



Right of Way Management

Right of Way Management

- Why do we need ROW Management?
- Look at some of the photos found at:
<http://iog.gizmodo.com/photos-from-the-days-when-thousands-of-cables-crowded-t-1629961917>
- That does not even address the issues with underground utilities!

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- From the time that utilities came into existence until the mid-1990's, most ROW Management was handled either through a franchise (for non-municipal utilities) or handled in-house because the utilities were municipally owned

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- Municipally owned utilities:
 - Water and sewer
 - Electric (MOU)
 - In the early 1990's some cities were beginning to consider owning telephone or Internet wires
- Privately owned utilities:
 - Electric (IOU)
 - Telephone
 - Cable
 - Gas

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- In the 1990's and forward, cities began to lose the ability to control the ROW
- Telecommunications (land lines, called "access lines" by the statute) no longer needed a franchise after House Bill 1777 (1999) which became Chapter 283 of the Local Government Code
- Cable operators no longer needed a franchise after 2 SB 5, which became chapter 66 of the Utilizes Code, was passed in 2005, second called session

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- Telephone companies paid for land lines use of ROW through “access lines” charges.
- Cable companies paid for ROW use through a percentage of gross receipts – 5% plus an additional 1% for PEG fees
- ROW Management could no longer depend upon franchise terms. Many cities passed ROW management ordinances as part of their codified ordinances in order to address this gap

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- Chapter 283 provided for PUC oversight. A series of hearing occurred while certain ruling were worked out. One important ruling concerned backhaul, and it allowed backhaul to be placed in the ROW without charge
- That has resulted in certain long wire runs for companies that do not pay any access line charges

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- Electric (Oncor,) continues to need a franchise
- Note - some cities either provide electric or have a coop provider
- Gas (Atmos) continues to need a franchise
- Backhaul has become much more burdensome
- And in the last few years city staff has received requests to put network nodes in the ROW, often from new companies like Crown Castle, Mobilitie, or ExteNet

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- New legislation (SB 1004 or HB 2383) would allow network nodes in the ROW as of right
- One important way this legislation is different – for the first time, companies are allowed not just in the ROW, but also on municipal facilities (traffic signals, street lights)
- That is, before companies were granted access to the ground – now they are being granted access to vertical facilities

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- The legislation is a moving target. Earlier versions of it were even worse. The latest version of SB 1004 (as accepted with amendments by the House) is not even on the website yet. The House Committee substitute is not on the website either, but I have obtained a copy of it.
- I believe (without any evidence) that the version of SB 1004 accepted as modified by the House will match the committee substitute for HB 2838

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Analysis of HB 2838 Committee Substitute

- HB 2838 and SB 1004 add a new chapter – chapter 284 – to the Texas Local Government Code
- Section 284.001 is a statement of findings and policy (the “whereas’s” if you will) – statements designed to support the legislature’s reasons for passing the legislation

Right of Way Management Analysis of HB 2838 Committee Substitute

- Section 284.002 contains definitions. This section is very important. For example, cities do not have to allow facilities on “decorative poles” but those “decorative poles” must match the definition in this section
- Other important definitions include (2) “Applicable codes,” “Design district,” and “Network nodes”

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Analysis of HB 2838 Committee Substitute

- Section 284.003 “Limitation of Size of Network Nodes”
- Remember, these are the facilities that will be allowed by right
- Cannot protrude from the pole where they are installed by more than 2 feet or be higher than 5 feet
- Ground based enclosures (not on pole) cannot be higher, wider or deeper than 3 feet, 6 inches

Right of Way Management Analysis of HB 2838 Committee Substitute Section 284.003 continued

- For an antenna that does or does not have exposed elements and is attached to an existing pole – enclosure of not more than six cubic feet in volume
- The cumulative size of other wireless equipment attached to existing structure may not be more than 28 cubic feet in volume

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Analysis of HB 2838 Committee Substitute

- Section 284.051 – Subchapter B (284.051 to 284.057) applies to municipal authority in relation to network nodes and related transport facilities

Question – What does that mean in relation to the recent PUC ExteNet case?

- Section 284.052 – Exclusive use prohibited
- Section 284.053 – ROW rate - \$250 per node; no separate provision about fee for installing new poles
- Section 284.054 – Rate cost of living adjustment – must notify every network provider

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Analysis of HB 2838 Committee Substitute

- Section 284.055 Use of ROW and Applicable rate – addresses rate for transport facilities.
- Has a provision where this fee goes away once the network providers “payment of municipal fees to the municipality exceeds its monthly aggregate per-node compensation”

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Analysis of HB 2838 Committee Substitute

- Section 284.056 - Important addition to HB 2838 Committee substitute – does require an agreement with the municipality
- Section 284.057 – Other Compensation prohibited

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Analysis of HB 2838 Committee Substitute

- Subchapter C Access and Approvals
- Section 284.101 A network provider is authorized, as a matter of right to: (1) construct, modify, maintain, operate, relocate or remove a network node or support pole; (2) modify or replace a utility pole; or (3) collocate on a pole, subject to an agreement with the municipality.
- But see definition of “Pole” – “means a service pole, municipally owned utility pole, node support pole, or utility pole.”
- And definition of “Collocate” “the installation, mounting, maintenance, modification, operation, of network nodes in a public right-of-way on or adjacent to a pole.”
- Does the broad definition of “pole” offset the limitation of the agreement requirement only appearing in subsection (3)?

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Analysis of HB 2838 Committee Substitute

- Section 284.101(b) – subject to applicable codes
- Again – see definition of “Applicable code” – “(A) uniform building, fire, electrical, plumbing, or mechanical codes recognized by a national code organization; and (B) local amendments to those code **to the extent not inconsistent with this chapter**” [Emphasis added.]

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Analysis of HB 2838 Committee Substitute

- Section 284.102 – General Construction and Maintenance Requirements – cannot obstruct the ROW from travel or public safety, cannot obstruct the legal use of ROW by other utility providers; cannot violate codes; cannot violate “**publicly disclosed design specifications**” (important) and cannot interfere with ADA requirements

Right of Way Management Analysis of HB 2838 Committee Substitute

- Section 284.103 General limitation on placement of poles
- The lesser of:
 - 10 feet higher than the tallest existing poles or
 - 55 feet above ground level

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Analysis of HB 2838 Committee Substitute

- Section 284.104 – No installation in a city park or residential area without city consent (“discretionary, nondiscriminatory, and written”)
- Residential public ROW cannot be more than 50 feet wide and has to be adjacent to single family or multi-family residential (not mixed use)
- Wider street next to residential – apparently they can put their facilities in those locations.

Right of Way Management Analysis of HB 2838 Committee Substitute

- Section 284.105 Historic or Design Districts – has to obtain advance approval.
- Section 284.106 – Equipment Cabinets – Subject to limit in 284.003
- Section 284.107 – Undergrounding – “comply with nondiscriminatory undergrounding requirements” but can replace an existing structure

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Analysis of HB 2838 Committee Substitute

- Section 284.108 – Design Manual – Can have a design manual that does not conflict with this chapter. The design manual may include a requirement that an industry standard pole load analysis be completed and submitted to the city indicating that the pole will safely support the load and a requirement that node equipment be eight feet above ground level.
- (b) “A network provider shall comply with a design manual, if any, **in place on the date a permit application is filed**”

Right of Way Management Analysis of HB 2838 Committee Substitute

- Section 284.109 – Exception – City can agree to poles that exceed the limits in this chapter
- Section 284.110 – Discrimination prohibited

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Analysis of HB 2838 Committee Substitute

- Subchapter D – Applications and Permits
- Section 284.151 – “Prohibition of Certain Municipal Actions” – a city cannot “prohibit, regulate, or charge” for network node installation except as provided by this chapter (pre-emption)
- Also, no in kind contributions may be required, no moratorium may be passed

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Analysis of HB 2838 Committee Substitute

- Section 284.152 – A city may require a permit, if the permit is one of general applicability to users of the ROW, does not apply exclusively to network nodes, and is nondiscriminatory. A network provider may apply for up to 30 network node installations at one time.

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Analysis of HB 2838 Committee Substitute

- Section 284.153 – Permit application – cannot require more information than a telecommunications utility that is not a network provider has to provide; a city can require the applicant to include “construction and engineering drawings and information” to confirm that the applicant will meet ROW design specifications and applicable codes; and can require that they show they will comply with this chapter and FCC regulations and that the node will be placed in active commercial service by or for a network provider no later than 60 days after construction and final testing

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Analysis of HB 2838 Committee Substitute

- Section 284.154 – Municipal review process:
 - (a) Nondiscriminatory
 - (b) 30 days after receive application for network node must determine complete
 - (b) 10 days after receive application for transport facility determine if complete
 - (c) Shall approve unless it does not comply with codes or other municipal rules, regulations or other law
 - (d) Must approve or deny no later than 150 day for pole, 60 days for network node, and 21 days for transport facility or is deemed approved

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Analysis of HB 2838 Committee Substitute

- Section 284.154 continued:
 - (e) if denial because incomplete, must give specific code provisions; must send by email
 - (f) Applicant can cure within 30 days, does not open up new review
 - Approve or deny within 90 days

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Analysis of HB 2838 Committee Substitute

- Section 284.155 Time of installation – have to start 6 months after final approval. No end date (“diligently pursue the installation to completion.”) City can give more time.
- Section 284.156 Applicable Fees - can charge if charge for other permits. Can only be for costs. Capped at \$500 per application for up to 5 nodes, \$250 for each additional; \$1,000 per pole. Cannot pass through any costs for third party legal or engineering.



Right of Way Management Analysis of HB 2838 Committee Substitute

- Section 284.157 No permit needed for maintenance, replacement or installation of micro network nodes that are strung on cables (even if



Right of Way Management Analysis of HB 2838 Committee Substitute

- Subchapter E Access to Municipally Owned Utility Poles
- Section 284.201 - allows use of municipally owned utility poles

Right of Way Management Analysis of HB 2838 Committee Substitute

- Subchapter F Effect on Other Utilities and Providers
- Section 284.251 – Definitions
- Section 284.251 – no effect on IOUs, telecommunications providers (this chapter does not require that they allow collocations)
- Section 284.253 – no effect on cable providers

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Analysis of HB 2838 Committee Substitute

- Subchapter G General Conditions of Access
- Section 284.301 – can still have police power based regulations
- Section 284.302 – Indemnification – like the indemnification in chapter 283
- Section 284.303 – relocation – they have to relocate
- Section 284.303 – interference – only have to ensure that they do not interfere with any FCC authorized mobile telecommunications operations “operating at the time the network node was initially installed” – so later frequency changes required by FCC for police/fire not covered?

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Analysis of HB 2838 Committee Substitute

- Section 2 – grandfathering – if agreement was for facility that was “installed and operational” before effective date of legislation – grandfathered. If installed and operational after date of legislation – have to change
- Question – how do you know if it was “operational”

ROW Management – other challenges

- Chapter 283 – “backhaul” or “transport” – City of Houston v. ExteNet case before the PUC
- FCC rulemakings also occurring in regard to the node issue
- Traditional relocation for public works projects has been challenged in court – City of Richardson v. Oncor



Questions?

Thank you!