Mississippi Municipal League
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How Cities Can Gain Maximum Value from Use of the Right of Way and Government Facilities

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TOWER LEASE NEGOTIATIONS
HOW TO OBTAIN MAXIMUM VALUE FOR USE OF YOUR WATER TOWER OR LAND

Generally, cellular companies want to place their facilities on city property. In most cases, that property is a water tower or a communications tower (such as where a city has its 911 operations). Wireless Companies prefer working with local governments rather than private landowners which avoids their having to deal with zoning rules associated with private land use. So, when a cellular company presents you an offer or a proposed lease here are some things to keep in mind with tower lease negotiations to maximize your value:

- Generally, the initial rent offer is substantially lower than the market rate you can receive. We have seen initial offers of $500.00 per month that were negotiated for $2,000.00 or more. Most water tower leases are minimally in the $2,000.00 plus per month range depending on coverage density and traffic routes.

- Rent will vary depending on automobile traffic, proximity to major highways, sports venues, pedestrian traffic, equipment to be used.

- Include an inflation escalator clause to increase monthly rent ranging from 3%-5% per year.

- Before negotiations begin know the number of antennas and equipment that will be attached to your tower and do not provide company a general lease to add equipment without city's prior approval and additional rent consideration.

- Initial Term is normally 5 years with two (2) 5-year term extensions. Negotiate for higher compensation for any longer term.

- A comprehensive structural analysis should incorporate the planned installation and all existing antennas, components and structures.

- Retain final design approval to ensure that any installation will be completed to the City's standards or codes.

- Early termination fees should be included with clear wording about removing equipment, repairs, clean up and touch up of the tank if company should terminate lease in midterm.

- If painting or maintenance is to be performed on tower make sure company is required to pay for moving their equipment and not the City.

- Require cellular companies to reimburse you for outside expertise used to negotiate lease.

LAND LEASES

- Cities should include a revenue sharing provision in every land lease as towers are usually constructed with the capacity to add additional companies' antennas on the tower. You should approve all subleases and share 20% to 40% in collocation revenue.

Beware of Companies trying to reduce your rent or offering lump sum payouts. Some companies request a reduction of rent usually in conjunction with a claim that technological advances may make the need for your tower obsolete or because of industry consolidation. In most cases we recommend cities to reject these proposals. A more recent trend is for cities to be approached with lump sum payment offers in return for a City to abate future rent. All too often these offers are not in the cities interest and are far below the value cities should receive.

Beware of Consultants who offer to market your tower and negotiate a lease for you in return for 30% of your rent over the term of your lease including renewal terms. It's a pretty safe bet that most cellular companies know that communities have a water tank tower. The need to have someone market your tower for you is pretty remote. Additionally, most leases contain common language for water tank tower leases. You should seek out professional assistance in negotiating a lease and you should include in the negotiations for the cellular company to reimburse you for the cost of acquiring that assistance. If most tower leases require a minimum of $2,000.00 monthly rent and the initial term along with renewal terms extend to 25 years the rent over that time would be $600,000.00 without any inflation escalator. To pay a consultant 30% of that amount or $180,000.00 over that period is questionable public policy.

FCC ISSUES SMALL CELL ORDER AFFECTING HOW CITIES REGULATE DEPLOYMENT OF SMALL CELLS IN THE RIGHT OF WAY

On September 27, 2018, the FCC issued its DECLARATORY RULING AND THIRD REPORT AND ORDER in WT Docket No. 17-79 and WC Docket No. 17-84, which adopts a number of provisions related to local regulation of small cell facilities.

Fees. The FCC adopted a cost-based approach, providing "fees are only permitted to the extent that they are nondiscriminatory and represent a reasonable approximation of the locality's reasonable costs." The following fees are presumed reasonable:

> (a) $500 for non-recurring fees, including a single up-front application that includes up to five Small Wireless Facilities, with an additional $100 for each Small Wireless Facility beyond five, or $1,000 for non-recurring fees for a new pole (i.e., not a collocation) intended to support one or more Small Wireless Facilities; and

(b) $270 per Small Wireless Facility per year for all recurring fees, including any possible ROW access fee or fee for attachment to municipally-owned structures (city utility pole) in the ROW.

Shot Clocks. The FCC also adopted the following shot clock provisions for reviewing wireless facility applications:

(i) Review of an application to collocate a Small Wireless Facility using an existing structure: 60 days.

(ii) Review of an application to collocate a facility other than a Small Wireless Facility using an existing structure: 90 days.

(iii) Review of an application to deploy a Small Wireless Facility using a new structure: 90 days.

(iv) Review of an application to deploy a facility other than a Small Wireless Facility using a new structure: 150 days.

Key items cities should consider in granting a cable franchise agreement.

1. **Franchise Fee**. Cities should pursue authority to impose up to the maximum 5% franchise fee on all gross revenues derived from the provision of services within the city consistent with 47 U.S.C. § 542.

- **Gross Revenue**. "Gross Revenues" should be broadly defined to encompass any and all revenue derived from the provision of video services. In particular the definition should include "fee on fee" revenue, advertising revenue, home shopping commissions, cable service revenue, equipment revenue and related revenue sources. **We do not recommend cities to include definitions based on Gross Subscriber or Gross Basic Revenues as these definitions typically exclude several sources of revenues from being subject to franchise fees which would greatly reduce your annual franchise fee revenue.**

- **Fee Verification**. The Agreement should contain a provision allowing cities the right to verify franchise fee payments by conducting a review or audit of company's books and records. Language should be included to permit such a review and to ensure that no limitation on the relevant state statute of limitation is applied. In other words, a company may want to limit the review period to 2-3 years - this type of limitation should be rejected.

2. **Grant of Authority**. The Agreement should clearly define what authority a city is granting regarding use of the right-of-way. This provision must be carefully drafted to ensure no waiver of rights by cities while also providing companies adequate protections for their telecommunications facilities.

3. **Term**. Generally, the term of an Agreement will extend between five and fifteen years. A ten-year Agreement term has become standard.

4. **Public, Educational and Governmental Channels (PEG)**. Language should be included in the Agreement to provide sufficient capacity, connectivity and funding to support local PEG programming as may be desired by a City. These issues will vary depending upon the historical use of such channels within a community and in certain cases depending upon the size of the jurisdiction.

5. **Customer Service Standards**. Generally, most cable companies agree to comply with the FCC's customer service standards found at 47 C.F.R. §76.309. Ideally these standards should be incorporated by reference into the Agreement and, if possible, an exhibit should be added to the Agreement setting forth the customer services standards. These standards include everything from telephone response time to service installations and refunds to subscribers.

6. Right-of-Way. The Agreement should include right-of-way protections within the Agreement clarifying how and when cable should be buried, collocation on facilities, restoration issues and other standard right-of-way protections.

This list is by no means complete but it does represent some key issues, which should be focused on during any negotiations with any company. **Additionally, it is very important for cities to examine their current franchise agreements to determine if there are any "level playing field" provisions that may negatively impact your City if your City enters into a competitive Cable/ Video Services Agreement.**

DETERMINING THE VALUE OF CABLE TELEVISION FRANCHISE FEE REVENUE FOR USE OF PUBLIC RIGHTS OF WAYS

A local government can determine the value (in terms of franchise fees it will receive) of its public rights of ways for use by cable television companies by using the following calculation method:

- Determine City's population using 2010 census data; divide by 2.5 the average number of persons living by household (U.S. Census) to determine total number of households in the community.

- Multiply number of households subscribing for cable television services by $100.00 per month; this will provide total monthly revenue received by Cable Company for the use of the public rights of ways.

- Annualize monthly revenue received by the Cable Company and then take 5.00% of that amount to calculate the total (franchise fee) value of public rights of way for use by a Cable Company.

An example would be to take a community of 5,000 people divide by 2.5 = 2,000 households. Thirty (30) percent of the total households would = 600. Multiply 600 by $100.00 = $60,000

monthly revenue Cable Company receives. Annualized monthly revenue = $720,000 x 5.00% of the total annualized revenue = $36,000.00 annually the City should approximately receive.

There are numerous factors that may affect the amount your City is receiving. If your community is currently assessing a 5.00% franchise fee and is not receiving income that is relatively close to the amount generated by using the above formula the current Franchise Fee provision in your City's Franchise Agreement may not require payment on all of a Cable Companies "Gross Revenues". For example, your Franchise may state franchise fees are to be paid on "Gross Basic Subscriber Services" or "Gross Subscriber Revenues" or "Gross Revenues received by Grantee from Subscribers residing within the Service Area for Cable Services purchased by such Subscribers on a regular, recurring monthly basis". All of these examples limit the sources of revenues a Cable Company has to pay on. A cable company may not be coding all of the city street addresses correctly in their customer billing records as well which would cause franchise fees to be paid erroneously to another government jurisdiction.

"Gross Revenues"

Any and all Revenue derived from the operation of the Cable/Video System

- All Cable Service Fees
  Basic/Expanded/Digital/PPV/Pay/Premium
- Installation
- Franchise Fee
- Ad Sales
- Home Shopping Commissions
- Late Fees
- Leased Access
- Whole House Maintenance
- Early Termination Fees
- Billing and Collection Convenience Fees
- FCC User Fee (not a tax)
- Equipment (DVR Box, Remotes)
- Guide

CITY OF _____, MISSISSIPPI

ANNEXATION NOTIFICATION AND CONFIRMATION

Date:

TO:

FROM:

SUBJECT: Notification of Annexation No._____ (Attach Copy of Published Notice and Other Pertinent Documentation, i.e. copy of tax plat)

Attached are the published notice and other pertinent documentation for the annexation of (address) which was annexed by _____ on (date). Please change the jurisdictional coding for the address listed in the documentation from (former jurisdiction, i.e. County) to the City of _____. Once the coding for the address has been changed, please sign and date the certification below and return the original to me at the above address. If you have any questions, please contact me at _____.

Physical Addresses of Properties Annexed:

I hereby certify that this annexation notification report was received and that the jurisdictional coding for the annexed address (es) was updated to the City of _____ on this date.

_____ _____

AUTHORIZED SIGNATURE DATE

Print name of_____