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The Municipal Right of Way Fee: A Heavy Burden on Texas Consumers

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Key Points

- The local municipal right of way fee costs Texas consumers and businesses more than $500 million a year.
- These fees, ostensibly charged for "renting" public rights of way, far exceed the services provided in maintaining ROWs.
- The vast majority of the money generated through the ROW fees is spent on non-related government services.
- ROW fees should be reduced to cover the marginal cost of the use of public ROWs, rather than as a way to fill the cities' coffers at residents' expense.

For years, Texas municipalities have imposed franchise fees upon telecom and utilities providers to provide revenue that supports general city expenditures. These fees are much higher than needed to support the use of the city rights-of-way by these companies. Ostensibly charged as a form of "rent" for use of public right-of-way to benefit taxpayers of a city, these fees are simply a tax charged to those citizens in their role as consumers.

In 2011, the cost of the right-of-way (ROW) fee to consumers and businesses in the 10 largest Texas cities was more than $530 million. Since 2008, the cost to consumers has totaled more than $2 billion. Rather than serving as benefit to taxpayers, these excessive fees represent a major cost to consumers, as well as a bar to new competitive entrants into these markets.[1]

Cities and towns levy the franchise fee on all manners of companies—natural gas, electric, and telecommunications—that utilize ROWs for the piping and wiring needed to transfer the product or service in question from the source to the consumer.[2] It is not controversial that companies should pay a fee for placing lines in the ground or on a transmission pole and thereby utilizing the public ROWs.

The question, however, is whether the cities should charge more than the cost of allowing the use of the right-of-way. Today, the fees don't just go to maintaining ROWs—many city budgets show quite clearly that franchise fees are used to pay for things wholly unrelated to ROW usage.

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Annual ROW Fee Revenue to Texas' 10 Largest Cities

City	2008	2009	2010	2011	Total
Houston	$194,669,913	$193,827,955	$190,541,052	$188,735,712	$767,774,632
San Antonio	$28,386,813	$29,299,815	$28,976,795	$31,280,630	$117,944,053
Dallas	$141,973,599	$102,694,805	$99,191,374	$97,150,282	$441,010,060
Austin	$35,577,058	$33,633,691	$34,082,500	$35,138,817	$138,432,066
Fort Worth	$38,169,246	$38,356,895	$38,150,027	$38,427,847	$153,104,015
El Paso	$56,958,897	$58,265,775	$60,562,865	$60,783,183	$236,570,720
Arlington	$30,335,162	$31,234,099	$31,020,116	$37,415,856	$130,005,233
Corpus Christi	$17,322,510	$16,840,925	$16,830,119	$16,958,182	$67,951,736
Plano	$22,628,847	$23,586,444	$22,197,743	$21,378,509	$89,791,543
Laredo	$6,793,268	$7,005,906	$6,618,978	$6,645,215	$27,063,367
Total	$572,815,313	$534,746,310	$528,171,569	$533,914,233	$2,169,647,425

Source: Calculated by author based on each city's annual budget

The Austin city budget for Fiscal Year 2011 estimated revenue of $35.1 million from franchise fees, but only about one million of those dollars would be put towards maintenance of the ROW. The remainder is essentially the "profit" the city realizes from its citizens above and beyond the cost of managing the ROW, saddling Austin residents with an extra $34 million on their phone, cable, and gas bills.[3]

The basis for the high profits the cities earn is the decision they have made to maximize the revenue earned from services provided. This means that the fee is charged based on the consumer's bill for the service, not on additional burden—if any—the service places on the ROW. If a new service is provided through the same pipeline—most noticeable with telecom services—the fee is levied on the new service, charging companies and customers double despite no new physical ROW use.[4]

This goes beyond charging "rent," becoming a tax upon consumers. The money is then used by the cities to fund any number of projects completely without a nexus to the justification for the "fee." This brings up issues related to transparency in addition to the issue about the welfare of citizens.

Additionally, this challenges the contention of whether or not this fee should be legally treated as a tax. Tennessee courts came to the conclusion it should—such fees, beyond whatever marginal costs are necessary to maintain ROWs, are indeed taxes on the citizens, and should be treated as such legally.[5]

Regardless of the current legal status of franchise fees, rent is an inaccurate way to describe their function. Governments are not private landlords, whose obligation is to extract the maximum rent from users. They are defenders of the public interest.

The public ROW is not created like private development, which comes about through personal investment and a good deal of risk. The ROW is created usually through the police power of the government, solely for the benefit of the community. It is harmful for a municipality to maximize franchise fees at the expense of its own citizens, making them pay more to use their own property, disrupting the efficiency of the ROW, and obstructing the entry of new consumer technologies.

Today's excessive franchise fees stymie competition and strain consumer budgets. Charging a fee to cover the cost of providing ROW access is appropriate; charging Texas consumers over $2 billion since 2008 to essentially use their own property is not. ✯

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1 Bill Peacock and Jordan Brownwood, "Local Franchise Fees Generate Hundreds of Millions for Cities: Consumers Are Footing the Bill," Texas Public Policy Foundation (Jan. 2011).

2 Thomas Hazlett, "Allocating Public ROW Slots," Texas Public Policy Foundation (Jan. 2007).

3 City of Austin, "City of Austin, Texas 2010-2011 Approved Budget, Volume 1" (2010).

4 Bill Peacock, "Paying for the Use of the Public Right of Way," Texas Public Policy Foundation (June 2006).

5 Barrie Tabin, "Court strikes down Chattanooga's telecom franchise fee: says local fees must relate to costs incurred," *Nation's Cities Weekly* (21 Sept. 2010).

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