

TELECOMMUNICATIONS ISSUES AND THE 78TH TEXAS LEGISLATURE

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by
Monte Akers, Director of Legal Services
Texas Municipal League

Introduction

The enactment of H.B. 1777 in 1999 was supposed to usher in a new era of calm and agreement between Texas cities and telecommunications providers. A century of disagreement, particularly over franchise issues, was finally going to be a thing of the past. It didn't happen.

While some issues were resolved, new ones leaped into the resulting void. The crush of fiber optic and other new projects requiring excavations in city rights-of-way, together with interpretations given H.B. 1777 that were never intended by its drafters, led to new, fractious debates and tensions across the state. Particularly vexing was the spate of gas, water, and sewer line ruptures caused by telecommunications, cable company, and contractor excavators. In Dallas on Labor Day 2000, contractors installing fiber optic struck a downtown water main and flooded two levels of a parking garage, destroying many cars. The same contractor had ruptured a 48 inch line in Irving the year before. Ruptures of three different water lines in Austin in October, 2000 caused an estimated \$700,000 to \$800,000 in damage. Water mains were also ruptured in San Antonio, and gas line breaks in Houston and Fort Worth caused explosions and fires in November, 2000.¹

The problems caused by such excavations were certainly not unique to Texas. Four people were killed, a dozen were injured, and property damage in excess of a million dollars occurred when a natural gas line was ruptured in St. Cloud, Minnesota on December 11, 1999. Water main breaks were caused in Atlanta, Georgia, Cincinnati, Ohio, and Richmond, Virginia, with the latter break requiring evacuation of a courthouse. A gas line rupture in Warrensburg, Missouri sent fumes into a sewer line and several homes, one of which exploded and burned a man over 30 percent of his body.² What is the likelihood that the Texas legislature will take any action to address these or other telecommunications issues in the 2003 session?

¹ See, *Cable Crew Ruptures Gas Line*, FORT WORTH STAR TELEGRAM, Nov. 1, 2000; *Gas Explosion Destroys Home, Forces Evacuations*, HOUSTON CHRONICLE, Nov. 3, 2000; *AT&T Awarded \$350 Million for Cut Line*, AUSTIN AMERICAN STATESMAN, Nov. 15, 2000; *Water Lines are Victim of Progress*, AUSTIN AMERICAN STATESMAN, Jan. 2, 2001; *Telecommunications and Rights-of-Way*, pp. 1-2 (NLC, NACO, IMLA, NATOA: Washington, D.C., 2002).

² *Telecommunications and Rights-of-Way*, *supra*.

Telecommunications Issues and the TML Legislative Process

Prior to each legislative session, the 1062 member cities of TML establish a legislative agenda through a combination of policy committee meetings, submission of resolutions by individual cities, and adoption, modification, or rejection of those resolutions at the TML Annual Conference. During the session, the TML staff reads and recommends positions on the 5500 to 6000 bills that are filed in manners consistent with the legislative program adopted by the membership. TML typically takes positions on approximately 1200 bills (of which 700 to 800 are bills that TML opposes), and introduces and seeks passage of six to ten bills.

Telecommunication franchise issues were high on TML's priority list in 1999, along with annexation reform (S.B. 89), impact fees (H.B. 2045), validation (H.B. 485), property tax notice and hearing changes (H.B. 954 and H.B. 1520), electric deregulation (S.B. 7), public information changes (S.B. 1851), and the vesting statute (H.B. 1704). Representatives of several cities and TML spent approximately three weeks (one in March and two in May) negotiating issues that led to the enactment of H.B. 1777.

In 2001, two telecommunications-related bills were on TML's radar screen. One was S.B. 1185, a Southwestern Bell initiative to allow the expansion of an existing "critical facility" in a city in which an impervious cover restriction would not normally allow the expansion. Representatives of Austin and TML met with SWB representatives and negotiated a compromise that allowed the bill to pass. Of more universal application and concern was S.B. 1783—the Texas Universal Broadband Access Act of 2001—which was intended to ensure statewide deployment of broadband. Representatives of TML, the Texas Public Power Association, and the Coalition of Rural Cities met with representatives of the Texas Cable Association for two weeks of negotiation to produce a section of the bill that would address the rights and obligations of cities, particularly those with municipally-owned electric utilities, to provide cable modem and cable video services in a non-discriminatory manner. S.B. 1783 passed both houses of the legislature, but its wheels fell off at the conference committee stage.

This year, any issues relating to telecommunications, broadband deployment, franchising, or similar topics will be addressed by TML's General Government policy committee. The work of that committee will be summarized in a resolution that is presented to a resolutions committee on October 16 and then to the entire membership of TML on October 19 at the Annual Conference in Fort Worth.

Outlook for Telecommunications Issues in the 2003 Session

1. Transportation

Several bills related to transportation are expected in the 2003 session, some of which may include telecommunications topics.

The reason transportation is expected to be a major legislative topic is because the state of mobility in Texas is worsening, transportation infrastructure is overburdened, and funding is inadequate. Some of the reasons for this situation are that (1) the State of Texas has been spending less on transportation during a period in which population and traffic congestion have been growing; (2) state tax collections are relatively low, Texas being among the nation's 15 most populous states but ranking last in terms of tax revenue per capita; (3) among the 50 states, Texas is tied for 30th place in the level of state gas tax, having not raised its gas tax in ten years; and (4) Texas uses much of its mobility-related tax revenue—about 48 percent—for non-mobility-related expenditures.

Three pieces of legislation (S.J.R. 16, S.B. 4, and S.B. 342) from the 2001 session created the Texas Mobility Fund, provided for annual dedications of state revenue to the fund, and laid out the procedures by which TxDOT could participate in the construction, operation, and maintenance of toll facilities utilizing the fund. However, no dedications of revenue have been made, and proponents of transportation funding maintain that the 2003 Texas Legislature should allocate state tax revenue to the Texas Mobility Fund.

A statewide coalition of cities, counties, private businesses, chambers of commerce, metropolitan planning organizations, and other interested groups calling itself Transportation Excellence for the 21st Century (Tex21) has formed and is focusing on improving transportation infrastructure in the state. In addition, Governor Rick Perry announced a proposal in early 2002 to construct the Trans Texas Corridor as a “multi-use, statewide transportation corridor” which would include toll roads, passenger and freight rail, and underground transportation of water, gas, and telecommunications infrastructure.

Accordingly, several bills on transportation issues are expected to be introduced in the 2003 session, and some may contain provisions directly related to the effect that excavations in city rights-of-way have had and are having on city transportation infrastructure and funding. It is too early at this time, however, to know the specifics about any potential bill proposal.

2. Broadband

After the failure of S.B. 1783, the House State Affairs Committee was given an interim charge to “(1) examine the deployment of advanced telecommunications services throughout Texas and study barriers faced by communities attempting to obtain access to affordable broadband services; and (2) determine what, if any, broadband service is available in rural areas.”

On February 27, the Committee issued ““Ten Questions to Begin the Committee's Inquiry Into State Broadband Policy” to broadband providers and other interested parties, with a request for answers by April 3. A hearing was then held by the Committee on April 10, and another is scheduled for June 12.

The primary issue involved in the “10 questions” and the hearing was whether the legislature needs to act to adopt a state broadband policy or whether to let the deployment of broadband be controlled by normal market forces. On the side of arguing for a state policy and another SB 1783-like bill in 2003 is the argument that broadband is a “\$500 Billion Opportunity,”³ having the potential to “transform the way we live, learn, work, and play,”⁴ for which the “benefits to quality of life are immeasurable.”⁵ On the side of the argument that the state should not adopt the policy is the fact that, in areas where broadband is available, less than 10 percent of eligible customers have signed up.

Part of the broadband deployment argument being heard nationwide is that that cities should be prevented from exercising regulations that might be seen as an obstacle to deployment of broadband. More often than not, the message is accompanied by a description of how cities’ actions are the real reason that all Americans are not clamoring for broadband. The following statement is representative:

*State and local governments exert enormous leverage over broadband providers through their control over public rights of way and public property. Too often, this leverage results in excessive fees, including exorbitant yearly per-foot charges, or fees based on a percentage of a provider’s gross revenue, both unrelated to the use of rights of way and in many cases far in excess of appraised values of these easements. In-kind payments in the form of free fiber, services and conduit (and even unrelated “pet projects”) are also routinely charged. . . . Broadband carriers also face delays in application processing, tower siting restrictions, layers of state and local taxes and other restrictions that are major impediments to broadband deployment.*⁶

TML, in responding to the “10 Questions” cautioned legislators to ignore such rhetoric (and also advocated the authorization of cities to provide telecommunications services as one means of advancing opportunities for deployment of broadband in the state). Mercifully, none of the type of argument contained in the preceding quotations was voiced at the hearing on April 10, and hopefully such sentiments will not receive much play time if raised at future hearings. Such arguments are, however, a potential bomb that the telecommunications industry may attempt to hurl in 2003.

Conventional wisdom is that a S.B. 1783-like bill will be introduced next session, probably by Chairman Steve Wolens. In fact, the bill may be identical in form to the version of S.B. 1783 that died at the end of the session. In this regard, TATO and other city representatives are urged to examine that version of S.B. 1783, particularly

³ R. Crandall & C. Jackson, *The \$500 Billion Opportunity: the Potential Economic Benefits of Widespread of Broadband Diffusion of Broadband Internet Access*, July 2001.

⁴ TechNet Texas, *A National Imperative: Universal Availability of Broadband by 2010*, p. 4.

⁵ *Ibid.*

⁶ *Ibid.* at 12.

the provisions concerning a city's offering of cable service, and to alert TML if any provision may need to be revised or re-written.

3. The Telecommunication Infrastructure Fund

Another of the House State Affairs Committee's interim charges is to "review the activities and mission of the Telecommunications Fund and assess the extent to which it has met the goal of extending services to underserved groups."

The TIF is funded by the telecommunications industry (currently 1.25 percent of taxable telecommunications receipts), and will expire whenever it has collected \$1.5 billion or in 2005, whichever first occurs. As of the end of 2001, the TIF board had distributed \$920 million to public schools, libraries, universities, health science centers, not-for-profit healthcare facilities, and community networking initiatives.

Many cities have benefited from the TIF by partnering with local school districts, hospital boards, libraries, or universities, but cities are not allowed to apply for or receive TIF revenue solely in their status as a city. One of TML's responses to the "10 questions" was that TIF revenue should be available directly to qualifying cities.

Because the life expectancy of TIF probably will not continue into 2005, legislative proposals about the fund are certain to be filed in the 2003 session.

4. Franchising, police power, and similar H.B. 1777-like issues

There are plenty of city critics of H.B. 1777. On the one hand, the bill preserved and in many cases increased city telecommunications franchise revenue, avoided a series of lawsuits that could have had taken that revenue away, and has been described by some telecommunications providers as a one-sided, pro-city bill that they do not like. On the other hand, failure of the PUC to give it certain meanings that the negotiating parties intended, unanticipated consequences of other provisions, and the general difficulty in implementing the bill (as well as a tendency to blame it for problems that are not connected to the legislation) have led to complaints and criticisms that may or not be warranted.

However, it is unlikely that the legislature will entertain any major revision of H.B. 1777 in 2003. The principal reasons for this prediction are (1) after the state legislature has enacted a large, controversial bill such as H.B. 1777 or S.B. 89, it usually does not re-visit the same issue for three or more sessions; and (2) controversy over telecommunications franchising ongoing at the federal level, which may lead to proposals for city preemption either by the FCC or by Congress through revision of FTA 96, will be viewed as grounds for not taking state action.

Nevertheless, TML has received a request from one member city for action on H.B. 1777, and the request will be reviewed by TML's legislative policy committee. The concerns expressed by the city are generally that H.B. 1777 has not been interpreted

correctly by the PUC, that CTPS are modifying access line counts improperly, that city franchise fees are much lower than intended under H.B. 1777, that the PUC is not being responsive to city concerns, and that the PUC is not exercising authority over CTPs that were enacted in the bill.

The discussion generated by this request may lead to new legislative proposals or positions in TML's legislative program for 2003. However, as previously stated, it is unlikely that the 78th Legislature will look favorably on any proposal to dramatically modify H.B. 1777, whether it is promoted by cities or the telecommunications industry. A viable suggestion for modification of H.B. 1777, in order to have a realistic chance for success, should be a narrow, rifle-shot proposal that repairs one or two weaknesses or misinterpretations of H.B. 1777 that have been experienced by numerous cities to the detriment of all, for which compelling evidence and testimony can be provided. Any city, city official, or TATO member possessing such a suggestion is invited to communicate it to this author or another member of TML's staff.