STATE AND LOCAL COMPENSATION
REQUIREMENTS FOR ACCESS TO PUBLIC RIGHTS OF WAY FOR FIBER
(Oct. 19, 2020)

Broadband providers that seek to deploy fiber facilities in public rights of way are frequently subject to extremely high compensation requirements imposed by state and local governments. These compensation requirements (“State and Local Fees”) take many different forms, including per linear foot fees, fees based on a percentage of revenues in the jurisdiction, and in-kind compensation requirements. These high fees harm fiber investment in a number of ways. They frequently cause service providers to delay, scale back, or modify fiber deployment. Moreover, because funds available for investment in fiber deployment are finite, money spent on high State and Local Fees is unavailable for fiber deployment in other areas. Some of the State and Local Fees that Zayo, Crown Castle, and Lumen have encountered are described below.

**High fees that delay fiber deployment.** There are many circumstances in which high State and Local Fees have caused companies to delay fiber deployment for extended periods of time while they attempt to persuade state and local governments to adopt more reasonable compensation requirements. For example, Zayo is currently seeking to deploy a fiber facility between Dallas and Atlanta. In order to cross the Mississippi River, Zayo requested authorization to attach its fiber to the Vicksburg Bridge. It did so in March of this year. The Vicksburg Bridge Commission (“VBC”), which controls access to the right of way along the bridge, has insisted that Zayo sign a 25-year agreement governing such access under which Zayo would (1) pay a base annual fee of $49,650, which would increase by five percent on a compounded basis each year and (2) install two innerducts that would become the property of the VBC. Zayo estimates the market value of the two innerducts to be approximately $450,000-500,000. The total compensation under the proposed contract would be approximately $2,819,650–$2,869,650 over 25-years or approximately $112,786-$114,786 per year. The fiber facility is approximately 7,500 linear feet in length. This translates to approximately $15 per linear foot per month. This is vastly higher than per linear foot fees charged by other jurisdictions. For example, the fee for access to public rights of way in metropolitan areas throughout the state of Michigan is $0.05 per linear foot per year.¹

In response to the VBC proposal, Zayo reluctantly proposed a 25-year contract which would include (1) a one-time rights of way access fee of $49,650, and (2) the two innerducts requested by VBC. The total compensation amount under the contract proposed by Zayo would be approximately $450,000-$500,000 or approximately $18,000-$20,000 per year. This would result in at least a $2.40 per linear foot annual fee, far higher than most other State and Local per linear foot fees. Nevertheless, the VBC rejected Zayo’s offer and continues to erroneously assert that its bridge does not constitute a public ROW. This is so despite the fact that the Mississippi Attorney General issued an opinion to the VBC in 2018 stating that “the Mississippi River Bridge is, by statute, already public property and designated for public use.”² The ongoing dispute with the VBC has caused substantial delays to Zayo’s project. If Zayo fails to complete

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¹ See Mich. Comp. L. Serv. § 484.3109(4) (establishing fee of “5 cents per each linear foot of public right-of-way occupied by the provider’s facilities within a metropolitan area” throughout the state).

the construction of the fiber facility between Dallas and Atlanta by December 2020, it could become liable for significant liquidated damages under customer contracts.

Zayo has also been forced to delay its plans to deploy fiber in Athens County, Ohio because of high fees. As part of a project to deploy fiber in public rights of way in large portions of the State of Ohio, Zayo has been trying to obtain access to the public rights of way in Athens County since November 2019. The Athens County Engineer, who controls access to the public rights of way, has insisted that in order to obtain access to the public rights of way Zayo must provide the County with conduit and/or fiber along the route where Zayo seeks to deploy fiber. Zayo has declined the County’s in-kind request, which would cost approximately $1 million for the originally requested three conduits traversing 29-miles across three townships.

Zayo has repeatedly requested that its permit applications be timely processed, but the County Engineer has failed to do so. It has instead insisted that Zayo comply with unnecessary and costly procedural requirements. For example, the County Engineer has recently required Zayo to provide an inventory of every culvert in the County. This culvert survey is not a standard permitting requirement, and it is not necessary to demonstrate Zayo’s compliance with applicable codes. Zayo estimates that the cost of the survey is approximately $50,000, and it requires approximately 800-workman hours. As is the case with the Vicksburg Bridge, the delays associated with obtaining access to the Athens County rights of way are quickly reaching a critical stage, because Zayo is close to missing deployment deadlines set forth in its customers’ contracts. Missing those deadlines could cause Zayo to become liable for significant liquidated damages under customer contracts.

High fees that force changes to business plans. There are many circumstances in which high State and Local Fees dictate the extent to which service providers deploy fiber, dictate network architectures, and even determine the customers they must serve. For example, the Port Authority sets per linear foot fees for access to rights of way on bridges and tunnels in parts of New York and New Jersey. The company that deployed Zayo’s network in the Holland Tunnel had taken advantage of the economies of scale associated with deploying fiber facilities by placing 1152 fiber strands in the Holland Tunnel rights of way. After Zayo acquired that company, the Port Authority dramatically increased the rates for utilizing the tunnel’s rights of way by, among other things, charging higher rates to companies with more fiber strands in the rights of way. This change forced Zayo to reduce the number of fiber strands in the Holland Tunnel rights of way from 1152 to 144. Even with this reduced number of fiber strands, Zayo still pays $58.44 per linear foot per year, an extremely high rate. Moreover, when the smaller number of fibers is exhausted, Zayo will again need to incur the costs of deploying new fiber in the rights of way. The increased cost associated with serving future customers would have been avoided if the Port Authority charged reasonable rates for accessing public rights of way.

Albuquerque’s high compensation requirements have had a similar effect. Crown Castle has been trying to obtain access to public rights of way on reasonable rates, terms, and conditions in Albuquerque, New Mexico since 2015 for the purpose of deploying fiber in a large portion of the City. The municipal government has insisted that the fees be set based on the “market price,” such as $2.50 per linear foot per year. Although Crown Castle has repeatedly explained that such rates render fiber deployment uneconomic in many circumstances, the City has refused to
change its position. As a result, Crown Castle limited its fiber deployment to locations needed to meet its obligations under a wholesale contract it signed with T-Mobile in May 2016. In order to obtain the access needed for the T-Mobile deployment, the Company entered into temporary, two-year Fiber License Agreements with the City in June 2018. Under those agreements Crown Castle must pay $2.50 and $1.50 per linear foot per year to deploy fiber in underground and above-ground public rights of way respectively. The $2.50 fee for underground access is 50 times the $0.05 fee charged in Michigan.

In October 2019, Crown Castle renewed its effort to obtain a long-term agreement for public rights of way access at reasonable prices in Albuquerque, a request that it reiterated in a subsequent conference call with the City and in written correspondence. The City has refused to offer prices below those set forth in the two-year Fiber License Agreements. Those agreements expired in June, but Crown Castle continues operate under them. Due to the absence of a reasonable, long-term agreement for public rights of way access in Albuquerque, Crown Castle continues to forgo further network deployment in the City. It is unlikely to deploy any new fiber in Albuquerque unless the City reduces the cost associated with accessing public rights of way.

The high fees in Newark, N.J. illustrate yet another effect of high State and Local Fees. Those fees forced Lumen to change its network deployment plans by switching from reliance on public rights of way to (still expensive) private rights of way. Lumen sought to deploy 12,000 feet of fiber optic lines in Newark, New Jersey public rights of way as part of a larger fiber route along the East Coast. In response to its request for access, Newark demanded that Lumen (1) pay $15,000 just for the right to enter into an agreement for access to the public rights of way needed for the proposed route (i.e., not for citywide access); (2) pay an annual $5,000 administrative fee; (3) pay an annual $2.50 per foot fee; and (4) deploy conduit along the entire route for the City’s use without charge. When the value of the conduit is included, these fees totaled approximately $425,000 over ten years or $42,500 per year. The fee per foot for the 12,000-foot route would have been $3.54 per year, far higher than most other cities.

Lumen made numerous attempts to negotiate a more reasonable compensation requirement with Newark officials. After Lumen submitted its initial access request, the City sent Lumen a draft contract containing the terms described above in December 2015. Lumen objected and sought several times to engage in discussions with the City. The City refused. Lumen had no choice therefore but to change its fiber deployment route by utilizing private rights for way for as much of the route as possible. It was able to do so for 10,900 feet. The charges for access to these private rights of way were high, and well above the fees charged by some cities, but they were lower than the fees Newark demanded. Lumen then revised the draft agreement with the City to include only 1,100 feet to be deployed in the public rights of way. In September 2016, Lumen submitted the revised agreement along with a check for the fees associated with the 1,100 feet of access. The City never signed the agreement, but it cashed the check and issued the ROW permit in November 2016, more than one year after Lumen initiated the process.

The high fees in Georgia have had still another effect, in this case dictating the customers that a service provider seeks to serve. In Georgia, if a service provider does not provide local telephone service to a retail customer in a municipality, it must pay the fee charged by the
Georgia Department of Transportation ("GDOT") for public rights of way access.\textsuperscript{3} That fee is up to $5,000 per mile per year.\textsuperscript{4} Crown Castle deployed fiber in several municipalities in Georgia in which it had planned to serve wholesale but not retail customers. Where this is the case, the $5,000 per mile fee imposes significant burdens on the Company. For example, that fee exceeds the gross revenues that Crown Castle earns in Thomson, GA and constitutes approximately 50 percent of Crown Castle’s gross revenues in Augusta, GA. Given that the municipal public rights of way fees in many Georgia cities are significantly lower than $5,000 per mile, Crown Castle has been forced to search for retail customers in those municipalities solely for the sole purpose of qualifying for the lower fees.

**Other high fees.** In addition to delays and changes to business plans, high State and Local Fees constitute a recurring tax on fiber providers that diverts resources away from possible fiber deployment in other areas. For example, the annual per linear foot fees in Arizona for public rights of way access include the following: $1.88 in Carefree; $2.27 in Chandler; $2.09 in Gilbert; $1.96 in Glendale; $2.10 in Guadalupe; $1.89 in Mesa; $1.89 in Peoria; $1.88 in Scottsdale; $2.15 in Tempe; and $2.21 in Tucson. These fees are extremely high and almost certainly well above the cities’ costs of managing public rights of way. For example, they far exceed the annual per linear foot fee in Maricopa County, Arizona, which is $0.54. There is no apparent reason why the costs of managing the rights of way in Maricopa County, which includes Phoenix, would be lower than in the other Arizona cities. If anything, one would expect that the costs would be higher in Phoenix, the largest city in the state. Moreover, even the Maricopa County fee is more than ten times higher than the $0.05 per linear foot fee charged throughout Michigan. Nevertheless, Crown Castle has had no choice but to sign public rights of way access agreements with the high-fee municipalities listed above while disputing the lawfulness of those fees.

High State and Local Fees also sometimes take the form of a percentage of a service provider’s revenues in the jurisdiction. For example, Eugene, Oregon requires that Zayo pay five percent of its gross revenues in the city; Portland, Oregon requires that Zayo pay five percent of its gross revenues for services that Zayo provides within the City or via the fiber facilities deployed in the City’s rights-of-way (Zayo has resisted paying this entire fee, but it may be forced to do so in order to remain in business); and San Antonio, Texas requires that Zayo pay

\textsuperscript{3} See Official Code of Georgia Annot. § 46-5-1(a)(1) (requiring that carriers pay a municipal authority “due compensation” for use of public rights of way); \textit{id.} at § 46-5-1(b)(9) (defining “due compensation” as an amount equal to no more than 3 percent of actual recurring local service revenues received by such company from its retail, end user customers located within the boundaries of such municipal authority); \textit{id.} at § 46-5-1(b)(18) (“If a telephone company does not have retail, end user customers located within the boundaries of a municipal authority . . . payment at rates in accordance with the rates set by regulations promulgated by the Department of Transportation shall be considered the payment of due compensation”).

\textsuperscript{4} See Ga. Comp. R. & Regs. r. 672-11-.03 (setting GDOT rate of $5,000 per mile for access to rights of way “[a]long roads and streets inside urban areas”).
5-percent of its gross revenues. These fees of course bear no relationship to the costs that the cities incur to manage the rights of way.

Finally, the complex and harmful compensation regime developed by the New York State Department of Transportation (“NY DOT”) threatens to impose even greater costs on fiber providers. In 2019, New York passed laws that authorized the NY DOT to require that entities installing or operating fiber optic lines in the state-controlled highway rights of way pay compensation at a rate set based on fair market value. The law prohibits entities that must pay the new rights of way fees from recovering them from customers. After the laws were passed, the NY DOT developed a schedule of fees that it asserts is based on data showing the fair market value of the rights of way. The fees differ depending on a range of factors, including the area within the state in which the right of way is located, whether the rights of way run parallel to or cross the highway, and the number of fiber strands in the rights of way. The fees are extraordinarily high. For example, the base fee per linear foot per year for use of underground rights of way parallel to the highway in Buffalo, Rochester, Albany, and Syracuse is $3.98; in Manhattan above 59th Street it is $16.97; in Manhattan below 59th street it is $22.66; and in areas surrounding Manhattan it ranges from $0.74 to $3.59. The rates for traversing the highway are significantly higher. All of these fees appear to exceed the costs New York incurs to manage public rights of way. Again, the comparison with Michigan, a state that contains dense urban areas such as Detroit as well as less dense areas, is instructive. The statewide $0.05 per linear foot fee in Michigan is far below the fees that New York is now charging.

The NY DOT has sent bills to entities with fiber in the rights of way along the state highways based on the new fees. The bills seek compensation that vastly exceeds the previous fees for the use of the same rights of way. Entities affected by these changes have sought to negotiate more reasonable fees with the state, but those negotiations have failed to yield an agreement. The NY DOT’s latest settlement offer to the industry was that all entities using the

5 See N.Y. Cons. L. Serv. § 7 (stating that the agreement between the commissioner of the NY DOT and the entity occupying or using the rights of way “shall not be greater than fair market value”); id. at § 10.24-e (“The commissioner of transportation is hereby authorized to enter into an agreement with any fiber optic utility for use and occupancy of the state right of way for the purposes of installing, modifying, relocating, repairing, operating, or maintaining fiber optic facilities. Such agreement may include a fee for use and occupancy of the right of way, provided, however, such fee shall not be greater than fair market value”).

6 See id. at § 7 (“Any fee for use or occupancy charged to a fiber optic utility shall not be passed through in whole or in part as a fee, charge, increased service cost, or by any other means by a fiber optic utility to any person or entity that contracts with such fiber optic utility for service.”); id. at § 10.24-e (same).


8 See id.
NY highway rights way would pay an aggregate $275 million in additional fees, to be allocated on a pro rata basis. Again, extraordinarily high fees like these simply divert resources away from future fiber deployment projects.