Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Acceleration of Broadband Deployment:	)	WC Docket No. 11-59
Expanding the Reach and Reducing the	)	
Cost of Broadband Deployment by Improving	)	
Policies Regarding Public Rights of Way and	)	
Wireless Facilities Siting	)	

REPLY COMMENTS OF TW TELECOM INC.

I. INTRODUCTION

tw telecom inc. ("TWTC") is a facilities-based communications provider serving business customers in 75 markets spanning 30 states and Washington, D.C. Since its inception TWTC has been investing in and deploying fiber networks to serve the needs of its customers and since the latest economic downturn in 2007, TWTC has invested more than $1 billion in fiber and building connectivity. The time it takes to install facilities in public rights of way and the fees that must be paid to occupy such rights of way are of paramount importance to TWTC. Obtaining prompt access to rights of way on fair and reasonable terms is critical to TWTC's ability to deploy broadband facilities, roll out services, and meet customer needs on a timely basis. Reasonable, nondiscriminatory right of way use fees that are easily and uniformly calculated are critical to TWTC's ability to keep the cost of service down for its customers and be competitive in the market place.

For over a decade, TWTC has worked with other communications providers and numerous local governments in an effort to find a balanced approach for accessing and occupying public rights of way. Such an approach recognizes both the providers' need to install

facilities on a reasonable and timely basis and the local government's obligation to manage its rights of ways to protect the health, safety, and welfare of the public. Policies governing access to rights of way, and the manner in which fees for rights of way use are calculated, can vary significantly from locale to locale. Because of TWTC's significant experience in this area, it offers these comments on what policies do and do not work effectively.

For example, in many markets, local or state governments have dispensed with the time-consuming and often contentious process of negotiating and approving a franchise before the issuance of a construction permit is allowed.[1] Further, when local governments no longer require providers to obtain franchises, they usually have implemented streamlined procedures to obtain construction permits that are uniform among all rights of way users. Such an approach has significantly simplified the permitting process and made it more efficient for local officials to administer. At the same time, it has accelerated the ability of providers to deploy broadband services, resulting in a more robust and competitive environment. In those venues that no longer require negotiation and approval of franchises, construction permits can be obtained in a matter of days or a few weeks, depending on the size and nature of the project. In contrast, in those markets where franchises are still a prerequisite to obtaining a construction permit, it can take months to negotiate and obtain approval of the franchise alone. In extreme circumstances, it can take a year or more to secure a franchise. The franchise negotiation and approval process is lengthy, cumbersome and costly for providers and local governments alike. Such delays and added costs inject uncertainty into business plans and impede the deployment of new services to customers. TWTC believes that local governments that have discontinued franchising

[1] Arizona (Revised Statute Title 9 Chapter 5), Florida (Statute Title XXVI Chapter 337 Sections 401-404) and Georgia (Code Title 46 Chapter 5 Article 1), have all adopted state laws that streamline permitting processes, compensation and municipal regulation of telephone corporations.

requirements and streamlined their permitting procedures would agree that such policy shift has resulted in increased efficiency and helped foster a more rapid deployment of competitive broadband services. If such streamlined procedures could be shared and identified as best practices, other local governments will be more likely to adopt such procedures and obtain the same benefits.

TWTC has also grappled with the challenging issue of how to calculate "fair and reasonable compensation" for occupancy of public rights of ways. The means used to calculate fair and reasonable compensation vary widely in terms of formulas, amounts and ease of calculation. While formulation of compensation schemes is probably best left to individual state and local authorities, TWTC believes that best practices can be identified and promoted in this area. Compensation mechanisms should be cost- based, but, at a minimum, they should be rational, competitively neutral, non-discriminatory, simple to administer, and the fee should be reasonable.

TWTC encourages the Commission to address the issue of rights of way access and compensation and to identify best practices for local governments to emulate. A collaborative approach by local governments and providers to help the Commission identify and promote such best practices will encourage the adoption of such practices and advance the deployment of advanced services.

II. PROPOSED BEST PRACTICES

A. The Permitting Process

The streamlined permitting process adopted in Texas is one example of a policy that allows local municipalities to effectively manage public rights of way within their domains while allowing providers reasonable and timely access thereto. More than ten years ago, the Texas

legislature enacted progressive legislation that allowed certificated providers to terminate existing franchises and thereafter, to occupy public rights of way without a franchise.[2] Once the local franchising scheme was discontinued in Texas, competitive providers were able to enter markets and roll out new services much more rapidly. While the Texas statute leaves the issuance of construction permits to local authorities and preserves the authority of local officials to manage *use* of public rights of way by communications providers, it expressly prohibits municipalities from regulating activity unrelated to a provider's use of the rights of way. It also prohibits local authorities from charging permitting fees or requiring the provision of fiber or services at reduced costs in return for access to public rights of way. Finally, the Texas statute endeavors to ensure that construction permits will be issued on a timely, competitively neutral and non-discriminatory basis. TWTC believes that the aspect of the Texas statute ending local franchises and streamlining the construction permitting process could serve as a best practices model.

Allowing providers to terminate existing franchises and apply for construction permits without first obtaining a franchise is particularly important because of the time and expense associated with obtaining a franchise. In TWTC's experience, disputes in franchise negotiations rarely involve right of way management issues. Rather, disputes center on non-right of way issues such as compensation and municipal demands for free fiber and service.

In franchise negotiations, a competitive provider such as TWTC has little or no bargaining power. TWTC must have access to rights of way in order to install facilities and

---

[2] Tex. Loc. Gov't Code §§ 283.001 *et seq.* TWTC notes that while the Texas statute effectively streamlined the permitting process in Texas and expedited the deployment of broadband services, the statewide compensation scheme that the statute put in place for use of public rights of way is unwieldy, difficult to administer and audit, and has resulted in the imposition of extraordinarily high fees relative to the cost of the underlying service. TWTC will address the failings of the Texas compensation scheme later in these comments.

serve its customers. As such, it is highly motivated to conclude franchise negotiations in a timely manner. Municipalities, however, have little or no motivation to conclude the franchise negotiations and they are rarely compelled to compromise. TWTC routinely spends six to nine months negotiating franchises. After those negotiations are concluded, it takes an additional thirty to sixty days to obtain city council approval of the franchise. Sometimes, the franchise negotiation process can take even longer. As a case in point, TWTC is currently in the *thirteenth* month of negotiating a franchise renewal with one particular city. At one juncture during the negotiations, the city threatened to deny all of TWTC's pending construction permit applications - - a move that would have effectively deprived TWTC of the ability to market services to new customers, unless TWTC agreed to certain of the city's demands. When the threat was made, TWTC was not in breach of its existing franchise; the threat was merely a tactic intended to pressure TWTC into acquiescing to the city's demands. Ultimately, the city dropped its threat and negotiations are ongoing. None of the outstanding issues pertain to right of way management, but rather center on TWTC's provision of fiber to the city.

Promulgation of a best practices guide for public right of way access should also emphasize that right of way policies should be reasonable and applied in a competitively neutral and non-discriminatory manner. In one county, TWTC has been told that any new facilities it installs must be placed underground in accordance with a county ordinance that requires undergrounding of facilities. TWTC would note that the ordinance specifically exempts above ground facilities installed by wireless communications providers; additionally, it is unclear that the county is applying the ordinance evenly to all other right of way users. The county's interest in relocating overhead facilities underground may be laudable, but there was no coordinated planning with utilities on the undergrounding requirement and no consideration of

the costs inherent with implementing such requirement. Underground construction is much more expensive than overhead placement of facilities because of the nature of boring under streets and through hard ground. While construction costs vary by region and often depend on local conditions, the cost of aerial construction is fairly consistently about $5-$10 per linear foot. Underground construction is much more expensive - - averaging $35-$45 per linear foot. In some central business districts, underground construction can cost upwards of $300 per linear foot. Many times, customers are unwilling or unable to absorb the added cost of underground facility deployment and utilities are unable to justify the expense relative to the business case. Opportunities are then lost and broadband is not deployed. Worse, if undergrounding requirements are applied only to "new" entrants, there is a grave competitive impact on those not already on the poles. TWTC understands that beautification efforts are important to cities and counties, but any undergrounding requirement should be applied uniformly and only after collaboration between local governments and utilities so as not to stifle investment and broadband deployment.

TWTC urges the Commission to publish a best practices guide for right of way access. When it is costly and time-consuming to access rights of way, the deployment of broadband service is inevitably impeded. Drawing upon the Texas statute as a model, TWTC would propose consideration of the following as best practices for access to public rights of way:

1. If a provider is certificated by the Commission or State commission to provide telecommunications services, the provider should not be subject to local franchise or license requirements.
2. Local governmental entities may require the issuance of a construction permit to a certificated provider seeking to install facilities in or on a public right of way. If

a permitting fee is charged, the cost should be directly related to the cost incurred in issuing the permit.

3. A certificated provider's application for a construction permit should be promptly processed and issued within a reasonable period of time. TWTC suggests that fifteen business days is a reasonable period of time to process permits.

4. Local governmental entities should treat all certificated providers in a competitively neutral manner and not discriminate against or act in favor of any provider.

5. The terms of a construction permit issued to a certificated provider should be consistent with construction permits issued to other persons installing facilities in or on a public right of way.

6. The terms of a construction permit issued to a certificated provider may require proof of insurance in a reasonable amount and a bond in an amount that is reasonable in proportion to the size and nature of the project.

7. Local governmental entities should regulate certificated telecommunications providers only to the extent such regulation is necessary to protect the health, safety, and welfare of the public and any such regulation should be competitively neutral and should not be unreasonable or discriminatory. Examples of regulations that should not be authorized include (1) requirements that particular business offices be located in the municipality; (2) requirements for filing reports and documents with the municipality that are not related to use of a public right of way; (3) inspection of a provider's business records, except to the extent

necessary to confirm compliance with required right of way use compensation; and (4) approval of transfers of ownership or control of a provider's business.

8. Local governmental entities should not demand or request any services or facilities from certificated providers without compensation or at below-market rates.

9. Policies that require underground placement of facilities or other such beautification efforts should be adopted only after consideration of the cost associated therewith and the impact of such policy on competition and deployment of broadband services.

B. Compensation

As stated above, right of way compensation schemes vary widely, not only in the manner that the compensation is calculated, but in the amounts paid. While some right of way use fees are cost-based, most municipalities charge a fee that is based upon a percentage of gross revenue, the definition of which varies from municipality to municipality. The percentage levels also vary, but the levels typically range from one to ten percent. Some cities combine a percent of revenue fee with a minimum flat fee. Other cities charge a fee based on the actual number of linear feet occupied by the provider or the fee may vary based on various ranges of network mileage. In addition to right of way use fees, providers are often subject to a host of other fees, such as permit application fees, environmental assessment fees, street cut fees, and legal fees.

Calculating fees for use of public rights of way can be complex and fraught with uncertainty. Because right of way fees are, in almost all cases, passed through to customers, customers are often confused and perplexed when they see yet another "fee" on their bills,

particularly when there is no easy explanation as to how such fee was calculated.[3] When right of way use fees are unusually high, they also become a potential source for competitive manipulation. Customers have been known to select one provider over another because one provider interprets and calculates the right of way compensation formula in a manner that results in a lower fee. There is no discernable difference in the level of service being provided and the impact and burden on the public right of way is no different, but the right of way compensation formula may be tilted in favor of one type of technology or subject to dueling interpretations. Right of way compensation schemes should not promote such arbitrage. Instead, marketplace performance should dictate market share.

Probably one of the most confusing right of way compensation schemes and the most difficult to administer is the compensation scheme adopted in Texas. While the Texas legislature did a good job of streamlining access to public rights of way, the compensation scheme that is part of the same statute falls far short of a best practices model. In Texas, a service-based fee is assessed for use of public rights of way. Providers calculate the fee, collect it from end-use customers and remit it to the municipality where the end-use customer is served. The amount of the fee varies not only from municipality to municipality, but within each municipality, the amount of the fee varies depending on the categorization of the service being provided.[4]

---

[3] TWTC would point out that the City of San Antonio is wrong when it states that the effect of reducing right of way compensation would be to transfer money from the City and its taxpayers to broadband providers. (Comments of San Antonio at p. 2). Since right of way use fees are passed through to customers in San Antonio, a reduction in the amount of right of way use fees would result in a savings for customers in San Antonio.

[4] In accordance with the statutory formula, the Texas Public Utility Commission annually adjusts the right of way use rates for each of the 1130 cities in Texas and publishes the rates on its website: http://www.puc.state.tx.us/industry/communications/row/accrates/2011rates.xls. To further complicate matters under the Texas scheme, the overwhelming majority of cities have elected to charge a different rate for each category of service provisioned within its boundaries. Under the Texas compensation scheme, there are three categories of service. Thus, the Texas Commission calculates and publishes the rate for each of the three categories of service in each of the 1130 cities.

Although an entire body of counting methodology rules has been adopted by the Public Utility Commission of Texas (the agency charged with implementing the compensation scheme), in an effort to explain and simplify the compensation scheme, calculation of the fee is still woefully confusing.

The Texas compensation scheme also has resulted in some of the highest public right of way use fees in the nation in relation to the cost of the underlying service. For example, if a business customer in Arlington, Texas buys a fully channelized T-1 service, the customer will be charged a *monthly* right of way use fee of $ 158.47.[5] At TWTC, a fully-channelized T-1 that combines voice and data services typically sells for approximately $400 per month. Thus, the right of way use fee paid on a fully-channelized T-1 service in Arlington, Texas is nearly *forty* percent of the cost of the service. While the Arlington rate is one of the highest in Texas, it is not an anomaly. In neighboring Dallas, , the *monthly* right of way use fee for a fully channelized T-1 sold to a business customer is $157.55; El Paso $124.66; Austin $117.07; Houston $133.63; Laredo $117.53; and San Antonio $92.92.[6] Clearly, these are instances where the fee exceeds "fair and reasonable compensation" for use of the public rights of way.[7] Moreover, these fees

---

[5] Under the Texas compensation scheme, a channelized T-1 service sold to a business customer is a "category 2" service or "access line." According to the counting methodology rules, each channel of a channelized T-1 is counted as an "access line." Since there are 23 channels in a fully-channelized T-1, the number of "access lines" counted for a fully-channelized T-1 is 23. A fee is imposed on each "access line" in accordance with the rates published by the Texas Commission. Under the 2011 rate schedule, the rate for a category 2 access line in the City of Arlington is $6.89. Thus, the formula for calculating the monthly right of way use fee for a fully channelized T-1 sold to a business customer in Arlington is: 23 x $6.89 = $158.47.

[6] It came as no surprise to TWTC that San Antonio lists right of way use fees paid by telecommunications providers as its fourth largest source of revenue. (Comments of San Antonio at p. 5).

[7] While some courts have held that the phrase "fair and reasonable compensation" as that term is used in Section 253 (c) of the Telecom Act means that such fees must be "cost-based," others have held that such fees are not restricted to being cost-based. *Compare Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland,* 49 F. Supp.2d 805,817 (D. Md. 1999), *vacated on other grounds,* 212 F.3d 863 (4th Cir. 2000) (holding that franchise fees imposed on telecommunications providers must be directly related to use of the rights-of-way and reasonably calculated to compensate the municipality for the cost of

are discriminatory as they far exceed the fees paid by other entities that place similar burdens on the public rights of way.[8]

It is TWTC's position that compensation for right of way use should be directly related to the actual costs incurred by a municipality when a telecommunications provider makes use of the rights of way. As was evident in the initial comments, however, many local governments reject the concept of any cost-based fee structure. Thus, recommendations on rational payment structures are much needed. TWTC suggests that best practices for determining fees for use of public rights of way be based on the following criteria:

1. Fees should be administratively easy for providers and local governmental entities to calculate.
2. Fees should be uniform within each state.
3. If fees are not directly related to the costs incurred by a municipality when a telecommunications provider makes use of the public rights of way, there should be a correlation between the price paid for the service provided and the amount of the fee assessed.
4. If fees are not directly related to the costs incurred by the municipality when a telecommunications provider makes use of the public rights of way, they should be comparable to the compensation paid by other entities that place similar burdens on the public rights of way and be competitively neutral.

---

administering its franchise program and of maintaining and improving the public rights-of-way.") with *Qwest Corp. v. City of Santa Fe*, 224 F. Supp.2d 1305,1327 (D. N.M. 2002), *aff'd in part*, 380 F.3d 1258 (10th Cir. 2004) (holding that cost recovery is not necessarily the only type of compensation allowed under Section 253 (c). In either event, it makes sense for right of way use fees to be "fair and reasonable" and fees that are *twenty* to *forty* percent of the cost of the service simply are not fair and reasonable.

[8] In Texas, cable and video service providers pay a state-mandated uniform fee of 5 percent of gross revenue for use of public rights of way. Tex. Util. Code Ann. §66.005.

5. Fees should be technology neutral.

   1. Fees should be assessed on a non-discriminatory basis.

   2. Fees should be reasonable. One test of reasonableness would whether the fee exceeds five percent of gross revenue derived from providing service within the boundaries of the municipality.

   3. There should be reasonable audit procedures with limitations on the look-back period, except in cases of fraud.

   4. There should be prompt procedures for refunding overpayment of fees.

CONCLUSION

Broadband cannot be deployed without access to public rights of way which municipalities control. To promote the provision of broadband services, access to and occupancy of public rights of way should be on reasonable terms. TWTC urges the Commission to adopt a best practices guide as set forth herein.

Respectfully submitted,

By: /s/ Diane M. Barlow

Diane M. Barlow
Texas State Bar No. 01758557
dbarlow@phonelaw.com
CASEY, GENTZ & BAYLIFF, L.L.P.
98 San Jacinto Blvd., Suite 1400
Austin, Texas 78701-4296
(512) 480-9900
(512) 480-9200 Fax

ATTORNEYS FOR TW TELECOM INC.