



Right-of-Way Management and Community-led Broadband

Right-of-Way Management

Municipalities have the legal right to manage their streets and roads (“public rights-of-way”) and to assess fees for the use of those rights-of-way. While many municipalities currently assess minimal fees on companies that use the rights-of-way, new developments have caused them to reevaluate their needs and assess more reasonable fees.

First, more and more companies seek to install wires, poles, antennas, pipes and other equipment in the public rights-of-way. Telecommunications companies, for example, including wired and wireless companies, are demanding quick access to the rights-of-way for installation of their facilities. Second, video streaming over the internet is beginning to erode cable franchise fees in certain regions of the country. Federal law allows franchise fees to be assessed on cable revenue, but not on internet revenue. As some cable customers engage in “cord cutting” or “cord shaving” by dropping or reducing their cable service, franchise fee revenue may begin to decrease.

As a result, municipalities are considering new and enhanced fees for their management of the public rights-of-way. Depending on state law, these fees may be in the form of a “rental fee” (a percentage of gross revenues) or a cost-based fee (derived from a municipality’s costs in managing the rights-of-way). Most likely your municipality is “under-recovering” its costs and could implement a new fee schedule for companies using the rights-of-way. Municipalities also need new regulatory tools to better manage their rights-of-way. Through a right-of-way ordinance and specific right-of-way and lease agreements, local governments can begin to regain control of their public rights-of-way.

Community-Led Broadband

High speed broadband service is as important to the vitality of a community as roads, bridges, electricity, and water. It promotes economic growth by retaining existing businesses and attracting new businesses. Studies have also shown that high-speed broadband dramatically improves educational opportunities and increases residential property values. Finally, high speed broadband leads to improved government services.

The problem for many municipalities throughout the country is that they suffer from poor internet service, and incumbent cable and telecommunications companies are resistant to investing the necessary capital to achieve a Gigabit network. These communities are worried that they will be left behind in the digital revolution. For this reason, many local governments, in conjunction with other community anchors, are embarking on a community-led broadband program.

Depending on the existing broadband landscape, state law, and the level of available resources, community-led broadband could involve: 1) the construction and operation of a municipal broadband network; 2) a partnership between local government and a fiber or wireless company; or 3) the enactment of ordinances and policies (for example, “one touch make ready”, “dig smart” and micro trenching requirements) to attract broadband companies to your community. The first step, however, is for your local government to conduct a feasibility study to: 1) assess current providers and internet speeds; 2) identify practical and affordable options; and 3) determine actual costs and funding opportunities. The Cohen Law Group has the knowledge and experience to assist you in making your municipality a “smart community.”



Cable Franchise Renewal and Franchise Fee Audits

Franchise Renewal

The Cohen Law Group's (CLG's) core practice is assisting local governments in cable franchise negotiations. Over the past 18 years, CLG has represented hundreds of municipalities in several states in franchise negotiations with their cable companies. There have also been dramatic changes in cable technology and federal regulations over the past several years. We are committed to ensuring that our clients' interests are protected in this rapidly changing world.

Local governments have the legal right to require their cable company to enter into a franchise agreement to use the public rights-of-way for their wires and equipment. Local officials manage those rights-of-way as a public trust and are entitled to receive benefits for the cable company's use of their property. These include financial and in-kind benefits. A key financial benefit is the payment of franchise fees by the cable company. Local governments may assess up to 5% of the company's gross revenues for cable services. There are currently 27 revenue sources that should be included in the definition of "gross revenues" in a franchise agreement.

Other important benefits include: franchise fee accountability; a possible cash grant; a cable system upgrade to obtain advanced cable and internet services; customer service standards; free cable and/or internet services to municipal buildings; and right-of-way protections. For municipalities that have or wish to have an access channel, we assist in securing financial support and advanced services for the channel. We obtain these benefits for our clients because we know the law, we know the company representatives, and we know their negotiating tactics.

Franchise Fee Audits

Franchise fees are a significant revenue source for local governments. Unlike other revenue line items in the budget, however, franchise fee revenue often lacks any accountability. Do you know whether the payments you receive from your cable company are accurate? Through a franchise fee audit, a local government can hold the cable company accountable for past payments and ensure that it receives the future franchise fee revenues to which it is entitled.

Our firm has performed franchise fee audits of virtually every cable company. Over the past four years, we have conducted over 150 audits and have discovered underpayments 73% of the time. In virtually every case, the cable company paid the underpayment, which has also resulted in increased franchise revenue going forward. Even if there are no underpayments, the local government will have achieved accountability for this revenue source. An audit also sends a message to the company that your municipality is being vigilant in monitoring its payments.

We have found that errors in franchise fee payments arise for a variety of reasons. First, the cable company's interpretation of "gross revenues" is often limited and, as such, biased in favor of the cable company. Additionally, the cable company's accounting department may inadvertently omit one or more revenue sources from the franchise fee calculation or misallocate certain revenue sources among the three available services (cable, telephone, and internet). Finally, cable systems were not built along municipal boundaries, and cable companies often "miscode" certain addresses to the wrong municipality. Through a franchise fee audit, such mistakes on the part of the cable company will be identified and corrected.



Wireless Facilities Regulation

The dawn of the 21st Century has brought technological innovations that have revolutionized the wireless industry. Advances in technology and an abundance of “smart phones” and other electronic devices have led to a spike in demand for wireless broadband service. Meanwhile, the wireless industry is rolling out new infrastructure to boost capacity to meet this growing consumer demand. With the upcoming launch of 5G technology, construction of new infrastructure will occur on a massive scale in communities across the country.

This infrastructure has extended beyond traditional cell towers to include distributed antenna systems (“DAS”) and small cells—or, in simpler terms, mini-cell towers and antennas. A critical aspect of these new facilities is that they are located in the public rights-of-way. Wireless contractors obtain utility status from the state Public Utility or Public Service Commissions and then claim that they have unfettered access to the rights-of-way. This is not true. Municipalities have the legal authority to control the construction, placement, and modification of wireless facilities through their Zoning Codes.

Most municipalities have not yet developed the regulatory framework necessary to respond to these new facilities. Wireless contractors demand “speed to market” and municipalities must be prepared to respond quickly to these demands. It is critical, therefore, that municipalities develop a regulatory structure that balances the need for wireless broadband service with the need to preserve the character of their communities. Municipalities may also assess fees for wireless facilities that are installed in the public rights-of-way.

Most local governments have not revised their wireless facilities ordinance (sometimes referred to as a cell tower ordinance) in years. These ordinances can be largely ineffective (and in some cases, illegal) when faced with the new wireless landscape. There have also been major changes in federal law in the last several years, including the FCC’s “Shot Clock” Order and its Wireless Siting Order of 2014, as well as new wireless statutes in nearly every state. We work with municipalities to craft carefully tailored ordinances that protect their rights and are consistent with federal and state law.

In addition, we assist municipalities in negotiating leases with wireless providers for cellular towers, antennas in the rights-of-way, and rooftop antennas. Whether these facilities are located on remote property or on the roof of a fire station, our attorneys obtain maximum revenue from the wireless providers while ensuring that the municipality is properly protected.