecommunications services. A political subdivision may require a telecommunications licensee or franchisee to disclose all persons with whom it contracts to use its facilities in the public highways within the political subdivision to provide telecommunications services. A political subdivision may require a person using a licensee's or franchisee's facilities in the public highways within the political subdivision to obtain from the political subdivision a telecommunications license or franchise if the person constructs, installs, operates or maintains telecommunications facilities within the public highways of the political subdivision.

**E. The requirements imposed in a telecommunications license or franchise shall treat similarly situated telecommunications corporations similarly.** The requirements may be changed over time and applied prospectively. Nothing in this subsection or subsection B of this section affects section 9-582, subsection D. A political subdivision may distinguish between a telecommunications corporation described in section 9-582, subsection E and other telecommunications corporations to a justifiable extent based on differences in legal rights.

F. Subsections B through E of this section do not apply to a telecommunications corporation described in section 9-582, subsection E.

G. The requirements of this section apply to applicants for licenses or franchises filed and acted on after December 1, 1998 or if earlier, the date after August 1, 1998 that a political subdivision adopts an ordinance implementing this article. Licenses or franchises issued pursuant to this section shall be for a term of five years and shall be renewed if:

1. The telecommunications corporation satisfies the conditions of the renewal license or franchise.

2. The renewal applicant has complied with the material terms of its prior license or franchise and applicable law. However, renewal shall not be denied for failure to comply with license or franchise terms unless the licensee or franchisee has had written notice and a reasonable opportunity to cure the defect in past performance. A license or franchise may be revoked for failure to comply with the material terms of the license or franchise or applicable law. Revocation may occur only if the telecommunications corporation is given written notice of the defect in performance and the defect in performance is not cured within sixty days of the notice, unless the political subdivision finds that the defect in performance is due to intentional misconduct, is a violation of criminal law or is part of a pattern of violations if the telecommunications corporation has already had notice and an opportunity to cure. A political subdivision shall hold a hearing before revoking or refusing to renew a license or franchise if requested by the licensee or franchisee.

## United States Federal Legislation -

### Communications Act of 1934

#### **SEC. 622. [47 U.S.C. 542] FRANCHISE FEES.**

(a) Subject to the limitation of subsection (b), any cable operator may be required under the terms of any franchise to pay a franchise fee.

**(b) For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues** derived in such period from the operation of the cable system to provide cable services. For purposes of this section, the 12-month period shall be the 12-month period applicable under the franchise for accounting purposes. Nothing in this subsection shall prohibit a franchising authority and a cable operator from agreeing that franchise fees which lawfully could be collected for any such 12-month period shall be paid on a prepaid or deferred basis; except that the sum of the fees paid during the term of the franchise may not exceed the amount, including the time value of money, which would have lawfully been collected if such fees had been paid per annum.

(c) Each cable operator may identify, consistent with the regulations prescribed by the Commission pursuant to section 623, as a separate line item on each regular bill of each subscriber, each of the following:

(1) The amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid.

(2) The amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels.

(3) The amount of any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber.

(d) In any court action under subsection (c), the franchising authority shall demonstrate that the rate structure reflects all costs of the franchise fees.

(e) Any cable operator shall pass through to subscribers the amount of any decrease in a franchise fee.

(f) A cable operator may designate that portion of a subscriber's bill attributable to the franchise fee as a separate item on the bill.

(g) For the purposes of this section--

(1) the term "franchise fee" includes any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such;

(2) the term "franchise fee" does not include--

(A) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers);

(B) in the case of any franchise in effect on the date of the enactment of this title, payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of, public, educational, or governmental access facilities;

(C) in the case of any franchise granted after such date of enactment, capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities;

(D) requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or

(E) any fee imposed under title 17, United States Code.

(h)(1) Nothing in this Act shall be construed to limit any authority of a franchising authority to impose a tax, fee, or other assessment of any kind on any person (other than a cable operator) with respect to cable service or other communications service provided by such person over a cable system for which charges are assessed to subscribers but not received by the cable operator.

(2) For any 12-month period, the fees paid by such person with respect to any such cable service or other communications service shall not exceed 5 percent of such person's gross revenues derived in such period from the provision of such service over the cable system.

(i) Any Federal agency may not regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, except as provided in this section.

### **Telecommunications Deregulation Act of 1996**

#### SEC. 253. REMOVAL OF BARRIERS TO ENTRY.

**(c) STATE AND LOCAL GOVERNMENT AUTHORITY- Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.**

### **FEDERAL COMMUNICATIONS COMMISSION**

In March 202, the FCC issued a Declaratory Ruling and Notice of Proposed Rulemaking, concluding that cable modem service is an interstate information service subject to FCC jurisdiction under Title I of the Communications Act. **The FCC declared that the Cable Act limits franchise fees to 5% of gross revenues received from cable service, and revenues from cable modem service should not be used in calculating these fees.**

### **CASE LAW**

#### **Owest Corporation v City of Tucson**

Owest claimed State's statute exempting telecommunications providers operating pursuant to a territorial franchise from local licensing and franchise requirements.

**... the district courts concluded that the charges are taxes because the revenues from the charges flow into the City's general funds.**

Because the charges are taxes, not fees, the district court did not have jurisdiction. Qwest had already lost in State Court.

### **Qwest Corporation v Portland**

Oregon district courts issued a ruling from the bench in favor of Oregon cities. Federal law does not preempt the revenue based fees charged by cities for use of the right of way.

Portland charges 7% of gross revenues.

### **Determine whether a government charge is a fee or a tax**

1. San Juan Cellular Test  
The classic “tax” is imposed by a legislature upon many, or all citizens. It raises money, concentrated to the general fund, and spent for the benefit of the entire community . . .
2. Bidart Brothers vs. California Apple Commission  
Bidart Bros. v. Cal. Apple Comm’n, 73 F.3d 925, 931 (9<sup>th</sup> Cir. 1996). The test instructs courts to focus on three primary factors: (1) the entity that imposes the charge; (2) the parties upon whom the charge is imposed; and (3) whether the charge is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed.
3. Russell J. Henderson vs. Louisiana Specialty License Plates program – Department of Public Safety and Corrections  
Much of the case law and commentary regarding the TIA relates to methods of distinguishing a “regulatory fee” from a “tax”. The classic test relied on by the panel for distinguishing a fee from a tax is stated as follows:  
A classic tax sustains the essential flow of revenue to the government, while the classic fee is linked to some regulatory scheme. A classic tax is imposed by a state or municipal legislature, while the classic fee is imposed by an agency upon those it regulates. The classic tax is designed to provide a benefit for the entire community, while the classic fee is designed to raised money to help defray the agency’s regulatory expenses.

## **PIMA COUNTY ORDINANCES AND POLICIES**

Administrative Procedures Number 54-4 Licenses for the use of County rights of way communication Facilities (Five year terms)

Board of Supervisors Policy –F54.6 Licenses for use of County Rights-of-Way for Wireless Facilities

Board of Supervisors Policy F54.3 Licenses for encroachment into County or Flood Control District Rights-of-Way (Five year terms Adjusted for inflation every five years)

Ordinance 2004-19 An Ordinance of the Board of Supervisors for Pima County, Arizona, establishing applications fees for the encroachment of the rights-of-Way

Pima County Code- 5.04 Cable Communications

# ADMINISTRATIVE PROCEDURES



Procedure Number: 54-4

Effective Date: 12/01/99

Revision Date: 07/24/02

*C. D. Schubert*  
County Administrator

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SUBJECT: **Licenses for Use of County Rights-of-Way for Wireless Communication Facilities**

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DEPARTMENT RESPONSIBLE: **Public Works Administration - Real Property Services**

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## I. **BACKGROUND AND PURPOSE:**

Pima County has an interest in maintaining the safety and scenic quality of the various right-of-way corridors within the County and in limiting the number and placement of additional vertical elements in the right-of-way. Private industry providing cellular phone services, personal communications services, and similar wireless communication services throughout the community have requested permission to place poles or to affix equipment onto existing utility poles within Pima County-right-of-way and to place related equipment and facilities within Pima County right-of-way. This document sets forth the requirements and procedures to obtain licenses from Pima County for such purposes and to set forth the conditions and fees for such licenses.

## II. **POLICY:**

No person or entity shall place wireless communication facilities within the County road right-of-way without have first obtained a license for such purposes. Wireless communication facilities shall include poles, towers, antennae, mounts, equipment cabinet and related equipment placed on the ground or attached to existing facilities (whether such existing facilities are wireless communication facilities, utility poles, light poles or any other structure located within the County right-of-way).

## III. **PROCEDURE:**

### A. **Applications:**

Applications for licenses or amendments to licenses shall be filed with Real Property Services. A processing fee of \$500 shall be paid at the time of application. Each Application shall contain, as a minimum, the following information:

- Seven prints of a map of the proposed site at a minimum scale of one inch equals 20 feet, although a larger scale may be necessary depending on details to be depicted. The map shall show a horizontal view of right-of-way lines and location of facilities with distance to edge(s) of pavement and curbs.

- A description of the height, mounting style, and number of antennae on the proposed facility, including the pole, tower, ground equipment and any other facility requested to be placed in County-right-of-way.
- If the facility is to be connected to fiber optic cables located or to be located within the County-right-of-way, evidence of an existing license agreement issued by Pima County for the purpose of installing such fiber optic cable.

**B. Scenic Routes:**

On any County roadway designated as a scenic route, as shown on maps on file with Pima County Department of Transportation Mapping and Records Section, new wireless communication facilities may only be located on an existing light pole or utility pole.

**C. Compliance Other Applicable Ordinances, Rules and Regulations:**

The issuance of a license under this policy does not relieve the applicant from meeting the requirements of any and all applicable federal, state or local ordinances, rules and regulations, including building and zoning codes with particular reference to Chapters 18.03 and 18.07 of Pima County Zoning Code. Any license shall be contingent upon subsequently obtaining an approved development plan or site plan and the issuance of a conditional use permit, if required by Development Services Department.

**D. Size of Facilities Located on Ground:**

Ground mounted equipment shall not exceed eight (8) feet in height and shall have a foot print not exceeding 120 square feet. All facilities located on the ground shall be set back from the roadway surface and shall comply with safety requirements made by the Department of Transportation and Flood Control District. No structure shall be installed within roadway clear zones.

**E. Type of Pole Permitted:**

Poles placed in the County right-of way shall be free standing and shall not be supported by guy wires unless such wires are expressly approved by the Department of Transportation. No lattice work towers shall be permitted within the right-of-way.

**F. Screening of Pole and Equipment:**

All poles must be camouflaged at a minimum as follows:

1. Antenna and related structures shall, to the extent possible, use materials, colors, textures, screening and landscaping that will blend the facilities to the natural setting and built environment.

2. If an antenna is installed on a structure other than a tower, the antenna and supporting electrical and mechanical equipment must be of a neutral color that is identical to or closely compatible with, the color of the supporting structure so as to make the antenna and related equipment as visually unobtrusive as possible.
3. Antenna shall not be artificially lighted, unless required by FAA or other applicable authority. If lighting is required, the type of lighting used shall be of a design that will cause the least disturbance to the surrounding views.

All ground equipment and facilities placed in the County right-of-way pursuant to this policy shall be screened from adjacent properties by the construction or installation of walls, fencing, landscaping or other appropriate screening buffer as required by the County's landscape architect.

**G. License Fees:**

Licensees shall pay a monthly fee for the use of the County right-of-way at the following monthly rates per pole. If a pole is used by more than one licensee, each licensee shall pay the reduced rate for joint use of the pole.

<b>Individual Use</b>	<b>Co-Location Joint Use</b>
\$1,000	\$500

Pima County may on the extension of any license adjust the monthly fee.

**H. License Provisions:**

Each license shall contain, among other provisions, a provision for an indemnification of County by licensee, insurance provisions acceptable to the County Risk Manager, and a provision for a bond or letter of credit or similar security to secure the timely performances of licensee's obligations, including the obligation to relocate facilities and remove facilities at the termination of the license. A licensee may be required to demonstrate financial ability to comply with the terms of the license.

**I. Relocation or Removal:**

Any facility placed within Pima County right-of-way shall be relocated or removed at licensee's expense upon written notice from the County.

**J. Duration:**

Licenses granted under the terms of this policy shall be for a period not to exceed five (5) years. Wireless communications facilities that are not used for six (6) months shall be removed by the licensee within ninety (90) days of the end of such six-month period. Upon removal of the facilities, whether at the

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end of the term of the license or upon early termination or abandonment, the site shall be revegetated to blend with the surrounding vegetation.

**K. Factors to be Considered in Granting or Renewing a License:**

1. Traffic safety and sight visibility concerns.
2. The need for the property on which the tower, pole or antenna is located for a public improvement or other public purpose incompatible with the location of the facility.

**L. Approval of Licenses:**

The County Engineer is authorized to approve, execute, and record licenses and amendments pursuant to the provisions of this policy. The County Engineer is also authorized to waive specific provisions of this policy for just cause, provided however, the waiver does not contradict the purpose of this policy. Any amendment to a license that has been granted shall be subject to the requirements of this policy as amended from time to time.

**M. Applicability:**

The provisions of this policy relate to the use of County right-of-way by non-County users, whether private entities, persons, or other governmental agencies.

Public Works Administration shall be responsible for the administration of this procedure.



## PIMA COUNTY, ARIZONA BOARD OF SUPERVISORS POLICY

<u>Subject:</u> Licenses for encroachments into County or Flood Control District Rights-of-Way	Policy Number	Page
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**PURPOSE:** The purpose of this policy is to set forth the conditions under which a License Agreement for encroachments into Pima County or Pima County Flood Control District (collectively, “County”) rights-of-way may be issued to ensure consistent and fair treatment of such encroachments.

**BACKGROUND:** Developers and land owners sometimes request permission to put encroachments such as fences, walls and landscaping into County rights-of-way. To ensure these requests are received, considered and monitored in a uniform and fair manner, County wishes to develop guidelines and procedures for the use of License Agreements to allow encroachments.

**POLICY:** Pima County may authorize encroachments in County rights-of-way and collect fees commensurate to the use of the County property.

**PROCEDURE:**

1. Encroachments into County rights-of-way may be reviewed by the County Department of Transportation and Flood Control District for potential permit, license, or other requirements. A License Agreement must be approved and executed by the Board of Supervisors or the Flood Control District Board of Directors (the “Board”), and all appropriate permits shall be acquired prior to use of the property by the applicant.
2. Requests to place encroachments within County rights-of-way shall be submitted to Public Works-Real Property Services on an application form along with proof of ownership for the abutting property and a plot plan and legal description identifying the location of the intended encroachment. Real Property Services will assist the applicant in determining if the right-of-way is owned by Pima County or Pima County Flood Control District.
3. When landscaping is to be placed within the rights-of-way, a landscaping plan shall be submitted in accordance with Policy No. F54.1, Planting in Pima County Right-of-Way. If the landscaping meets the criteria outlined in said policy, the owner will be exempt from this license policy and all license fees will be waived.

<u>Subject:</u> Licenses for encroachments into County or Flood Control District Rights-of-Way	Policy Number	Page
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4. If the request is approved by the County Department of Transportation and Flood Control District, a License Agreement will be submitted to the Board for approval. Unless a reduced amount is approved by Risk Management Department, a \$5,000,000 commercial general liability insurance policy to cover the intended encroachments must be provided. The policy shall name Pima County or Pima County Flood Control District as an additional insured and an original Certificate of Insurance must be returned with the License Agreement.
5. Real Property Services shall record License Agreement approved by the Board.
6. Prior to installing the encroachment, all applicable permits must be obtained. This includes a Right-of-Way Use Permit and, when appropriate, a County Use Permit or Building Permit (which can be obtained from Development Services) or a Floodplain Use Permit (which can be obtained from the Flood Control District).

FEE SCHEDULE:

**RESIDENTIAL ENCROACHMENTS**

For landscaping, natural buffers, fences, walls, masonry mailboxes, and other miscellaneous encroachments into rights-of-way for individual residential use, there will be charged a one-time initial processing fee of an amount set from time to time by county ordinance, plus an annual fee of \$50.

**COMMERCIAL ENCROACHMENTS**

For landscaping, natural buffers, fences, walls, permanent signs, traffic devices, parking, storage, bus benches, bus bays, or other occupancy for commercial use or use by a homeowners association, there will be a charged a one-time initial processing fee in an amount set from time to time by County ordinance, plus an annual fee determined by Real Property Services on a case by case basis based on the value of the County property. The annual fee will be adjusted every five years based on the increase in the consumer price index over the previous five year period.

**COLLECTION**

Fees shall be invoiced and collected annually. At the discretion of the Board, the annual fees may be waived in cases where there is a benefit to public health, safety and welfare.

<u>Subject:</u> Licenses for encroachments into County or Flood Control District Rights-of-Way	Policy Number	Page
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FAILURE TO OBTAIN LICENSE: In the event that any type of improvement or facility is installed in Pima County Rights-of-Way without a license first being obtained therefore, the installer or current owner of such improvement or facility will be required to promptly apply for such a license, and will pay twice the normal initial processing fee. In the event that the application is not ultimately approved, the installer or owner of the improvement will remove it immediately upon receipt of notification from Pima County.

RESPONSIBLE DEPARTMENT: The process shall be administered by the Department of Transportation.

Effective Date: April 13, 2004

F. ANN RODRIGUEZ, RECORDER  
RECORDED BY: LAM  
DEPUTY RECORDER  
6545 PE4



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PAGE: 1490  
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PICKUP  
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PIMA CO CLERK OF THE BOARD  
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ORDINANCE NO. 2004- 19

**AN ORDINANCE OF THE BOARD OF SUPERVISORS OF PIMA COUNTY, ARIZONA, ESTABLISHING APPLICATION FEES FOR VARIOUS ROADWAY ABANDONMENTS, EASEMENT RELEASES, ROADWAY CONVERSIONS, AND LICENSES FOR ENCROACHMENT ON COUNTY RIGHTS-OF-WAY, AND MAKING CERTAIN CONFORMING CHANGES TO PIMA COUNTY CODE SECTIONS AND BOARD OF SUPERVISOR POLICIES**

WHEREAS, private parties from time to time request the County to abandon or release portions of County roadways or easements, or to arrange for the release of utility easements by the holders thereof, or to issue to such parties a license permitting such parties to encroach in County rights-of-way; and

WHEREAS, the processing of such applications and the granting of such licenses, releases, and abandonments result in administrative costs to the County; and

WHEREAS, the Board of Supervisors of Pima County, Arizona has authority under A.R.S. § 11-251.08 to charge fees to defray the costs of services provided by the County.

**BE IT ORDAINED BY THE BOARD OF SUPERVISORS OF PIMA COUNTY, ARIZONA:**

**SECTION 1. Fee Schedule.** Fees shall be charged for the processing of applications for certain County actions, as follows:

- a. Roadway Abandonment. Application for abandonment of a County roadway under Article 8, Chapter 20, Title 28, Arizona Revised Statutes: \$5,000.00
- b. Sewer Easement Release. Application for release of easement for installation, maintenance, and use of sewer facilities: \$250.00
- c. Utility Easement Release. Application for County to coordinate release of easements by utility companies: \$300.00
- d. Construction Easement Release. Application for formal release of easement for construction: \$300.00

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- e. Access Control Release. Application for release of access control (i.e., release of a portion of a one-foot no-access easement): \$850.00
- f. Slope Easement Release. Application for release of slope easement: \$1,200.00
- g. Drainage Easement Release. Application for release of drainage easement: \$1,200.00.
- h. Public Trail Easement Release. Application for release of easement for installation, maintenance and use of public trail or access to public trail: \$1,200.00
- i. Cable TV License.
  - Application for a license for the installation, maintenance and operation of a cable television system in County right-of-way: \$7,500.00.
  - Application for renewal of an existing license: \$7,500.00.
  - Application for assignment of an existing license: \$1,000.00.
- j. Fiber Optic Lines.
  - Application for a license for installation, maintenance and operation of fiber optic telecommunication facilities in County right-of-way (or for amendment of an existing license to increase line distance): \$3,000.00.
  - Application for renewal of an existing license: \$1,980.00.
  - Application for assignment of an existing license: \$1,000.00
- k. Wireless Communications.
  - Application for a license for the installation, maintenance and operation of wireless communications facilities in County rights-of-way: \$2,600.00.
  - Application for renewal of an existing license: \$1,700.00.
  - Application for assignment of an existing license: \$1,000.00.
- l. ROW Encroachments.
  - Application for a license for encroachment in County right-of-way (one-time installation, such as for a fence, signage, monument, etc.): \$2,900.00.
  - Application for renewal of an existing license: \$500.00.
  - Application for assignment of existing license: \$300.00.

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m. Monitor Well License.

Application for a license for the installation, maintenance and operation of a groundwater monitor well in County right-of-way: \$2,500.00.

Application for renewal of an existing license: \$1,650.00.

Application for assignment of an existing license: \$1,000.00.

Application for installation of an additional well in the same right of way segment already reviewed pursuant to prior application: \$1,250.00.

n. Private Utility Lines.

Application for a license for the installation, maintenance and use of electrical or other utility lines in County right-of-way: \$2,400.00.

Application for renewal of existing license: \$1,580.00.

Application for assignment of existing license: \$600.00.

Application for installation of additional lines in same right-of-way: \$1,200.00.

o. Road Conversion: Application for conversion of a road from private to public: \$3,500.00.

**SECTION 2. Payment of Fees.** The fees set forth above are for the processing of the application for the requested action, and must be submitted along with any required application materials. They shall apply regardless of the outcome of the application process. The fees set forth above are in addition to any license fees paid pursuant to the terms of any license agreements granted, or any amounts paid pursuant to ARS § 28-7208 for property conveyed by the County.

**SECTION 3. Amendment of Section 5.04.200 of the County's Cable Communications Code.** Ordinance 1997-17, and Subsection A of Section 5.04.200 of the Pima County Code are hereby amended as follows.

Chapter 5.04  
CABLE COMMUNICATIONS  
\*\*\*\*\*

5.04.200 Fees, deposits and bonds.

\*\*\*\*\*

A. Application Fee. Each application for the granting, renewal or modification of a license under the authority of this chapter shall be accompanied by a filing fee in an amount set from time to time by County ordinance.

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1. Each application for license to be granted under the authority of this chapter shall be accompanied by a nonrefundable filing fee in the amount of two thousand five hundred dollars (\$2,500) by a certified or cashier's check made payable to Pima County.

2. If an application is for service to more than one licensed area, there shall be an additional filing fee of five hundred dollars (\$500) for each such license area.

3. Subsequent applications by a licensee for renewal or modification of a license shall be accompanied by a nonrefundable filing fee in the amount of five hundred dollars (\$500) for each license area.

\* \* \* \*

**SECTION 4.** Addition of new Section 5.04.205 to the County's Cable Communication Code. Chapter 5.04, Article II of the Pima County Code is hereby amended by the addition of a new section 5.04.205 as follows:

**Chapter 5.04  
CABLE COMMUNICATIONS**

\* \* \* \*

**5.04.205 Failure to Apply for License.**

In the event that any cable system facilities are installed in Pima County Right-of-Way without a license first being obtained therefore as required by this chapter, the installer or current owner of such facilities shall be required to promptly apply for such a license, and shall pay twice the normal filing fee. In the event that the application is not ultimately approved, the installer or owner of the facilities will remove them immediately upon receipt of notification from Pima County, in accordance with Section 5.04.120.

\* \* \* \*

**SECTION 5.** Amendment of Board of Supervisors Policy No. F 54.3. The Board of Supervisors Policy No. F 54.3, Licenses for encroachments into County or Flood Control District Rights-of-Way, is hereby amended as follows:

\* \* \* \*

**FEE SCHEDULE:**

**RESIDENTIAL ENCROACHMENTS**

For landscaping, natural buffers, fences, walls, masonry mailboxes, and other miscellaneous encroachments into right-of-way for individual residential use, there will be charged a one-time initial processing fee of \$250 in an amount set from time to time by County ordinance, plus an annual fee of \$50.

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## COMMERCIAL ENCROACHMENTS

For landscaping, natural buffers, fences, walls, permanent signs, traffic devices, parking, storage, bus benches, bus bays, or other occupancy for commercial use or use by a homeowners association, there will be charged a one-time initial processing fee of \$250 in an amount set from time to time by County ordinance, plus an annual fee determined by the Real Property Division on a case by case basis based on the value of the County property. The annual fee will be adjusted every five years based on the increase in the consumer price index over the previous five year period.

## COLLECTION

Fees shall be invoiced and collected annually. At the discretion of the Board, the annual fees may be waived in cases where there is a benefit to public health, safety and welfare.

## FAILURE TO OBTAIN LICENSE

In the event that any type of improvement or facility is installed in Pima County Right-of-Way without a license first being obtained therefore, the installer or current owner of such improvement or facility will be required to promptly apply for such a license, and will pay twice the normal initial processing fee. In the event that the application is not ultimately approved, the installer or owner of the improvement will remove it immediately upon receipt of notification from Pima County.

\*\*\*\*\*

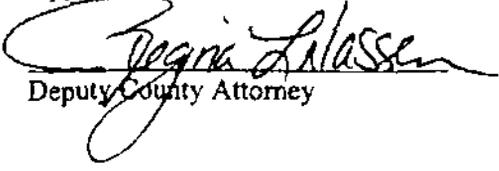
**SECTION 5. Amendment of Administrative Procedure.** The County Administrator is hereby directed to amend Administrative Procedure 54-4 to be consistent with this ordinance.

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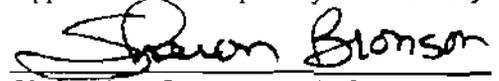
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PASSED AND ADOPTED by the Board of Supervisors of Pima County,  
Arizona, this 13 day of APRIL, 2004.

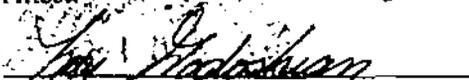
Approved as to Form:

  
Deputy County Attorney

Approved and accepted by Pima County.

  
Chair, Pima County Board of  
Supervisors      APR 13 2004

Attest:

  
Clerk of the Board of Supervisors



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## Chapter 5.04

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### CABLE COMMUNICATIONS

#### Sections:

#### Article I. General Regulations

- [5.04.010 Title.](#)
- [5.04.020 Purpose.](#)
- [5.04.030 Definitions.](#)
- [5.04.040 License-Required.](#)
- [5.04.050 License-Application, renewal, modification.](#)
- [5.04.060 Standards for granting or denying license.](#)
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#### Article II. System Operation Requirements

- [5.04.080 Generally.](#)
- [5.04.090 System, Capability.](#)
- [5.04.100 Construction method.](#)
- [5.04.110 Service schedule.](#)
- [5.04.120 Removal of licensee property.](#)
- [5.04.130 Local office, records to be main-tained.](#)
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- [5.04.150 Local channel required.](#)
- [5.04.160 Interconnection capability.](#)
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- [5.04.200 Fees, deposits and bonds.](#)
- [5.04.205 Failure to apply for license.](#)
- [5.04.210 License-Termination.](#)
- [5.04.220 Revocation.](#)
- [5.04.230 Appeal of license revocation.](#)
- [5.04.240 System disposal.](#)
- [5.04.250 Continuity of service required.](#)
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#### Article III. Administration

- [5.04.290 County administration.](#)
- [5.04.300 Licensee rules and regulations.](#)
- [5.04.310 Subscriber rights.](#)
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- [5.04.330 Cumulative rights and remedies.](#)
- [5.04.340 Rights reserved to the county.](#)
- [5.04.350 Liquidated damages](#)
- [5.04.360 Effect upon existing licenses.](#)

## Article I. General Regulations

### 5.04.010

#### Title.

The ordinance codified in this chapter shall be entitled the Pima County cable communications ordinance. (Prior code § 19.04.010)

### 5.04.020

#### Purpose.

It is the purpose of this chapter to:

- A. Authorize the county to grant nonexclusive licenses to operate cable systems in areas under its jurisdiction;
- B. Provide for the payment of certain fees and other considerations to the county;
- C. Promote the widespread availability of high quality cable communications service to residents of the county. (Ord 1997-17 § 1, 1997; Prior code § 19.04.020)

### 5.04.030

#### Definitions.

As used in this chapter:

- A. "Basic service" means all subscriber services provided by the licensee covered by the regular monthly charge paid by all subscribers, excluding optional services for which a separate charge is made, or as specifically provided in the license agreement.
- B. "Cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include:
  - 1. A facility that serves only to retransmit the television signals of one or more television broadcast stations;
  - 2. A facility that services subscribers without using any public right-of-way;
  - 3. A facility of a common carrier which is subject in whole or in part to the provisions of TITLE II of the Communications Act of 1934, 47 U.S.C. Subsection 201 et seq., except that such facility shall be considered a cable system (other than for purposes of section 621 C) to the extent such facility is used in the transmission of video programming directly to subscribers; or
  - 4. Any facility of any electric utility used solely for operating its electric utilities systems.

If there is a connection of any such exempt system to a licensed system, such exemption shall cease.

- C. "Channel" means a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel as defined by the FCC.
- D. "County" means Pima County in the state of Arizona.
- E. "FCC" or "Federal Communications Commission" means that agency as presently constituted by the Communications Act of 1934 as amended, or any successor agency.
- F. "Gross Annual Revenues" or "Gross Revenues" means all revenues, cash, credits, property of any kind or nature, or other consideration, received directly or indirectly by the licensee, its affiliates, subsidiaries, parent or any other person, firm or corporation in which the licensee has a financial interest or which has a financial interest in the licensee, arising from or attributable to the licensee's operation of its cable system to provide cable services within the county, including, but not limited to:
  - 1. Revenue from all charges for services provided to subscribers;
  - 2. Revenue from all charges for the insertion of commercial advertising upon the cable system;
  - 3. Revenue from all charges for the leased use of studios;
  - 4. Revenue from all charges for the installation, removal, connection and reinstatement of equipment necessary for a subscriber to receive cable service and for any equipment sold or leased to a subscriber to receive cable service;
  - 5. Revenue from the sale, exchange, use or cablecast of any programming developed for community use

or institutional users;

6. Revenue for the carriage or cablecast of leased access programming on the cable system; and

7. Any other income derived from the operation of the cable system to provide cable services.

"Gross Revenues" shall not include taxes collected by licensee on behalf of any government exclusive of the license fee required by Section 14 hereof; any increase in the value of any stock, security or asset; the value of complimentary service provided to licensee's employees and as required by the Cable Ordinance or this license agreement; dividends or other distributions made in respect to any stock or securities; value received by a licensee (or any of its affiliates, subsidiaries or parent) through cooperative advertising.

G. "License" means the right and authority granted by this chapter to the licensee to construct, maintain and operate a cable system through use of the public streets or other public rights-of-way. The term does not include any license or permit that may be required by this Ordinance or other laws, ordinances or regulations of the county for the privilege of transacting and carrying on a business within the county or for disturbing the surface of any street or public right-of-way.

H. "License area" means the particular part of the county for which an applicant may request a license to provide cable communications services. A number of such license areas have been designated by the county and are identified on Exhibit A of the ordinance codified in this chapter.

I. "License Agreement" means a contract entered into in accordance with the provisions of this chapter between the county and a licensee that sets forth the

terms and conditions under which the license will be exercised.

J. "Licensee" means a person who executes a license agreement with the county, in accordance with this chapter, for the nonexclusive privilege to construct, install, operate, maintain or dismantle a cable system in the county.

K. "Person" means any individual, corporation (whether for profit or nonprofit), joint venture, partnership, or any other business entity who holds or applies for a license from the county.

L. "Private Channel" means any channel which is available only to subscribers who are provided with a special tap, converter or terminal equipment to receive signals on the channel.

M. "Two-way Capability" means the ability to receive and transmit signals of any type from a subscriber terminal to other points in the system.

N. "Subscriber" means any person or entity receiving cable services of the licensee.

O. "Subscriber Density" means the number of business and residential units per mile of system. Business and residential units shall be counted when they are within two hundred fifty feet of any portion of the cable distribution system, including trunk or feeder cable. (Ord 1997-17 § 1, 1997; Prior code § 19.04.030)

#### 5.04.040

##### **License-Required.**

A. No person shall construct, install, maintain or operate a cable system within, along, over or under any street in the county, or otherwise use county right-of-way for cable, unless a license has first been granted pursuant to the provisions of this chapter.

B. Any license issued by the county shall be nonexclusive, and the county specifically reserves the right to grant, at any time, such additional licenses for cable systems that the county deems appropriate. (Ord 1997-17 § 1, 1997; Ord. 1989-164 § 1, 1989; prior code § 19.04.040)

#### 5.04.050

##### **License-Application, Renewal, Modification.**

A. Any person desiring to construct, install, maintain or operate a cable system within the areas under the jurisdiction of the county shall make an application for license.

1. The application shall consist of executed application forms as prescribed and furnished by the county.

2. Failure of any applicant to fully provide all information requested on the application forms will be sufficient cause for not considering the application.

3. To be accepted for consideration, an application shall be submitted with any required application fee, be properly executed on the forms prescribed by the county, and contain information required by any application form, this ordinance and any applicable requests of the county.

B. A licensee may initiate a formal license renewal process in accordance with Section 626 (A)-(G) of the

Federal Telecommunications Act, 47 U.S.C. Subsection 546 (A)-(G), in which case the county may conduct a formal renewal process in accordance with the Telecommunications Act or the county may, after affording the public notice as provided by ARS § 9-507(B) and opportunity for comment, grant the renewal.

C. An application for modification of a license agreement shall include, at a minimum, the following information:

1. The specific modification requested;
  2. The justification for the requested modification, including the impact of the requested modification on subscribers and others, and the impact on the applicant if the modification is not approved;
  3. A statement whether the modification is sought pursuant to Section 625 of the Telecommunications Act, 47 U.C.S. Subsection 445, and if so a demonstration that the requested information meets the legal requirements of the Act; and
  4. Any other information for the county to make a determination on the modification request.
- D. Applications for license, renewal, and modification shall be made to the county administrator or designee. (Ord 1997-17 § 1, 1997; Prior code § 19.04.050)

#### **5.04.060**

##### **Standards for granting or denying license.**

In making any determination as to an application, the board shall give due consideration to the following:

- A. The quality of the service proposed;
- B. The experience;
- C. Character;
- D. Background;
- E. Financial responsibility of the applicant. If the applicant is a company or corporation, an audited or reviewed statement must be submitted. If the applicant is an individual, a reviewed or audited personal financial statement is required. Financial documents may be subjected to an in-depth review by Pima County;
- F. Willingness;
- G. Ability to abide by the license limitations and requirements; and
- H. Any other considerations deemed pertinent by the board for safeguarding the interest of the county and the public. (Ord 1997-17 § 1, 1997; Ord. 1992-57 § 1 (part), 1992; prior code § 19.04.060)

#### **5.04.070**

##### **License agreement.**

- A. Upon granting of a license, modification, or renewal by the county, the licensee shall execute a license agreement within sixty days.
- B. The license agreement shall incorporate all terms and provisions of this chapter wherein a requirement is placed upon the licensee, whether expressed or implied by this chapter.
- C. The licensee shall expressly and specifically accept the terms of and be bound by the terms of this chapter and any amendments thereto.
- D. The agreement shall be binding upon the licensee, its successors, lessees or assigns.
- E. The license shall be nonexclusive and shall be for a period not to exceed ten years commencing upon the execution of the license agreement between the county and the licensee. In the event that the license is for a period exceeding five years, certain terms of the license shall be subject to renegotiation at the county's sole discretion. These renegotiable terms include provisions which will accommodate changes in: technology, community needs, services, public, educational and governmental access (PEG), and franchise or license fees as permitted by federal law.
- F. Upon written notice by the licensee, as required by the Federal Telecommunications Act 47 U.S.C. 546, or in any event, not less than one year prior to the fourteenth anniversary of the effective date, and after the holding of a public hearing affording due process, the license may be renewed for a reasonable term. (Ord 1997-17 § 1, 1997; Prior code § 19.04.070)

## **Article II. System Operations Requirements**

**5.04.080****Generally.**

A. A licensee shall conform to the minimum standards set forth in Sections 5.04.090 through 5.04.190 relative to the construction, operation and maintenance of a cable system in the county, unless such standards are waived by the county in writing.

B. It is not the intent of this article to prevent any licensee from providing more than the required minimum to meet the standards listed in Sections 5.04.090 through 5.04.190. (Ord 1997-17 § 2, 1997; Prior code § 19.08.010(A), (B) (part))

**5.04.090****System capability.**

The cable systems shall be equipped to provide:

A. Two-way capability;

B. Emergency override of the audio portion of all channels during a cleared emergency or disaster. (Ord 1997-17 § 2, 1997; Prior code § 19.08.010(B)(1))

**5.04.100****Construction method.**

A. The cable system shall be constructed, installed, and maintained in accordance with standard good engineering practices and shall conform when applicable with the National Electrical Safety Code and the Federal Communications Commission rules and regulations, as they apply.

B. A licensee shall utilize, with the owner's permission, existing poles, conduits or such other facilities whenever possible. Underground street, sidewalk and driveway crossings not using existing conduits shall be bored unless specific county approval is received. Copies of agreements for use of poles, conduits or other facilities shall be filed with the county upon county request. A licensee may install its own poles only when approved by the county and then subject to whatever reasonable terms and conditions the county requires in the county right-of-way use permit.

C. All transmission lines, equipment and structures shall be installed and located to cause minimum interference with the rights and reasonable convenience of the public and property owners. The county may from time-to-time adopt such reasonable rules and regulations concerning the installation and maintenance of the cable system installed in the public rights-of-way as may be consistent with this chapter and state and federal law. In the absence of such rules and regulations, the *Pima County/City of Tucson Standard Specifications for Public Improvements* apply.

D. Suitable safety devices and practices as required by county, state and federal laws, ordinances, regulations and permits shall be used during construction, maintenance and repair of a cable system.

E. A licensee shall remove, replace or modify at its own expense the installation of any of its facilities within any public right-of-way when required to do so by the county to allow the county to change, maintain, repair, improve or eliminate a public right-of-way. Nothing in this section shall prevent licensee from seeking and obtaining reimbursement from sources other than the county.

F. On streets and roads where electrical and telephone utility wiring are located underground, either at the time of initial construction or subsequently, the cable shall also be located underground at the licensee's expense. Between a street or road and a subscriber's residence, the cable shall be located underground. If both electrical and telephone utility wiring are aerial, a licensee may install aerial cable except where a property owner or resident requests underground installation and agrees to bear the additional cost over aerial installation.

G. A licensee shall obtain any required permits before doing any excavation or causing disturbance to public rights-of-way or private property as a result of its construction or operations and shall restore to their former condition such private property and public rights-of-way, the latter in a manner consistent with all applicable rules, regulations, resolutions or other county requirements relative to construction, repair or maintenance of facilities in the public right-of-way. If such restoration is not satisfactorily performed within a reasonable time, the county may, after prior notice to the licensee, cause the repairs to be made at the expense of the licensee. The county may inspect on-going construction and require a

licensee to halt construction where it finds the construction to create a public hazard or to be in noncompliance with the requirements of this chapter, the license agreement, the permit, or other laws.

H. Simultaneously with the filing of construction plans with the county for a permit or otherwise, a licensee shall file a copy of the plans with all public utilities in the construction area as determined by the Blue Stake Center or separately to the Blue Stake Center.

I. Prior to the commencement of construction, a licensee shall have complied with the following requirements:

1. Have received a permit from the county for construction on public property or rights-of-way;
2. Have received clearance from utilities in the area of construction; and
3. Where construction will be on private property or in public rights-of-way adjoining private property, have provided no less than seven days prior written notice by mail or hand delivery to all such property occupants. The notice shall identify the name and the address of the licensee and provide a local or toll-free telephone number that the affected person may call for more information or to lodge a complaint.

J. A licensee may trim trees within public rights-of-way at its own expense as necessary to protect its wires and facilities, subject to approval by the county and any direction that may be provided by the county. Trees on private property may be trimmed only with the consent of the property owner.

K. At the request of any person holding a valid building moving permit and upon sufficient notice, the licensee shall temporarily raise, lower or cut its wires as necessary to facilitate such move upon not less than seventy-two hours advance notice. The direct expense of such temporary changes, including standby time, shall be paid by the permit holder and the licensee may require payment in advance. (Ord 1997-17 § 2, 1997; Prior code § 19.08.010(B)(2))

#### **5.04.110**

##### **Service schedule.**

Unless the license agreement provides otherwise, a licensee shall be required to extend its cable system pursuant to the following requirements:

A. Upon reasonable written request for service by any person located within the service area, the licensee shall, within sixty days, furnish the requested service to such person, unless prevented from providing said service due to factors outside licensee's control such as permit restrictions or private easement considerations. If such service has not been implemented within ninety days of written notice from the county, the county may impose liquidated damages for each day thereafter in accordance with 5.04.350.

B. The licensee shall extend and make cable television service available to every unserved dwelling unit within any area reaching the minimum density of at least thirty dwelling units per aerial cable mile, or fifty dwelling units per underground cable mile, except that the licensee shall not be required to install cable where another authorized licensee has already done so. Upon request, this density requirement may be modified by the county for a specific licensee, provided said licensee demonstrates that it would be commercially impracticable to comply with said requirement. For purposes of this section, a density requirement may be considered commercially impracticable if licensee's compliance with said requirement would create a significant adverse impact on the capital costs of licensee's Pima County cable system.

C. The licensee shall prevent unnecessary damage to streets, rights-of-way and property by installing cables or conduits underground in new subdivisions at the same time and in the same trench as telephone, electric or similar services are installed. Given reasonable notice, the licensee shall install underground cable or conduit in all new subdivisions of six or more dwelling units within the service area at the same time and in the same trench as telephone, electric or similar services are installed. Cable need not be installed and/or activated until the new subdivision meets the criteria established for line extensions.

D. The licensee shall extend and make cable television service available to any resident requesting connection within the licensee's authorized service area at the standard connection charge if the connection to the isolated resident would require no more than a one hundred fifty-foot aerial or underground drop line.

E. With respect to requests for connection requiring an aerial or underground drop line in excess of one hundred fifty feet, the licensee shall extend service to such residents at a one-time charge not to exceed the actual installation costs incurred by the licensee for the distance exceeding one hundred fifty feet. (Ord 1997-17 § 2, 1997; Prior code § 19.08.010(B)(3))

#### **5.04.120**

**Removal of licensee property.**

- A. In the event that licensee property has been installed in a street or other dedicated public right-of-way without complying with the requirements of this chapter, or the license has been terminated, revoked or expired, or the use of any licensee property is discontinued for any reason for a continuous period of twelve months, the licensee shall at its sole expense, on the demand of the county, remove promptly from the street all licensee property other than that which the county may permit to be abandoned in place.
- B. Upon such removal of licensee property, the licensee shall promptly restore the street or other public places from which the licensee property was removed to a condition as near as possible to its prior condition.
- C. Licensee property no longer in service may be left in place with the approval of and in a manner prescribed by the county.
- D. Upon abandonment of licensee property in place, the licensee shall deliver to the county an instrument transferring ownership of such abandoned licensee property to the county.
- E. Any cost arising from compliance with this provision shall be borne by the licensee. (Ord 1997-17 § 2, 1997; Prior code § 19.08.010(B)(4))

**5.04.130****Local office, records to be maintained.**

- A. The licensee shall maintain an office accessible during all usual business hours or have a listed telephone and operate so that complaints and requests for repairs and adjustments may be received.
- B. The licensee shall maintain a written record listing date of customer complaints, identifying the subscriber, and describing the nature of the complaint, and when and what action has been taken by the licensee in response thereto.
- C. Such record shall be kept at the licensee's office and shall be available for inspection during regular business hours without further notice or demand of the county.
- D. The licensee shall notify each subscriber at the time of initial subscription to service of the procedure for reporting and resolving complaints. (Ord 1997-17 § 2, 1997; Prior code § 19.08.010(B)(5))

**5.04.140****Service provisions.**

- A. The licensee shall render efficient service, make repairs promptly and interrupt service only for good cause and for the shortest time possible; the licensee shall be able to demonstrate by instruments and otherwise to subscribers that a signal of adequate strength and quality is being delivered to the subscriber's terminal.
- B. The following minimum requirements for facilities and services apply to all licenses. The county may require that a licensee exceed these minimum requirements.
  - 1. A cable system shall have a minimum capacity of fifty-four video channels available for immediate or potential use. Two-way capability shall be designed into the system. Upon request, this minimum channel capacity requirement may be modified by the county for a specific licensee, provided said licensee demonstrates that it would be commercially impracticable to comply with said requirement. A licensee shall have the burden of demonstrating, by clear and convincing evidence, that compliance with the minimum channel capacity would be commercially impracticable for its Pima County cable system.
  - 2. A cable system shall provide leased access channels as required by federal law.
  - 3. Standard installation and basic service to public buildings may be required without charge as set forth in the license agreement.
  - 4. A licensee shall design its system to allow the county to interrupt the audio portion of the cable service in an emergency to deliver information to subscribers.
  - 5. A licensee shall provide standby power for the head end so as to be able to operate some channels during a power outage for a minimum of six hours.
- C. For purposes of customer service and customer complaint procedure, licensee shall maintain a business office open during normal business hours with a listed local or toll-free telephone number and employ a sufficient number of telephone lines to allow reasonable access by subscribers and members of the public. Unless a waiver is granted by the county, said office shall be located in the county. When the business

office is closed, an answering machine or service capable of receiving service complaints and inquiries shall be employed.

1. A licensee shall have available at all times personnel, equipment and procedures capable of locating and correcting major system malfunctions. System outages and major system malfunctions shall be corrected without delay. Corrective action for all other service problems shall be initiated as provided for in the license agreement.

2. A cable system shall be operated in a manner consistent with the principles of fairness and equal accessibility of facilities, equipment, channels, studios and other services to all residences, businesses, public agencies or other entities having a legitimate use of the system, and no one shall be arbitrarily excluded from its use. A licensee shall not discriminate in terms of rates, terms of service, or extension of service on the basis of age, race, creed, color, religion, national origin, sex or marital status. Nor shall a licensee fail to extend service to any part of the county within its licensed service area on the basis of the income of the residents.

3. A licensee shall establish procedures for the investigation and resolution of all complaints, including, but not limited to, those regarding the quality of service and equipment malfunction. A copy of such procedures shall be provided to the county upon request.

4. A licensee shall provide each subscriber, at the time cable service is installed, written instruction for placing a service call, filing a complaint, or requesting an adjustment. The name, address, and telephone number of the county office responsible for supervision of cable operations shall be listed. Each subscriber shall also be provided with a schedule of the subscriber's rates and charges, a copy of the service contract, delinquent subscriber disconnect and reconnect procedures, and a description of any other of the licensee's applicable policies in connection with its subscribers.

5. A licensee may interrupt service on the cable system only for good cause and for the shortest time possible and, except in emergency situations, only after prior notice to subscribers and the county of the anticipated service interruption, provided, however, no prior subscriber or county notice shall be required for the performance of system maintenance work requiring a maximum of one-hour duration during the hours of 6:00 a.m. until 12:00 midnight or four-hours duration during the hours of 12:00 midnight until 6:00 a.m.

6. A licensee shall maintain a complete record of service complaints received and action taken. These records shall be open to the county for inspection during normal business hours. A summary of such records shall be submitted to the county upon its request. Such records shall be retained for not less than one year.

7. Upon termination of service to a subscriber and at the subscriber's request, a licensee shall promptly remove all its facilities and equipment from the subscriber's premises. Where removal is impractical, such as with buried cable or internal wiring, facilities and equipment may be disconnected and abandoned rather than removed.

D. The county may waive minimum requirements for licenses where the applicant demonstrates that such waiver is in the public interest. (Ord 1997-17 § 2, 1997; Prior code § 19.08.010(B)(6))

### 5.04.150

#### **Local channel required.**

A. Each cable system shall carry as part of the basic service, local channels broadcast in its area as required and defined in current FCC regulations.

B. In this regard, those parts of 47 C.F.R. Part 76 relating to carriage of local channel signals as exist-

ing, or as may be amended, shall apply and are incorporated in this section by reference.

C. In the event the FCC deletes the requirement referred to in this section, or ceases to exercise jurisdiction in this area, the requirement shall continue to apply to this chapter as it existed on the date immediately preceding such federal action. (Ord 1997-17 § 2, 1997; Prior code § 19.08.010(B)(7))

### 5.04.160

#### **Interconnection capability.**

A. Each cable system shall be designed and operated so as to facilitate interconnection to any or all other cable systems within the county and the city of Tucson.

- B. The cost of such interconnection links shall be equally shared by the two connecting cable systems.
- C. A licensee may be required to interconnect its cable system with any or all other systems located in the county upon the request of the county, where economically and technically feasible as determined by the county. (Ord 1997-17 § 2, 1997; Ord. 1992-57, § 1 (part), 1992; prior code § 19.08.010(B)(8))

#### **5.04.170**

##### **Observance of rights of privacy.**

The licensee shall strictly observe and protect the rights of privacy and property rights of subscribers and users at all times.

- A. Individual subscriber preferences of any kind, viewing habits, political, social or economic philosophies, beliefs, creeds, religions or names, addresses or telephone numbers shall not be revealed to any person, governmental unit, police department or investigating agency unless upon the authority of a court of law or upon prior voluntary valid authorization of the subscriber.
- B. Such authorization shall not in any event be required as a condition of receiving service.
- C. Exclusive of signals useful only for the control or measurement of cable system performance, licensees shall not permit the transmission of any signal, including "polling" or monitoring of channel selection from the subscribers' premises without first obtaining written permission from the subscribers. (Ord 1997-17 § 2, 1997; Prior code § 19.08.010(B)(9))

#### **5.04.180**

##### **Service to public buildings.**

The licensee shall make available, at no cost, one service outlet to a conveniently accessible point in each public, private and parochial school, nonprofit college or university, police station, fire station or other facility or building located within the license area and used for public purposes, as may be designated by the county as long as the connection would require no more than a 500-foot aerial or underground drop line. When connection to a public building requires more than a 500-foot aerial or underground drop line, there will be a one time connection charge not to exceed the actual installation costs incurred by the licensee. There shall be a minimum monthly charge at those locations. (Ord 1997-17 § 2, 1997; Prior code § 19.08.010(B)(10))

#### **5.04.190**

##### **Maintenance.**

- The cable system shall be maintained in accordance with the highest accepted standards of the industry.
- A. Each cable system shall be maintained so as to comply with all applicable technical standards and regulations as promulgated by the FCC. In this regard, 47 C.F.R. Section 76-061 et seq., relating to technical standards (including, but not limited to, performance monitoring and measurements), as existing or as may be amended, shall apply in full and are incorporated in this section by reference.
  - B. In the event the FCC deletes the technical standards referred to in subsection A, or ceases to exercise jurisdiction in this area of technical standards, the standards shall continue to apply to this chapter as they existed on the date immediately preceding such federal action. (Ord 1997-17 § 2, 1997; Prior code § 19.08.010(B)(11))

#### **5.04.200**

##### **Fees, deposits and bonds.**

- The following fees are required for each license granted under the authority of this chapter:
- A. Application Fee. Each application for the granting, renewal or modification of a license under the authority of this chapter shall be accompanied by a filing fee in an amount set from time to time by county ordinance.
  - B. License Fee.
    - 1. Each licensee shall pay to the county an amount equal to five percent of the licensee's annual gross revenues as defined in Section 5.04.030 of this chapter.
    - 2. The payment shall be computed quarterly, for the preceding quarter, as of March 31, June 30,

September 30 and December 31 of each year. Each quarterly payment shall be due and payable no later than thirty days after the relevant computation date. Each payment shall be accompanied by a financial report certified by the chief financial officer of licensee, showing in detail the gross revenues of the licensee related to that quarter. The payment required pursuant to this section shall be in addition to any other tax or payment owed to the county pursuant to any other applicable ordinance, regulation or law of the county, the state of Arizona or other jurisdiction.

3. The licensee may identify as a separate line item on each regular bill for each subscriber the amount of the total bill assessed as a license fee and the identity of the license authority to which the fee is paid.

#### C. Performance Bond.

1. Within thirty days after the execution of the license agreement, the licensee shall file with the county a performance bond for the benefit of the county in the amount of one hundred thousand dollars (\$100,000).

2. In the event that the licensee fails to comply with any provision of this chapter or the license agreement, then there shall be recoverable jointly and severally from the principal and surety any and all damages or costs suffered by the county.

3. The damages or costs shall include, but not be limited to, attorney's fees and cost of any action or proceeding and including the full amount of any compensation, indemnification, cost of removal or abandonment of any property or costs due and owing the county up to the full amount of such bond.

4. The bond shall be maintained in full as a continuing obligation during the entire term of the license agreement and for six months following the termination of the agreement.

5. The bond shall be issued by a surety company authorized to do business in the state and shall be in a form approved by the county attorney. (Ord. 2004-19 § 3, 2004; Ord 1997-17 § 2, 1997; Prior code § 19.08.020)

### 5.04.205

#### **Failure to apply for license.**

In the event that any cable system facilities are installed in Pima County right-of-way without a license first being obtained therefore as required by this chapter, the installer or current owner of such facilities shall be required to promptly apply for such a license, and shall pay twice the normal filing fee. In the event that the application is not ultimately approved, the installer or owner of the facilities will remove them immediately upon receipt of notification from Pima County, in accordance with Section 5.04.120. (Ord. 2004-19 § 4, 2004)

### 5.04.210

#### **License-Termination.**

The license shall terminate upon the expiration of the term thereof, unless renewal is applied for as per Section 5.04.070 of this chapter. (Prior code § 19.08.030(A))

### 5.04.220

#### **Revocation.**

Sufficient cause for revocation shall exist when the licensee:

- A. Fails to comply with any provisions of this chapter or the license agreement;
- B. Makes willful false or misleading statements in any application;
- C. Engages in the practice of any fraud or deceit upon the county or subscribers;
- D. Fails to abide by the privacy provision of this chapter;
- E. Fails to make timely payment of any moneys due the county pursuant to this chapter;
- F. Fails to commence construction in the license area within six months and to commence basic service within eighteen months from the effective date of the license agreement. (Ord 1997-17 § 2, 1997; Prior code § 19.08.030(B))

### 5.04.230

#### **Appeal of license revocation.**

The county shall deliver to the licensee written notice of intent to revoke, setting forth causes for revocation. A public hearing on this revocation shall be held by the board of supervisors no less than thirty days after issuance of the notice. (Prior code § 19.08.030(C))

#### 5.04.240

##### **System disposal.**

In the event of termination or revocation of a license, the licensee involved shall offer to sell the cable system, at the fair market value, to another licensee or applicant for a license.

- A. The fair market value shall be determined in accordance with generally accepted appraisal procedures.
- B. The original cost of all tangible and intangible property, as well as salvage value, book value, replacement cost, cash flow, and other factors will be considered.
- C. Under no circumstances shall any valuation be made for any right or privilege granted by license.
- D. Should the licensee fail to negotiate a sale, as described in this section, the county may purchase the system at the fair market value for superpose of leasing to a qualified operator until a buyer can be found. (Ord 1997-17 § 2, 1997; Prior code § 19.08.030(D))

#### 5.04.250

##### **Continuity of service required.**

- A. The licensee shall provide continuous service for the entire term of the license agreement to all subscribers and users in return for payment of the established rates, fees and charges.
- B. If the licensee seeks to sell or transfer, or if the county revokes or fails to renew the license, the licensee shall continue to operate the system as trustee for its successor in interest until an orderly and lawful change of operation is effected.

This period of operation shall not exceed six months from the occurrence of any of the events described in this section. (Ord 1997-17 § 2, 1997; Prior code § 19.08.030(E))

#### 5.04.260

##### **Change of control.**

- A. The licensee shall not sell, transfer, assign, exchange or release, or permit the sale, transfer, assignment, exchange or release of more than five percent of the cumulative ownership of the cable system without prior written authorization from the county.
- B. For purposes of this section, a merger or consolidation shall be deemed a transfer or assignment.
- C. Nothing in this section shall be deemed to prohibit a pledge or hypothecation or mortgage or similar instrument transferring condition ownership of the system's assets to a lender or creditor in the ordinary course of business, unless such interest shall exceed seventy-five percent of the original cost or the fair market value, whichever is higher. (Ord 1997-17 § 2, 1997; Prior code § 19.08/040)

#### 5.04.270

##### **Indemnification of county.**

Each licensee shall, at its sole cost and expense, indemnify, hold harmless and defend the county, its officials, boards, commissions, agents and employees, by providing immediate defense with counsel approved by the county, against any and all claims, suits, causes of action, proceedings and judgements for damages arising out of construction, maintenance or operation of the cable system. (Ord 1997-17 § 2, 1997; Prior code § 19.08.050(A))

#### 5.04.280

##### **Insurance requirement.**

Each licensee, within thirty days after written notice of the granting of a license, shall provide the county with and maintain in full force throughout the term of the license agreement, insurance issued by a company duly authorized to do business in the state of Arizona, insuring with respect to the installation, construction, operation and maintenance of the cable system as follows:

A. Liability, comprehensive general and automobile liability coverage including, but not limited to, blanket contractual liability, completed operations liability, broad form property damage, including, but not limited to, coverage for explosion, collapse and underground hazard, and automobile nonownership liability. This insurance shall be written in the following minimum amounts:

1. For bodily injury, including death, five hundred thousand dollars combined single limit,
  2. Property damage, five hundred thousand dollars combined single limit,
  3. Comprehensive automobile liability, bodily injury, five hundred thousand dollars combined single limit,
  4. Excess umbrella liability in the minimum amount of five million dollars;
- B. Workers' compensation coverage as required by the law and regulations of the state;
- C. All insurance policies required in this section shall include Pima County as a named insured party;
- D. The licensee shall be solely responsible for all premiums due and payable for insurance required in this section;
- E. All insurance policies required in this section shall be in a form approved by the county risk manager and shall include a sixty-day notice of cancellation endorsement. (Ord 1997-17 § 2, 1997; Prior code § 19.08.050(B))

### **Article III. Administration**

#### **5.04.290**

##### **County Administration.**

- A. The county administrator shall administer cable communications operations within the county as governed by this chapter and applicable license agreements. The county administrator or designee may take all administrative action on behalf of the county except for those actions specified herein which are reserved for the board of supervisors. The board of supervisors has the sole authority to: grant licenses, modify license agreements, renew licenses, revoke licenses, and authorize the transfer of licenses.
- B. The county reserves the right during the term of the license agreement and during normal business hours and upon the giving of reasonable notice to examine, audit, review and obtain copies of the licensee's contracts, engineering plans, accounting, financial data, and service records relating to the property and operations of the licensee and to all other records required to be kept pursuant to this chapter.
- C. The county expressly reserves the right to regulate a licensee's rates and charges to the extent permitted by law at any time it deems it to be desirable or in the public interest. If the county decides to exercise any such authority it may have, it shall develop regulations which shall govern the procedure pursuant to which a licensee may seek authority for rate increases. (Ord 1997-17 § 3, 1997; Prior code § 19.12.010 (A))

#### **5.04.300**

##### **Licensee rules and regulations.**

Copies of rules, regulations, terms and conditions adopted by the licensee for the conduct of its business shall be filed with the county and remain a public record therein. (Ord 1997-17 § 3, 1997; Prior code § 19.12.010(B))

#### **5.04.310**

##### **Subscriber rights.**

- A. A licensee shall not deny service, access, or otherwise discriminate against subscribers, users, or residents of the county. A licensee shall comply at all times with all applicable federal, state and county laws, rules and regulations, executive and administrative orders relating to nondiscrimination and equal employment opportunity requirements. A licensee shall strictly adhere to the equal employment opportunity requirements of the FCC, state statutes and local regulations, and as the same may be amended from time to time.
- B. A licensee shall at all times comply with the subscriber privacy provisions of Section 631 of the Cable Act, 47 U.S.C. Subsection 551.
- C. No equipment shall be installed by the licensee for subscriber service without first securing a service

request from the owner or resident of any private property involved.

D. A licensee shall not originate or knowingly permit subliminal transmission at any time for any purpose whatsoever.

E. A licensee shall establish and conform to the following policy regarding refunds to subscribers and users:

1. If the licensee collects a deposit or advance charge on any service or equipment requested by a subscriber or user, the licensee shall provide such service or equipment within thirty days of the collection of the deposit or charge or it shall refund such deposit or charge within five days thereafter upon request of the subscriber or user. The subscriber shall be advised of this right of refund at the time the order is placed.

2. If any subscriber or user terminates any monthly service during the first twelve months of said service because of the failure of the licensee to render satisfactory service in terms of signal quality in accordance with the standards set forth in the license agreement, the licensee shall refund, on a pro-rata basis, to such subscriber or user an amount equal to the installation or reconnection charges paid by the subscriber or user for the period of unsatisfactory service.

3. In the event that a subscriber or user makes an annual or other payment in advance, the appropriate pro-rata portion of said payment shall be refunded by the licensee.

F. The following requirements shall apply to disconnection:

1. There shall be no charge for disconnection of any installation or outlet unless such charge was disclosed at the time the subscriber ordered service. All cable communications equipment shall be removed within a reasonable time from a subscriber's property at the subscriber's request, such time not to exceed thirty days from the date of the request.

2. If any subscriber fails to pay a properly due monthly subscriber's fee or other charge, the licensee may disconnect the subscriber's service outlet; provided, however, that such disconnection shall not be effected until thirty days after the due date of the charges and shall include a prior written notice to the subscriber of the intent to disconnect. After disconnection, upon payment in full of all proper fees or charges, including the payment of any reconnection charge, the licensee shall promptly reinstate the service. (Ord 1997-17 § 3, 1997; Prior code § 19.12.020(A))

#### **5.04.320**

##### **Compliance with laws and codes required.**

Each licensee shall comply fully with all applicable local, county, state and federal laws, codes, rules and regulations. (Prior code § 19.12.020(B))

#### **5.04.330**

##### **Cumulative rights and remedies.**

All rights and remedies of the county in this chapter are cumulative and may be exercised singly or cumulatively at the discretion of the county. (Ord 1997-17 § 3, 1997; Prior code § 19.12.020(D))

#### **5.04.340**

##### **Rights reserved to the county.**

A. Without limitation upon the rights which the county may otherwise have, the county expressly reserves the right to amend any section or provision of this chapter for any reason determined to be desirable by the county including, but not limited to:

1. New developments in the state of technology of cable communications systems;
2. Any changes in federal or state laws, rules or regulations.

B. The county reserves the right to require the designation or use of channel capacity, equipment, facilities, and services for public, educational or governmental use under Section 611 of the Cable Act, 47 U.S.C. Subsection 531. (Ord 1997-17 § 3, 1997; Prior code § 19.12.030)

#### **5.04.350**

##### **Liquidated damages**

A. The county may impose liquidated damages as set forth in this section and the license agreement.

B. All license agreements executed subsequent to the adoption of this Ordinance shall contain a provision for liquidated damages, in amounts as mutually agreed upon between the county and the licensee, for the licensee's failure to comply with various requirements of this chapter and the license agreement in amounts not to exceed those specified below:

1. For failure to substantially complete system construction or line extensions as required, unless the county specifically approves a delay caused by the occurrence of conditions beyond the licensee's control, the licensee shall pay five hundred dollars (\$500) per day for each day, or part thereof, the deficiency continues.

2. For material failure to provide data, documents, reports and information in a timely manner as required, the licensee shall pay one hundred dollars (\$100) per day, or part thereof, that each violation occurs or continues.

3. For substantial failure to remedy any other violation of this ordinance or the license agreement within fifteen days of receipt of notice of each violation, the licensee shall pay three hundred dollars (\$300) per day for each day, or part thereof, that the violation continues.

4. For failure to substantially comply with reasonable orders of the county, the licensee shall pay fifty dollars (\$50) per day for each day, or part thereof, that noncompliance continues.

C. Liquidated damages will not be imposed if the county finds that the failure of the licensee resulted from conditions beyond the licensee's control. Liquidated damages may be reduced or eliminated by the county if it finds that the failure of the licensee resulted from excusable neglect. The licensee shall bear the burden of proof in establishing the existence of such conditions.

D. Prior to assessing any of the liquidated damages set forth in this section, the county shall give licensee thirty days written notice of its intention to assess such damages. In said notice(s), the county shall set forth, at a minimum, the following:

1. The amount to be assessed;
2. The factual basis for such assessment; and
3. The specific provision of this chapter or the license alleged to have been violated.

Following receipt of the notice set forth in this section, licensee shall have a thirty-day period during which time licensee and the county shall make reasonable efforts to resolve the dispute in question.

E. The imposition and collection of liquidated damages shall not prevent the county from pursuing other remedies for violations of this ordinance or the license agreement. (Ord. 1997-17 § 3, 1997)

### 5.04.360

#### **Effect upon existing licenses.**

It is the intent of this chapter that all licenses in force at the time of enactment of the ordinance codified in this chapter shall remain valid for the full term thereof, subject to the following conditions:

A. Each licensee holding such a license shall, within a period of one hundred eighty (180) days following the enactment of the ordinance codified in this chapter, execute a license agreement binding the licensee to conform to all provisions, requirements, and obligations of this chapter.

B. The license shall become valid immediately upon execution of the license agreement. (Ord 1997-17 § 3, 1997; Prior code § 19.12.040)

#### **EXHIBIT A**

#### **Legal Description of License Areas**

Note that the descriptions begin at the northwest corner of the license area and proceed in a clockwise direction. All incorporated jurisdictions within the areas as described below are also excluded from the license area.

License area "A" encompasses all of the unincorporated lands lying within the area bordered to the north by the Maricopa County line; to the east by the Tohono O'Odham Indian Reservation; to the south by the Organ Pipe Cactus National Monument; and to the west by the United States Air Force Bombing Range.

License area "B" encompasses all of the unincorporated lands lying within the area bordered to the north by the Pinal County line; to the east by the Coronado National Forest, the Saguaro National Park, and

the Cochise County line; to the south by the Santa Cruz County line, the Coronado National Forest, the Santa Rita Experimental Range and the Mexican Border; and to the west by the Tohono O'Odham Indian Reservation.

License area "C" encompasses all of the unincorporated lands lying within the area of the Coronado National Forest known as Summerhaven.

License area "D" encompasses all of the unincorporated lands lying within the area bordered to the north by the Pinal County line; to the east by the Graham County line and the Cochise County line; and to the south and west by the Coronado National Forest.

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**Questions and Comments may be directed to:**

Clerk of the Board of Supervisors

Administration Building

130 West Congress, 5th Floor

Tucson, Arizona 85701

Telephone (520) 740-8449

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## RIGHT-OF-WAY FEES

1. Pima County requirements are not imposing unreasonable barriers to competition. Pima County preserves the authority to manage the public right-of-way.
2. The value of the right-of-way space occupied by utilities is substantial.
3. Utility uses of right-of-way impose significant ongoing costs on Pima County.
4. Charge utilities equally (not the same) – competitively neutral basis and non-discriminatory basis.
5. Level playing field based on usage/non-exclusive.
6. In-kind services provided by the utility to the County reduce the fee. Value of the services to be determined.

UTILITY FEES & TAXES PAID TO PIMA COUNTY

1. Permit/Inspection Fees
2. Repair costs
3. Relocation Costs
4. Application Fees
5. Regional Transportation Tax of One-half percent
6. Property Taxes
7. Planning and Zoning Fees
8. Linear Foot fees paid by Long Distance Companies \$.933 per foot
9. Competitive Local Exchange Carrier fees of \$20,000 per year plus in kind service of four dark fibers.
10. Cell Towers \$1,000 per month per site or \$500 per month for co-location.
11. Cable Communications – 5% of gross revenues plus in-kind PEG channels.

## **Linear Foot Charge vs. Percentage Fee For the Use of the Right-of-Way**

### Percentage Fee

1. Increases and decreases with the economy and gross revenues of the utility
2. Looks like a tax
3. Easy to collect-needs to be audited for gross revenue data
4. Does not have to be adjusted annually
5. Usually charged by cities and towns for utilities
6. Fair and equal, easy to understand and is simple
7. Easier for utilities to pass through to customers
8. Can be used by Charter Counties
9. Can use the Model Cities Code

### Linear Foot Charge

1. Difficult for utilities with large infrastructure but low revenues. Companies just started out. Can be adjusted from a flat amount to a linear foot charge as the company grows.
2. Fee can be adjusted for inflation or costs. Fee is flexible for usage and cost.
3. Fee looks like a fee based on costs rather than an arbitrary percentage.
4. Can be fair and equally based on usage.
5. Revenues could be less than a percentage of gross revenues.
6. Can be easily adjusted for in-kind services.
7. Needs to be periodically audited for new usage and annexation.
8. Difficult to add to customers' bills and for the customer to understand.
9. Should meet legal requirements for a fee.

## COST COMPONENTS

Land – Use an average width estimate of 40 feet

1. Value of Land – Methods
  - a. Book Value – purchase price, debt service on existing land debt.
  - b. Across or “At the Fence” Value (ATF) is the book value plus improvements.
  - c. Comparable Transaction Valuation – Market value – comparable transaction valuation looks in the marketplace and uses sales and transfers of similar assets to establish a value for the property in question.
  - d. Across the Fence value plus a corridor enhancement factor. A factor to account for the “connectivity nature of right-of-way.” This multiplier accounts for the transactional cost savings realized by the right-of-way user not having to negotiate rights-of-way with each abutting landowner and the value by the nature of the two points the right-of-way connects. The multiplier is between 2-6.
  - e. Rental Value – converted land values to annual rental values by applying a ten percent return factor and take an easement factor of 70-100% of market value.
2. Development Costs of the right-of-way. Capital improvements, Real Property.
3. Right-of-way monitoring and oversight activities, including franchise management, related legal costs, transportation systems, transportation engineering, traffic engineering, transportation CIP staff, and technical services.
4. Maintenance of the existing right-of-way – maintenance operations.
5. Costs due to degradation of streets from utility costs.
6. Lost tax revenue for property held for potential utility use.
7. Administrative/management costs, such as permitting, map inventory and updating, and GIS.
8. Overhead – County Administrator’s Office, Board of Supervisors, County Clerk, etc.
9. Disruption Costs
10. Repair Costs

### Number of Linear feet of right-of-way

	# of Lanes	Miles	Feet per Mile	# of total Feet	ROW Road Width*	Percentage ROW	ROW Feet
County Maintained roads	2 lane	2101.3	5280	11,094,864	12' of 40'	30%	3,328,459
County Maintained roads	4 lanes	56.5	5280	298,320	12' of 60'	20%	59,664
County Maintained roads	6 lanes	5	5280	26,400	12' of 80'	15%	3,960
Includes 278.7 miles are dirt roads							
* See TeleCommUnity Report - Valuation of Public right of way				Total Feet		Total ROW Feet	3,392,083
						Percentage ROW	30%

**Pima County Linear Foot Fee**  
**Fiscal Year 2006-2007**

	Operating Cost	ROW Percentage	ROW Cost to Utilities	ROW Cost per Linear Foot 3,392,083
Street and Highway Revenue Debt Service	\$ 18,057,251	5.0%	\$ 902,863	\$ 0.27
Management Administration ( Director's Office and Support SVCS.)	10,098,301	5.0%	504,915	0.15
Transportation Systems (Systems, Operations and Maintenance)	35,516,931	5.0%	1,775,847	0.52
Transportation Engineering			-	
Field Engineering			-	
Maintenance Operations			-	
Traffic Engineering			-	
Transportation CIP	1,721,839	5.0%	86,092	0.03
Real Property			-	
Technical Services	449,622	30.0%	134,887	0.04
<b>Total</b>	<b>\$ 65,843,944</b>		<b>\$ 3,404,603</b>	<b>1.00</b>
<b>Other Costs</b>				
Degradation due to utilities				
Lost tax revenue				
Overhead				
Disruption costs				
Repair Costs				

**TAB 4**

**COST STUDIES**

1. Recovery Costs by Municipalities March 1998  
Study Commissioned by the Texas Municipal League
2. Public Right of Way Cost Recovery Plan  
Mid-American Regional Council May 1998
3. TelecommUnity – Alliance for a Communications Bill of Rights  
Valuation of the Public Rights of Way Asset
4. Pima County – Competitive Local Exchange Carrier (CLEC’s) Fee Schedule  
Analysis – FY 2004-05
5. National Telecommunications and Information Administration  
Comments of Qwest Communications International Inc. on November 14, 2001  
concerning carriers’ experience with access to local rights-of-way and whether, in  
that regard, there is a need for federal government involvement.
6. Rights of Way laws by State – 2003

**[TAB 4]**

Attachments (Only in .pdf):

- Study of Utility Access to City-Owned Right-of-Way article by NATOA Journal of Municipal Telecommunications Policy - Summer 2000.
- Public ROW Cost Recovery Plan, Mid-America Regional Council – May 1998
- Tele Comm Unity – Valuation of Public Rights-of-Way Asset
- National Telecommunications and Information Administration, Washington, DC 20230, Docket 011109273-1273-01 – December 19, 2001
- NTIA: Rights of way Laws by State (last updated: May 21, 2003)
-

# study of utility access to city-owned right-of-way

## Issues Concerning Existing Access Agreements and Recovery Costs by Municipalities March 1998

**Editor's Introduction:** *Occasionally we hear of a piece of work that has been done which may be of general interest to those not directly affected by the outcome. The following is the Executive Summary of a Study commissioned by the Texas Municipal League, reprinted here with permission of the League.*

**T**he current activity of the Legislative Committee on Municipal Franchise Agreements with Telecommunications Utilities (Committee) provided the impetus for this study.<sup>1</sup> Cities represented by the Texas Municipal League (TML) sought to provide empirical information to the Committee regarding:

- Whether current municipal agreements permit competition among utility services requiring access



**EXECUTIVE SUMMARY**

to the city-owned rights-of-way (ROW); and whether municipalities are reasonably compensated for such access.

There are approximately 1,200 incorporated Texas cities. The study is based on a judgment sample; twenty (20) cities were selected to achieve a reasonable cross-section in terms of:<sup>1</sup>

- Population
- Geographic location
- Service providers
- Recent controversies involving right-of-way use.

The study addresses city franchising practices and costs related to six types of utilities that use city rights-of-way:<sup>2</sup>

- Telecommunications
- Cable television
- Electric
- Natural gas
- Water
- Sewer

The selected cities received a sixty-five page survey.<sup>3</sup> Not all of the selected cities were able to respond: fifteen returned fully or partly completed surveys to us.<sup>4</sup> The responding cities assigned appropriate personnel to complete each survey section. We conducted follow-up interviews with selected city employees where appropriate to obtain clarifications.<sup>5</sup> We also interviewed select utility experts and reviewed relevant previous studies.

Our principal conclusions are as follows:

- City franchising requirements are not imposing unreasonable barriers to competition.
- The value of the right-of-way space occupied by utilities is substantial.
- Utility uses of right-of-way also impose significant ongoing costs on cities.

- The compensation that cities now receive from utilities for right-of-way use is notably less than the rental value plus related costs.
- A shift to a statewide “cost-based” method of compensating cities for right-of-way use would be problematic in a number of respects.

Each of these conclusions is discussed briefly below.

## ■ City franchising requirements are not imposing unreasonable barriers to competition.

All of the survey respondents use a “franchising” process as the primary means for authorizing access to the city-owned ROW.<sup>6</sup> The details of the processes vary by city and by utility type. However, based on the survey results overall, we conclude that existing franchise requirements do not present unreasonable barriers to market entry by utilities.<sup>6</sup> For example, we found that:

- By law, cities grant non-exclusive use of the right-of-way when they grant franchises.
- Typically there are no city application fees for ROW access. Where there are such fees, they are generally nominal (ranging from one-time charges of \$850 to \$7,500) in relation to the size of the utility business.<sup>7</sup>
- The time frames for processing utility applications generally are not excessive (for example, the majority of the time frames reported were three months or less).<sup>10</sup>
- All of the responding cities reported that they have never denied access to a utility seeking to serve the community.

Most utilities pay the respondent cities a percentage of gross receipts. Several more recent telecommunications agreements apply other methods (flat rate, per linear foot, or access line basis). Variations in compensation methods are, in large part, due to agreements

<sup>1</sup> Established pursuant to an amendment that follows *Texas Utility Code* § 54.204 to study the extent to which municipal practices are consistent with Texas’ telecommunications policies seeking to promote competition.

<sup>2</sup> See the map on the following page. [not printed herein] The sample is not *random*. Therefore, while the data permit broad estimations of costs and broad conclusions about franchising, costs, and compensation, the specific quantified findings are not intended to portray precision or norms applicable statewide or to cities not included in the sample.

<sup>3</sup> The analyses presented in the study generally treat all of these utility types as a bundled aggregate. No separate conclusions are developed for particular utilities within this group. Both municipally owned and privately owned utilities were included (for example, water and sewer are typically municipal utilities). Special adjustments to the data were made where appropriate to ensure that municipal ownership among the survey cities did not bias conclusions.

<sup>4</sup> We developed the survey questions based on initial on-site interviews and data review at three representative test sites (chosen from the sample).

<sup>5</sup> That some cities did not respond is not surprising given the length and complexity of the survey (even the 65 pages reflected compromises to achieve brevity by sacrificing the level of detail). It illustrates one of the principal difficulties that would arise if information were needed on an ongoing basis to support a system to compensate cities based on costs. Those that did respond are noted on the map on the previous page by means of an asterisk.

<sup>6</sup> While we followed-up in many cases, the reliability of the results is dependent on the information the cities provided. We did not audit city records to test the reliability of the survey responses.

<sup>7</sup> Some respondents indicated that other processes are sometimes used, but primarily for site-specific location of utilities within the ROW and not as the general method by which utilities are given broad access to city ROW.

<sup>8</sup> This does not mean that there are *no* barriers. Economic barriers, federal regulations, or many other factors distinct from local government requirements could constrain entry.

<sup>9</sup> The application information sought by some larger cities may appear lengthy, but it is generally restricted to information that should be kept in the normal course of utility business.

<sup>10</sup> Certain cities have shortened the time as more applications have been received in recent years for telecommunications services, for example.

mutually negotiated between utilities and cities,

## ■ The value of the right-of-way space occupied by utilities is substantial.

The land that utility systems occupy is a major component of cost relevant to this study. Just as it would be unreasonable to expect a landlord to provide free space to tenants and charge only for ongoing maintenance and repair costs, it is unreasonable, even if compensation is to be "cost-based," that cities should not be compensated for the value of the right-of-way space used by utilities.

We valued the land that utilities use by applying survey information to estimate land market values and a space allocation factor to distribute the value between utility and other municipal uses.<sup>11</sup> We assumed that utilities as a group use ten feet of width in ROW space (allowing for appropriate clearances) and that utility system distance is the same as the street center line distance in the city. Based on the data we reviewed, we believe that these assumptions are conservative; utility systems may actually use more space than we assumed.<sup>12</sup>

We converted land values to annual rental values by applying a ten percent return factor.<sup>13</sup> To apply further caution in our assumptions, we also tested the valuations assuming that rent for the space could possibly be discounted so that the easement value of the land could vary between 70 and 100 percent of market value. The results are shown in the following chart; the values are expressed as annual rents divided by the street center line feet, or "dollars per street center line foot" in order to allow a basis for comparisons

among city groups. Not surprisingly, the land values were higher in the larger cities.

The grouped estimates are simple averages unless otherwise indicated. Both a simple average and a weighted average are shown for the survey group as a whole; the simple average counts each city equally, and the weighted average is proportional to the street miles in each city.

## ■ Utility uses of right-of-way also impose significant ongoing costs on cities.

Some of the other costs that cities incur associated with utility uses include:

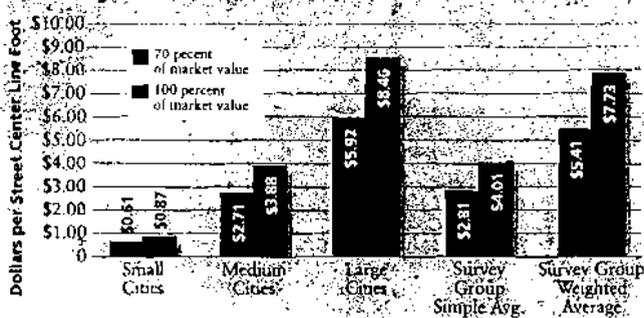
- Land acquisition transaction costs and costs for development of the ROW (in addition to the cost of the land itself)
- ROW monitoring and oversight activities, including franchise management, related legal costs, permitting activities, barricading inspections, and others
- Maintenance of the existing ROW
- Costs due to degradation of streets from utility cuts
- Lost tax revenue for the property held for potential utility use

We distributed standardized "Cost Report Forms" in the survey and asked cities to provide the best cost data available concerning particular types of activities.<sup>14</sup> We sought data on salaries, benefits, contracted services, material and supplies, intra-departmental overhead, city-wide overhead, and annual capital expenditures. In most instances, the respondents did not maintain precise information concerning the types of costs in question. Rather, the respondents had to estimate the costs (for example, by either applying ratios to other cost data or by using information from knowledgeable employees regarding time spent on particular activities). We relied primarily on the city-provided data for the first three categories shown above. We developed appropriate allocation factors for each category to assign costs to utility uses.

For the fourth category, street degradation, we relied on a detailed engineering study performed previously for the city of Austin, and extrapolated the findings to other cities. For the fifth category, lost tax revenue, we applied city tax rates and assumptions consistent with our analysis of space use.<sup>15</sup>

The chart on the following page shows the findings. As with the valuation analyses, the costs are shown on

**Rental Value of Right-of-Way Space Used by Utilities (Annual)**



<sup>11</sup> Estimates of land market values were developed based on broad geographic areas within each jurisdiction and "comparable sales" information provided by the cities and Central Appraisal Districts for the respective city areas. Cities also supplied data on ROW characteristics, such as typical lane, parkway, alley and easement widths, and we applied this information to help develop the allocation factor.

<sup>12</sup> See Appendix A. [not printed herein]

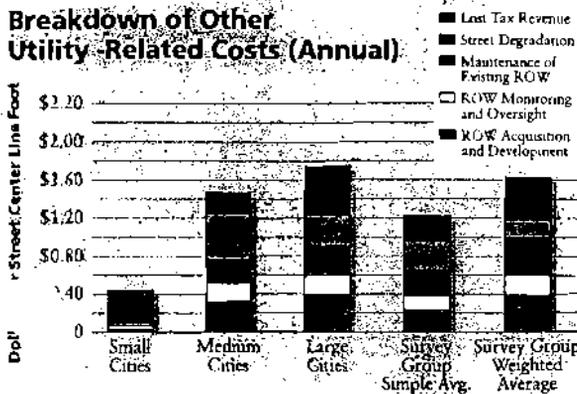
<sup>13</sup> One way to assess the reasonableness of this assumption is to examine what utilities have agreed to pay where rental arrangements between a city and a utility were freely negotiated. "Private license" agreement information provided supports the reasonableness of this assumption. Ten percent also approximates the twenty-year average of municipal bond rates.

<sup>14</sup> The survey included nine cost sections based on the types of costs incurred at the three test site.

<sup>15</sup> We assumed, theoretically, that at least ten feet (width) of ROW property (outside the curb) could be abandoned to the adjacent property holder were it not held for possible utility placements. Because we are using only a ten-foot ROW requirement for utility placement (see Appendix A) and because cities are required to obtain and make available considerably more ROW, the cities have opportunity costs on that portion not being used. We computed this opportunity cost by applying the property tax rate times the estimated value of the ten feet that cannot be abandoned. This estimate does not duplicate the land value we assigned because the ten feet assumed to be held for potential use is not the same ten feet assumed to be currently occupied.

If truly cost-based, including space use, compensation to cities may increase. While this outcome may be appealing from a municipal government perspective, it would not promote competitive market entry.

a "per street center line foot" basis for each of the city groupings. Generally, the medium and large cities incurred higher costs. This may be explained, in part, by the fact that the medium and large cities have more providers requiring ROW access and more developed systems to monitor provider activities within the ROW.

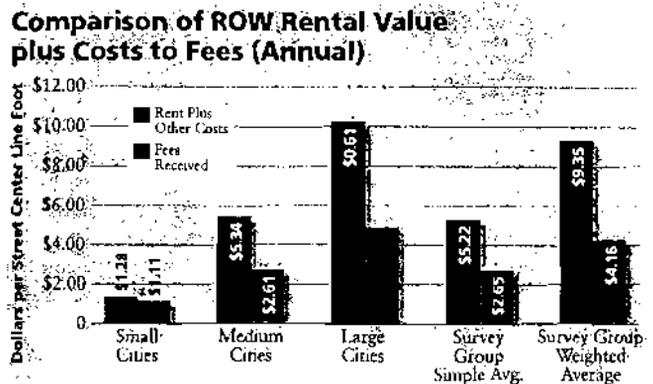


The compensation that cities now receive from utilities for right-of-way use is notably less than the rental value plus related costs.

The survey respondents provided the average annual franchise fee payments received from all utilities. Where applicable, we included receipts from city-owned utility operations.<sup>16</sup> In addition, because some cities charge additional fees for particular types of utility activities, we asked respondents to provide the annual amount of such fees.<sup>17</sup>

We compared the compensation received to the estimated utility-related costs. The results appear in the following chart. Each grouping in the chart represents the total of the land rent component and the other ongoing costs, and then shows the total of the fees received from

utilities. The chart reflects the land rent at 100 percent of market value, and shows that the fees cities now receive clearly fall well short of the related costs. Although the gap shrinks somewhat if the land rents are adjusted to 70 percent of market value, the same general conclusion still applies.<sup>18</sup> Again, for purposes of comparison, the results are summarized by city grouping on a "per street center line foot" basis.



A shift to a statewide "cost-based"<sup>19</sup> method of compensating cities for right-of-way use would be problematic in a number of respects.

The study findings have several implications relevant to proposed changes in how cities are compensated for right-of-way use; for example:

- If truly cost-based, including space use, compensation to cities may increase. While this outcome may be appealing from a municipal government perspective, it would not promote competitive market entry.
- A cost-based compensation method would likely be very difficult and costly to administer. The required data are typically not readily available and there

<sup>16</sup> In only three instances did the respondents indicate that there were no payments to the general fund by city-owned utilities for ROW use.

<sup>17</sup> For example, some of the respondents charge a fee for receipt of a construction permit to conduct activities within the ROW. For a more detailed description of the types of fees that are being charged in some locations, refer to Section V of the study.

<sup>18</sup> In fact, the same general conclusions are drawn for the medium and large cities with a 50 percent of market value computation. Lowering the percentage of market value reflects a more conservative combination of a potential discount related to easement, and/or a lower return on investment.

<sup>19</sup> Cost-based refers to a combination of rental value and other related costs incurred by cities.

<sup>20</sup> City accounting systems do not capture cost information in a manner compatible with all of the cost categories that would be appropriate. The ready availability of detailed utility space use information is limited at the city level. For these and other reasons, various special analyses would be required to develop even broad estimates for any given city. Even then, when there are multiple users of the same resource, cost issues are often contentious. A cost-based system would likely give rise to continuous disputes.

A statewide cost-based method of compensation to cities is simply not needed if promoting more utility competition is a primary goal. The compensation that cities are now entitled to receive is already well below the true costs of the city resources the utilities use in aggregate, and thus favors market entry.

are several conceptual issues (for example, allocation methods) that would be difficult to resolve.<sup>20</sup>

- There could be large and possibly undesirable transitional impacts in shifting to a new system. For example, while most medium and large size cities would likely be "winners" in a truly cost-based system, at least some small cities could possibly be "losers." Because small city revenues are already limited, a drop in compensation from utilities could have a high budgetary impact on a percentage basis.

A statewide cost-based method of compensation to cities is simply not needed if promoting more utility competition is a primary goal.<sup>21</sup> The compensation that cities are now entitled to receive is already well below

the true costs of the city resources the utilities use in aggregate, and thus favors market entry. If city compensation were reduced further (to exclude any compensation for the value of the land resource, for example) it would possibly create windfall benefits for certain utilities and their major customers without any meaningful promotion of competitive entry. ■

*Our thanks to Mr. Monte Akers, Director, Legal Services, The Texas Municipal League. The Texas Municipal League is located at 1821 Rutherford Lane, Suite 400, Austin, TX 78754-5128; (512) 719-6300; website: [www.tml.org](http://www.tml.org). This study was prepared for TML by C2 Consulting Services, Inc., Public Knowledge Inc and KFA Services.*

<sup>21</sup> This observation does not preclude the possibility that *specific cities* could develop cost-based methods that are competitively neutral. A *statewide* approach raises more concerns than a *city-specific* approach because of the difficulties in accommodating the wide variations among cities in land values, costs, and data availability.

*Public Right-of-Way Cost Recovery Plan  
Mid-America Regional Council*

*May 1998*

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- It is recommended that this public right-of-way cost recovery plan include degradation, disruption, repair, and administrative/management cost recovery methods. It is also recommended that public right-of-way costs be allocated to the service providers that intrude upon the public right-of-way and to the consumers of those services.
- Telecommunications deregulation has increased interest in the use of public rights-of-way.
- The public demands that cities provide cost-efficient management of public rights-of-way, and Kansas and Missouri statutes allow municipalities to manage their local public rights-of-way.
- Kansas and Missouri case law appears to indicate that cities may recover costs for the use of public rights-of-way, provided that there is a direct cost to the city.
- Costs incurred due to degradation (loss of road life due to intrusion into the road surface) can be recaptured through a recommended cost recovery method that includes various street construction cost and age components. In addition, degradation costs should be recaptured when intrusion damages and/or depreciates trees, sidewalks, boulevard/landscaped areas, other infrastructure, or amenities located within the public right-of-way.
- It is recommended that repair costs due to intrusions into the public right-of-way should be the responsibility of the intruding party.
- A grace period for completing work within the public right-of-way is deemed appropriate; however, in order to minimize disruption to the local public, it may be necessary for cities to use one or more disruption cost recovery methods as incentive for utility companies to complete their work in a timely manner.
- It is appropriate and reasonable to recover administrative and management costs incurred by municipalities for the management of public rights-of-way. In order for municipalities to recover these costs, they must be able to accurately identify the unique service components (both labor and materials) which their jurisdiction provides in the completion of these duties.
- A utility coordination plan is recommended as an effective way to minimize and/or avoid management costs associated with future public rights-of-way use.
- Franchise, consumption, and license fees are also legitimate fee mechanisms for cities to impose on private utility companies for the use and occupancy of the public right-of-way.

## Background

In April 1996, President Clinton signed the Telecommunications Deregulation Act of 1996 which significantly increased the interest in the use of the public right-of-way. The Act effectively eliminated monopolistic protections previously afforded to telecommunications providers and has now created unprecedented competition to provide quickly changing telecommunication services. As a result of the Act, cities across the country have seen a rapidly increasing demand for space within the public right-of-way, which has resulted in greater and more frequent construction and disruption of the public right-of-way. In some cases, this has strained the physical capacity of the public right-of-way to meet the needs of all potential users.

Local governments, in order to fulfill their fiduciary and stewardship responsibilities to the public, must now find ways to effectively manage this public asset. Plans must be developed for the orderly use of the public right-of-way, as well as creating methods for identifying and recovering public costs involved with this process.

While the Telecommunications Act of 1996 expands the possibilities for competition and increased use of the public right-of-way, it does not eliminate the responsibility and ability of a local government to manage the public right-of-way or receive compensation from users for its use. The Act specifically states that compensation must be "fair and reasonable," and it must also be "competitively neutral and nondiscriminatory."

The many challenges facing cities relating to new technology are succinctly addressed in the accompanying excerpt taken from *The Municipal Year Book 1997* which is published by the International City/County Management Association.

### Legal Issues - Generally

Cities in the States of Missouri and Kansas face similar right-of-way cost recovery issues, and the laws governing a city's authority to manage public rights-of-way are also similar. However, there are distinct differences relating to franchise, consumption, and license fee laws which are discussed in more detail in Section IV. The cost recovery options presented in this report have been developed for use in either state.

Missouri and Kansas law allows cities to manage the public right-of-way including the authority to regulate the placement of infrastructure. Furthermore, cities in each state have the authority to recover costs associated with a service provider (i.e., utility company) locating their facilities within the public right-of-way whether or not local inhabitants receive a direct benefit. These costs include, but are not limited to, degradation, repair, disruption, and administration/management. Each city should have its legal counsel evaluate all public right-of-way cost recovery options, including potential issues of equity and/or enforceability, prior to implementing these cost recovery strategies.

Exhibits 1 and 2 are legal briefs for the States of Kansas and Missouri, respectively. A special thanks to William Geary, Assistant City Attorney with the City of Kansas City, Missouri, and Eric Arner and Beccy Swanwick, Assistant City Attorneys with the City of Lenexa, Kansas, for their work in preparing the legal briefs. Together, they have addressed the status of the law in the States of Missouri and Kansas relating to cities' ability to manage the public right-of-way.

## Purpose

The Mid-America Regional Council, on behalf of the cities listed in Figure 1, and at the directive of the Manager's Roundtable, engaged Springsted Incorporated to prepare a plan with the purpose of developing appropriate alternative cost recovery methods for degradation, repair, disruption, and administrative/management costs associated with the use of the public right-of-way.

**Figure 1**

Cities Participating in the Mid-America Regional Council  
Public Right-of-Way Cost Recovery Plan

City of Belton, Missouri	City of Lenexa, Kansas
City of Blue Springs, Missouri	City of Liberty, Missouri
City of Grandview, Missouri	City of Overland Park, Kansas
City of Independence, Missouri	City of Prairie Village, Kansas
City of Kansas City, Missouri	City of Shawnee, Kansas
City of Leawood, Kansas	Wyandotte County/Kansas City, Kansas
City of Lee's Summit, Missouri	

The cost recovery methods are to be designed with the primary objective of being reasonable and defensible. Definitions of the major cost components to be studied are as follows:

- **Degradation** is defined as depreciation to the roadway, trees, sidewalks, boulevard/landscaped areas, other infrastructure, or amenities that result from intrusion into the public right-of-way.
- **Repair** is associated with the actual intrusion into the public right-of-way.
- **Disruption Costs** are caused by the interruption of the normal use of the public right-of-way.
- **Administrative/Management Costs** relate to those costs associated with a public right-of-way project such as permitting and supervision, as well as inventory, map updating, location, and general inquires related to public right-of-way intrusion.

The cost recovery study prepared for the Mid-America Regional Council was developed as a practical tool for member cities to utilize for measuring and recovering their costs associated with the use of the public right-of-way. The cost recovery methods presented are flexible in nature so that member cities will be able to utilize information that is specific to their community while still maintaining the consistency of the overall cost recovery plan.

All municipalities participating in the study recognize that intrusion into, and use of, the public right-of-way will continue to be a fact of life. Therefore, while the plan attempts to assist communities in the process of recovering associated costs, it also encourages those doing repairs or installations in the public right-of-way to complete their work in as timely a manner as possible. This allows for the earliest restoration of the normal use of the public right-of-way in order to avoid prolonged inconvenience to the residents of a community.

## Study Approach

Springsted Incorporated collected and reviewed appropriate available public right-of-way cost data. This study component included processing and analyzing information relating to degradation, repair, disruption, and administrative/management costs associated with public right-of-way intrusion and use by private utilities.

Local, regional, and national data collected from reports and studies was examined. This data included individual city studies; regional, state, and national association research; communication and transportation association studies; and state and national legislation.

Interviews and surveys were used to ascertain information from a variety of professionals including administrators, engineers, lawyers, and other staff or political leaders from the Mid-America Regional Council and its member cities. The Mid-America Regional Council established a steering committee ("Committee") that was instrumental in developing the results contained in this plan. Exhibit 3 is a survey response synopsis of participating members in the Mid-America Regional Council public right-of-way cost recovery plan. This synopsis was developed using the survey results provided by each community that participated in this study. Springsted has retained the original survey results and has provided copies to the Mid-America Regional Council and cities participating in this study. In addition, information was obtained from several sources, including the Kansas Corporation Commission, Missouri Public Service Commission, Kansas and Missouri Departments of Transportation, United States Department of Transportation, and others knowledgeable in right-of-way management.

Right-of-Way cost studies that contained fees relating to degradation, restoration, user, franchise, and other fees were examined, including those studies referenced in Exhibit 4. Each study recognizes the need for cities to modernize their approach to managing and maintaining the public right-of-way. The studies indicate that utility cuts into the public right-of-way significantly reduce the life of the surface of the public right-of-way. Cities need to consider the economic realities of increased demand for entry into the public right-of-way. Furthermore, cities must address the increased costs and expenses related to maintaining the public right-of-way.

After examining the studies, it is clear there is a recognition that additional revenues need to be raised by cities to carry out their responsibilities as stewards of the public right-of-way. Cities are now beginning to address the question of how public right-of-way costs should be allocated among users and service providers. They must also determine what service providers or public right-of-way users should pay for using, causing premature depreciation of, and/or disrupting the public right-of-way.

## Assumptions

Cities have been responsible for maintaining safe and efficient use of the public right-of-way including the space above and below the street surface. New issues have arisen including an increasing demand for placing utilities within the public right-of-way. Greater entry into the public right-of-way increases the frequency and cost of reconstruction, maintenance, and improvement activities, and causes higher traffic concentrations and disruptions.

The structural integrity and quality of the street surface and subsurface of the public right-of-way must be ensured. Trenching degrades the value of the resource, reduces the quality of the street, shortens the life of the street, trees, sidewalks, etc., and increases costs to property taxpayers. Furthermore, trenching can cause disruptions and congestion, as well as increased administrative/management costs for cities.

In some cases, the demand threatens to exceed the limited available space in the public right-of-way. Uncontrolled use of the public right-of-way for utility placement increases construction and installation costs of future users and reduces availability of limited space. The space above and beneath the surface of the public right-of-way is a limited resource which has value to public investor-owned utilities, as well as to other for-profit service providers.

Public right-of-way management must minimize negative disruptions of economic and transportation activities, as well as any adverse environmental impact of public right-of-way work zones. The public is entitled to timely and cost-effective completion of preventive maintenance, replacement, or renovation paid for by the intruding party.

Consequently, cities must have authority to protect public health, safety, and convenience, and to provide safe and efficient public right-of-way use for residents, business, and commerce. In other words, cities must continue to be good stewards of the public right-of-way. Users of the public right-of-way must pay to cover costs such as degradation, repair, disruption, and administrative/management activities such as planning, record-keeping, issuance of permits, enforcement, and inspections of right-of-way construction.

## Right-of-Way Costs—Generally

Many different costs are legitimately part of maintaining, repairing, replacing, and expanding the public right-of-way. These expenses include degradation, disruption, repair, and administrative/management costs. Proper management of the public right-of-way will ensure citizens' ability to secure the necessary and discretionary services they need and want. Furthermore, increased competition and increased demand require that communities respond to the pressures of current and potential providers developing new needs for the public right-of-way and for newly-developed services. However, the costs and expenses incurred by local governments are significant and may seriously impact the budgets of many cities.

The cost recovery methods contained in this study focus on subsurface utilities within the paved area of the public right-of-way. However, the Committee recognized that there is significant work that occurs within the public right-of-way but outside the paved area. Boulevards and sidewalks are examples of areas within the public right-of-way that, like streets, require proper management by cities to ensure that the functional and aesthetic characteristics of these resources are maintained to established standards. The Committee recognized that the cost of enforcement activities associated with maintaining boulevards and sidewalks is a significant issue and that it is appropriate to use the cost recovery methods in this plan including those relating to repair, administration/management, and disruption.

In addition to infrastructure located beneath the street, overhead utilities also present public right-of-way costs for local jurisdictions. Overhead utilities typically do not degrade the public right-of-way as do subsurface utilities; however, there are administrative/management and disruption costs associated with overhead utilities. Tree trimming, for example, may be a public right-of-way management cost if a city is required to maintain boulevard trees that come into contact with power lines. These costs are recognized, in part, in the following subsections relating to administrative/management and disruption costs.

Although this study was designed to address public right-of-way cost recovery options, franchise, consumption, and license fees are also public right-of-way issues. These are legitimate fee mechanisms for cities to impose on private companies for the use and occupancy of the public right-of-way. Franchise fees involve granting non-exclusive rights to private utility companies to locate and maintain facilities within the public right-of-way. Franchise fees are commonly based on a percent of gross operating income of a utility company. Consumption fees relate to the value of the public right-of-way consumed by service providers during the construction or maintenance of facilities. Renting the public right-of-way on a per square foot basis is one example of a consumption fee. The Committee determined that consumption fees should not be pursued at this time. More and more cities are considering the imposition of license fees for those companies that occupy the public right-of-way but do not provide direct service to local residents. A customary method for charging license fees is on a per lineal foot basis. This license fee concept is similar to private utility companies that lease space on their equipment or infrastructure to other private utility companies.

Kansas and Missouri cities can collect a franchise fee from a service provider provided that local consumers or recipients receive a direct benefit from those services. A city cannot charge a franchise fee to a telecommunications company that simply passes through the city without providing a service to local inhabitants. The "Kansas Franchise Statute" (K.S.A. 12-2001 *et. seq.*) permits cities to grant a franchise to service providers that occupy the public right-of-way as long as the franchise is non-exclusive in nature and does not exceed a 20-year term. For Missouri cities, the ability to increase franchise, consumption, and/or license fees is subject to

the "Hancock Amendment" (Article X §16 - §24, Missouri Constitution). Basically, the Hancock Amendment requires voter approval before a city can expand the base of a tax or fee. The Committee determined that franchise, consumption, and license fees should not be part of the final recommendations relating to this cost recovery plan.

## Degradation Costs

Degradation is defined as depreciation to the roadway, trees, sidewalks, boulevard/landscaped areas, other infrastructure, or amenities that result from intrusion into the public right-of-way.

Current political policy and technology encourage competitors to demand greater use of the public right-of-way. Increase in demand for public right-of-way space will encourage more intrusions, which in turn will cause more rapid deterioration and depreciation of the public right-of-way and increased costs for cities. Increased costs must then be paid for either by taxpayers or public right-of-way users and their consumers.

Several public right-of-way cost recovery studies have concluded that when projects intrude into the surface of a street, there is a cost. The cost, which, depending upon the number of cuts in the street surface or depending on the size of the hole or trench, creates a definable reduction in the remaining life of the street. Studies listed in Exhibit 4 found significant reduction of life for both cement and asphalt road surfaces. These studies concluded street life reduction is especially serious in the early years of a newly-constructed or reconstructed street. The studies also concluded that when more than three cuts occurred in a street surface, or if only 10% of the street surface was disrupted, the normal life expectancy of that surface was measurably reduced. These studies show that intrusion into the public right-of-way causes a "degradation" which will shorten its useful life and require early replacement or repair and more maintenance.

The recommended degradation cost recovery method is shown below. This cost recovery method is intended for cities that have data relating to street construction, overlay, and sealcoat costs. The advantage of this cost recovery method is that cities can use costs that are unique to their community.

### Recommended Degradation Cost Recovery Method

*Cost per Square Yard for Streets Overlays and Sealcoats X Depreciation Rate X  
Area of Influence*

Tables 1, 2, and 3 include suggested depreciation schedules for streets with 20-, 30- and 40-year design standards, respectively. Fifteen percent of the street value is retained in the last year of the design standard regardless of age. The different street ages could possibly reflect different street types and/or local standards. These schedules depict depreciation schedules for street construction, overlays, and sealcoats. Table 4 shows graphically the typical depreciation schedule for each of the three street design standards. The depreciation schedules were developed with input from the Committee and information obtained in a survey of cities participating in this study. Table 5 is an example of how this degradation cost recovery method

**Mid-America Regional Council  
Public Right of Way Cost Recovery Study**

Table 1

**Degradation Costs  
Recommended Cost Recovery Method (With 20-Year Street Design Standard)**

**Cost per Square Yard for Streets, Overlays and Sealcoats  
X Depreciation Rate X Area of Influence (1)**

**Depreciation Rates**

Street (2)			
Age	Rate	Age	Rate
0	100%	21	
1	99%	22	
2	98%	23	
3	97%	24	
4	96%	25	
5	95%	26	
6	90%	27	
7	84%	28	
8	79%	29	
9	74%	30	
10	68%	31	
11	63%	32	
12	58%	33	
13	52%	34	
14	47%	35	
15	42%	36	
16	36%	37	
17	31%	38	
18	26%	39	
19	20%	40	
20	15%		

Overlays	
Age	Rate
1	90%
2	80%
3	70%
4	60%
5	50%
6	40%
7	30%
8	20%
9	10%
10	0%

Sealcoats	
Age	Rate
1	80%
2	60%
3	40%
4	20%
5	0%

**Cost Per Square Yard (3)**

Type	Cost
Asphalt Street Reconstruction	\$45.00
Overlays	\$5.00
Sealcoats	\$1.10

- (1) Area of influence is equal to area of the cut plus 3.0 feet on each side (expressed in sq. yds.)
- (2) Depreciation rates are based on a 20-year street design standard.  
Depreciation for the first 5 years is 1.0% per year, followed by straight line depreciation less 15.0% for the remaining street design standard (15 years). Depreciation can occur at 1.0% per year after this time for up to 15 years or street reconstruction, whichever occurs first. This reflects the consensus of the Committee that streets retain some value beyond their design standard or expected street life.
- (3) Average cost estimates as determined by a survey of cities from the Mid-America Regional Council Public Right-of-Way Cost Recovery Study.

**Mid-America Regional Council  
Public Right of Way Cost Recovery Study**

**Table 2**

**Degradation Costs  
Recommended Cost Recovery Method (With 30-Year Street Design Standard)**

*Cost per Square Yard for Streets, Overlays and Sealcoats  
X Depreciation Rate X Area of Influence (1)*

**Depreciation Rates**

Street (2)			
Age	Rate	Age	Rate
0	100%	21	44%
1	99%	22	41%
2	98%	23	37%
3	97%	24	34%
4	96%	25	31%
5	95%	26	28%
6	92%	27	25%
7	89%	28	21%
8	85%	29	18%
9	82%	30	15%
10	79%	31	
11	76%	32	
12	73%	33	
13	69%	34	
14	66%	35	
15	63%	36	
16	60%	37	
17	57%	38	
18	53%	39	
19	50%	40	
20	47%		

Overlays	
Age	Rate
1	90%
2	80%
3	70%
4	60%
5	50%
6	40%
7	30%
8	20%
9	10%
10	0%

Sealcoats	
Age	Rate
1	80%
2	60%
3	40%
4	20%
5	0%

**Cost Per Square Yard (3)**

Type	Cost
Asphalt Street Reconstruction	\$45.00
Overlays	\$5.00
Sealcoats	\$1.10

- (1) Area of influence is equal to area of the cut plus 3.0 feet on each side (expressed in sq. yds.)
- (2) Depreciation rates are based on a 30-year street design standard. Depreciation for the first 5 years is 1.0% per year, followed by straight line depreciation less 15.0% for the remaining street design standard (25 years). Depreciation can occur at 1.0% per year after this time for up to 15 years or street reconstruction, whichever occurs first. This reflects the consensus of the Committee that streets retain some value beyond their design standard or expected street life.
- (3) Average cost estimates as determined by a survey of cities from the Mid-America Regional Council Public Right-of-Way Cost Recovery Study.

Mid-America Regional Council  
Public Right of Way Cost Recovery Study

Table 3

Degradation Costs  
Recommended Cost Recovery Method (With 40-Year Street Design Standard)

*Cost per Square Yard for Streets, Overlays and Sealcoats  
X Depreciation Rate X Area of Influence (1)*

Depreciation Rates

Street (2)			
Age	Rate	Age	Rate
0	100%	21	58%
1	99%	22	56%
2	98%	23	54%
3	97%	24	52%
4	96%	25	49%
5	95%	26	47%
6	93%	27	45%
7	90%	28	42%
8	88%	29	40%
9	86%	30	38%
10	84%	31	36%
11	81%	32	33%
12	79%	33	31%
13	77%	34	29%
14	74%	35	26%
15	72%	36	24%
16	70%	37	22%
17	68%	38	20%
18	65%	39	17%
19	63%	40	15%
20	61%		

Overlays	
Age	Rate
1	90%
2	80%
3	70%
4	60%
5	50%
6	40%
7	30%
8	20%
9	10%
10	0%

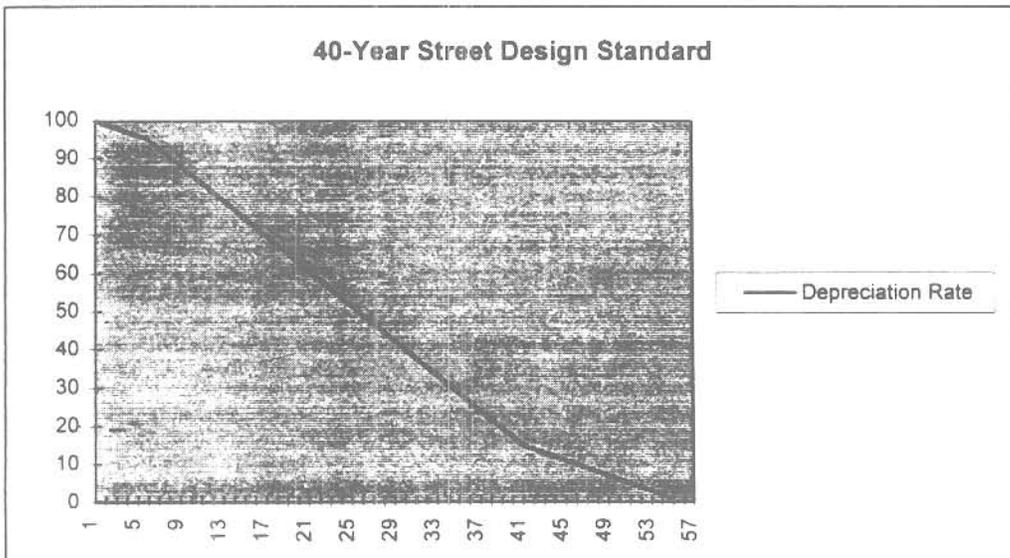
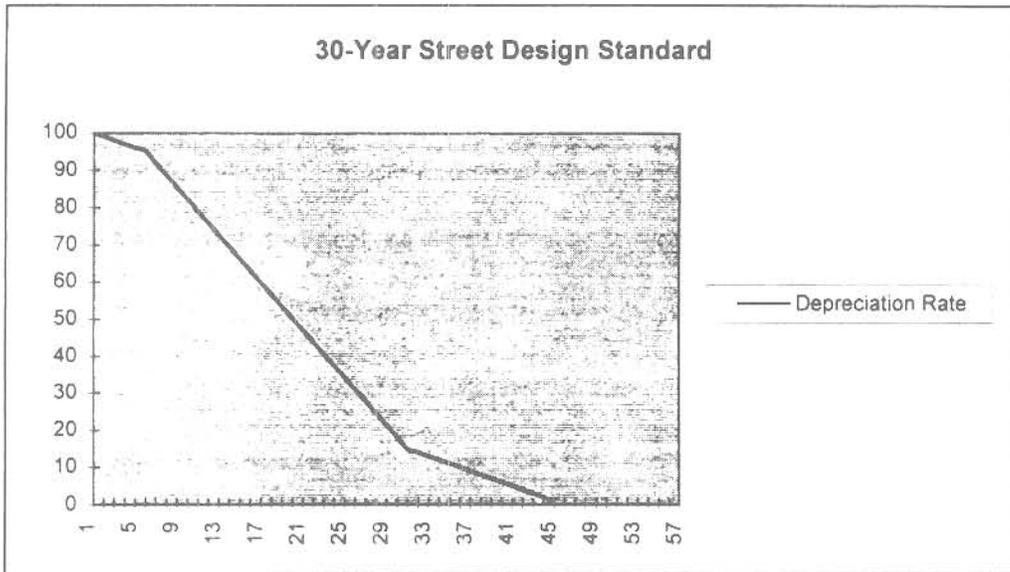
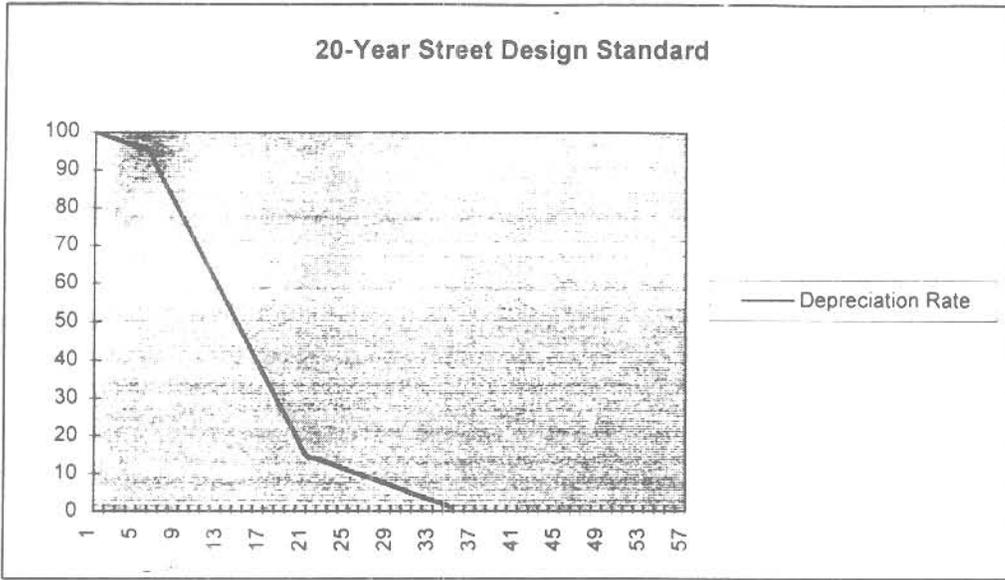
Sealcoats	
Age	Rate
1	80%
2	60%
3	40%
4	20%
5	0%

Cost Per Square Yard (3)

Type	Cost
Asphalt Street Reconstruction	\$45.00
Overlays	\$5.00
Sealcoats	\$1.10

- (1) Area of influence is equal to area of the cut plus 3.0 feet on each side (expressed in sq. yds.)
- (2) Depreciation rates are based on a 40-year street design standard.  
Depreciation for the first 5 years is 1.0% per year, followed by straight line depreciation less 15.0% for the remaining street design standard (35 years). Depreciation can occur at 1.0% per year after this time for up to 15 years or street reconstruction, whichever occurs first. This reflects the consensus of the Committee that streets retain some value beyond their design standard or expected street life.
- (3) Average cost estimates as determined by a survey of cities from the Mid-America Regional Council Public Right-of-Way Cost Recovery Study.

Table 4



**Mid-America Regional Council**  
**Public Right of Way Cost Recovery Study**

Table 5

**Degradation Costs**  
**Recommended Cost Recovery Method**

*Cost per Square Yard for Streets, Overlays and Sealcoats  
 X Depreciation Rate X Area of Influence (1)*

**Example**  
**Using 20-Year Street Design Standard**

Assumptions: Street is 16 years old  
 Overlay is 5 years old  
 Sealcoat is 1 year old  
 Area of cut = 3 feet x 3 feet  
 Area of influence = 9 feet x 9 feet = 81 square feet  
 = 9 square yards

	<u>Cost per Square Yard</u>	<u>Depreciation Rate</u>	<u>Area of Influence</u>	<u>Degradation Cost</u>
Street	\$45.00	36.00%	9.0	\$145.80
Overlay	\$5.00	50.00%	9.0	\$22.50
Sealcoat	\$1.10	80.00%	9.0	\$7.92
			Total Cost	\$176.22

is utilized to calculate a degradation fee using a street with a 20-year design standard that is 16 years old with a five-year overlay and one-year sealcoat. The cost recovery method allows cities to utilize their own unique cost information.

Two equally legitimate degradation cost recovery alternatives were discussed by the Committee and are presented in Exhibits 5 and 6. A third option that requires the intruding party to repair and provide ongoing maintenance for the area impacted by the street cut was not recommended by the Committee since implementation was not practical as compared to the other alternatives. These alternative degradation cost recovery methods are presented, but are not meant to be recommended. Each alternative is discussed in the following paragraphs.

The first alternative is contained in the 1997 Lee's Summit Street Cut Report (Exhibit 5) which was developed by the City of Lee's Summit, Missouri, using street deterioration information from studies conducted by Cincinnati, Ohio and Burlington, Vermont. Although this option was felt to be very fair and complete, the Committee did not recommend this option since it would be more difficult to explain and administer than the recommended option. In addition, a number of cities do not have the data on their streets, such as a paving condition index, that would be necessary to administer this approach.

The second degradation cost recovery alternative (Exhibit 6) which relies on averages for street construction was discussed by the Committee, but was not selected in order to preserve the ability of the cities to use their own cost data. This option uses life reduction estimates developed from studies done in Phoenix, Arizona and Anaheim, California. This cost recovery method relies on general assumptions taken from existing data relating to average street replacement cost, design life, and depreciation caused by intrusions into the public right-of-way. Cities that do not have easy access to accurate street replacement costs can substitute the average taken from other jurisdictions and/or agencies. However, this alternative degradation cost recovery method is deemed to be less dependable than the recommended method.

## Repair Costs

Repair costs are associated with the intrusion into the public right-of-way and includes, but is not limited to, tree replacement, sodding or re-seeding, excavation, backfill, pipes, and pipe-laying. Currently, most cities require public and private utilities to repair the public right-of-way to equal or better condition if they intrude into it to repair or enhance their equipment or expand their service. Some cities do the repair work and require the intruding party to reimburse the city for this work. At this time, the practices used by private companies to do repair work within the public right-of-way results in degradation to streets, trees, sidewalks, boulevard/landscaped areas, other infrastructure, or amenities. With respect to trees, standards such as those developed by the International Society of Arboriculture (Exhibit 7) can be used to recapture costs associated with repair and/or replacement of trees. Also included in this plan is a draft ordinance prepared by the City of Kansas City, Missouri, relating to construction activity that impacts trees located within the public right-of-way (Exhibit 8).

A third possible repair alternative that would address, in part, both degradation and repair costs is to require the intruding party to repair the public right-of-way using more stringent restoration standards such as those identified in Exhibit 9. This exhibit is a public right-of-way cost recovery study that includes a standard method for calculating the real costs of pavement cuts in New York, New York. Like the others that were reviewed, this one found that the most

significant cause of premature deterioration of the public right-of-way is due to street cuts. This study concluded that the area of influence for a street cut could be ten times the typical utility cut area. As a result, this study suggests that cities should require utility companies to increase the area of restoration with more stringent compaction standards for the street base, as well as increased removal and replacement of the asphalt layer of a street.

The Committee did not recommend one repair cost approach but rather concluded that each community should select an option that is appropriate for that particular city. The consensus of the Committee is that the intruding party is responsible for repair and/or replacement of the roadway or street, trees, sidewalks, boulevard/landscaped areas, other infrastructure, or amenities impacted by work within the public right-of-way. The following options reflect those discussed by the Committee.

### Alternative Repair Costs Recovery Approach

*Require the intruding party to repair the public right-of-way to equal or better condition subject to inspection and acceptance by the city.*

*Require the intruding party to reimburse the city and/or the city's contractor for actual costs relating to repair of the public right-of-way.*

*Require the intruding party to repair the public right-of-way to standards equal to or greater than those recommended in the New York, New York study (Exhibit 9) and exempt the intruding party from degradation charges.*

### Disruption Costs

Disruption Costs are those costs that result in the interruption of the normal use of the public right-of-way. The most common disruptions relate to lane closures and, to a lesser degree, detours.

When there is an intrusion into the public right-of-way, the public access can be obstructed directly in the form of traffic and/or service diversion. Obstructions, or disruptions, cause citizen delays, inconvenience, and loss of time and/or money to local business people, residents, and others. In addition, these disruptions will increase travel distance on local streets where the cost of additional increments of public right-of-way use will result in city expenditures relating to infrastructure. Furthermore, disruptions require greater oversight and management by local officials; and it will necessitate more traffic control and planning to avoid potential problems.

When disruptions to the public right-of-way occur, it requires the city to address new safety concerns regarding pedestrians and motorists. Cities need to allocate staff time to accommodate additional inspections; and they need to provide informational updates, when necessary. They also need to prevent, if possible, the potential damage to other utilities. When

disruption occurs, it will also increase the level of congestion, noise, air, and visual pollution in the area of the disruption.

Some of the effects of disruption are more difficult to determine, such as pollution, business losses, and increases in the number of accidents; but others such as staff time, delays, stops, costs of traffic control, and construction costs can more easily be measured. When costs can be determined, they should be allocated to those who directly benefit from the service provided. If the costs are not clearly identified, then some reasonable estimate might be made to reflect the societal cost of such disruptions.

The Committee determined that service providers should be given a reasonable amount of time to complete their projects. A grace period, as defined by the City, is deemed appropriate in that it recognizes that private and public utilities will need to periodically perform work within the public right-of-way. To encourage utility providers to complete work promptly, four disruption cost recovery methods, which are discussed below, have been identified as legitimate techniques for charging service providers for public right-of-way work that extends beyond the grace period.

### Recommended Disruption Cost Recovery Method

*A minimal grace period, as determined by the City, that allows the intruding party a specified time for completing work within the public right-of-way after which the actual costs associated with disruption will be recovered based on the length of disruption.*

The first disruption cost recovery option was developed by the City of Kansas City, Missouri and is based on lane closures as a result of utility companies performing work within the public right-of-way (Exhibit 10). This disruption cost recovery option is logical in that it allows cities to recover their cost and provides utility companies with the incentive to complete their work as quickly as possible. There are other disruption cost recovery options for lane closures such as the one used by the City of Leawood, Kansas, where a simple flat fee (e.g., \$25) is charged each time a utility company requests closing a lane. There are variations to this lane closure approach including one used by the City of Toronto, Ontario, Canada where, in addition to the lane closure permit, a utility company is charged \$500 per day if a lane is closed during rush hour.

Exhibit 11 shows three additional disruption cost recovery methods including Option A, which takes into consideration the added wear and tear on local roads as a result of detours and increased travel distance caused by disruption of the public right-of-way. This cost recovery method uses the number of days of disruption, increased travel distance, average daily traffic, and a distress factor developed by the U.S. Department of Transportation Federal Highway Administration's 1997 Federal Highway Cost Allocation Study – Final Report to arrive at a disruption cost. Option A includes an example of this disruption cost recovery method assuming five and ten day disruptions with detours that increase the travel distance from one-quarter to one-half of a mile. The Committee agreed that this cost recovery method is appropriate where disruptions to the right-of-way result in detours.

The third and fourth disruption cost recovery options (Exhibit 11, Options B and C, respectively) attempt to recover costs related to personal use of operating a motor vehicle. The cost recovery methodology is similar to that employed in Option A except that an IRS mileage factor is used in the third option, and the fourth option uses vehicle type (i.e., car versus truck) to determine disruption costs.

## **Administrative/Management Costs**

Administrative/management costs are related to initial costs such as permitting, inventory, map updating, location, tree inspection, and general inquires relating to public right-of-way intrusion. Some administrative/management costs such as salary and benefits are relatively easy to determine. These direct costs can be calculated by multiplying the employees' salaries or wages by the time devoted to providing a public right-of-way service (e.g., permit processing, traffic control, and certain management functions). Time devoted to public right-of-way management and other costs such as supplies and materials will require some analysis by the city where certain costs (e.g., permit forms and road signs) are more easy to determine than other costs (e.g., tracking time spent addressing inquires relating to the public right-of-way). Administrative overhead costs (e.g., accounting, management information services, vehicles and equipment, insurance, etc.) are more difficult to determine and will most likely require that a city conduct a detailed analysis of these costs. Furthermore, these indirect costs can account for a significant portion of the total cost of providing a service. Because direct and indirect costs associated with administration/management of the public right-of-way will vary from city to city, the administrative/management cost recovery method will require that each city calculate their own cost per unit. Table 6 shows a hypothetical example of how a city might recover administrative/management costs. In this example, the annual number of public right-of-way permits represents units. Cities can substitute permits with other measurable units that more accurately reflect their costs.

The Committee also discussed ongoing management costs and the importance of utility coordination so as to avoid unnecessary costs. Location/general inquires, enforcement of right-of-way ordinances, and those costs associated with increased difficulties in managing future access into the public right-of-way for public infrastructure repairs or maintenance are continuous administrative/management costs. These costs include both subsurface and overhead infrastructure (e.g., power lines). While it is difficult to identify and calculate these costs, the cost recovery methods presented in this plan or some type of user fee may be a logical source of revenue for recovering some of these costs. Furthermore, a well-designed utility coordination plan or ordinance can help reduce or eliminate future utility conflicts and associated costs. Any city considering a public right-of-way ordinance might include a utility accommodation policy similar to the State of Kansas Department of Transportation, "1994 Utility Accommodation Policy" (see Exhibit 12). If cost avoidance measures are not sufficient for recovering ongoing management costs, a city can conduct a comprehensive user fee analysis where a systematic and documented approach is used to recapture costs related to delivering public right-of-way services.

In summary, administrative/management expenses increase the total cost of the public right-of-way project and must be paid for by someone. Trying to decide who pays these costs, the consumer or the general public, is usually left to the elected representatives who must choose the most cost-effective alternative possible. Currently, with the acceptance of concepts such as the cost recovery methods contained in this report and user fee and cost-benefit analyses, the idea of shifting the real cost of projects to the ultimate user is more acceptable and appropriate. If expenses are not allocated to the provider who can pass them on to users of the service, the burden of the costs will be left to the taxpayers—who may not benefit from the service provided.

**ADMINISTRATIVE/MANAGEMENT COSTS**

$[(\text{Labor} + \text{Indirect Costs}) \times \text{Time} + \text{Other Costs}] / \text{Units} = \text{Cost per Unit}$

**Hypothetical Example:**

$[(\$30,000 + \$21,000) \times 25\% + \$2,500] / 300 = \$51 \text{ per permit}$

Assumptions:

Salary (e.g., public works employee) = \$30,000

Benefits = 45% of salary or \$13,500

Administrative/Management Overhead = 25% of salary or \$7,500.

Other costs (e.g., permit forms) = \$2,500

Time devoted to right-of-way management = 25%

Units\* = 300 public right-of-way permits per year

\* Units may include, but are not limited to, number of linear feet of street cuts per year and/or number of permits issued annually.

The Telecommunications Deregulation Act of 1996 has significantly increased the interest in the use of the public right-of-way. Telecommunication providers are rapidly expanding their infrastructure, resulting in more frequent construction within, and disruption of, the public right-of-way. Furthermore, this increased usage of public rights of way which have finite space has placed additional demands and costs on cities that are responsible for managing and maintaining local street infrastructure.

Efficient management and control of the public rights of way are not only desirable, but necessary, if the public safety is to be maintained and if individual pedestrians and motorists are to be protected from harm when using that public right-of-way. In addition, if cities are to manage their resources more efficiently, as the public demands, they must develop a plan that identifies and recovers public right-of-way-related costs. These costs, once defined, can be allocated to those who benefit from the services.

Kansas and Missouri laws allow cities to manage their local public rights of way. Furthermore, the laws appear to suggest that cities may charge a fee for public right-of-way use, provided that there is a direct cost to a city.

Degradation, disruption, repair, and administration/management costs are the primary components of this cost recovery plan. Degradation results from cuts or trenches which are significant intrusions into the public right-of-way. This plan recommends that costs due to degradation can be recaptured most effectively using street construction or maintenance cost (e.g., overlays and sealcoats) and age components of the street. In addition, degradation costs should be recaptured when intrusion damages and/or depreciates trees, sidewalks, boulevard/landscaped areas, other infrastructure, or amenities located within the public right-of-way.

Repair costs that result from intrusion into the public right-of-way are straightforward expenses. This cost recovery plan includes three repair cost recovery alternatives including one that requires the intruding party repair the public right-of-way to an equal or better condition prior to intrusion and subject to inspection and acceptance by the city. A second option has the utility company reimburse the city and/or the city's contractor for actual costs relating to repair in the public right-of-way. A third option that has more stringent repair standards is presented and may help mitigate not only repair costs but also some of the degradation costs that result from street cuts. This plan recognizes that repair costs from intrusions include not only the roadway but also trees, sidewalks, boulevard/landscaped areas, other infrastructure, or amenities located within the public right-of-way.

Disruption costs relate to interruption of the normal use of the public right-of-way. This plan recommends a grace period for completing required work within the public right-of-way. However, this plan also recognizes the need to minimize disruptions to the public. As a result, this plan includes four disruption cost recovery methods that can be used as incentives for service providers to complete work in a timely fashion.

Administrative/management costs, such as permitting, map inventory and updating, tree inspections and replacement are real public right-of-way management costs incurred by cities. Both direct and indirect costs associated with public right-of-way administration/management will vary from city to city. As a result, this cost recovery plan recommends that each city should develop its own unique administrative/management cost recovery method that incorporates the required service components (e.g., labor and materials) associated with public right-of-way management.

In addition to public right-of-way cost recovery methods, this cost recovery plan recommends a utility coordination plan as an effective tool for minimizing and/or avoiding costs that may occur in the future as a result of public right-of-way intrusion. The Mid-America Regional Council and cities involved in the study recognize the importance of encouraging timely work, as well as recovering costs incurred due to right-of-way intrusions.

Although this study was designed to address public right-of-way cost recovery options, franchise, consumption, and license fees are also recognized as legitimate fee mechanisms for cities to impose on private companies for the use and occupancy of the public right-of-way.

This cost recovery plan has been developed so that cities can implement the necessary measures to better manage and control their public rights of way. It is recommended that the cost recovery plan include degradation, disruption, repair, and administrative/management cost recovery methods. These methods reflect the real costs allocable to users within the public rights of way, and they provide cities with a measurable standard on which cities can base their cost recovery plan.

This study concludes that the recommended cost recovery plan is an appropriate approach for cities to use to recover public right-of-way costs. The plan allocates public right-of-way costs to the providers and consumers of services using the public right-of-way rather than the general public. This plan can be implemented on its own or as a component of a model public right-of-way ordinance that may be considered by the Mid-America Regional Council and its member cities.



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## VALUATION OF THE PUBLIC RIGHTS-OF-WAY ASSET

### I. Introduction

The value of the rights-of-way held in trust by state and local government is the sum of the value of the real estate plus the value of the capital improvements, which make rights-of-way useful and usable. There are numerous appraisal methods to identify this value: Book Value; Replacement Value; Willing Buyer/Willing Seller Value; Income-Based Method and a Comparable Transactions Valuation.<sup>1</sup> This paper employs the book value and comparable transaction valuation methods. These and the other valuation methods substantiate that state and local governments hold, and are responsible for, one of the most important and valuable assets in the United States economy. Managing this asset in trust on behalf of the nation's taxpayers is a central responsibility of state and local elected officials.

### II Establishing the Size of the National Rights-of-Way Inventory. (625,517,587,200 square feet)

The Federal Highway Administration of the U.S. Department of Transportation estimates there are 3,917,232 linear miles of roads in the United States.<sup>2</sup> State and local governments are responsible for the acquisition, construction and maintenance 78% of this total inventory.<sup>3</sup> This paper uses an average width estimate of 40 feet.<sup>4</sup>

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<sup>1</sup> See *Fair Market Value Analysis For a Fiber Optic Cable Permit in National Marine Sanctuaries*, National Oceanic and Atmospheric Administration (August 2001.) Assigning a value to the rights-of-way is not a case of first impression for federal, state or local government. Federal agencies such as the United States Department of Transportation, the U.S. Department of the Interior (Bureau of Land Management "BLM"), the United States Department of Agriculture (U.S. Forest Service) and the National Oceanic and Atmospheric Administration ("NOAA") have all been actively engaged in assessing value for rights-of-way for years. Valuation of rights-of-way, and the requirement that government receive fair market value for their use, can be found in regulations (43 C.F.R. Sections 2803 and 2883) statutes, and case law. A whole industry has developed to provide federal, state, and local governments, as well as individual land-owners, with valuations of their rights-of-way. The public side of this industry can be found at the International Right of Way Association <http://www.irwaonline.org/> and the American Public Works Association <http://www.apwa.net>. Private practitioners of evaluating and valuing rights-of-way may be found at the Appraisal Institute <http://www.appraisalinstitute.org/>.

<sup>2</sup> All highway number are drawn from the U.S. Department of Transportation's Highway Statistics 2000 study available at <http://www.fhwa.dot.gov/ohim/hs00/index.htm>

<sup>3</sup> The total 3,917,232 inventory includes 2,961,731 miles that are the sole responsibility of state and local governments. In addition, 160,161 miles belong to the Interstate System, and an additional 795,340 miles are state and local roads entitled to Federal funds. State and local governments pay ten percent of the acquisition, construction and maintenance of these roads. This analysis reflects this burden by adding ten percent of the federal roads (79,534 + 16,016) to the state and local mileage.

<sup>4</sup> 40-foot average width is a conservative number. A traffic lane must be a minimum of nine-feet wide. A 40-foot width provides a single lane of traffic, two lanes of parking, plus a six-foot sidewalk/ pedestrian way/utility right-of-way on each side of the street. Many streets and roads are much wider than a single traffic lane.



5,280 feet/centerline mile x 2,961,731 centerline miles x 40 feet width = 625,517,587,200 square feet of rights-of-way that are the sole responsibility of state and local government.

### III. Establishing the Value of the Rights-of-Way Inventory

1. Net Book Value: (\$4,676,039,947,040)

A. Value of Improvements: (\$1,110,589,700,000)

The Bureau of Economic Analysis (BEA) states that the present value of the total capital expenditures on streets and highways is \$1,423,833,000,000.<sup>5</sup> This is the depreciated capital cost borne by taxpayers to improve streets and highways. State and local taxpayers paid 78% or \$1,110,589,700,000.<sup>6</sup>

B. Value of the Land.<sup>7</sup>(\$3,565,450,247,040.00)

There are several methods to establish an average value for each square foot of land in the rights-of-way. Land in the right of way has widely varying value. The “Across or At the Fence” value (ATF) is less than a penny per square foot for some western rural counties.<sup>8</sup> The ATF value exceeds \$2,500 per square (in 1989 dollars) for downtown New York.<sup>9</sup> Between these extremes lies a national average.

The Minnesota Department of Transportation estimated in 1994 that the average ATF value of the land abutting the rights of way for the City of Minneapolis at \$5.70/square foot.<sup>10</sup>

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<sup>5</sup> The Bureau of Economic Analysis of the Department of Commerce (the organization that estimates the Gross National Product numbers other leading economic indicators) has tracked government fixed assets for decades. Among those fixed assets is a category for roads and highways. See Department of Commerce’s Bureau of Economic Analysis Fixed Asset Tables for 2002. These tables may be viewed at [www.bea.doc.gov/bea/dn/faweb/FATableView.asp?SelectedTable=67&FirstYear=1995&LastYear=2000&Freq](http://www.bea.doc.gov/bea/dn/faweb/FATableView.asp?SelectedTable=67&FirstYear=1995&LastYear=2000&Freq).

<sup>6</sup> This valuation understates the interest of state and local government in the rights-of-way. BEA staff, in interviews for this paper, suggested state and local jurisdictions are responsible for 100% of the ownership and maintenance of the nations streets and highways, regardless of whether the road is identified as a local, state or interstate highway.

<sup>7</sup> There exists no government research number for a national value of the land located in the right-of-way. This paper therefore employs the following formulae: [(Feet per mile) x (miles of no-federal roads)x (40 feet width)] x value of land per square foot.

<sup>8</sup> Not all western land, however, is that cheap. In 1994 Nevada Bell paid the federal government an annual fee of \$1.05 per linear foot or \$5,544 per mile for an easement. This followed a determination by the Bureau of Reclamation that the market price for the land ranged from 1,000 to \$50,000 per mile. See page 25 of the National Ocean Service “Fair Market Value Analysis” of December 2000.

<sup>9</sup> See *Indirect Costs of Utility Placement and Repair Beneath the Streets*. A Report by Raymond L. Sterling , Ph.D., P.E. to the Minnesota Department of Transportation. (1994)

<sup>10</sup> The \$5.70 is 1994 dollars. Adjusted for recent increases in property values in Minneapolis and other inflation, the value would be \$9.00 per square foot in 2002 dollars. \$9.00 per square foot appears to be a representative number based on two recent fiber optic easement class action lawsuits brought against railroads by abutting landowners. In *Vera J. Hinshaw et.al , v. AT&T Corp* (S.D. Ind, 2001) Civil Action No. IP99-0549-C-T/G ) a Federal Court



This paper uses the Minnesota 1994 valuation of a mid-size, mid-western urban area as a conservative approximation of the nation-wide average.<sup>11</sup>

Multiplying the length x width x average value equals \$3,565,450,247,040.00.<sup>12</sup>

C. Total Book Value (\$4,676,039,947,040)

The total book value of the rights-of-way is the sum of the value of the land plus the value of the improvements, which equals \$4,676,039,947,040.<sup>13</sup>

## II. Comparable Transaction Valuation ( \$7.1 trillion to \$10.9 trillion)

Comparable transaction valuation looks in the marketplace and uses sales and transfers of similar assets to establish a value for the property in question. As explained by NOAA, “Prices paid in actual market transactions provide direct data of fair market value.”<sup>14</sup> NOAA cautions that “a wide variety of conditions and prices can create difficulties in finding the right comparison. A verifiable set of comparable sales must be viewed as a tool for identifying market trends and a basis for establishing a range of possible appraisal values.”<sup>15</sup>

Employing this traditional method for assessing real estate values faces specific difficulties that must be accommodated when used to assess rights-of-way value:

- ∑ **Proprietary Information:** As the U.S. Department of Transportation learned in its study *Shared Resources: Sharing Right-Of-Way for Telecommunications* (FHWA-JPO-96-0015, April 1996): “Although access to rights-of-way is leased and prices are recorded in various contracts, these values may not be generally available because they are considered proprietary.”
- ∑ **Dramatic Increases in Value:** The explosive growth of telecommunications sector has resulted in an exponential growth in rights-of-way value. In its report, NOAA stated, “For...rights of way greater than 5 miles in length, price levels rose from \$8,026 per mile in 1987 to \$11,880 per mile in 1993 to \$100,042 in 1997.” See NOAA report at p. 18.

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accepted \$10 per square foot for the class action settlement. A copy of the agreement may be found at [http://att.fsiwebs.net/settlements/IN\\_docs/ClassSettlementAgreement.htm](http://att.fsiwebs.net/settlements/IN_docs/ClassSettlementAgreement.htm). *Uhl v. Thoroughbred Tech and Telecomms.*, 2001 U.S. Dist Lexis 13115 (S.D. Ind. 2001), settled another class action lawsuit by landowners abutting a railroad right-of-way. The *Uhl* court awarded \$31,875 per mile (approximately \$6.00 a linear foot), plus an equity interests in the optical fibers deployed, plus 7.5% to 11.25% of the operator’s gross receipts. In an affidavit filed with the United States District Court for the District of Oregon, in *Qwest v. Portland*, (D.Oregon) Civil Action No. 01-CV-1005-JE ) Brant Williams, a city engineer for the City of Portland, stated that the combined property value and improvements in the city’s rights-of- way was almost \$10.00 per square foot.

<sup>11</sup> Assessing right-of-way values at full value is difficult, as value has been rapidly growing over the last 15 years. In its report, NOAA stated “For...rights of way greater than 5 miles in length, price levels rose from \$8,026 per mile in 1987 to \$11,880 per mile in 1993 to \$100,042 in 1997.” See NOAA at p. 18.

<sup>12</sup> Value of Land in Right of Way: 625,517,587,200 square feet x \$5.40/square foot = \$3,565,450,247,040.00.

<sup>13</sup> \$3,565,450,247,040 (land) + \$1,110,589,700,000 (improvements) = \$4,676,039,947,040

<sup>14</sup> NOAA report at 12.

<sup>15</sup> *Id.*



NOAA's research identified two valuation trends for market rates for fiber optic rights-of-way fees:

- Σ Linear trend, which places the value of right-of-way in October 1995 at a value approaching \$120,000 per mile per year; and
- Σ Exponential trend, which for the same time period established the rates at \$100,000 per mile per year.<sup>16</sup>

Employing either of these base numbers as capturing the entire value of the nation's rights of way for a single year produces an annual rental value range between \$ 366,153,720,000 and \$305,128,100,000.

Normal sales prices for real estate are based on 30 times annual lease payments, according to NOAA. Doing the math, comparable rates for the rights-of-way ranges between \$10,984,611,600,000 and \$9,153,843,000,000<sup>17</sup>

A second comparable transaction valuation may be reached by multiplying the "ATF" average value by a corridor enhancement factor. The International Right of Way Association suggests that current prices paid by governments and private utilities to condemn and construct right of way is related the "across the fence value" of the abutting land, plus a multiplier factor to account for the "connectivity nature of right of way". This multiplier accounts for the transactional cost savings realized by the right of way user not having to negotiate rights of passage with each abutting landowner and the value added by the nature of the two points the right of way connects. According to NOAA, the connectivity factor ranges between 2 and 6.<sup>18</sup>

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<sup>16</sup> While the fiber optic rights-of-way numbers identified by Federal Highway Administration and NOAA are supportive of the values discussed in this paper, they establish a floor, not a ceiling. Fiber rights-of-way are not exclusive and most often are in rights-of-way housing competitive fibers. So the value assigned to a particular fiber facility is necessarily less than the value of the right-of-way as a whole.

<sup>17</sup> The NOAA evaluation was based in part on the following transactions identified in its study. In 1994 the Bureau of Reclamation established that the market price for the non-exclusive rights-of-way in rural Nevada reached \$50,000 per mile for rural interstate. 1988 research developed by the United States Department of Transportation established a value for non-exclusive rights-of-way per mile in urban areas at \$31,250. See *Shared Resources: Sharing Right-of-Way for Telecommunications*, Appendix A, U.S. Department of Transportation (April 1996). A research study by San Francisco established an annual rate of \$350,000 per mile for a seven-mile right-of-way that crossed the grounds of the Presidio and the Golden Gate Bridge. The City of Austin Texas charges the equivalent of \$126,316 per mile per year for an easement on 31 miles of Transit Authority right-of-way. The Massachusetts Turnpike Authority concluded a deal for 50 miles of right-of-way with Level 3 Communications of Boulder, Colorado for \$112,477 per mile per year plus a fee for each fiber deployed. The parties further agreed that these additional fees per fiber have the potential to raise the level of compensation to \$1 million per mile.

<sup>18</sup> NOAA acknowledges this multiplier in its seminal study: "In contrast to the ATF [Across the Fence] approach, what is called a 'corridor value' accounts for assemblage of land parcels into a contiguous right of way. ATF values for land along a right of way may be multiplied by an 'assemblage factor' or 'corridor enhancement factor' to reach an estimate....Some analyses have determined that corridor values typically exceed ATF appraisals by a factor of two to six." (NOAA at p. 6) See also Clifford A. Zoll, A Logical Approach to Appraising Railroad Rights of Ways, *The Appraisal Journal*, October 1998 and Clifford A. Zoll, Rail Corridor Markets and Sale Factors, *The Appraisal Journal*, October 1991.



The following formula projects the value:

$$\begin{aligned}\text{Value of right of way} &= \text{Value of ATF square footage} \times \text{Value of Connectivity} \\ &= \$3,565,450,247,040 \times 2 \\ &= \$7,130,900,494,080\end{aligned}$$

## CONCLUSION

The total value of the land and improvements held in trust by state and local governments for the taxpayer is enormous. Using conservative assumptions, the value ranges from \$1.1 Trillion for the improvements alone to \$4.7 Trillion for the improvements and the ATF land value. However the cost of acquiring a right-of-way corridor necessarily is more expensive than simply the ATF value of the abutting land. Applying the lowest corridor enhancement factor now employed by appraisers suggests the value is \$7.1 Trillion. These results are consistent and conservative when measured against comparable transactions reported by federal government agencies.

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Another way to think of this multiplier effect has been captured by Charles P. Bucaria and Robert G. Kuhs in their paper "*Fiber Optic Communications Corridor Right of Way Valuation Methodology*" delivered at the December 4, 2002 Appraisal Institute Workshop. They captured the multiplier as "Cost Avoidance Analysis." David Harris in an unpublished paper cited by the Department of Transportation study below, identifies that the savings from dealing with a single landowner can be as much as the purchase price of the land.

The U.S. Department of Transportation has also accepted the premises that a straight valuation based upon "ATF" or the value of adjacent land is not sufficient for valuation of a telecommunications corridor. "Using adjacent real estate values directly overlooks the degree of uninterrupted access afforded by public rights-of-way as well as the very real financial and administrative advantages of dealing with one agent rather than a number of individual landowners." The Department then cites examples of this "continuity factor". Citing from Miltenberger's "Rail Right of Way Valuation," *The Appraisal Journal* for 1992, Vol. 60, No. 1 (Chicago IL), DOT demonstrated that the lowest continuity factor employed was 1.9 by Penn Central in 1995.

Before the

NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

Washington, DC20230

Request For Comments on )  
Deployment of Broadband Networks and )Docket No. 011109273-1273-01  
Advanced Telecommunications Services )

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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December 19, 2001

Comments of Qwest Communications International Inc.

Qwest Communications International Inc. (“Qwest”) is pleased to file these comments in response to the request for information that NTIA issued in this docket on November 14, 2001 concerning carriers’ experience with access to local rights-of-way and whether, in that regard, there is a need for federal government involvement. [\[1\]](#)

**Introduction**

Based on its experience seeking to deploy facilities inside and outside of its 14-state region to provide wireline, wireless, and other services, Qwest believes that one of the most significant deterrents to the deployment of communications infrastructure and the development of facilities-based competition is the increasing tendency of municipalities to attempt to fund their operating budgets on the backs of facilities-based carriers and their customers by adding a third, local tier of regulation to existing state and federal regulation. Perhaps the most pernicious — but certainly not the only — forms of municipal interference with national policy favoring deployment of communications facilities are the attempts to extract exorbitant fees from carriers for the use of public rights-of-way. Attempts to impose these and other unnecessary and improper regulatory burdens as a condition of rights-of-way access significantly delay and multiply the costs of building out this country’s communications infrastructure.

Canada has recognized these problems and has acted to address them. Earlier this year, Canada’s counterpart to the Federal Communications Commission (FCC), the Canadian Radio-television and Telecommunications Commission

(CRTC), adopted a decision limiting local government regulation of the public rights-of-way.<sup>[2]</sup> Although cognizant of the need for municipalities to oversee their physical rights-of-way, the CRTC observed that federal authority over telecommunications overrode municipal control over the rights of way.<sup>[3]</sup> In particular, the CRTC found that federal telecommunications policies encouraging the development of communications services required limits on excessive municipal regulation of the rights-of-way. Importantly, the CRTC noted that “[t]he benefits of a competitive telecommunications market and greater access to modern, high-speed networks are not enjoyed solely by the shareholders and customers of carriers. The economic base that such facilities support will provide generalized benefits throughout the municipality, attracting industry, creating jobs, increasing tax revenue, etc.”<sup>[4]</sup> Accordingly, the CRTC specifically rejected local government efforts to impose charges on carriers that were unrelated to the carriers’ actual use of, or the city’s costs of managing, the public rights-of-way.<sup>[5]</sup> And the CRTC similarly rejected the requirement that carriers install extra conduit, finding that it would improperly “add another layer of regulation” for communications carriers.<sup>[6]</sup>

In the United States, existing federal law, embodied in both section 253 and Title I of the Communications Act,<sup>[7]</sup> likewise provides ample authority for the FCC to step in and limit local government rights-of-way overreaching. However, until now the FCC has been reluctant to become involved and slow to define the limits of proper local regulation. The challenge is to encourage the FCC to act assertively, on the principles that Congress already has enunciated, in order to eliminate the so-called “third-tier” of municipal regulation that currently constrains the communications market.

### **I. “THIRD TIER” LOCAL GOVERNMENT REGULATION AND ABUSE OF LOCAL RIGHTS-OF-WAY CONTROL**

Over the past few years, as the Administration, Congress, and even the FCC have sought to move toward a deregulatory approach for the communications industry, municipal regulation of access to public rights-of-way has become one of the central problems facing all types of facilities-based carriers across the country. The issue is not routine local government oversight of the permitting process, construction scheduling, and the like. To the contrary, municipal authority to regulate such concerns is uncontested. Rather, the issue is that municipalities have converted their control over the rights-of-way into a broad “third tier” of regulation of carriers — one that overlays federal and state regulation and imposes unnecessary and unreasonable costs, burdens, and delays on the deployment of communications facilities. Thus, despite the deregulatory trend on the federal level, noted above, carriers increasingly face a patchwork of inconsistent, burdensome, and inappropriate municipal requirements across the country.

These “third tier” municipal regulations range from the imposition of substantial fees and non-monetary compensation for use of the rights-of-way, to efforts to regulate carriers’ transfers of control and dictate their provision of facilities to third parties. While municipal governments certainly have a right to be reimbursed for their reasonable costs incurred in

managing the rights-of-way, these regulations go substantially farther, imposing fees (and other forms of compensation) that bear little — and usually no — nexus to any burden that carriers' facilities place on the public rights-of-way. Instead, they are blatant efforts to use the government's control over rights-of-way access to extort revenues from carriers and their customers. Thus, carriers that may already provide low-cost universal service to local residents, that employ local citizens for the construction involved in infrastructure buildout and to otherwise run the local network, and that pay applicable local taxes, end up nonetheless subsidizing the municipal purse yet again through this hidden rights-of-way subsidy.

Such local rights-of-way access fees and requirements have in many cases significantly increased the cost of providing the facilities needed to roll-out service in a particular area, so much so that in some cases, carriers have been forced to reevaluate or abandon their plans to deploy new facilities or expand existing facilities. In other cases, the result has been extraordinary delay in providing service, as municipalities withhold necessary permits unless and until carriers submit to their terms.

Municipal overreaching with respect to rights-of-way regulation has imposed significant costs on all of Qwest's operations and has frequently interfered with Qwest's ability to provide timely service and build facilities. Qwest uses the public rights-of-way for almost all its services. For example, in Portland, Oregon, where Qwest is the incumbent LEC, the local government requires compensation for Qwest's rights-of-way use that is unrelated in any way to the city's costs of managing the rights-of-way: Portland demands that Qwest pay a fee of 7% of its gross revenues, as well as a \$5,000 application fee.<sup>[8]</sup> A Sandy, Utah draft ordinance proposes a fee of 6% of gross revenues on top of the \$5,000 application fee.<sup>[9]</sup> In Santa Fe, New Mexico, rather than imposing a percentage of revenues fee, the local government has demanded a "rental" fee equal to the "fair market value" (as determined by a city-approved appraiser, paid for *by Qwest*) of each and every right-of-way Qwest uses in serving city residents.<sup>[10]</sup> Given that Qwest is the incumbent and a carrier of last resort and must have facilities in place to serve *every* citizen of Santa Fe, its rights-of-way use is obviously extensive, and the resulting costs exorbitant.

Santa Fe also has required that Qwest dedicate free facilities to the municipal government in return for rights-of-way use — obligating Qwest to lay twice as much cable as it needs and donate the excess to the city in fee simple.<sup>[11]</sup> In some other localities, the price for rights-of-way access is that the carrier must provide the local government with free service or facilities and give the city most-favored nations clauses with respect to service.<sup>[12]</sup>

Outside of Qwest's region, the situation has been the same: Atlanta, Georgia imposes a fee equal to 3% of gross revenues, in addition to an application fee of \$5,000 or \$10,000 depending on the type of franchise.<sup>[13]</sup> Maryland Heights, Missouri and Overland Park, Kansas both impose an annual fee of 5% of gross receipts, as well as a charge per linear foot. Plano, Texas imposes an annual fee of \$2.50 per linear foot for any new deployment of facilities, even

where such facilities are installed in existing conduit and do not require any new construction or change to the rights-of-way. And Qwest has encountered in-kind compensation demands in cities where it seeks to provide competitive service: for example, Norfolk, Virginia requires carriers installing facilities to provide the city with free use of one duct for municipal wires. <sup>[14]</sup>

Beyond these specific fees or in-kind compensation obligations, local governments also increase the costs of providing telecommunication services by imposing onerous application requirements for use of the rights-of-way. As a condition for rights-of-way access, many local governments have required Qwest and other carriers to describe their financial, technical, and legal qualifications and describe the services they are providing or will provide — even though the state public utility commission reviews and approves all the same data. <sup>[15]</sup> These range from the merely bureaucratic to the truly absurd: Laewood, Kansas required Qwest to provide a statement describing its understanding of federal law with respect to rights-of-way regulation before the government would approve access to the rights-of-way. Some local governments have insisted that, in return for rights-of-way access, carriers provide them with copies of all petitions they file at the state public utility commission. <sup>[16]</sup> And while the costs of complying with such requirements in a single jurisdiction may not be enormous, the cumulative costs of satisfying these obligations in multiple jurisdictions are substantial.

In addition, some local governments have imposed far more costly obligations. For example, in the greater Seattle area, a regional transit authority sought to compel Qwest and other carriers to pay to relocate their facilities to new rights-of-way as a result of a city transit project that would disrupt the existing facilities, even while city-owned telecommunications providers would have their relocation subsidized by the government. Qwest and other carriers are similarly being asked by other municipalities around the nation to bear relocation costs resulting from construction of proposed transportation projects, though, again, municipally owned utilities are not being asked to pay for relocation. Thus, carriers in some instances must pay three times: to install the facilities in the original right-of-way in the first instance; then for the costs of relocation and new facilities; and then for the privilege of using the new rights-of-way.

The issue is not simply costs. Qwest also has experienced significant delay in providing service and in deploying facilities as a result of these sorts of requirements. In Santa Fe, for example, because Qwest was unwilling to agree to the new and unreasonable requirements imposed by the city, Qwest could not place a new remote terminal in the public right-of-way, and thus could not provide service to many customers; Qwest was not able to install the remote terminal — or provide service — for more than six months, until it brought suit against Santa Fe and was able to negotiate an interim standstill agreement for the pendency of the lawsuit. Out-of-region, Qwest similarly has suffered lengthy delays in deploying facilities, which in some cases have prevented Qwest from serving customers entirely. For example, the

City of Berkeley first adopted a moratorium on granting new permits for use of the rights-of-way, then passed a telecommunications ordinance imposing unlawful demands on carriers seeking to use the rights-of-way; as a result, Qwest was delayed more than a year in installing telecommunications facilities that it had agreed to provide under a contract with the Lawrence Berkeley National Laboratory in connection with national scientific research efforts. This dispute was not resolved until Qwest obtained a preliminary injunction in federal court barring Berkeley from enforcing its ordinance.<sup>[17]</sup>

In addition to delay and cost, municipal over-regulation also leads to uncertainty that makes it difficult if not impossible to plan facilities build-out and commit to provide service on a date certain. Many ordinances give local authorities broad discretion to grant or deny applications to use the rights-of-way, and often the ordinances contain no deadlines for ruling on such applications.<sup>[18]</sup> Some ordinances even require one or multiple public hearings (sometimes over several months) before ruling on such applications.<sup>[19]</sup> As a result, a carrier seeking to deploy facilities and provide service in a locality may not know when, or even if, it will be able to obtain approval to use the public rights-of-way. And finally, cities have imposed the ultimate contract of adhesion to ensure their continued right to regulate access to the rights-of-way in this manner: as a condition of rights-of-way access, the local governments have insisted, in several cases, that carriers expressly waive their right to challenge the local rights-of-way ordinances under federal or state law.<sup>[20]</sup>

## **II. SECTION 253 OF THE COMMUNICATIONS ACT REQUIRES THE FCC TO LIMIT MUNICIPAL RIGHTS-OF-WAY OVERREACHING.**

Such municipal overregulation is clearly out of step with the new era of deregulation ushered in by this Administration; these requirements interfere with facilities deployment and artificially inflate costs. FCC Chairman Powell himself recognized that “legal restraints can retard deployment of new services.”<sup>[21]</sup> In particular, Chairman Powell noted that “regulations that govern rights of way, zoning, and building codes” are among the restrictions that many in the industry point to as “some of the most vexing problems in bringing new services to consumers,” and he observed that “local governments—principally state and local—control the terms and conditions of local upgrades and can be more proactive in facilitating deployment in their community.”<sup>[22]</sup>

Although these statements are welcome, merely urging cities to exercise restraint has proven wholly ineffectual. Municipal governments have made quite clear that they see their control over the rights-of-way as a significant cash cow; and they have been resolute in insisting that the federal government should not and may not trim their authority in any manner, asserting that “[a]ny Commission action that intrudes on right-of-way compensation authority will significantly harm state and local government efforts to” manage the rights-of-way.<sup>[23]</sup> Amazingly, cities now assert that they “are *legally and ethically obligated* to control and charge for the use of rights-of-way,” insisting that “use of publicly owned rights-of-way is a privilege, not a right,” and that privilege justifies the “levying of rental

charges.”<sup>[24]</sup> Rather than simply urge the cities to come to their senses, then, it is time that the federal government act to ensure that cities wean themselves from heavy handed regulation and enforced subsidies.

And indeed, federal law already provides a potentially powerful mechanism for the FCC to limit excessive municipal rights-of-way regulation. Section 253 of the Communications Act requires the FCC (and the federal courts) to preempt state and local regulations that “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”<sup>[25]</sup> Section 253 is not intended to interfere with — and expressly protects — cities’ genuine right-of-way management and preserves their right to require “fair and reasonable compensation” for use of the public rights-of-way.<sup>[26]</sup> It is designed, however, to prevent cities from using their rights-of-way authority to impose onerous obligations and extract fees that bear no relationship whatsoever to rights-of-way use, and which *do* interfere with carriers’ ability to provide services. As one federal district court explained, for example, in considering non-cost-based right-of-way fees under 253(a):

[A]ny franchise fees that local governments impose on telecommunications companies *must be directly related to the companies’ use* of the local rights-of-way, otherwise the fees constitute an unlawful economic barrier to entry under section 253(a). For the same reason, . . . local governments *may not* set their franchise fees above a level that is reasonably calculated to compensate them for the costs of administering their franchise programs and of maintaining and improving their public rights-of-way.<sup>[27]</sup>

Other courts similarly have ruled that section 253 prevents municipal rights-of-way regulations that bear no relationship to actual management of rights-of-way use, but instead seek to procure revenues, or free services, or seek to regulate the providers themselves, or the services they offer.<sup>[28]</sup>

While, as these precedents suggest, carriers have had some success using section 253 to challenge local regulations in the courts, challenging local regulations one at a time is time-consuming and expensive, and successful challenges often are not sufficient to prevent other local governments from enacting and enforcing similar ordinances. Municipal governments have shown no compunction about enacting ordinances that are substantially equivalent to one that has just been overturned by a federal court in an adjacent district: The Santa Fe rights-of-way ordinance mentioned above and currently the subject of a challenge by Qwest in federal district court,<sup>[29]</sup> for example, was enacted after the same federal district court overturned a similar ordinance in Grant County, New Mexico for imposing non-cost-based rights-of-way fees.<sup>[30]</sup> And a campaign of city-by-city challenges is simply too cumbersome; even if carriers seek to chip away at municipal regulation in this manner, the process will be endless. In the long run, carriers will be forced to delay or simply abandon deployment of new facilities, to the detriment of consumers and the nation.

In the absence of strong federal policy on this issue, however, carriers have little choice but to fight municipal regulations city by city, filing suits in federal court or bringing individual preemption petitions before the FCC. Yet the FCC has sent confusing signals in the past about its willingness to step up to the plate and exercise its authority under

section 253. Over two years ago, the agency initiated a notice of inquiry to explore whether local governments were abusing their rights-of-way authority and interfering with carriers' provision of service.<sup>[31]</sup> Many carriers, including Qwest, filed comments and/or have since made *ex parte* presentations to the FCC regarding these issues, yet there has never been any action from the FCC. Similarly, the FCC recently filed an amicus brief in the Second Circuit in *TCG New York, Inc. v. City of White Plains*, 125 F. Supp. 2d 81 (S.D.N.Y. 2000), noting that fees for rights-of-way access that are based on a percentage of revenue and are not cost-based are very likely not protected by section 253's carve out for "reasonable" compensation; this is so, the agency noted, because such fees are not properly related to *use* of the rights of way and in any event are likely not to be competitively neutral, as section 253 also requires.<sup>[32]</sup> But soon after filing the *TCG* amicus brief, the FCC issued a letter stating that the brief "was not intended to represent a definitive FCC position that Section 253 precludes any compensation above cost recovery."<sup>[33]</sup>

What is needed — and what the law clearly permits — is for the FCC to take an aggressive, *proactive* role in enforcing limits on local government abuse of rights-of-way access. The Administration should encourage the FCC to play a meaningful role in this instance, and not to rely on simply exhorting municipalities to behave well. It is critical for government to recognize that, in this instance, deregulation means the government must play an active role — not in regulating carriers, but in trimming the excesses of municipal regulation. The FCC has full authority under section 253 to act on — and to invite — preemption petitions challenging municipal rights-of-way abuses; indeed, the agency has the authority to act on its own accord, without regard to whether an individual carrier has brought a challenge.

But beyond acting on individual petitions, the FCC can and should issue a clear statement of what types of local regulations it will view as *per se* violations of section 253. In particular, the government should make clear that rights-of-way fees are not opportunities to raise revenues, but must be designed to recover no more than the costs of maintaining the rights-of-way. If express rules are articulated by the FCC, municipal governments will have clear notice of what types of rights-of-way regulation will and will not be tolerated under section 253 and can design appropriate rights-of-way regulation within that framework.<sup>[34]</sup> This approach is fully consistent with existing law and is the only means of encouraging deployment of new facilities by incumbents and new carriers of all types, throughout the nation.

### **III. TITLE I OF THE COMMUNICATIONS ACT PROVIDES ADDITIONAL AUTHORITY FOR THE FCC TO CURB EXCESSIVE LOCAL REGULATION.**

Title I of the Act creates the FCC for the express purpose of regulating interstate and foreign commerce in communication by wire and radio to make available rapid and efficient communications service on a nation-wide basis.

<sup>[35]</sup> Title I's broad grant of authority provides additional jurisdictional support, supplemental to section 253, for an active federal role in eliminating local requirements and policies that impede the orderly deployment of important new facilities and services. The authority granted the FCC under Title I overlaps, and is consistent with, that in section 253 and empowers the agency to preempt local authorities from erecting barriers to the provision of all intrastate and

interstate communications services.

The pervasive authority granted in Title I has provided a cornerstone for regulatory approaches facilitating deployment of new, right-of-way dependent services in the past. Nearly 30 years ago, when the nation's first cable system operators were deploying another new technology, they also confronted the daunting prospect of negotiating a maze of disparate local procedures and requirements to obtain access to critical public rights-of-way in potentially hundreds of individual communities. In this endeavor they encountered a perplexing array of conflicting and often excessive local requirements.

Recognizing its obligation to establish a coherent national policy for the development of this important new medium, the Commission expressed concern over incompatible local requirements and troubling abuses such as extraction of excessive franchise fees "more for revenue-raising than for regulatory purposes."<sup>[36]</sup> In the absence of a specific federal statute, the Commission's response was a regulatory scheme, grounded in Title I,<sup>[37]</sup> that took a dual jurisdictional approach toward rights-of-way issues. The rules permitted localities to play a key role in management of their public rights-of-way, with certain aspects of local regulation subject to prescribed federal standards.<sup>[38]</sup>

The examples of local impediments that Qwest has encountered and that are described in Section I above are similar to the impediments faced by pioneering cable system operators thirty years ago and show that access to local rights-of-way poses no less a problem for deployment of advanced networks today than it did in the deployment of cable television systems then. Qwest respectfully submits that NTIA and the FCC have no less of a corresponding obligation to promote a solution for the current generation of rights-of-way issues than the Commission assumed in 1972. And today as yesterday, Title I provides an additional jurisdictional basis the FCC can use to assure the prompt and orderly deployment of advanced networks. The NTIA, as the advocate of the Administration's telecommunication policy, can and should play an important role by identifying available options and encouraging the Commission to fully utilize them to set standards and guidelines for local rights-of-way management that is compatible with deployment of all types of networks and services.

### **CONCLUSION**

The Administration should encourage the FCC to use existing federal authority to reign in municipal rights-of-way overreaching, and ensure that local governments join the federal government's initiative to facilitate, rather than interfere with, the development and deployment of communications infrastructure across the country. A clear and assertive policy is needed, and should be adopted as soon as possible.

Respectfully submitted,

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 December 19, 2001

[1] In [comments that Qwest is filing under separate cover](#) today, we address the broader question posed by the notice, with respect to advancing broadband deployment.

[2] See *Ledcor/Vancouver -- Construction, Operation and Maintenance of Transmission Lines* — Decision, CRTC 2001-23 (January 25, 2001) (attached hereto as [Attachment A](#)).

[3] See *id.* ¶34.

[4] *Id.* ¶ 46.

[5] See *id.* ¶¶ 117, 120, 121. The CRTC rejected “market based” fees finding that there was no “free market” for rights-of-way, and also rejected “percentage of revenue fees.”

[6] *Id.* ¶ 58.

[7] 47 U.S.C. § 253; *id.* § 157.

[8] City Code of Portland, Oregon, § 7.14.040.

[9] Sandy Draft Ordinance, §§ 2.1, 2.2 (January 31, 2001).

[10] Santa Fe City Code § 27-5.3.

[11] *Id.* § 27-3.7.

[12] See *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1178-79 (9th Cir. 2001).

[13] Atlanta Code of Ordinances, General Ordinances, §§ 138-127(h), 138-129.

[14] See Norfolk City Code § 42.59(b).

[15] See, e.g., *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1178 (9th Cir. 2001); *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1099 (N.D. Cal. 2001); *Bellsouth Telecomms., Inc. v. Town of Palm Beach*, 127 F. Supp. 2d 1348, 1355 (S.D. Fla. 1999), *reversed in part on other grounds*, 2001 WL 567711 (11th Circuit. 2001); *Bellsouth Telecomms., Inc. v. City of Coral Springs*, 42 F. Supp. 2d 1304, 1310 (S.D. Fla. 1999); *AT&T Communications of Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998).

[16] See Albuquerque Ordinance No. 20-1997, adding Chapter 13-4-10-4(D)(8).

[17] See *City of Berkeley*, 146 F. Supp. 2d at 1087-88.

[18] See, e.g., *City of Auburn*, 260 F.3d at 1176, 1179.

[19] See *id.* at 1176; Santa Fe City Code § 27-3.4.

[20] See, e.g., *TCG New York, Inc. v. City of White Plains*, 125 F. Supp. 2d 81, 95 (S.D.N.Y. 2000).

[21] See Remarks of Michael K. Powell, Chairman of the Federal Communications Commission, National Summit on Broadband Deployment, October 25, 2001.

[22] *Id.*

[23] See FCC Local and State Government Advisory Committee Advisory Recommendation Number 23: Notice of Proposed Rulemaking, Notice of Inquiry, and Third Further Notice of Proposed Rulemaking, WT Docket No. 99-217, CC Docket No. 96-98.

[24] National League of Cities, Information Technology & Communications Steering Committee, 2001 Policy Report, Section 7.02, November 21, 2001 (emphasis added).

[25] 47 U.S.C. § 253(a).

[26] 47 U.S.C. § 253(c).

[27] *Bell Atlantic-Maryland v. Prince George's County*, 49 F. Supp. 2d 805, 817 (D. Md. 1999), *vacated on procedural grounds*, 212 F.3d 863 (4th Cir. 2000); see also *City of Auburn*, 260 F.3d at 1176 (“Some non-tax fees charged under the franchise agreements are not based on the costs of maintaining the right of way, as required under the Telecom Act.”); *Board of County Commissioners of Grant County v. U S WEST Communications, Inc.*, No. CIV 98-1354 JC/LCS, slip op. at 11-12 (D.N.M. June 26, 2000) (“*Grant County*”) (rejecting 5% franchise fee because there was no “evidence that it directly relate[d] . . . to [the County’s] expenses in managing the rights-of-way”).

[28] See, e.g., *City of Auburn*, 260 F.3d at 1176-80 (invalidating ordinances that, *inter alia*, obligated applicants to demonstrate their financial, technical, and legal qualifications, limited transfers of ownership, required in-kind compensation, and granted local authorities unfettered discretion in considering applications to use rights-of-way); *City of Berkeley*, 146 F. Supp. 2d at 1097-1100 (enjoining enforcement of ordinance that, among other things, created lengthy application process unrelated to management of rights-of-way and gave authorities broad discretion to rule on such applications).

[29] *Qwest Corp. v. City of Santa Fe*, No. CIV 00-795 LH (D.N.M. filed June 1, 2000).

[30] See *Grant County*, *supra*.

[31] Notice of Proposed Rulemaking and Notice of Inquiry, *Promotion of Competitive Networks in Local Telecommunications Markets*, 14 FCC Rcd 12673 (1999). The FCC issued a decision on some issues in the Notice in that proceeding but noted that the public rights-of-way issues would be addressed separately. See First Report and Order and Further Notice of Proposed Rulemaking, *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, FCC 00-366, ¶1 n.2 (rel. Oct. 25, 2000).

[32] See Brief of the Federal Communications Commission and the United States as Amici Curiae, *TCG New York, Inc. v. City of White Plains*, (No. 01-7213(L)) at 14 n.7 (2d Cir. June 2001).

[33] Letter from Jane E. Mago, FCC General Counsel, to Kenneth S. Fellman, Oct. 18, 2001.

[34] In addition, such rules can readily be applied by courts, which may be in the best position to issue the kind of relief, including preliminary relief, that is required to stem these abuses.

[35] 47 U.S.C. §157.

[36] Cable Television Report and Order, 36 FCC 2d 134, 209 (1972).

[37] In the absence of specific statutory regulatory authority, the Commission relied on Title I authority and the so-called “ancillary doctrine” to exert jurisdiction over cable, including cable operators’ relationships with local officials who controlled public rights-of-way. Cable television’s impact on over-the-air broadcasting – over which the FCC did

have express statutory jurisdiction – served as the basis for the Commission’s authority over cable, which was viewed as “ancillary to broadcasting.”The Commission’s reliance on Title I for its initial set of comprehensive cable television regulations was upheld in *United States v. Southwestern Cable Co*, 392 U.S. 157(1968).

[38] Another variation on the successful use of a dual jurisdictional approach can be found in the Commission’s regulation of rates, terms and conditions for cable television pole attachments.47 C.F.R. §1.1401 *et seq.*In this model, states have principal regulatory authority over access to utility poles and conduits; however, if a state fails to adopt measures consistent with federal rules, the FCC is charged with regulating the relationship between pole providers and users in that state. Although this approach is not grounded in Title I authority, it nonetheless provides an example of a successful regulatory relationship between state and federal authorities in deployment of facilities-based services.

**Rights-of-Way Laws by State**

*Last Updated: May 21, 2003*

The following is a survey of all 50 states and the District of Columbia on key rights-of-way laws. The matrix includes citations to relevant state statutes and provides a brief description of key statutory provisions relating to jurisdiction, compensation, timelines, nondiscrimination, mediation, remediation and maintenance concerning access to public rights-of-way. The information in this survey was compiled through original research by NTIA, with reliance on existing research by NARUC and NATOA. Special thanks to NTIA interns Anne Mitchell, Sara Meadows Tolleson, and Alan Dobson for creating this matrix.

Go to: [\[Alabama\]](#) [\[Alaska\]](#) [\[Arizona\]](#) [\[Arkansas\]](#) [\[California\]](#) [\[Colorado\]](#) [\[Connecticut\]](#) [\[Delaware\]](#) [\[District of Columbia\]](#) [\[Florida\]](#) [\[Georgia\]](#) [\[Hawaii\]](#) [\[Idaho\]](#) [\[Illinois\]](#) [\[Indiana\]](#) [\[Iowa\]](#) [\[Kansas\]](#) [\[Kentucky\]](#) [\[Louisiana\]](#) [\[Maine\]](#) [\[Maryland\]](#) [\[Massachusetts\]](#) [\[Michigan\]](#) [\[Minnesota\]](#) [\[Mississippi\]](#) [\[Missouri\]](#) [\[Montana\]](#) [\[Nebraska\]](#) [\[Nevada\]](#) [\[New Hampshire\]](#) [\[New Jersey\]](#) [\[New Mexico\]](#) [\[New York\]](#) [\[North Carolina\]](#) [\[North Dakota\]](#) [\[Ohio\]](#) [\[Oregon\]](#) [\[Pennsylvania\]](#) [\[Rhode Island\]](#) [\[South Carolina\]](#) [\[South Dakota\]](#) [\[Tennessee\]](#) [\[Texas\]](#) [\[Utah\]](#) [\[Vermont\]](#) [\[Virginia\]](#) [\[Washington\]](#) [\[West Virginia\]](#) [\[Wisconsin\]](#) [\[Wyoming\]](#)

State	Jurisdiction, Terms of Agreement (except fees)	Compensation	Timelines	Nondiscrimination	Mediation	Condemnation	Remediation & Maintenance	
Alabama	Ala. Code § 11-49-1 (2002): Requires consent from city or town authorities before using public lands for the construction or operation of any private utility or private enterprise.	Ala. Code § 11-50-B-3 (2002): Fair and reasonable compensation to municipalities for use of ROW is allowed.		Ala. Code § 11-50B-3 (2002): ROW usage fees must be assessed on a competitively neutral and nondiscriminatory basis.	On appeal, the right to condemn is to be determined by the court. <i>Nicrosi v. City of Montgomery</i> , 406 So. 2d (Ala. Civ. App. 1981).	Ala. Code § 11-50B-10 (2002): Public providers may exercise all powers of eminent domain as they are conferred on Alabama municipalities. However, no public provider may acquire any other person's or entity's cable system, telecommunications equipment, or telecommunications system, or any part or equipment of any other person's or entity's system, including, but not limited to, poles, wires, conduits, transmitters, receivers, towers, appliances, or rights-of-way, through the exercise of the power of eminent domain.		
	Ala. Code § 11-50-B-3 (2002): Government agencies at the state and local level have the authority to manage public rights-of-way, and to require fair and reasonable compensation from telecommunications providers for the use of such rights-of-way.	Ala. Code § 40-21-50 (2002): Telecommunications providers subject to 2.2% state gross receipts tax.						
	Ala. Code § 37-1-35 (2002): Reserves power of municipalities to maintain or require maintenance of their streets and other highways and public places. Statute protects any power of any municipality to adopt and enforce reasonable police regulations and ordinances in the interest of the public safety, morals and convenience, or to protect the public and also protect any right or power, by contract or otherwise, of any municipality to require utilities to pave and maintain the portions of highways used and occupied by them.	Ala. Code § 40-21-64 (2002): Counties prohibited from levying privilege/license tax.						
	Ala. Code § 10-5-14 (2002): This statute maintains the municipalities' power to regulate construction in public rights of way and to make ordinances accordingly.							
	Ala. Code § 11-43-62 (2002): County or municipal councils are in charge of regulating the use of streets for above-ground wire systems as they are used for telecommunications or electric utility purposes. A council may require that such systems be placed underground, if necessary, to ensure public convenience and safety. A council may sell or lease their franchise in any manner as it deems advisable, and the money raised is payable to the city treasury.							
Alaska	Alaska Stat. § 29.35.010 (2002): Municipalities granted the power to regulate rights of way. Alaska Stat. § 38.05.810(e) (2002): The Director of the Mining, Land and Water Division may negotiate with licensed public utilities or common carriers for the lease, sale, or other disposal of state land. Such negotiations must have the approval of the commissioner, and may only be entered into if the utility or carrier reasonably requires the land to conduct its business. Alaska Stat. § 38.05.850 (2002): The Division of Mining, Land, and Water Director may issue permits, rights-of-way, or easements on state land for roads, trails, ditches, field gathering lines or transmission and distribution pipelines not subject to AS 38.35, telephone or electric	Alaska Stat. § 42.05.251 (2002): Fee not to exceed actual cost to the municipality of the utility's use of the public way and of administering the permit program. Utilities may recover fee costs by applying them to customers' utility bills as a surcharge.			Alaska Stat. § 42.05.251 (2002): Disputes regarding fees, conditions or exceptions imposed by municipalities mediated by the Commission.	Alaska Stat. § 42.05.631 (2002): "A public utility may exercise the power of eminent domain for public utility uses. This section does not authorize the use of a declaration of taking."		

	<p>transmission and distribution lines, log storage, oil well drilling sites and production facilities for the purposes of recovering minerals from adjacent land under valid lease, and other similar uses or improvements, or revocable, nonexclusive permits for the personal or commercial use or removal of resources that the director has determined to be of limited value. These permits may be issued without prior approval from the Commissioner of the Department of Natural Resources.</p>						
<p><b>Arizona</b></p>	<p>Ariz. Rev. Stat. §§ 9-581 - 9-583; Ariz. Rev. Stat. § 9-583(A) (2001): A political subdivision (city, county, municipality, etc.) has the authority to manage its public highways and exercise its police powers, but may not exercise such power to prohibit the ability of any telecommunications company to provide its service.</p>	<p>Ariz. Rev. Stat. § 9-582(B) (2001): Any application or permit fees must be related to the costs incurred by processing the application, and must also be assessed within a reasonable amount of time after those costs are incurred.</p> <p>Ariz. Rev. Stat. § 9-582(D) (2001): Arizona permits a political subdivision and a telecommunications licensee or franchisee to agree to an in-kind arrangement, but the costs of the in-kind facilities offset the provider's obligation to pay local transaction privilege taxes or linear foot charges (applicable to interstate services) and must be equal to or less than the taxes or charges.</p> <p>Ariz. Rev. Stat. § 9-582(D) (2001): "The in-kind facilities . . . shall remain in possession and ownership of the political subdivision after the term of the existing license or franchise expires."</p> <p>Ariz. Rev. Stat. § 9-</p>		<p>Ariz. Rev. Stat. § 9-583(B) (2001): Licenses or franchises must be issued on a competitively-neutral basis, and within a reasonable time after application. The requirements for such licenses or permits are limited to: 1. Proof that the applicant has received a certificate of convenience and necessity from the AZ Corporation Commission; 2. Public highway use requirements; 3. Mapping requirements; 4. Insurance, performance bonds, or similar requirements; and 5. Enforcement and administrative provisions.</p> <p>Ariz. Rev. Stat. § 9-581, para. 4. (2001): Cable companies are exempt from regulatory statutes relating to rights-of-way because they are excluded from the definition of "telecommunications." However, A.R.S. § 9-582 (G). "A municipality may not discriminate against a cable operator in its provision of telecommunications systems if that cable operator complies with the requirements applicable to telecommunications corporations."</p> <p>Ariz. Rev. Stat. § 9-582 (A), (E) (2001): Any telecommunications company that was granted its franchise prior to November 1, 1997 is exempt from paying any additional fees.</p>	<p>Ariz. Rev. Stat. § 9-582(A)(3) (2001): ... "Political subdivisions shall establish a nonbinding outside arbitration procedure to attempt to resolve disputes over recovery of reasonable, proportionate and attributable costs of construction permit fees pursuant to this paragraph and other fees pursuant to this article before the disputes are submitted to a court for resolution."</p>		

		<p>582(D) (2001): "Notwithstanding subsections A and B of this section, in a license or franchise, a political subdivision and a telecommunications corporation may agree to in-kind payments for use of the public highways different from those specified in subsection A or B of this section."</p> <p>Ariz. Rev. Stat. § 9-582(E) (2001): "... .The license or franchise shall be structured so that the in-kind payments made for use of the public highways to provide interstate telecommunications services under the license or franchise are less than or equal to and are offset against any linear foot charge owed pursuant to section 9-583, subsection C, paragraphs 2 and 3."</p>				
Arkansas	<p>Ark. Code Ann. § 14-200-101(a)(2) (2002): Cities and towns have jurisdiction to assess franchise fees and other terms and conditions of franchise agreement.</p> <p>Ark. Code Ann. § 14-200-110 (2002): Municipalities may require from the provider, as a condition of the franchise agreement, all books, records, and other information as to any matter pertaining to its business or organization. Utilities shall provide verified itemized and detailed inventory and valuation of any or all of its property as to which the municipal council or city commission should properly have knowledge in order to enable it to perform its duties.</p> <p>Ark. Code Ann. § 27-67-304(a) (2002): "The rights-of-way provided for all state highways shall be held inviolate for state highway purposes, except as provided in subsections (b) and (c) of this section. No physical or functional encroachments, installations, signs other than traffic signs or signals, posters, billboards, roadside stands, gasoline pumps, or other structures or uses shall be permitted within the right-of-way limits of state highways."</p> <p>Ark. Code Ann. § 27-67-304(b) (2002): As long as it does not interfere with public use of the highways, any political subdivision, rural electric cooperative, rural telephone cooperative, private cable company or public utility may use State</p>	<p>Ark. Code Ann. § 14-200-101(a)(1) (A) (2002): Local franchise fees not to exceed 4.25% of gross receipts from local service or higher amount agreed to by affected provider OR the voters.</p> <p>Ark. Code Ann. § 14-200-101(a)(1) (D) (2002): Affected utilities may recover fee costs by charging customers an amount equal to the right-of-way fee.</p>			<p>Ark. Code Ann. § 14-200-101(b)(1) (2002): A public utility may appeal an ordinance within 20 days of receipt of notice before the Arkansas Public Service Commission.</p>	

	Highway Commission lands under existing permits, or under subsequent permits approved by the Commission.						
<b>California</b>	Cal. Pub. Util. Code § 1004 (2002): Providers must obtain a local franchise, license, or permit before applying for a certificate of public convenience and necessity from the state. Construction may not begin until a certificate of public convenience and necessity is granted by the Public Utility Commission. However, a provider may be exempted from certification requirements by the Commission and be granted registration status instead.	Cal. Pub. Util. Code § 7901.1 (2001): Statutes reserve right of municipalities to impose fees and "exercise reasonable control" over right of way access.			Cal. Pub. Util. Comm., Dec. No. 98-10-058, No. R.95-04-043 (Filed April 26, 1995), No. I.95-04-044 (Filed April 26, 1995); 1998: "Parties to a dispute involving access to utility rights of way and support structures may invoke the Commission's dispute resolution procedures, but must first attempt in good faith to resolve the dispute. Disputes involving initial access to utility rights of way and support structures shall be heard and resolved through the following expedited dispute resolution procedure. ..."	Cal. Gov. Code § 53066 (2001): Any cable television franchise or license awarded by municipality pursuant to this section may authorize the grantee to place wires, conduits and appurtenances for the community antenna television system along or across such public streets, highways, alleys, public properties, or public easements of the municipality. Public easements, as used in this section, shall include but shall not be limited to any easement created by dedication to municipality for public utility purposes or any other purpose whatsoever.	Cal. Pub. Util. Code § 10102 (2002): A municipal corporation exercising its rights under this article shall restore the road, street, alley, avenue, highway, canal, ditch, or flume so used to its former state of usefulness as nearly as may be, and shall locate its use so as to interfere as little as possible with other existing uses of a road, street, alley, avenue, highway, canal, ditch, or flume.
	Cal. Pub. Util. Code § 1007.5 (2002): Commission rules pre-empt local ordinances.  Cal. Pub. Util. Comm., Dec. No. 98-10-058, No. R.95-04-043 (Filed April 26, 1995), No. I.95-04-044 (Filed April 26, 1995); 1998 APPENDIX A COMMISSION-ADOPTED RULES GOVERNING ACCESS TO RIGHTS-OF-WAY AND SUPPORT STRUCTURES OF INCUMBENT TELEPHONE AND ELECTRIC UTILITIES: I. PURPOSE AND SCOPE OF RULES A. These rules govern access to public utility rights-of-way and support structures by telecommunications carriers and cable TV companies in California, and are issued pursuant to the Commission's jurisdiction over access to utility rights of way and support structures under the Federal Communications Act, 47 U.S.C. § 224(c)(1) and subject to California Public Utilities Code §§ 767, 767.5, 767.7, 768, 768.5 and 8001 through 8057. These rules are to be applied as guidelines by parties in negotiating rights of way access agreements.	Cal. Gov. Code § 50030 (2001): "Any permit fee shall not exceed the reasonable costs of providing the service for which the fee is charged."			Cal. Pub. Util. Comm., Dec. No. 98-10-058, No. R.95-04-043 (Filed April 26, 1995), No. I.95-04-044 (Filed April 26, 1995); 1998: "In the event that such an application is granted, and the local governmental body refuses to grant access in accordance with the Commission order, the carrier's recourse shall be to file a lawsuit in the appropriate court of civil jurisdiction for resolution." ...		
<b>Colorado</b>	Colo. Rev. Stat. §§ 38-5.5-101 - 38-5.5-108; 38-5.5-104 (2002): Any telecommunications provider authorized to do business in Colorado may construct facilities on state public lands upon payment of just compensation and compliance with the requirements set by the State Board of Land Commissioners.	Colo. Rev. Stat. § 38-5.5-107(1)(b) (2002): Any application or permit fees must be related to the costs incurred by processing the application, and must also be assessed within a reasonable amount of time after those costs are incurred.			Colo. Rev. Stat. § 38-5.5-107 (2) (a) (2002): "Any tax, fee, or charge imposed by a political subdivision shall be competitively neutral among telecommunications providers."		

		<p>Colo. Rev. Stat. §38-5.5-107(3) (2002): In-kind fee provisions are not allowed, nor may a municipality require one as a condition of consent to use a highway.</p>		<p>Colo. Rev. Stat. § 38-5.5-103(2) (2002): Municipalities cannot discriminate among or grant a preference to competing telecommunications providers in the issuance of permits or the passage of any ordinance for the use of its rights-of-way, nor create or erect any unreasonable requirements for entry to the rights-of-way for such providers.</p> <p>Colo. Rev. Stat. § 38.5.5.102(3) (2002): Cable companies are excluded from the definition of "telecommunications service," and are therefore exempt from right-of-way regulation.</p> <p>Colo. Rev. Stat. § 38.5.5.101(2)(d) (2002): "Access to rights-of-way and oversight of that access must be competitively neutral, and no telecommunications provider should enjoy any competitive advantage or suffer a competitive disadvantage by virtue of a selective or discriminatory exercise of the police power by a local government."</p>			
<b>Connecticut</b>	<p>Conn. Gen. Stat. § 7-130d (2001). Municipalities are granted authority to regulate right-of-way.</p> <p>Conn. Gen. Stat. § 7-148 (2001). Municipalities may regulate installation of facilities and control excavation procedures.</p> <p>Conn. Gen. Stat. § 16-11 (2001): The Department of Public Utility Control will be kept informed as to the condition of all utility facilities, and may order improvements or repairs on these facilities as needed.</p> <p>Conn. Gen. Stat. § 16-18 (2001): The Department of Public Utility Control may require a telecommunications company to move its lines or for multiple telecommunications companies to string their lines together.</p> <p>Conn. Gen. Stat. § 16-228 (2001): Telecommunications companies may construct their lines along public roads or navigable waters, as long as such construction does not obstruct the roads or waters.</p>	<p>Conn. Gen. Stat. § 7-130 (2001). Municipalities are granted authority to charge fees.</p>			<p>Conn. Gen. Stat. § 16-235 (2001): Carriers may appeal to the Department of Public Utility Control within 30 days after the order is issued from the local government stipulating the terms and conditions of the permit. The Department shall process the appeal as speedily as possible.</p>		
<b>Delaware</b>	<p>Del. Code Ann. tit. 26, § 901 (2002): Local authorities are explicitly granted authority over right-of-way management.</p>	<p>Del. Code Ann. tit. 30, § 5501 (2002): 4.25% Gross Receipts Tax assessed by PSC on intrastate telecommunications services, including cellular service.</p>			<p>Del. Code Ann. tit. 10, § 61 (2002): Condemnation: "This chapter shall govern the procedure for all condemnations of real and personal property within this</p>	<p>Del. Code Ann. tit. 26, § 902(c)(1) (2002): If a telecom or other company alters the street surface in order to place or repair its underground</p>	

		Providers may pass through to customers.			State under the power of eminent domain exercised by any authority whatsoever, governmental or otherwise."	facilities, the company must immediately restore the street surface to its pre-existing condition.
	Del. Code Ann. tit. 22, § 103 (2002): "Street openings. No person shall open or excavate the bed of any street or highway of any city, town or village in this State for the purpose of laying or placing pipes, wires or other conductors therein without first obtaining the consent of the duly constituted authorities of such city, town or village. Nothing in this section shall require such consent before opening or excavating the bed of any such street or highway for the purpose of repairing any pipes, wires or other conductors theretofore lawfully laid or placed in such street or highway."	Del. Code Ann. tit. 30, § 5502(4) (2002): "A tax is imposed upon any distributor of cable television communications commodities and services which tax shall be at the rate of 2.125% of the gross receipts or tariff charges received by the distributor for such commodities or services distributed within this State."				Del. Code Ann. tit. 26, § 902(c)(2) (2002): If a company fails to restore the street surface, then the municipality may perform the task and recover its costs from the company.
		Del. Code Ann. tit. 26, § 115 (2002): Gross revenues assessment on all public utilities for cost of regulation.				
		Del. Code Ann. tit. 8, § 501-518 (2002): Corporate Franchise Tax: "Every telegraph, telephone or cable company . . . to be incorporated under the laws of this State, shall pay an annual tax, for the use of the State, by way of license for the corporate franchise as prescribed in this chapter."				
DC	D.C. Code Ann. § 10-1141.03 (2002). The Mayor may issue permits to occupy or otherwise use public rights-of-way, public space, and public structures for any purpose. He may do so without regard to whether the permittee owns the property abutting the public areas, and he may revoke the permit at any time. Any leasing or subleasing of the public areas must be with the express consent of the mayor. When a permit is revoked or expires, the Mayor may require the permittee to remove any apparatus constructed in the public areas.	D.C. Code Ann. § 10-1141.04 (2002): Right-of-way access permit fees to cover costs of reviewing permit applications. "The Mayor may allow a permittee to pay a fixed charge for a set period of time, pay an amount based upon the amount of the public right-of-way or public space used or occupied, pay an amount based upon a revenue sharing formula, or provide in-kind services to the District in lieu of a monetary payment, or the Mayor may require a permittee to pay a combination of		D.C. Code Ann. § 34-2004 (2002): Terms and conditions of franchise agreement must be competitively neutral and fees must be nondiscriminatory.	D.C. Code Ann. § 34-1921.08 (2002). Rights to build and lay conduits not compensable in event of condemnation [Formerly '43-1417]	D.C. Code Ann. § 34-2004(c) (2002): "The Mayor shall issue rules to establish and regulate the process through which any alteration or damage to public rights of way in the District of Columbia shall be compensated by the telecommunications service provider whose construction or repair work has altered or damaged public rights of way. The rules shall require the telecommunications service provider to repair any alteration or

<p>D.C. Code Ann. § 43-1454(a) (2002): "Any telecommunications provider in the District shall have the right to utilize the public right-of-ways of the District for installation, maintenance, repair, replacement, and operation of its telecommunications system..."</p>	<p>these items." D.C. Code Ann. § 47-2501(3) (2002): "After May 31, 1994, pay to the Mayor 10% of these gross receipts from sales included in bills rendered after May 31, 1994, for a telephone company. . ."</p>				<p>D.C. Code Ann. § 16-1311 (2002) If the Mayor needs District lands for an authorized municipal use, and the property cannot be purchased at a price acceptable to District representatives, then a complaint may be filed in Superior Court for the condemnation of the property and the ascertainment of its value.</p>	<p>damage pursuant to specifications and inspection by the District of Columbia Department of Public Works, or require that the telecommunications service provider compensate the District of Columbia for the cost of repair to a public right of way."</p>
<p>D.C. Code Ann. § 34-2004(b) (2002): "Prior to constructing each portion of its telecommunications system located within the public ways, a telecommunications service provider shall obtain all necessary construction permits and licenses from the appropriate agency. All such construction shall be performed in compliance with applicable codes and regulations, and all facilities so constructed shall be maintained in compliance with applicable codes and regulations."</p>					<p>D.C. Code Ann. § 16-1301 (2002): "Jurisdiction of District Court. The United States District Court for the District of Columbia has exclusive jurisdiction of all proceedings for the condemnation of real property authorized by subchapters IV and V of this chapter, with full power to hear and determine all issues of law and fact that may arise in the proceedings."</p> <p>D.C. Code Ann. § 2-1219.19. The District may acquire land, property, easements, or other interests in real property through condemnation through eminent domain in furtherance of public purposes. Any exercise of eminent domain powers must be approved by a 2/3 vote of the District Board. Under this section, the Board must determine that any property to be acquired by this process is one of four types of condemnable land. Any exercise of eminent domain powers must be submitted to the Council for final approval or disapproval within 30 days of submission.</p>	

<p><b>Florida</b></p>	<p>Fla. Stat. Ch. 202.10-202.41 (2002) COMMUNICATIONS SERVICES TAX SIMPLIFICATION LAW Prohibits municipalities and counties from requiring a telecommunications company to enter franchise, license or other agreements. Municipal and county right-of-way rules and regulations may only address placement and maintenance of facilities. Requires local governments to provide notice of proposed right-of-way ordinances to FL Department of State.</p>	<p>Fla. Stat. Ch. 202.10-202.41 (2002) COMMUNICATIONS SERVICES TAX SIMPLIFICATION LAW Municipalities &amp; counties may charge permit fees to recover actual costs (not to exceed \$100) and tax rate reduced by .12%. If no permits, may increase tax rate by .12%.</p> <p>Fla. Stat. Ch. 202.10-202.41 (2002) Florida enacted a harmonized state and local communications services tax system, which functions as a sales or use tax assessed on the retail price of telecommunications services. Fla. Stat. Ch. 337.401(3)(c), (2002). The local tax component varies by locality. Of the combined state and local tax rate (which can exceed 10%), 0.24% is earmarked to replace permit fees foregone by local governments that opt to participate in the tax collection system instead of collecting fees.</p> <p>Fla. Stat. Ch. 202.24(2) (2002). Prohibits in kind compensation.</p>		<p>Fla. Stat. Sec. 202.19. Tax collection scheme applies explicitly to wireless telecommunications providers.</p> <p>Fla. Stat. Ch. 337.401 (3)(a)(2). Cable companies are exempt from the statutory right-of-way access provisions, but do have to pay communications services tax (in lieu of permitting municipalities to negotiate and collect franchise fees.)</p>	<p>Fla. Stat. Ch. 73.161 Right-of-Way for Telephone and Telegraph over Railroad Right-of-Way. If a telecom fails to successfully negotiate with a railroad company for the construction of lines along its right-of-way, then this access may be acquired through eminent domain. The judgment will authorize the petitioner telecom company to enter upon the railroad right-of-way and construct lines. The lines may not be constructed in any way as to interfere with the railroad's business, and the railroad may require the telecom company to move its lines at any time.</p>	
<p><b>Georgia</b></p>	<p>Ga. Code Ann. § 32-4-92 (2002). Authorizes permitting authority of local governments. Locals may establish reasonable regulations for the installation and construction of facilities in right-of-way, but the regulations may not be more stringent than those enforced by the Dept of Transportation to regulate state highway right-of-way. The locality may require a written application specifying the nature, extent and location of the facilities in the area. They may also require the applicant to furnish indemnification bond or other acceptable security to pay for any damage to public road or member of the public.</p> <p>Ga. Code Ann. § 46-5-1(a) (2002): Any telecom company has the right to construct, maintain, or operate its lines along the state public highways, as long as the local municipal authorities</p>	<p>Ga. Code Ann. § 46-5-1(a) (2002): A telecom company may have right-of-way access to construct and maintain its lines over any state lands, railroads, or private lands as long as it pays due compensation for such use.</p> <p>Ga. Code Ann. § 48-5-423 (2002): "Ascertainment of valuations of special</p>			<p>Ga. Code Ann. § 48-5-420 (2002): Telecommunications companies are granted special franchise by the state, granting them the power to exercise right of eminent domain, use any public highway in the state and use land above or below public highways. For these privileges, the telecom must remit to the state a special franchise tax.</p> <p>Ga. Code Ann. §22-3-1 (2002). If a telecom company needs to condemn</p>	

	<p>approve.</p>	<p>franchises; levy and collection of tax. (a) In arriving at a proposed assessment, the commissioner shall not be bound to accept the valuation fixed for a special franchise in the return made but shall review the return and valuation. When the commissioner refuses to accept the return, the subsequent proceedings shall be in all particulars the same procedures as are provided by law in the case of refusal to accept the returns made by public utilities of their tangible property. (b) Special franchises shall be taxed at the same rate as other property upon the value of the special franchise as returned or upon the value determined by the county board of tax assessors. The tax on special franchises shall be levied and collected in the same manner as is provided by law in the case of the tangible property of public utilities."</p>				<p>part of a railroad right-of-way in order to construct, maintain, or operate its lines, notice shall be given to the railroad company, and such notice should include: 1. The manner in which the telecom company proposes to construct its lines on the railroad right-of-way; 2. Give the time of the hearing; 3. Give the name of the assessor chosen by the telecom company; and 4. Instruct the railroad company to select their own assessor.</p>	
<p><b>Hawaii</b></p>	<p>Haw. Rev. Stat. § 264-13 (2002). The governor or the director of transportation may dispose of easements or rights-of-way along state highways under any terms that are within the public interest.</p>	<p>Haw. Rev. Stat. § 264-7(b) (2002): The director of transportation established the fee schedule for permits. The fee schedule should be calculated to recover any costs spent on issuing the permit. The applicant shall pay the fee, but the director may waive the fee where he determines that the work to be done will improve the highway or otherwise benefit the state. No fee is required where the only work to be done is the setting of poles to carry overhead wires.</p>				<p>Haw. Rev. Stat. § 101-4 (2002): The right of eminent domain is granted to telecommunications companies, as well as other public utility companies, and public transportation companies.</p>	
	<p>Haw. Rev. Stat. § 264-6 (2002). State highways may not be disturbed without a permit.</p>						

<p><b>Idaho</b></p>	<p>Idaho Code § 62-618 (2002): Municipalities are not permitted to regulate telecommunications companies.</p>	<p>Idaho Code § 50-329A (2002). Municipal franchise fees may be levied on providers, but levy may not exceed 3% of gross operating revenues; providers may pass through to customers. This franchise fee is in lieu of any other tax or fee imposed by the municipality related to easements, franchises, rights of way, utility lines and equipment installation.</p>				
	<p>Idaho Code § 62-701 (2002): Telecommunications providers may erect facilities and structures on any public lands, including along public roads, waterways, or other lands, as long as those facilities don't disrupt the use of such roads, etc.</p>	<p>Idaho Code §§ 61-1001 &amp; 1004 (2002). Utilities pay yearly gross revenue fee to Public Utilities Commission to reimburse for cost of regulation. This fee is based upon a consideration of the time and expense devoted to the supervision and regulation of each class of . . . public utilities during the preceding calendar year, including salaries and wages of the commissioners and employees and all other necessary and lawful expenditures of the commission.</p>				
	<p>Idaho Code § 62-701A(2) (2002): "With respect to the installation of its facilities within public rights-of-way, the telecommunications provider shall at all times be subject to the authority of a city, county or highway district. No grant of authority pursuant to this section shall be deemed to waive other rights or requirements of the codes, ordinances or resolutions of a city, county or highway district regarding permits, reasonable fees to be paid, manner of construction, or the like, nor to grant any property interest in the public rights-of-way."</p>					
<p><b>Illinois</b></p>		<p>35 Ill. Comp. Stat. 635/5 (2002): Recognizing that telecommunications providers were becoming more competitive, the Illinois General Assembly abolished municipal franchise fees and established a uniform municipal infrastructure maintenance fee. Although this fee is meant to replace the revenue that municipalities lost from the franchise fees, the statute provides that the fee may not be related to the use of public rights-of-way or to the costs of maintaining and regulating such use.</p> <p>35 Ill. Comp. Stat.</p>		<p>35 Ill. Comp. Stat. 625/10(b). Cable companies are excluded from the definition of "telecommunications service," and are therefore exempt from right-of-way regulation.</p>		<p>220 Ill. Comp. Stat. 65/4 (2002): Every telecommunications provider has a right of entry on private lands when necessary to maintain, alter, or extend its system. Compensation for such condemnation must be calculated according to provisions of the Telegraph Act. (220 ILCS 55/0.01 et. seq.)</p>

		<p>636/5-60 (2002): With the implementation of the municipal infrastructure maintenance fee, municipalities were deemed to have waived their rights to any compensation that might subsequently accrue under a franchise agreement executed before January 1, 1998, if: 1) the municipality imposes a tax at a rate exceeding 5%; 2) the municipality affirmatively waives such fees; or 3) the municipality has a municipal infrastructure maintenance fee in place.</p> <p>35 Ill. Comp. Stat. 635/15 (2002): The state fee portion of the municipal infrastructure maintenance fee is .05% of the gross retail revenues.</p> <p>35 Ill. Comp. Stat. § 635/20 (a), (b) (2002): The municipality's portion of the municipal infrastructure maintenance fee may not exceed 1% of gross retail revenues in areas with a population of 500,000 or less, or 2% in areas with a population of 500,000 or more.</p> <p>35 Ill. Comp. Stat. 635/30 (2002): With the implementation of the municipal infrastructure maintenance fee, municipalities may no longer assess franchise fees or other charges on telecommunications providers.</p>				
Indiana	Ind. Code § 8-1-2-101(b) (2002): Municipalities or county executives may operate and maintain the public roads and other lands for the benefit of public safety. They may also manage the rights-of-way associated with the public roads or other lands, and may require compensation for their use. Such compensation must be competitively neutral and non-discriminatory.	Ind. Code § 8-1-2-101(b) (2002): Compensation may not exceed the municipality's direct and actual costs of managing the right-of-way for the	Ind. Code § 8-1-2-101(a)(4) (2002). A municipality has 30 days in which to approve construction	Ind. Code § 8-1-2-101(b)(2002) The assessment of compensation for the use of public rights-of-way must be competitively neutral and nondiscriminatory.		Ind. Code § 8-1-2-101(b) (2002): Management costs may include the costs of: . . . 4. Restoring work inadequately performed; 5.

		<p>public utility. These costs shall be assigned individually to the public utility creating the costs.</p> <p>Ind. Code § 8-1-2-101(b) (2002): Management costs may include the costs of: 1. Registering occupants; 2. Verifying occupation; 3. Inspecting job sites and restoration projects; 4. Restoring work inadequately performed; 5. Administering a restoration ordinance that ensures the right-of-way will be returned to its original condition; and 6. any management costs associated with the implementation of any other ordinance associated with rights-of-way. These costs may not include rents, franchise fees, or any other fee paid by a public utility for occupation of the right-of-way.</p>	<p>on a right-of-way. After 30 days of inaction, may petition the public utility commission for a hearing.</p>	<p>Ind. Code § 8-1-2-101(b)(2002) This section specifically defines "right-of-way" as excluding airwaves above the streets (so not including wireless communications.) However, it does not deal with the issue of wireless transmitters.</p> <p>Ind. Code § 8-1-2-101(d)(2002) None of the right-of-way statutes affect franchise agreements between a municipality and a cable company.</p>		<p>Administering a restoration ordinance that ensures the right-of-way will be returned to its original condition . . .</p>
Iowa	<p>Iowa Code § 364.2(4)(a) (2002): "A city may grant to any person a franchise to erect, maintain, or operate plants and systems [for telecommunications systems and other utilities] . . . within the city for a term of not more than 25 years. When considering whether to grant, amend, extend, or renew a franchise, a city shall hold a hearing . . . The franchise may be granted, extended, or renewed only by an ordinance, but no exclusive franchise shall be granted . . .</p>	<p>Iowa Code § 480A.3 (2002): The only fee that a municipality can recover from a utility are those management costs caused by the utility's occupation of the right-of-way. If the management costs are attributed to more than one entity, the costs shall be allocated proportionately to the users of the right-of-way. Any other obligations must be imposed on a competitively neutral basis.</p>		<p>Iowa Code § 480A.2 (2002): This section specifically defines "right-of-way" as excluding airwaves above the streets (so not including wireless communications.) However, it does not deal with the issue of wireless transmitters.</p>	<p>Iowa Code § 480A.5 (2002). Arbitration upon completion of administrative review.</p>	<p>Iowa Code § 364.2(4)(e) (2002): "The franchise ordinance may regulate the conditions required and the manner of use of the streets and public grounds of the city, and it may, for the purpose of providing electrical, gas, heating, or water service, confer the power to appropriate and condemn private property upon the person franchised."</p>
	<p>Iowa Code § 364.2(4)(e) (2002): "The franchise ordinance may regulate the conditions required and the manner of use of the streets and public grounds of the city, and it may, for the purpose of providing electrical, gas, heating, or water service, confer the power to appropriate and condemn private property upon the person franchised."</p>	<p>Iowa Code § 480A.4 (2002): A municipality may not allow in-kind services in lieu of fees, nor may it require in-kind services as a condition for use of the right-of-way.</p>		<p>Iowa Code § 480A.2 (2002): Cable companies are excluded from the definition of "public utility," and are therefore exempt from right-of-way regulation. (Other telecommunications providers are</p>		
	<p>Iowa Code § 477.1 (2002): Any telecommunications provider may construct its</p>					

	<p>system along the public roads, along public waterways, or through public or private lands. However, construction along a primary road is subject to rules adopted by the state department of transportation.</p> <p>Iowa Code § 480A.1- § 480A.6 (2002). § 480A.1: "Purpose. The general assembly finds that it is in the public interest to define the right of local governments to charge public utilities for the location and operation of public utility facilities in local government rights-of-way."</p>			included.)			
<b>Kansas</b>	<p>Kan. Stat. Ann. § 17-1902(B) (2002) (Amended by Senate Bill 397, effective Jul 1, 2002): Any provider has the right to construct systems and related facilities along the state's public rights-of-way. The systems and facilities must be constructed so as not to obstruct other entities' use of the rights-of-way.</p>	<p>Kan. Stat. Ann. § 17-1902(N) (2002) (Amended by Senate Bill 397, effective Jul 1, 2002). A city may charge for the reasonable, actual, and verifiable costs of managing the city right-of-way. Fees may include: a permit fee, excavation fee, inspection fee, repair and restoration costs, performance bond.</p>	<p>Kan. Stat. Ann. § 17-1201(h) (2002) (Amended by Senate Bill 397, effective Jul 1, 2002). Franchise applications must be processed within 90 days of receipt.</p>	<p>Kan. Stat. Ann. § 17-1902(D) (2002) (Amended by Senate Bill 397, effective Jul 1, 2002). The ability of a provider to use a right-of-way is subject to public health and safety considerations. A city may regulate the use of a right-of-way provided that such exercise is competitively neutral and nondiscriminatory.</p>	<p>Kan. Stat. Ann. § 17-1902(F) (2002) (Amended by Senate Bill 397, effective July 1, 2002). Before the city government can deny a provider access to a right-of-way, it must give the provider notice and an opportunity for public hearing. The subsequent denial may be appealed to district court.</p>	<p>Kan. Stat. Ann. § 17-1902(k) (2002) (Amended by Senate Bill 397, effective July 1, 2002): A city may require a telecommunications provider to repair all damage to a right-of-way cause by the use of that right-of-way. If the provider fails to make such repairs, the city may effect the repairs and charge the provider for their cost.</p>	
	<p>Kan. Stat. Ann. § 17-1902(k) (2002) (Amended by Senate Bill 397, effective Jul 1, 2002): A city may require a telecommunications provider to repair all damage to a right-of-way cause by the use of that right-of-way. If the provider fails to make such repairs, the city may effect the repairs and charge the provider for their cost.</p>	<p>Kan. Stat. Ann. § 17-1902(h) (2002) (Amended by Senate Bill 397, effective Jul 1, 2002): A city may not require a telecommunications company to provide it with in-kind services.</p> <p>Kan. Stat. Ann. § 12-2001(g), (j). Each city may assess a one-time franchise application fee to cover the costs of reviewing the application. It may also impose either an access line fee of up to \$2.00 per access line per month, or a gross receipts fee of up to 5% on local services.</p>	<p>Kan. Stat. Ann. § 17-1902(l) (2002) (Amended by Senate Bill 397, effective Jul 1, 2002). A city must process a valid construction application with 30 days.</p>	<p>Kan Stat. Ann. § 17-1902(a)(1) (2002): This section specifically defines "right-of-way" as excluding airwaves above the streets (so not including wireless communications.) However, it does not deal with the issue of wireless transmitters.</p>		<p>Kan. Stat. Ann. § 17-1902(N) (2002) (Amended by Senate Bill 397, effective July 1, 2002). A city may charge for the reasonable, actual, and verifiable costs of managing the city right-of-way. Fees may include: . . . repair and restoration costs . . .</p>	
<b>Kentucky</b>	<p>Ky. Rev. Stat. Ann. § 278.540 (2002): Once just compensation has been made, the provider gains the right to construct, maintain and operate its lines through any public lands of this state and across and along any public road.</p>	<p>Ky. Rev. Stat. Ann. § 278.540(1) (2002): Just compensation for right-of-way access is authorized.</p>				<p>Ky. Rev. Stat. Ann. § 278.540(1) (2002): As long as just compensation is paid, telecommunications companies have the right to construct and maintain its lines on any public lands, public roads, or navigable waters.</p>	
		<p>Ky. Rev. Stat. Ann. § 278.130 (2002): Cities are prohibited</p>				<p>Ky. Rev. Stat. Ann. § 278.540(2) (2002): A</p>	

		from assessing occupational license tax on public utilities. Instead, PSC assesses annual license tax on utilities.				telecommunications company may contract with a private property owner for right-of-way over private lands, or if they are unable to reach an agreement by contract, the telecommunications company may condemn the private land under the Eminent Domain Act of Kentucky. (Ky. Rev. Stat. Ann. § 416.450 - 416.680).	
Louisiana	La. Rev. Stat. Ann. § 48:381.1(C) (2002). Providers requesting access to state highways must apply for a right-of-way access permit with the PSC chief engineer.	La. Rev. Stat. Ann. § 48:381.2 (A)(2), (2002): When fiber optic cable providers apply for permits, their application commits them to a one-time permit fee.		La. Rev. Stat. Ann. § 48:381.2(A)(1) (2002): "The chief engineer or his duly authorized representative may issue nonexclusive permits, on a competitively neutral and nondiscriminatory basis for use of public rights-of-way, to utility operators for the purpose of installation of fiber-optic cable facilities within controlled-access highway rights-of-way."			
	La. Rev. Stat. Ann. § 48:381.3(A)(2) (2002). Providers seeking access to locally controlled right-of-way are subject to the ordinances and resolutions of the locality where they are located.	La. Rev. Stat. Ann. § 48:381.2(F) (2002): In-kind services (shared resources) may help defray permit fee costs for providers. "F. The fee for fiber-optic telecommunication installations placed within a controlled access highway right-of-way shall not exceed the actual cost of the administration of the program. The department may reduce fees in exchange for shared resources. The department is authorized to reduce fees for its agents, defined for the purposes of this Subsection as those applicants who erect facilities on behalf of the department in order to conduct department work."					
	La. Rev. Stat. Ann. § 33:4401(2002): Municipalities may grant franchises to telecommunications companies or other public utilities, allowing them to use public streets, sewers, alleys, etc. for their wire system. These franchises may not be exclusive, and may not extend beyond 60 years.						
Maine	Me. Rev. Stat. Ann. tit. 35-A § 2502 (2001): Statutes specifically designate licensing authority among municipal, county, and state governments, based on the location of the right-of-way.	Me. Rev. Stat. Ann. tit. 35-A §§ 2503, 2510 (2001): There are two permits, the right-of-way location permit and the right-of-way excavation permit. Each one has its own fee.			Me. Rev. Stat. Ann. tit. 35-A § 2503-13 (2001). Appeals may be filed within 2 weeks of the decision and must be heard within 30 days of the filing of such appeal.	Me. Rev. Stat. Ann. tit. 35-A § 7904 (2001): Telecommunications companies may purchase or take land as needed for the public use of constructing lines, poles, etc. If land is taken damages must be estimated	Me. Rev. Stat. Ann. tit. 35-A § 2512 (2001): If the provider does not properly restore the excavated right-of-way, the local government may restore the right-of-way and charge the provider the cost of redoing

	<p>Me. Rev. Stat. Ann. tit. 35-A § 2507 (2001): No provider may begin construction without a permit from the proper licensing authority.</p> <p>Me. Rev. Stat. Ann. tit. 35-A §§ 2503-2505 (2001): Permits may require description of facilities. Terms and conditions of permits may specify other requirements determined necessary in the best interests of the public safety and use of the right-of-way so as not to obstruct use for public travel.</p> <p>Me. Rev. Stat. Ann. tit. 35-A §§ 2503 - 2506 (2001): Providers are liable only for acts of negligence in the installation or maintenance of the facility.</p> <p>Me. Rev. Stat. Ann. tit. 35-A § 2503-8,9 (2001): Additional permits are not required for replacing or maintaining facilities.</p> <p>Me. Rev. Stat. Ann. tit. 35-A § 2503-14 (2001): Permit required for installing underground facilities.</p> <p>Me. Rev. Stat. Ann. tit. 35-A § 2312-1,2 (2001): If a provider owns facilities in a municipally designated historic district, the municipality may require the provider to offer services to buildings located therein, but the municipality is required to bear the cost of relocating or constructing facilities to those buildings.</p> <p>Me. Rev. Stat. Ann. tit. 35-A § 2522 (2001): Providers must provide written notice to local government and interested area residents before cutting, trimming or removing trees in order to access right-of-way.</p> <p>Me. Rev. Stat. Ann. tit. 35-A § 2301, 2307 (2001): Except as limited, every corporation organized under section 2101 for the purpose of operating telephones and every corporation organized for the purpose of transmitting television signals by wire may construct, maintain and operate its lines upon and along the route or routes and between the points stated in its certificate of incorporation; and may construct its lines and necessary erections and fixtures for them along, over, under and across any of the roads and streets and across or under any of the waters upon and along the route or routes subject to the conditions and under the restrictions provided in this chapter.</p> <p>Me. Rev. Stat. Ann. tit. 35-A § 2307 (2001): Telecommunications companies and public utilities may place their systems under streets and highways as long as they obtain a written permit from the licensing authority. The permit may be subject to additional rules concerning the location and construction of such systems.</p>	<p>Me. Rev. Stat. Ann. tit. 35-A § 2510-1 (2001): Local excavation fees may not exceed the reasonable cost of replacing the excavated pavement.</p>				<p>and paid in accordance with sections 6502-6512.</p>	<p>the work plus 50%.</p>
<p><b>Maryland</b></p>	<p>Md. Ann. Code art. 23A, § 2(13) (2002): Municipalities have the express power to grant exclusive or non-exclusive franchises to a community antenna system or cable systems that use rights-of-way. The municipality may impose franchise fees and establish rates, rules and regulations for the franchises.</p>					<p>Md. Code Ann., Public Utility Companies § 5-410 (4)(b) (2002): Telecommunications companies have the power to construct their systems on any authorized route, and acquire by condemnation any property deemed necessary for their purposes.</p>	
<p><b>Mass.</b></p>	<p>Mass. Gen. Laws Ann. ch. 166 § 25 (2002): Municipalities may permit construction of telecommunications systems in public areas, and they may also establish reasonable regulations for the construction and maintenance of telecommunications systems, as well as other</p>	<p>Mass. Gen. Laws Ann. ch. 166 § 25A (2002): The telecommunications and energy department has the</p>					

	public utility systems.	authority to set rates for right-of-way use, and in setting those rates the department must consider consumer interests.					
	Mass. Gen. Laws Ann. ch. 166 § 22 (2002): Providers must provide written notice of intent to access right-of-way for construction purposes. The municipality must hold a hearing and issue written notice of the hearing. After the hearing, the municipality may grant to the provider a location for the lines and allowances for the number and height of the lines to be installed.	Mass. Gen. Laws Ann. ch. 166 §25A (2002): The telecommunications and energy department shall set reasonable rates for telecommunications attachments to existing right-of-way. The rates shall not be lower than the cost to the utility providing the existing facility, nor more than the proportional cost of the attachment.					
	Mass. Gen. Laws Ann. ch. 166 § 25A (2002): Any municipal regulations pertaining to the installation or construction of telecom lines must be approved by the state Department of Telecommunications and Energy.						
	Mass. Gen. Laws Ann. ch. 166 § 38 (2002): Penalties for intentional or malicious injury of telecom facilities in right-of-way.						
<b>Michigan</b>	Mich. Comp. Laws Ann. §§ 484.3101-484.3120 (2002) Metropolitan extension telecommunications rights-of-way oversight act. § 484.3103: "(1) Pursuant to section 27 of article VII of the state constitution of 1963 and any other applicable law, the metropolitan extension telecommunications rights-of-way oversight authority is established as an autonomous agency within the department of consumer and industry services."	Mich. Comp. Laws Ann. § 484.3108 (2002) Maintenance fee. "... (3) Except as otherwise provided under subsection (6), for the period of November 1, 2002 to March 31, 2003, a provider shall pay an initial annual maintenance fee to the authority on April 29, 2003 of 2 cents per each linear foot of public right-of-way occupied by the provider's facilities within a metropolitan area, prorated for the period specified in this subsection. (4) Except as otherwise provided under subsection (6), for each year after the initial period provided for under subsection (3), a provider shall pay the authority an annual maintenance fee of 5 cents per each linear foot of public right-of-way occupied by the provider's facilities within a metropolitan area. (5) The fee required under this section is based on the linear feet occupied by the provider regardless of the quantity or type of the	Mich. Comp. Laws Ann. § 484.3106 (2002): The commission website has information regarding the length of time each municipality requires to grant an application.	Mich. Comp. Laws Ann. § 484.3115(3) (2002): "... A provider's right to access and use of a public right-of-way shall not be unreasonably denied by a municipality. ."	Mich. Comp. Laws Ann. § 484.3117 (2002). If requested, the Commission may review an Oversight Authority decision de novo. The Commission's decision or order is reviewable pursuant to section 26 of 1901 PA 300, MCL 462.26.		

	<p>provider's facilities utilizing the public right-of-way or whether the facilities are leased to another provider. (6) In recognition of the need to provide nondiscriminatory compensation to municipalities for management of their rights-of-way, the fees required under this section shall be the lesser of the amounts prescribed under subsections (3) and (4) or 1 of the following: (a) For a provider that was an incumbent local exchange carrier in this state on January 1, 2002, the fees within the exchange in which that provider was providing basic local exchange service on January 1, 2002, when restated by the authority on a per access line per year basis, shall not exceed the statewide per access line per year fee of the provider with the highest number of access lines in this state. The authority shall annually determine the statewide per access line per year fee by dividing the amount of the total annual fees the provider is required to pay under subsections (3) and (4) by the provider's total number of access lines in this state. (b) For all other providers in an exchange, the fee per linear foot for the provider's facilities located in the public rights-of-way in that exchange shall be the same as that of the incumbent local exchange carrier.</p>					
<p>Mich. Comp. Laws Ann. § 484.3115 (2002): Municipalities shall grant providers a permit to use any public rights-of-way located within the municipal jurisdiction. If an application involves an easement or public place, then the municipality should act promptly in granting the</p>	<p>Mich. Comp. Laws Ann. § 484.3106 (2002): When applying for a municipal permit, a provider must pay a</p>	<p>Mich. Comp. Laws Ann. § 484.3115 (2002): "(3) A municipality shall approve</p>		<p>Mich. Comp. Laws Ann. § 484.3107 (2002). If irrefolvable disputes arise between a</p>		

	<p>permit.</p> <p>Mich. Comp. Laws Ann. §484.3114 (2002): "(1) (a) Before the passage of any ordinance or resolution authorizing a county or municipality to either construct telecommunication facilities or provide a telecommunication or cable modem service provided through a broadband internet access transport service, a county or municipality shall conduct at least one public hearing. A notice of the public hearing shall be provided as required by law."</p> <p>Mich. Comp. Laws Ann. § 484.3115 (2002): If in constructing its facilities a provider damages or causes damage to the street or highway adjacent to the right-of-way, the provider must return the street or highway to its preexisting condition.</p>	<p>\$500 application fee. This fee must be paid to each municipality where the provider needs access to a right-of-way.</p>	<p>or deny access under this section within 45 days from the date a provider files an application for a permit for access to a public right-of-way."</p>	<p>municipality and a provider,... "the commission shall appoint a mediator within 7 days from the date of the notice to make recommendations within 30 days from the date of the appointment for a resolution of the dispute. If any of the parties are unwilling to comply with the mediator's recommendations, any party to the dispute may within 30 days of receipt of the recommendation request the commission for a review and determination of a resolution of the dispute. ..."</p>		
<p><b>Minnesota</b></p>	<p>Minn. Stat. § 237.04 (2002): The Minn. Department of Commerce has the authority to establish rules for the use of right-of-way by public utilities. These rules shall include regulations for construction, maintenance, and operation of facilities along right-of-ways.</p> <p>Minn. R. 7819.4000 (2002) Municipalities may establish a right-of-way mapping system to facilitate right-of-way management, enhance public safety, improve right-of-way design, and encourage cooperation between municipalities.</p>	<p>Minn. Stat. § 237.163(6)(a) (2002): "A local government unit may recover its right-of-way management costs by imposing a fee for registration, a fee for each right-of-way permit, or, when appropriate, a fee applicable to a particular telecommunications right-of-way user when that user causes the local government unit to incur costs as a result of actions or inactions of that user. A local government unit may not recover from a telecommunications right-of-way user costs caused by another entity's activity in the right-of-way."</p> <p>Minn. Stat. § 237.163(6)(b) (2002): "Fees, or other right-of-way obligations, imposed by a local government unit on telecommunications right-of-way users under this section must be: (1) based on the actual costs incurred by the local</p>		<p>Minn. R. 7819.1000(2) (2002) "Permit fees must be allocated in a competitively neutral manner and must be imposed in a manner so that aboveground uses of public rights-of-way do not bear costs incurred by the local government unit to regulate underground uses of public rights-of-way."</p> <p>Minn. Stat. § 237.162 (2002): This section specifically defines "right-of-way" as excluding airwaves above the streets (so not including wireless communications.) However, it does not deal with the issue of wireless transmitters.</p>		

government unit in managing the public right-of-way; (2) based on an allocation among all users of the public right-of-way, including the local government unit itself, which shall reflect the proportionate costs imposed on the local government unit by each of the various types of uses of the public rights-of-way; (3) imposed on a competitively neutral basis; and (4) imposed in a manner so that aboveground uses of public rights-of-way do not bear costs incurred by the local government unit to regulate underground uses of public rights-of-way."

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Minn. Stat. § 237.163(7)(d) (2002): "A local government unit may not collect a fee imposed under this section through the provision of in-kind services by a telecommunications right-of-way user, nor may a local government unit require the provision of in-kind services as a condition of consent to use the local government unit's public right-of-way."

Minn. Stat. § 237.162 (2002): Cable systems are exempted from the definition of "telecommunications right-of-way user."

Minn. R. 7819.1100 (3) (2002): "Degradation fee. A right-of-way user may elect to pay a degradation fee in lieu of restoration. However, the right-of-way user shall remain responsible for replacing and compacting the subgrade and aggregate base material in the excavation and the degradation fee must not include the cost to accomplish these responsibilities."

Minn. R. 7819.1000  
 (1) (2002): "Permit fee. A local government unit that requires a permit for excavation in or obstruction of the public right-of-way shall make its permit fee schedule available to the public. The permit fee schedule must be established in advance and designed to recover the local government unit's actual costs incurred in managing the public right-of-way."

Minn. R. 7819.1000  
 (2) (2002): "Allocation of permit fees. Permit fees must be based on an allocation among all users of the public right-of-way, which shall include the local government unit itself, so as to reflect the proportionate costs imposed on the local government unit by each of the various types of users of the public rights-of-way. Although the local government unit must be allocated its proportionate share of permit fees, the local government unit need not transfer funds to pay permit fees. Permit fees must be allocated in a competitively neutral manner and must be imposed in a manner so that aboveground uses of public rights-of-way do not bear costs incurred by the local government unit to regulate underground uses of public rights-of-way."

Minn. R. 7819.1000  
 (3) (2002): "Delay penalty. A local government unit may establish and impose a reasonable penalty

		for unreasonable delays in right-of-way excavation, obstruction, patching, or restoration. The delay penalty must be established from time to time by resolution of the local government unit's governing body. A delay penalty must not be imposed if the delay in project completion is due to circumstances beyond the control of the applicant, including without limitation inclement weather, acts of God, or civil strife."					
<b>Mississippi</b>	<p>Miss. Code Ann. § 21-27-1 (2002): Municipalities do not have the right to grant exclusive use of rights-of-way, nor may they grant a franchise without compensation, or for a period of more than 25 years.</p> <p>Miss. Code Ann. § 21-37-3 (2002): ". . . Municipalities shall have the power to exercise full jurisdiction in the matter of streets, sidewalks, sewers, and parks; to open and lay out and construct the same; and to repair, maintain, pave, sprinkle, adorn, and light the same."</p>						
<b>Missouri</b>	<p>Mo. Rev. Stat. § 67.1832 (2001): Municipalities shall permit telecommunication companies and other public utilities to construct, maintain and operate their systems on public rights-of-way.</p>	<p>Mo. Rev. Stat. § 67.1840.2(1) (2001): "Right-of-way permit fees . . . shall be: [b]ased on the actual, substantiated costs reasonably incurred by the political subdivision in managing the public right-of-way."</p> <p>Mo. Rev. Stat. § 67.1830(5) (2001): ""Management costs" or "rights-of-way management costs", the actual costs a political subdivision reasonably incurs in managing its public rights-of-way, including such costs, if incurred, as those associated with the following: (a) Issuing, processing and verifying right-of-way permit applications; (b) Inspecting job sites and restoration projects; (c) Protecting or</p>	<p>Mo. Rev. Stat. § 67.1836.3 (2001): 31 day deadline for right-of-way applications relating to a specific excavation.</p>	<p>Mo. Rev. Stat. § 67.1836 (2001): Municipalities may deny right-of-way permits if they provide the applicant with a competitively-neutral and nondiscriminatory reason for denial, or if they provide an reasonable alternative.</p> <p>Mo. Rev. Stat. § 67.1830 (2001): This section specifically defines "right-of-way" as excluding airwaves above the streets (so not including wireless communications.) However, it does not deal with the issue of wireless transmitters.</p>	<p>Mo. Rev. Stat. § 67.1838 (2001): Disputes to be reviewed by governing body of the political subdivision -- mediation or binding arbitration permitted upon completion of administrative review.</p>	<p>Mo. Rev. Stat. § 67.1834 (2001): The right-of-way user is obligated to restore the right-of-way and any adjacent streets or highways to their preexisting condition. If they do not make the necessary repairs, the municipality is authorized to make the repairs and require the user to provide reimbursement for the costs.</p>	

		<p>moving public utility right-of-way user construction equipment after reasonable notification to the public utility right-of-way user during public right-of-way work; (d) Determining the adequacy of public right-of-way restoration; (e) Restoring work inadequately performed after providing notice and the opportunity to correct the work; and (f) Revoking right-of-way permits."</p> <p>Mo. Rev. Stat. § 67.1842.3 (2001): Prohibits in-kind compensation.</p>					
<b>Montana</b>	<p>Mont. Code Ann. § 7-13-2220 (2002): "Right-of-way across state lands. The right-of-way is given, dedicated, and set apart to locate, construct, and maintain district works over and through any lands which are the property of this state, and the district has the same rights and privileges relating to the right-of-way as are granted to municipalities."</p> <p>Mont. Code Ann. § 7-3-4449 (2002): "The commission shall have all powers to grant rights to occupy or use the streets, highways, bridges, or public places in the municipality that now are or hereafter may be granted to municipalities by the constitution or laws of Montana. Every ordinance or resolution passed by the commission granting the right to occupy or use streets, highways, or public places of municipalities shall be complete in the form in which it is finally passed and remain on file with the commission for inspection by the public for at least 1 week before the final adoption or passage thereof."</p> <p>Mont. Code Ann. § 7-14-4102 (2002): Local government may regulate and prevent the use or obstruction of streets, sidewalks and public grounds by signs, poles, wires, or any obstruction.</p> <p>Mont. Code Ann. § 69-4-101 (2002): A telecommunications company or other public utility may construct its system facilities along the public state roads. The construction of this system may not impede road use, nor may it threaten public safety.</p>					<p>Mont. Code Ann. § 70-30-102 (2002): Eminent domain may be exercised over private lands for the erection of telecommunications facilities, among other uses.</p>	
<b>Nebraska</b>	<p>Neb. Rev. Stat. Ann. § 86-704(1) (2002): A telecommunications company or other public utility may construct its system facilities along the public state roads, public lands, or private lands if necessary. The construction of this system may not impede road use, and any wires or cables must be at least 18 feet above highway crossings.</p>	<p>Neb. Rev. Stat. Ann. § 86-704 (4) (a) (2002): "A municipality shall not levy a tax, fee, or charge for any right or privilege of engaging in a telecommunications business or for the use by a telecommunications company of a public highway other than:</p>		<p>Neb. Rev. Stat. Ann. § 86-704(4)(b) (2002): "Any tax, fee, or charge imposed by a municipality shall be competitively neutral."</p>		<p>Neb. Rev. Stat. Ann. § 86-705 (2002): "Right-of-way; condemnation; procedure. Any telecommunications company may enter upon private lands to survey the lands for the purpose of obtaining a right-of-way. Every owner of an interest in</p>	

		<p>(i) An occupation tax authorized under section 14-109, 15-202, 15-203, 16-205, or 17-525; and (ii) A public highway construction permit fee or charge to the extent that the fee or charge applies to all persons seeking use of the public highway in a substantially similar manner. All public highway construction permit fees or charges shall be directly related to the costs incurred by the municipality in providing services relating to the granting or administration of permits."</p>				<p>private lands to be occupied by any telecommunications lines shall be compensated for any right-of-way appropriated pursuant to sections 86-701 to 86-707. The procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724."</p>	
		<p>Neb. Rev. Stat. Ann. § 86-704 (2002): (4)(a)(ii): Any highway construction permit fee or charge shall also be reasonably related in time to the occurrence of such costs. "(6) Taxes or fees shall not be collected by a municipality through the provision of in-kind services by a telecommunications company, and a municipality shall not require the provision of in-kind services as a condition of consent to the use of a public highway."</p>					
<p><b>Nevada</b></p>	<p>Nev. Rev. Stat. § 707.280 (2002): Anyone constructing a telecommunications line has the right-of-way for that line and any other lands, public or private, that may be necessary to construct and operate that line.</p> <p>Nev. Rev. Stat. § 707.250 (2002): A telecommunications company registered in the state of Nevada may construct and maintain their lines through any public or private lands, along public roads, or along navigable waters, provided the lines do not cause an obstruction.</p> <p>Nev. Rev. Stat. § 268.088 (2002): "Municipalities are not authorized to impose any terms or conditions on a franchise for the provision of telecommunications service other than terms or conditions concerning the placement and location of the telephone lines and fees imposed for a business license or the franchise, right or</p>						

	privilege to construct, install or operate such lines."						
<b>New Hampshire</b>	<p>N.H. Rev. Stat. Ann. § 231:161, I. (a)-(c) (2002): Permits to access state-maintained right-of-way must be acquired from the NH Transportation Commission. Local right-of-way access must be obtained from local governments.</p> <p>N.H. Rev. Stat. Ann. § 231:161 II (2002): Permits may not last longer than one year or two years if the governing authority is petitioned for an extension.</p> <p>N.H. Rev. Stat. Ann. § 231:184 (2002): Providers may not begin right-of-way construction until they also obtain the consent of the proper authorities.</p> <p>N.H. Rev. Stat. Ann. § 231:186 (2002): Providers are liable for all damages to the right-of-way or anyone injured due to the excavation.</p> <p>N.H. Rev. Stat. Ann. § 231:189 (2002): Willful damage to conduits within right-of-way will result in the liability of the guilty party for three times the damages sustained and he/she shall be guilty of a misdemeanor or a felony, depending on the nature of the case.</p> <p>N.H. Rev. Stat. Ann. § 48:17-10 (2002): Municipal or county government consent must be obtained before accessing right-of-way under their jurisdiction.</p>	<p>N.H. Rev. Stat. Ann. § 231:165 (2002): Payment for the town clerk's services and fees should be made by the provider. A minimum \$10 fee is authorized by state statutes.</p>	<p>N.H. Rev. Stat. Ann. § 231:164 (2002): The proper right-of-way authorities must process the permit within six months after the permit application is made.</p>	<p>N.H. Rev. Stat. Ann. § 231:166 (2002): The provider, if dissatisfied with the decision of the local government or Transportation Commission, may appeal to the Superior Court within 60 days after the respective governmental authority has delivered their decision.</p>	<p>N.H. Rev. Stat. Ann. § 231:185 (2002): Providers must restore right-of-way to original condition as soon as possible after construction is complete.</p>		
<b>New Jersey</b>	<p>N.J. Stat. Ann. § 48:17-11 (2002): "The municipal or county government may regulate the use of all right-of-way with police and other regulations and restrictions."</p> <p>N.J. Stat. Ann. § 48:5A-20(a) (2002): "Upon obtaining the prior approval of the board, a CATV company may construct and maintain the wires, cables, and conduits necessary to its business upon, under or over any highway, and may erect and maintain the necessary fixtures, including poles and posts, for sustaining such wires and cables; provided, however, that such wires, cables and fixtures shall be so placed or constructed as not to unreasonably inconvenience public travel on the highway or the use thereof by public utilities or other persons or organizations having rights therein."</p>				<p>N.J. Stat. Ann. § 48:17-9.1 (2002): A telecommunications company may condemn private lands as is reasonably necessary for the purpose of serving the public.</p>		
<b>New Mexico</b>	<p>N.M. Stat. Ann. §3-42-1 (2002): Franchise ordinances must be published twice during the 30-day period following their adoption. If opposed by a number of residents equal to 20% of the voters in the last regular municipal election, the ordinance must be approved by a public vote.</p> <p>N.M. Stat. Ann. §3-42-2A (2002): "If previous to the incorporation of a municipality, the board of county commissioners has granted to any person right-of-way over, upon, in and about the streets of the municipality for the erection, construction, maintenance or operation of a public utility, and such person has erected, constructed, or in good faith commenced the erection or construction of such a utility, the governing body shall, without a vote by the electorate: (1) authorize the completion of the system; (2) authorize the continued or subsequent operation and maintenance of the system; (3) recognize the rights acquired by the person erecting or constructing such a system; and (4) grant such a person a franchise for the maximum term of years allowed by law upon such terms as are fair, just and equitable to all parties concerned. State ROW rules governing state administration of ROW for telecoms."</p> <p>N.M. Stat. Ann. § 19-7-57(2002): The</p>						

	Commissioner may grant rights-of-way and easements to telecommunications providers and other public utilities. The grantee shall pay the price set by the Commissioner, and this price will be at least the minimum price for the lands.						
<b>New York</b>	N.Y. Const. Art. IX, § 2 (c)(6): Local governments have authority over the management of its streets and property.						
	N.Y. Gen City Law § 20 (Consol. 2002): Cities have the right to grant franchises or rights to use public waters, streets, or lands located within the city.						
	N.Y. Gen City Law § 20 (Consol. 2002): Cities have the power to purchase, lease, and regulate the lands inside its jurisdiction.						
	N.Y. Village Law § 4-412 (Consol. 2002): Villages have the right to grant franchises or rights to use public waters, streets or lands located within its jurisdiction.						
	N.Y. Town Law § 64 (Consol. 2002): Towns have the right to grant franchises or rights to use public waters, streets or lands located within its jurisdiction.						
	N.Y. Transp. Corp. Law § 27 (Consol. 2002): Telecommunications companies may construct their lines along public roads, navigable waters, or other public lands, provided that the lines do not impede the use of such roads, etc.						
<b>North Carolina</b>	N.C. Gen. Stat. § 62-39 (2002) Public Utility Commission has the power to regulate crossings of telephone, telegraph, electric power lines and pipelines and rights-of-way of railroads and other utilities by another utility					N.C. Gen. Stat. § 62-183 (2002): Telecommunications companies and other public utilities have a right to condemn private lands for the construction, maintenance, and operation of the telecommunications system, as long as just compensation is paid for the use of the land.	
	N.C. Gen. Stat. § 62-182 (2002): Telecommunications companies and other public utilities have the right to contract with private land owners for rights-of-way.						
<b>North Dakota</b>	N.D. Cent. Code § 49-09-16 (2002): Municipalities may grant rights-of-way, on the public lands and roads under their jurisdiction, for the construction of a telecommunications system or other public utility system. The municipality granting the right of way may also specify the rules and conditions attached to the right-of-way.	N.D. Cent. Code § 49-21-26 (2002): After December 31, 1998, all telecommunications recovery fees must be approved by the municipality electorate.		N.D. Cent. Code, § 49-21-01 (2002): This section specifically defines "right-of-way" as excluding airwaves above the streets (so not including wireless communications). However, it does not deal with the issue of wireless transmitters.	N.D. Cent. Code § 49-21-28 (2002). Arbitration upon completion of administrative review.		
		N.D. Cent. Code § 49-21-26 (2002): A municipality may request that a telecommunications company move its facilities from the public right of way, and the telecommunications company must pay for such removal.					
		N.D. Cent. Code § 49-21-26 (2002): Recovery fess may only include the municipality's costs of managing the right of way; any other fees must be assessed on a					

		<p>competitively neutral basis. If the management costs are attributable to more than one entity, the recovery fee must be assessed to all parties on a proportional basis.</p> <p>N.D. Cent. Code § 49-21-27 (2002): Municipalities may not require in kind services in lieu of a fee or as a pre-requisite to right-of-way use.</p>					
Ohio	Ohio Rev. Code Ann. § 4939.01 - 4939.09 (Anderson 2002); § 4939.02: Ohio's policy regarding rights-of-way grants authority to municipalities to manage rights-of-way, ensures lawful fee recovery, and promotes municipal coordination and standardization.	Ohio Rev. Code Ann. § 4939.05 (B) (Banks-Baldwin 2002): Municipalities may charge different fees for the use of their rights-of-way, based on the amount of public land used, the type of public utility, or any other different treatment justified by public health and safety concerns. This includes a complete waiver of the fee.	Ohio Rev. Code Ann. § 4939.03(C) (Anderson 2002): Municipalities must approve or deny applications within 60 days of receipt.	Ohio Rev. Code Ann. § 4939.04 (Anderson 2002): Municipalities shall provide access to rights-of-way on a competitively neutral and nondiscriminatory basis.	Ohio Rev. Code Ann. § 4939.06 (Anderson 2002): "Public utility may appeal fee. (A) If a public utility does not accept a public way fee levied against it pursuant to the enactment of an ordinance by a municipal corporation, the public utility may appeal the public way fee to the public utilities commission."		
	Ohio Rev. Code Ann. § 5571.16 (Anderson 2002): Municipalities may require a permit to excavate below local roads except where such excavation is necessary to repair a facility already in place.	Ohio Rev. Code Ann. § 4939.05 (C) (Banks-Baldwin 2002): Fees charged may only reflect actual costs of managing the rights-of-way, plus any demonstrable future costs.					
		Ohio Rev. Code Ann. § 4939.05 (A) (Banks-Baldwin 2002): Ohio prohibits the use of in-kind services in lieu of fees.					
Oklahoma	Okla. Const. Art. IX, § 2: Telecommunications companies and other public utilities have a right to construct their lines within the state, and to connect with like lines at the state border.				Okla. Stat. Tit.18 § 601 (2003): Telecommunications companies have a right to condemn railroad property in order to build their systems.		
	Okla. Stat. Tit.11 § 36-101(2003): Municipal governments are authorized to regulate and control use of ROW in the municipality.						
	Okla. Stat. Tit.18 § 601 (2003): Telecommunications companies are granted a right of way over public and private lands and roads, subject to the local authorities.						
Oregon	Or. Rev. Stat. § 221.515 (2001): Municipalities have the authority to regulate and collect taxes for the use of rights-of-way within their jurisdiction.	Or. Rev. Stat. § 221.515 (2001): Municipalities may collect a privilege					

		tax for the use of rights-of-way, not to exceed 7% of the gross revenues (earned within the municipality) of a telecommunications provider.					
	Or. Rev. Stat. § 758.010 (2001): Any telecommunications company or other public utility company has the right to construct and operate its system along public roadways, navigable waters, or other public lands, so long as it does not obstruct the use of such roads, waters, or lands.	Or. Rev. Stat. § 221.515 (2001): If a telecommunications company is paying the privilege tax, then it does not have to pay any other compensation. To the extent that any other fees are levied, they will be deducted from the privilege tax.					
Pennsylvania	71 PA. Cons. Stat. § 194 (2002) (Adm. Code § 514): Municipalities may not grant easements or rights-of-way without the express authority from the General Assembly. However, municipalities may grant licenses to public service companies to construct lines if those lines will give State buildings better service, or if such line is necessary to serve the public.	72 PA. Cons. Stat. § 6164 (2002): If a fee dispute is heard in court, the court will determine the license fee necessary to compensate the municipality for its services performed in regulating the license, and the amount determined will be the maximum amount charged to the licensee.					
	71 PA. Cons. Stat. § 194 (2002): (Adm. Code § 514): Licenses are revocable for cause, as long as the licensee is provided with at least six months notice.	71 PA. Cons. Stat. § 194 (2002): (Adm. Code § 514): Licenses shall provide the amount of compensation due to the Commonwealth for the use of its property.					
Rhode Island	R.I. Gen Laws § 39-17-1 (2002): Municipalities are granted franchising authority to regulate access to ROW.	R.I. Gen Laws § 39-17-3 (2002): Franchise holders must pay franchise tax up to 3% of gross earnings in that locality, on a quarterly basis.			R.I. Gen Laws § 39-17-7 (2002): Providers may, within 30 days of the municipality's decision, appeal to the Division of Public Utilities and Carriers, if they feel local regulations are unreasonable.		
	R.I. Gen Laws § 39-17-7 (2002): Providers are subject to reasonable rules and regulations and orders, controlling the extent and quality of construction and service to be maintained by the corporation and prescribing the location and arrangement of its tracks, poles, wires or conduits and their appurtenances enacted by local governments.	R.I. Gen Laws § 39-17-8 (2002): Cities and towns may not charge for use of streets, except as provided through the franchise tax authorization.					
	R.I. Gen. Laws § 37-7-8 (2002): "Grant of easements and rights of way over acquired lands. Whenever, in the opinion of the acquiring authority, an easement or right of way may be granted in land owned or held by the state without thereby jeopardizing the interests of the state, and the granting of the easement or right of way will be for the public good, the acquiring						

	<p>authority, with the approval of the state properties committee, is hereby authorized and empowered to grant the easement or right of way by proper instrument, approved as to substance by the director of administration and as to form by the attorney general, for such consideration, and in such manner and upon such terms and conditions as may, in the judgment of the state purchasing agent, be most advantageous to the public interest."</p> <p>R.I. Gen. Laws § 34-7-5 (2002). "Utility rights-of-way not acquired by enjoyment. No enjoyment by any persons, companies or corporations, for any length of time, of the privilege of maintaining telegraph, telephone, electric, or other posts, wires or apparatus in, upon or over any lands or buildings of other persons or corporations, shall thereby confer any right to the continued enjoyment of the easement or raise any presumption of a grant thereof."</p>					
<b>South Carolina</b>	<p>S.C. Code Ann. § 58-9-2240. A municipality may not use its authority to regulate rights-of-way as a means to impose additional regulations on telecommunications companies or public utilities.</p> <p>S.C. Code Ann. § 58-12-10 (2002): Public cable companies may place their cables anywhere on state lands, roads, or navigable waters, provided that the cable company contracts with the telephone company or electric utility to attach on their pre-existing poles or in their tunnels. Any cable installation shall not interfere with the use of lands, roads, or waters.</p> <p>S.C. Code Ann. § 58-12-10 (2002): Before a cable company may place its lines, it must get permission from the agency in charge of the lands, roads, and public waters. If the cable must traverse public lands, the cable company must get permission from the public landowner.</p>	<p>S.C. Code Ann. § 58-9-2220 (2002). South Carolina authorizes municipalities to implement a two-tiered tax system. (A). A business license tax of up to 0.75% of retail telecommunications gross income. A franchise or consent fee for the installation or construction of physical facilities in public rights-of-ways. The maximum permissible fee is based on municipal population and ranges from \$100 for a population of 1,000 or less to \$1,000 for a population of more than 25,000.</p>		<p>S.C. Code Ann. § 58-9-2230(B) (2002): A municipality must manage its public rights-of-way on a competitively neutral and nondiscriminatory basis.</p> <p>S.C. Code Ann. § 58-9-2230(D) (2002): Mobile telecommunications companies are not deemed to use rights-of-way unless they build physical facilities on public property.</p>		
<b>South Dakota</b>	<p>S.D. Codified Laws § 49-32-1 (2002): Telecommunications companies are granted rights-of-way over public lands and along public roads, subject to control by the proper authorities.</p> <p>S.D. Codified Laws § 49-7-22 (2002): Telecommunications companies are granted rights-of-way across public school lands.</p> <p>S.D. Codified Laws § 31-26-1 (2002): Localities have franchising authority, but no exclusive franchises may be granted and no franchise may last more than 20 years.</p> <p>S.D. Codified Laws § 9-35-1 (2002): Municipalities have the right to determine charges for local telephone service, subject to the PUC's powers, and to regulate the placement of telephone poles, lines, and other facilities.</p>					
<b>Tennessee</b>	<p>Tenn. Code Ann. § 65-21-201 (2002): Telecommunications companies or their equivalent are granted rights-of-way along public roads, over public lands, along navigable waters, and on private lands.</p> <p>Tenn. Code Ann. § 65-21-103 (2002): Telecommunications companies do not have the</p>				<p>Tenn. Code Ann. § 65-21-204 (2002): If a telecommunications provider is unsuccessful in contracting for a</p>	

	<p>right to contract for exclusive rights to rights-of-way in this state.</p> <p>Tenn. Code Ann. § 6-54-109 (2002): Municipalities have the exclusive right to franchise utilities within their jurisdiction.</p> <p>Tenn. Code Ann. §13-24-303 (2002): Protects authority of locals to exercise reasonable municipal and county police powers.</p>				<p>right-of-way over private land, then the company may condemn the land for its own purpose.</p>	
<b>Texas</b>	<p>Tex. Loc. Gov't. Code Ann. § 283.001 (2002): "(b) It is also the policy of this state that municipalities:</p> <p>(1) retain the authority to manage a public right-of-way within the municipality to ensure the health, safety, and welfare of the public;"</p>	<p>Tex. Loc. Gov't. Code Ann. § 283.001 (2002): "(b) It is also the policy of this state that municipalities:</p> <p>(2) receive from certificated telecommunications providers fair and reasonable compensation for the use of a public right-of-way within the municipality."</p>		<p>Tex. Loc. Gov't. Code Ann. § 283.001 (2002): "(c) The purpose of this chapter is to establish a uniform method for compensating municipalities for the use of a public right-of-way by certificated telecommunications providers that: (1) is administratively simple for municipalities and telecommunications providers; (2) is consistent with state and federal law; (3) is competitively neutral; (4) is nondiscriminatory;"</p>		
	<p>Tex. Loc. Gov't. Code Ann. § 282.002 (2002): "General Authority of General-Law Municipality. (a) A general-law municipality has exclusive control over the public grounds of the municipality."</p>	<p>Tex. Loc. Gov't. Code Ann. § 283.051 (2002): "Right-Of-Way Fee. (a) Notwithstanding any other law, a certificated telecommunications provider that provides telecommunications services within a municipality is required to pay as compensation to a municipality for use of the public rights-of-way in the municipality only the amount determined by the commission under Section 283.055."</p>		<p>Tex. Loc. Gov't. Code Ann. § 283.002 (2002): This section specifically defines "right-of-way" as excluding airwaves above the streets (so does not include wireless communications.) However, it does not deal with the issue of wireless transmitters.</p>		
	<p>Tex. Loc. Gov't. Code Ann. § 283.052 (2002): Telecommunications companies do not have exclusive rights to rights-of-way.</p>	<p>Tex. Loc. Gov't. Code Ann. § 283.055 (2002): The Texas Public Utilities Commission shall set the per-line rate that a municipality can charge for use of its rights-of-way.</p> <p>Tex. Loc. Gov't. Code Ann. § 283.055 (2002): Municipalities are prohibited from receiving services without compensation or at below market prices.</p>				
<b>Utah</b>	<p>Utah Code Ann. § 54-4-25 (2003): Telecommunications companies and other</p>	<p>Utah Code Ann. § 72-7-102 (4)</p>			<p>Utah Code Ann. § 78-34-1 (2003):</p>	

	<p>utilities must obtain certification from the PUC that construction is required before they may begin construction on a right-of-way.</p> <p>Utah Code Ann. § 72-7-102 (2003): Local highway authorities (county or municipal) may allow excavating, installation of utilities and other facilities or access under rules made by the [local] highway authority[ies] and in compliance with federal, state and local law as applicable.</p> <p>Utah Code Ann. § 72-7-109 (2003): "Telecommunications Advisory Council. ... (5) The council shall: (a) provide information, suggestions, strategic plans, priorities, and recommendations to assist the department in administering telecommunications access to interstate highway rights-of-way for statewide telecommunications purposes;..."</p> <p>Utah Code Ann. § 72-3-109 (2003): "(1) Except as provided in Subsection (3), the jurisdiction and responsibility of the department and the municipalities for state highways within municipalities is as follows: ... (c) (i) A municipality has jurisdiction over all other portions of the right-of-way and is responsible for construction and maintenance of the right-of-way."</p> <p>Utah Code Ann. § 72-5-203 (2003): "(d) A grant of a permanent easement or right of entry across state lands other than sovereign and trust lands shall be made upon a showing to the managing unit of state government that the continued use will provide a public benefit commensurate with the value of the easement and will not unreasonably interfere with the purposes for which the land was obtained or is now held."</p>	<p>(2003): The Highway Authority may require compensation from utilities for use of their rights-of-way, but such compensation may only include those management costs caused by the utilities' activity.</p> <p>Utah Code Ann. § 72-7-102 (4) (2003): The Highway Authority's fees must be charged on a competitively neutral basis. If more than one utility is responsible for the management costs incurred, the fees must be allocated to each company or entity proportionately.</p> <p>Utah Code Ann. § 72-7-102 (4)(e) (2003): Providers are entitled to recover ROW access fee costs from their customers.</p>				<p>The right of eminent domain is extended to telecommunications companies.</p>	
<p><b>Vermont</b></p>	<p>VT. Stat. Ann. tit. 19 § 1111(a) (2002): "Permits. -- Permits must be obtained by anyone or any corporation wishing to use as described in this section any part of the highway right-of-way on either the state or town system. Notwithstanding any other statutory requirement, a permit shall be required for any use of any highway right-of-way, consistent with the provisions of this section. The authority given to the board, the secretary and the attorney general under this section shall also apply to the legislative bodies of towns."</p> <p>VT. Stat. Ann. tit. 30 § 2513 (2002): Telecommunications companies may construct facilities along railroad tracks, so long as they render reasonable compensation to the railroad owner.</p> <p>VT. Stat. Ann. tit. 30 § 2502 (2002). "Lines of wires along highways; wireless</p>					<p>Vt. Const., Ch. 1, Art 2d. "That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money."</p>	<p>VT. Stat. Ann. tit. 19 § 1111(c) (2002): Permitted use of the right-of-way. "The permit shall include any conditions imposed by the issuing party.... Failure of any person, corporation or municipality to perform the work or to restore the highways in a satisfactory and timely manner to the agency or the town may result in</p>

	telecommunications facilities; construction; restriction. Lines of telegraph, telephone and electric wires, as well as two-way wireless telecommunications facilities, may, subject to the provisions of section 1111 of Title 19, be constructed and maintained by a person or corporation upon or under a highway, in such manner as not to interfere with repairs of such highway or the public convenience in traveling upon or using the same."						either the agency or the town completing the work at the expense of the permit holder;..."
Virginia	VA. Code Ann. § 56-458 (2002): Telecommunications companies have the right to build its system along public roads and railroads, on public lands, and along navigable waterways.	VA. Code Ann. § 56-468.1 (2002): In Virginia, the state Department of Transportation annually calculates the Public Rights-of-Way Use Fee as an annual average rate per access line. The average weights public highway miles at \$425 per mile and new installations at \$1 per linear foot.	VA. Code Ann. § 56-458(D) (2002) Transportation Board has 45 days to grant or deny approval for use of right-of-way, and if denied it must provide a written explanation of the reasons the permit was denied and the actions required to cure the denial.	VA. Code Ann. § 56-458(C) (2002): Municipalities and the Commonwealth Transportation Board are prohibited from unreasonably or discriminatorily restricting right-of-way use.			VA. Code Ann. § 56-467 (2002): Utility must restore the right-of-way to a good condition, and if it does not, the municipality may complete the restoration and recover costs from the utility.
	VA. Code Ann. § 56-462 (2002): "A. No incorporated city or town shall grant to any such telegraph or telephone corporation the right to erect its poles, wires, or cables, or to lay its conduits upon or beneath its parks, streets, avenues, or alleys until such company shall have first obtained, in the manner prescribed by the laws of this Commonwealth, the franchise to occupy the same."	VA. Code Ann. § 56-458(E) (2002). In-kind fees prohibited.			VA. Code Ann. § 56-458(B) (2002): Commercial mobile radio services are exempt from paying right-of-way fees.		
Washington	Wash. Rev. Code § 35.99.020 (2002): "Permits for use of right of way. A city or town may grant, issue, or deny permits for the use of the right of way by a service provider for installing, maintaining, repairing, or removing facilities for telecommunications services or cable television services . . . "	Wash. Rev. Code § 35.21.860(1) (2002): Municipalities may charge fees for the use of their rights of way that recover their administrative costs related to the permit process, and a site-specific charge to wireless providers for the placement of new structures in the right-of-way.	Wash. Rev. Code § 35.99.030 (2002): Municipalities must grant or deny a "master permit" (a permit to enter the right of way for the purpose of locating facilities) within 120 days of application, but service providers with statewide grants are not required to apply for master permits.				
	Wash. Rev. Code § 35.99.040 (2002): Municipalities may not use the right-of-way permitting process as a means of regulating service providers, except where permitted by federal law.	Wash. Rev. Code § 35.99.070 (2002): Washington permits cities and towns to obtain access to ducts, conduits, or related structures of a service provider, subject to conditions that include the payment of compensation	Wash. Rev. Code § 35.99.030 (2002): Municipalities must grant or deny a "use permit" (a permit to enter the right-of-way for installing, repairing, or				

		<p>sufficient to recover the provider's incremental costs. If the municipality allows the in-kind facilities to be used to provide service to the public, it must compensate the provider on the basis of fully allocated costs.</p>	<p>maintaining facilities) within 30 days of application.</p>			
<b>West Virginia</b>	<p>W.Va. Code § 8-31-1,2 (2002): Municipalities and counties have franchising authority and may impose terms and conditions for those agreements.</p> <p>W.Va. Code § 17-4-8 (2002): Telecommunications companies and other service providers are prohibited from constructing facilities on state roads except under the conditions as may be prescribed by the state road commissioner.</p>	<p>W.Va. Code § 17-16A-13 (2002): The Parkways Authority has the power to fix and collect fees for the use of rights-of-way along the state parkways.</p>				<p>W.Va. Code § 54-1-2 (2002): The right of eminent domain is permitted for construction and maintenance of telegraph and telephone lines if for public use.</p>
<b>Wisconsin</b>	<p>Wis. Stat. § 62.14(6)(b) (2002): "(b) Unusual use of streets. No building shall be moved through the streets without a written permit therefore granted by the board of public works, except in cities where the council shall, by ordinance authorize some other officer or officers to issue a permit therefore; said board shall determine the time and manner of using the streets for laying or changing water or gas pipes, or placing and maintaining electric light, telegraph and telephone poles therein; provided, that its decision in this regard may be reviewed by the council."</p> <p>Wis. Stat. § 196.58 (2002): Municipalities may determine whether and on what conditions a public utility may enter and occupy their rights-of-way.</p> <p>Wis. Stat. § 196.499(14) (2002): "EXTENSION OF FACILITIES. Any telecommunications carrier may extend its facilities into or through any municipality for the furnishing of its services, subject to the reasonable regulation of the governing body of the municipality relative to the location of poles and wires and the preservation of the safe and convenient use of streets and alleys to the public. Upon a petition for relief made by a telecommunications carrier, the commission shall set a hearing and if it finds a contract, ordinance or resolution under this subsection to be unreasonable, the contract, ordinance or resolution shall be void."</p>					<p>Wis. Stat. § 32.075 (2002): Telecommunications companies may file condemnation proceedings as prescribed herein.</p>
<b>Wyoming</b>	<p>Wyo. Const. Art. 10, § 17 (2002): "Rights of telegraph companies. Any association, corporation or lessee of the franchises thereof organized for the purpose shall have the right to construct and maintain lines of telegraph within this state, and to connect the same with other lines."</p> <p>Wyo. Const. Art. 13, § 4 (2002): "Franchises. No street passenger railway, telegraph, telephone or electric light line shall be constructed within the limits of any municipal organization without the consent of its local authorities."</p> <p>Wyo. Stat. Ann. § 15-1-103(a)(xi) (2002): Local governments granted authority to take all necessary action to plan, construct, maintain and regulate the use of streets, including the regulation of any structures thereunder.</p> <p>Wyo. Stat. Ann. §15-1-103 (a)(xxxiii)(A) (2002): Cities may grant franchises to install and maintain necessary facilities under or over any</p>					<p>Wyo. Stat. Ann. § 1-26-701- § 1-26-713 (2002): Landowner has right to compensation if property is taken by eminent domain. The right accrues on date of possession by condemner. Compensation equals the fair market value of the property on the date of valuation, the commencement of the condemnation proceedings.</p>

streets, alleys or avenues.							
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last updated: 21-may-2003

[TAB 5]

### Survey of Other Jurisdictions Long Distance Linear Foot Fee Survey

Jurisdiction	Rate Per Foot	Adjusted for CPI
<b>Pima County</b>	\$ 0.875	\$ 0.983
<b>Maricopa County *</b>		
Long Distance	\$ 0.54	\$ 0.966
Cable Pass Thru	\$ 1.000	\$ 1.760
<b>City of Chandler</b>	\$ 1.790	\$ 1.790
<b>City of Mesa*</b>	\$ 1.560	\$ 1.753
<b>City of Phoenix *</b>	\$ 0.760	\$ 0.890
<b>City of Tempe</b>	\$ 1.760	\$ 1.760
<b>City of Tucson</b>	\$ 0.987	\$ 0.987
<b>Clark County, Nevada*</b>	\$ 1.450	\$ 1.494

## Arizona Counties Contact Information

### Cochise County

Patricia Morris – 520-432-9300 Highway and Floodplain  
Permit to work in right of way \$100.00

### Yuma County

Bill Beck – 928-341-2500 Director of Public Works  
No fees

### Yavapai County

Joe Huot – 928-771-3183 Public Works  
Sending info. To e-mail

### Graham County

Joyce Porter – 928-428-0410 Engineering Division  
Permit to work in right of way-left another message 10/1 @ 10:13

### Santa Cruz County

Norma Northcross – 520-375-7830 Public Works  
Sending info. E-mail

### Greenlee County

628-865-4762 No answer call back

### Gila County

Lex Sheppard  
928-425-3231 Public works ext. 8505

### Apache County

928-337-7528 Engineering  
<http://www.co.apache.az.us/Engineering/>  
Forms and permits  
ROW permits

### Navajo County

Public Works 928-524-4100  
Left message 10/1

### Mohave County

Justin Hembree – 928-757-0910 Eng. Technician  
\$50 fee for permits to work in right of way

**Coconino County**

Cindy Berg – 928-341-2500 Engineering Division  
Left message 10/1

**La Paz County**

Roger Warnman - 928669-6407  
<http://www.co.la-paz.az.us/pworks.htm>

**Maricopa County**

Tom Crosby -602-506-5264 cable only  
Richard Wallace ADOT 602-506

[TAB 6]



Steve Postil, President  
S.P. Consulting  
11667 N. Ribbonwood Drive  
Tucson, Arizona 85737  
(520) 219-5079  
(520) 404-7755

November 15, 2007

Ms. Nanette Slusser  
Assistant County Administrator, Public Works Policy  
Pima County  
130 West Congress, 10<sup>th</sup> Floor  
Tucson, Arizona 85701

Dear Nanette,

Based on the Franchise Fee Study for Various Utilities Occupying Pima County Rights-of-Way, the following general recommendations are made:

1. The unique size and population of unincorporated Pima County require the recovery of costs related to utilities occupying the county right-of-way.
2. The development of a right-of-way license fee is consistent with Federal, State, and local laws and policies. Pima County plans on allocating the revenues to the related costs to show the nexus relationship between revenues and expenditures.
3. The information and assumptions used to calculate the fees are fair and reasonable. The fee is applied on a competitively neutral and nondiscriminatory basis. Implementation of the recommended charges are consistent with Pima County's policies and objectives related to financing infrastructure acquisition and maintenance through a fee for cost of service.

4. The methodology used to develop the fee is consistent with other jurisdictions and studies. The methodology is based on the debt service on land and improvements to roads maintained by Pima County. Costs include transportation budgets for FY 2007-08 with a minimum of 5% allocated to the right-of-way. Methodology did not include degradation of the roads due to utilities, lost revenues, overhead, disruption costs, and repair costs. The fee did not include areas used by utilities for the transmission of these services using the Flood Control District property. The fee did not include the value of the land and improvements already defeased.

Please call me at (520) 219-5079 if you have any questions or require further assistance.

Sincerely,

Steve Postil  
President  
S.P. Consulting

## **Summary**

Pima County is unique in that it is larger in area than six states and larger in population than six different states. The unincorporated areas have a population 341,661 or 36.1%, which is more than any other Arizona county. If unincorporated Pima County was a city it would be the fourth largest city in the state. (See Background)

Pima County is responsible for licensing or franchising corporations who use the public right-of-way. The county must manage the public right-of-way in order to minimize the impact and cost to county citizens and manage the public rights-of-way so as to maximize their efficient use, thereby minimizing the foreclosure of future additional uses of such rights-of-way. Pima County provides significant assets, which the county must manage as a public fiduciary trust to enhance the public health, safety, and welfare.

The county public right-of-way highways constitute a valuable public asset that have been acquired and maintained by the county over many years at great taxpayer expense. Pima County provides uniquely valuable property that private companies that may wish to use for profit-making purposes that may not necessarily benefit all the residents of the county. The right-of-way represents public investments for which the taxpayers are entitled to a fair monetary return on the county's past and future investment in the county's infrastructure.

Pima County, through a county ordinance (ARS 11-251-05-D) and license agreements (ARS 9-506), should require compensation for the commercial use of the right-of-way for profit. This requires equitable, fair, and reasonable compensation for right-of-way use in unincorporated Pima County to compensate the county for its cost of acquiring, improving, maintaining, and administrating the right-of-way. Actual costs attributable to a specific utility or event such as repair, relocation, permits, disruption, application, and planning and zoning fees should be charged separately.

## **Recommendation**

A fee of \$1.00 per linear foot should be charged (ARS 11-251-08) for underground utilities based on the Pima County Linear Foot Fee Study for FY2006-07, other cost studies and the Survey of Other Jurisdictions. Some Arizona governments (Maricopa County, Chandler, Mesa and Tempe) charge a linear foot fee of almost \$1.80 per foot as of September 2007. State law limits (ARS 9-582-3) the rate per linear foot to the highest rate charged by a political subdivision in this state. This fee is for underground long distance companies only. Arizona cities charge other utilities in the right-of-way a tax of 1.5% to 5%; the most common tax is 2% of gross revenues. It is recommended that Pima County use a linear foot fee rather than a percentage based on the attached comparison analysis "Linear Foot Charge verses Percentage Fee for the Use of the Right-of-Way."

Pima County cannot have a tax to recover its costs (ARS 11-251-05-C). Therefore, it is recommended that a linear foot fee be applied to other utilities in the right-of-way per the attached "Recommended Utility Fee Schedule." The fees can be reduced based on the value of in-kind contributions by the utility. This is fair and reasonable based on studies in other States and what Arizona cities and Maricopa County charge long distance companies and utilities.

## Recommendations for Licenses & Franchises

1. Duration: A franchise or license term should be as minimal as possible due to changes in technology and mergers and acquisitions of companies. The maximum term should be five (5) years. See Administrative Procedure Number 54.4 -J and ARS 9-583-G. The maximum term should not exceed twenty-five (25) years per ARS 11-256-A. The term should be a negotiated period. A Longer term should require concessions from the utility such as under grounding.
  
2. Inflation: Interstate Telecommunication Services  
Use Consumer Price Index – ARS 9-582-C-3  
Board of Supervisor Policy under F54.3 – Fee adjusted every five years based on Consumer Price Index.  
Any other linear foot fee should be adjusted every five years based on a Construction Cost Index.
  
3. Changes to Board Policies: Board of Supervisor Policy number F-54.3 Licenses for encroachment in county or Flood control District Rights-of-Way. Delete – Procedure #3 – “If the landscaping meets the criteria outlined in said policy, the owner will be exempt from their license policy and all license fees will be waived.” Landscaping restoration should be a requirement.  
  
Changes: Administrative Procedures under 54.4 Licenses for Use of County Rights-of-Way for Wireless Communication Facilities G. License Fees needs to be adjusted for inflation and usage (footprint) every five (5) years. The \$1,000 fee should be the minimum amount.
  
4. Failure to Obtain License: All franchises and licenses should include a provision for penalties for not obtaining a license before using the right-of-way. Penalties and fines should be severe enough to discourage non-compliance. Recommend it be a Class 1 Misdemeanor.
  
5. Right-of-Way Fees: (A) All fees should have a nexus relationship to their costs. Fees may be different based on usage by the utility. Revenues from the right-of-way fees should be placed in a separate fund and allocated to the related costs. (B) Have a linear foot fee for electric, natural gas, phone, and telecommunications. See Recommended Utility Fee Schedule
  
6. The Flood Control District needs to determine if utilities should be paying fees for the use of the Flood Control District property. See Board of Supervisors Policy number F54.3
  
7. Existing Utilities should be given a limited amount of time to negotiate a license (6 months) or begin paying fees.

8. Pima County should consider a County Use Tax on electricity per ARS 42-6110, which requires a unanimous vote of the Board of Supervisors and a County Capital Projects Tax per ARS 42-6111 for electricity and natural gas, which requires a unanimous vote of the Board of Supervisors and approval at a countywide election.
  
9. Issuance of license or franchise; use of public highways; limitations – ARS 9-582, ARS 9-583-D. A political subdivision may require a person using a licensee's or franchisee's facilities in the public highway within . . . . This relates to telecommunication companies that sublease facilities in the right-of-way. Pima County should require that these companies obtain a license and pay the appropriate fees.

### Licenses and Franchises Options

1. Request “As Built” maps of utility service area in unincorporated Pima County with total linear footage.
2. Free use of utility poles or conduit for Pima County’s telecommunication use.
3. Reduced fees or longer duration for under grounding utilities.
4. Waiver of fees per intergovernmental agreements with other governmental jurisdictions for utilities (water and sewer).
5. Flat dollar amount fee in exchange for use of dark fibers.
6. Franchises and licenses should include provisions concerning relocation costs, repair costs, and landscaping restoration.

## **Recommended Utility Fee Schedule**

<b>Utility</b>	<b>Fee</b>
Electric	\$1.00 -\$1.80 per linear foot. Rate based on other jurisdictions less in-kind contributions (under grounding) Adjusted every five years for CCI
Natural Gas	\$1.00 per linear foot Adjusted every five years for CCI
Water and Sewer	Per Intergovernmental Agreement
Competitive Local Exchange Carriers	\$1.00 per Linear foot less in-kind for four(4) dark fibers Adjusted at the end of the license term
Cable Television	Five percent of gross revenues
Cell Towers/Wireless	\$1,000 per month per site adjusted for CPI at end of term. up to one hundred square feet. Non-right of way locations minimum of \$1,000 per month per site.
Long Distance	\$1.00 per linear foot Adjusted for CPI at end of term.
Phone	\$1.00 -\$1.80 per linear foot less in-kind (under grounding) Adjusted for inflation (CCI) every five years

Fees do not include repair, relocation, permits, disruption, application, planning and zoning fees. These costs should be accessed based on actual costs.

## Survey of Other Jurisdictions Long Distance Linear Foot Fee Survey

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<b>City of Tempe</b>	\$ 1.760	\$ 1.760
<b>City of Tucson</b>	\$ 0.987	\$ 0.987
<b>Clark County, Nevada*</b>	\$ 1.450	\$ 1.494
<b>Tulsa, Oklahoma **</b>	\$1.15- \$3.45	\$1.22 -\$3.66

\* Adjusted for CPI thru 9/2007

\*\* Option Linear foot or 2%  
of gross revenues  
1 foot wide = \$1.22  
2 feet wide = \$2.44  
2 feet plus wide = \$3.66