

**NAVAJO NATION**

**A REPORT ON**

**RIGHTS-OF-WAY (ROW) COMPENSATION REVIEW**  
**OF CERTAIN LOCAL GOVERNMENTS**

SUBMITTED: MAY 12, 2006

Municipal Administrative Services, Inc. (MAS)  
P.O. Box 16336  
Sugar Land, Texas 77496  
713-429-1859  
281-466-4772 (Fax)  
[Municipaladminserinc.com](http://Municipaladminserinc.com)  
[Gwhite@municipaladminserinc.com](mailto:Gwhite@municipaladminserinc.com)

# NAVAJO NATION

## RIGHTS-OF-WAY (ROW) COMPENSATION REVIEW OF CERTAIN STATE AND LOCAL GOVERNMENTS

<b><u>CONTENTS</u></b>	<b><u>Page</u></b>
➤ Introduction	1
➤ Local Government Right-of-Way (ROW) Rental Fee Practices	1
➤ Utility Deregulation Impact on ROW Compensation Methods	2
➤ ROW Compensation Methods	2
➤ Overview of Gross Receipts ROW Fees	2
➤ Analysis of Gross Receipts ROW Fee Model Characteristics	3
➤ Linear Foot Fee Rental ROW Model	4
➤ ROW Rental Revenue Contribution to General Fund Budgets for Local Governments	7
➤ Conclusion	7

## **INTRODUCTION**

The general information contained in this report was prepared for the Navajo Nation. This report depicts various ways in which local governments assess fees for the rental of public lands and right-of-way (ROW). This report extracts and compiles data collected from various sources over a period of fifteen (15) years. As such, survey data for any particular city cited in this report may have changed from time to time over the data collection period. However, the comparative data should be helpful to illustrate how different entities approach the complex problem of establishing fees for right-of-way and public land use.

Determining “fair and appropriate compensation” is a critical part of the federal study requirements. The Navajo Nation must act as both the landowner and as a municipal government, providing police, social and other essential governmental services. Thus, tribal governments may require a more flexible approach for valuing ROW fees as a critical revenue stream than the ROW fee historic record would indicate. Tribal Indian governments may have been under-funded due to improperly low fees historically collected from rights-of-way. When considering what is “appropriate compensation”, the parties need to consider the real restraints on tribal revenue sources.

This report provides a discussion of the various methods local governments used to establish ROW rental fees. Included is data from surveys of rates used by selected cities and how ROW fees were applied. For illustration purposes, Municipal Administrative Services, Inc. (MAS) demonstrated the potential impact on Navajo Nation revenues by comparing the ROW fees charged by selected cities applied to the El Paso Natural Gas pipeline right-of-way easement.

## **LOCAL GOVERNMENT RIGHT-OF-WAY RENTAL FEE PRACTICES**

- Cities use two primary approaches for ROW valuation for rental fees: a percentage of gross receipts and linear foot. In some cases, minor easements flat annual fees are applied.
- City ROW rental fees averaged between 3%-5% of gross receipts of the company and linear foot fees range from less than \$1.00 to \$5.00 per linear foot.

MAS’ review of selected cities revealed that typical ROW users are electric and gas utilities, along with telephone, cable, communication, and fiber optic companies. These utilities and companies use surface, subsurface and airspace of the city’s alleys, sidewalks and streets, as well as, tunnels, poles, conduits and ducts to provide their customers service and transact business. The responsibility for managing, acquiring, maintaining, inspecting and regulating public rights-of-way in cities rests with the municipality.

## **UTILITY DEREGULATION IMPACT ON ROW COMPENSATION METHODS**

At the national level, the gas, electric and telecommunications industries have undergone tremendous changes in the last several years. Federal deregulation of the gas transportation industry has opened the transportation market and allowed gas to be freely transported through pipelines across the country. As a result, many gas distribution customers have gone "off tariff" to become transportation customers only.

Similarly in the electric industry, access to transmission systems has been mandated by the Federal Energy Policy Act of 1992 and recent orders of the Federal Energy Regulatory Commission (FERC). Public utilities have been ordered to open their transmission systems to all customers and to file open access transmission tariffs with FERC. As a result, the transmission of wholesale power supplies is an accomplished fact.

The telecommunications industry has changed dramatically in the last few years, largely as a result of the passage of the Federal Telecommunications Act of 1996. The opening of the telecommunications markets to competition has resulted in an influx of providers seeking access to public right-of-way for the installation of their facilities.

Given the changing gas, electric and telecommunications markets, the Navajo Nation should adopt right-of-way policies, rules and regulations establishing rental fees that consider existing and expected regulatory and structural changes in these industries.

## **ROW COMPENSATION METHODS**

MAS reviewed survey data of compensation methods used by cities. A ROW compensation model was developed to compare survey data to identify the impact of comparable fees that could be charged by the Navajo Nation. Our analysis revealed that there are several widely used methodologies employed by local governments to assess fees for the rental of public space and public right-of-way. Right-of-way compensation terms vary from a percentage of gross receipts to a linear foot fee. The application of the type of fee, in some cases, depended on the purpose for which the ROW is used. The most common methods of right-of-way compensation are a percentage of gross receipts and linear foot fees.

## **OVERVIEW OF GROSS RECEIPTS ROW FEES**

The percentage of gross receipts is a common method of determining compensation when the utility requires ubiquitous access to the public right-of-way. The fee is typically set by a local government based on a percentage of the value of the gross receipts to be collected in the jurisdiction. It is usually incorporated in a franchise agreement that also establishes terms and conditions for the use of the public right-of-way.

Gross receipts based franchise agreements generally permit utilities to have unlimited access to public space and right-of-way for a specific purpose such as providing electric,

telecommunication or gas service within the city. Franchises typically regulate pole placement, conduits, buried cable and all other aspects of the utility's activities in public right-of-way. In return for ROW access, the franchised utilities agree to pay the local government based on a percentage of all gross receipts from operations within the city. Utilities are typically required to pay property, utility and other taxes such as sale, use, special taxes and assessment for public improvements, in addition to gross receipts franchise fees. MAS' review of city data indicated that the average gross receipts franchise fee ranged between three (3%) and five (5%) percent. See Table 1 for examples of franchise revenues received by cities based on gross receipts of utility operations within city boundaries.

**Table 1  
Gross Revenues from Right-of-Way Fees**

CITY	ELECTRIC FRANCHISE FEE REVENUE	FRANCHISE FEE ELECTRIC / TELEPHONE	TELEPHONE FRANCHISE FEE REVENUE
Chicago**	\$ 63,000,000	4%-Elec./3%-Tele.	\$ 29,580,000
Houston	\$ 77,750,000	Electric per kwh / Fee per access line	\$51,000,000
St. Louis*	\$ 26,000,000	10%-Elec./10%-Tele	\$12,000,000
New Orleans***	\$ 9,000,000	2.5%-Elec./3% Tele.	\$3,000,000

\* St. Louis has a gross receipts tax instead of a franchise fee

\*\*Chicago data from early 1990s

\*\*\*New Orleans fee basis prior to 2000

### **ANALYSIS OF GROSS RECEIPTS ROW FEE MODEL CHARACTERISTICS**

Simple methodology. The percentage of gross receipts based rights-of-way rental fee is a most commonly used method to value access to public right-of-way for utilities, cable and telecommunication companies that require ubiquitous access to public rights-of-way. The calculation simply requires multiplying a fixed percentage rate times the gross receipts of the utility for a specific time.

Easy verification of fee. Accuracy of these fees can be verified by means of a financial audit of the franchised operator's gross receipts attributable to its operations within the limits of the City. The most critical requirement is to clearly define gross receipts and the accounts or services subject to the percentage calculation in the executed franchise agreement or ordinance.

Low cost of collection and administration. Typically, utility companies, telecommunication companies and cable companies, collect the fee, sometimes identifying it as a separate line item on a customer's statement, then remit the fee periodically to the local government. The exclusive nature of these services lowers the cost of collection to local governments because there are only a few collection points. Compliance costs for utility providers are also low because the fee is built into the

customer's invoice.

Applicability. Gross receipts fees cannot be universally applied to all tenants that use the public right-of-way. For example, gas pipeline and long distance companies that need access to public right-of-way to pass through the City without connecting to customers would not have gross revenue directly attributable to business within the City. Also, private businesses, universities, hospitals and nonprofit organizations may need to obtain access to public right-of-way to connect buildings with cable or fiber optic fiber for non-commercial purposes. These entities would not have gross receipts revenue that would be subject to a percentage of gross receipts fee. A linear foot fee would work better for non-commercial entities, interstate telephone and pipeline companies that do not connect to customers located within the City.

Fee versus tax issue. The percentage of gross receipts method has characteristics of a tax because it is easily calculated as a percentage of amounts billed to customers. Local utilities will complain that the City is imposing a new tax instead of assessing a rental fee for the use of public right-of-way.

In summary, the percentage of gross receipts method has, over the years, provided local governments a significant and growing source of rental revenue for the use of the public right-of-way. However, recent legislation, pressures of deregulation and judicial decisions have increased the difficulty of applying this here-to-fore easy method of obtaining street rental fees for the utility's use of the public right-of-way.

## **LINEAR FOOT FEE RENTAL ROW MODEL**

MAS reviewed survey data of various cities. The city data reviewed included: Atlanta, GA; San Antonio, TX; St. Louis, MO; and others. Generally, the linear foot charge is used for limited access to the public ROW as in the case of a telecommunications operator building a fiber optic network in the downtown or pipeline company passing through a city's boundaries. Many cities use this method for fiber optic local loop, interstate long distance carrier and interstate pipeline companies.

The average linear foot fee assessed by cities identified in this report is approximately \$2.03 with the highest fee of \$5.50 in Chicago, Illinois followed closely by Atlanta, Georgia at \$5.00 and the lowest in Phoenix, Arizona \$0.60. The City of Dallas has an ordinance requiring an annual fee for the use of a public right-of-way for subsurface use that is based on the equation: area X market value X 30% X 12%.<sup>1</sup> This type of fee is very similar to a linear foot charge, because the area is a product of the length of the pipeline, measure in feet, and the width, or diameter, of the pipeline. The market value of the area licensed is based on the square foot appraised value, as determined by the county appraisal district, of a fee simple interest in a useable tract of abutting property.<sup>2</sup> Further, the ordinance provides for annual review of the market values of licensed areas

---

<sup>1</sup> Dallas Code of Ordinances, Article VI, Sec. 43-115(b)(2)

<sup>2</sup> Dallas Code of Ordinances, Article VI, Sec. 43-115(e)

for which fees are based and subsequent changes, either higher or lower to the applicable fee.<sup>3</sup>

The City of Houston Article XIV of the Houston Code of Ordinances has conditioned the grant of privileges to telecommunications providers to place lines across, or under public rights-of-ways on right-of-way ordinance fees based on the total number of linear feet of public ways occupied.<sup>4</sup> The amount per linear foot is determined annually, beginning at \$1.60 and adjusted annually using a growth factor.<sup>5</sup> The growth factor is calculated by dividing the Consumer Price Index for All Urban Consumer for a set date.<sup>6</sup> Further, the ordinance provides that if the number of linear feet cannot be precisely determined, a reasonable method of estimating the number of linear feet will be delineated by the director of the city's department of finance and administration or the directors' designee.

The City of Laredo has an ordinance that computes public property use fees for the use of any street, right-of-way or other public property of the city for the locating or maintaining of any pipeline that is computed a lineal foot charge.<sup>7</sup> The ordinance provides that the basic rate for the lying, locating or maintaining of any pipeline for the transporting of any substance within the public right of way is one dollar (\$1.00) per linear foot of pipe up to and including six (6) inches in diameter plus ten cents (\$0.10) per inch of diameter per linear foot over and above six inches in diameter.<sup>8</sup> The rate for multiple lines is calculated at the basic rate times the number of lines.<sup>9</sup> Based on the Navajo Nation example of the El Paso Natural Gas pipeline sized at 42", the linear foot fee would be \$4.60. (See Table 2)

Further, the linear foot charges are computed continuously along a straight centerline projected between the connection ends of the pipe, and do not include vaults, manholes, valve boxes or other types of appurtenances.<sup>10</sup> In addition to the linear foot charges, an additional charge, in the event of any excavation for removal or installation of a pipeline which crosses a city road or street, of \$150 for the first crossing (up to six inches in diameter, then fifteen dollars (\$15) per additional inch), and \$150 for the second and all other than the first road or street crossings.<sup>11</sup>

If the Navajo Nation administered a fee similar to the City of Atlanta or the City of Laredo, the Navajo Nation would be generating annual revenues of \$23,232,000 or \$21,373,440 respectively, from its pipeline right-of-way leased to El Paso Natural Gas. Likewise, if the Navajo Nation administered a fee similar to what the City of Birmingham charge telecommunications providers, the Navajo Nation would receive annual revenues ranging from \$9,292,800 in annual right-of-way rental revenues.

---

<sup>3</sup> Dallas Code of Ordinances, Article VI, Sec. 43-115(f)

<sup>4</sup> Houston Code of Ordinances, Article XIV, Sec. 40-335

<sup>5</sup> Houston Code of Ordinances, Article XIV, Sec. 40-335(b)

<sup>6</sup> *Id.*

<sup>7</sup> Laredo Code of Ordinances, Chapter 28, § 28-154.

<sup>8</sup> Laredo Code of Ordinances, Chapter 28, § 28-154(1)

<sup>9</sup> Laredo Code of Ordinances, Chapter 28, § 28-154(3)

<sup>10</sup> Laredo Code of Ordinances, Chapter 28, § 28-154(4)

<sup>11</sup> Laredo Code of Ordinances, Chapter 28, § 28-155

The following table represents a summary of MAS' survey data of selected cities and the linear foot fees they charge. Table 2 further estimates the revenues for the Navajo Nation if the surveyed linear foot fees were assessed at rates used by selected cities based on our estimated 4,646,400 feet of occupied space. The survey utilizes a baseline of 880 miles of right of way provided from published media reports concerning negotiations for a new easement agreement between the Navajo Nation and El Paso Natural Gas.

**Table 2**  
**Survey of Selected Cities\*\*\***

NAME	POPULATION	TYPE OF RIGHT OF WAY USE	LINEAR FOOT FEE RATE	NAVAJO NATION ROW CONVERTED TO LINEAR FEET*	ESTIMATED ANNUAL NAVAHO REVENUE, IF RATE APPLIED**
Navajo Nation	175,000	Gas Pipeline Easement	4.73	4,646,400	\$21,977,472
Chicago, IL	2,783,730	Lightnet	\$ 5.50	4,646,400	\$25,555,200
Atlanta, GA	394,017	AT&T	\$ 5.00	4,646,400	\$23,232,000
Atlanta, GA	394,017	Western Union	\$ 5.00	4,646,400	\$23,232,000
Los Angeles, CA	3,694,820	Conduit 6"	\$ 5.00	4,646,400	\$23,232,000
Laredo, TX	176,576	Pipeline Companies 42" line	\$ 4.60	4,646,400	\$21,373,440
Eugene, OR	137,000	Telecommunications	\$ 4.00	4,646,400	\$18,585,600
City of Portland	529,121	Telecommunications Providers	\$ 3.15	4,646,400	\$14,636,160
Bryan, TX	43,000	Pipeline	\$ 2.50	4,646,400	\$11,616,000
San Antonio, TX	1,144,646	Open-cut Fiber Optic Conduit	\$ 2.10	4,646,400	\$9,757,440
Birmingham, AL	265,968	AT&T	\$ 2.00	4,646,400	\$9,292,800
Boca Raton, FL	61,492	Telecommunication services	\$ 2.00	4,646,400	\$9,292,800
Houston, TX	1,953,631	Telecommunications	\$ 1.60	4,646,400	\$7,434,240
St. Louis, MO	396,685	Telecommunications	\$ 1.50	4,646,400	\$6,969,600
Fort Worth, TX	447,619	N/A	\$ 1.33	4,646,400	\$6,179,712
Des Moines, IA	193,187	N/A	\$ 1.00	4,646,400	\$4,646,400
Des Moines, IA	193,187	Teleph, telegr, communications	\$ 1.00	4,646,400	\$4,646,400
Flint, MI	140,761	AT&T Communications	\$ 1.00	4,646,400	\$4,646,400
Fort Worth, TX	447,619	AT & T	\$ 1.00	4,646,400	\$4,646,400
Fort Worth, TX	447,619	MCI	\$ 1.00	4,646,400	\$4,646,400
Pittsburgh, PA	1,586,000	Telecommunication services	\$ 1.00	4,646,400	\$4,646,400
St. Paul, MN	272,235	Any Franchise	\$ 1.00	4,646,400	\$4,646,400
Tulsa, OK	367,302	US Sprint	\$ 0.75	4,646,400	\$3,484,800
Albuquerque, NM	384,736	AT&T	\$ 0.60	4,646,400	\$2,787,840
Phoenix, AZ	983,403	District Signal	\$ 0.60	4,646,400	\$2,787,840
		<b>Average Linear Foot Fee</b>	<b>\$ 2.03</b>		

\*Converted estimated 880 ROW miles to linear feet (880 miles x 5280 linear feet = 4,646,400 linear feet)

\*\* Total 4,646,400 linear feet of public space occupied x linear foot fee = estimated annual revenue

\*\*\* Survey data was compiled over a 15-year period. Actual rental rates may vary due to changes in fee by any given City

## **ROW RENTAL REVENUE CONTRIBUTION TO GENERAL FUND BUDGETS FOR LOCAL GOVERNMENTS**

The City of Houston, Texas currently receives \$171 million in franchise fees from utilities and other companies that use public right-of-way. This revenue represents approximately 10.1% of the City's general fund budget of \$1.6 billion. Houston's franchise fees are collected from all utilities that use public rights-of-way. Lawrence, Kansas population 80,000 collects \$2,448,000 in franchise fees, which represents approximately 9% of the City's General fund budget. Wichita, Kansas collects \$29,259,353 in franchise fees, which represents 7.3% of the general fund budget for the City. The funding requirement for government should not be the primary basis of determining the revenue policy for fees ultimately charged. We provided these examples to illustrate the importance of right-of-way revenue for certain local governments general fund requirements. The percentage right-of-way fee revenue to the general fund can vary significantly by city depending on the state and the authority granted to local governments.

### **CONCLUSION**

The annual linear foot fee model provides a reasonable approach and methodology to value the public land rights-of-way. Based on the Navajo Nation's responsibility for municipal government, providing police, social and other essential governmental services comparisons to municipal annual linear foot fee structures fees would be more appropriate, in most cases. The rationale for this conclusion is as follows:

- The linear foot fee method is widely used by local governments and does not have the same problems as the gross receipts method. If applied as an annual fee, it will provide the landlord consistent revenue stream with growth if a CPI escalator provision is included in the lease agreement.
- The linear foot fee calculation tends to be more complex as the compensation components include three possible factors: 1) determining the basis of ROW valuation; 2) establishing a rate of return; and 3) conducting an inventory of ROW space occupied. The factors for determining the ROW valuation includes adjacent land value and other considerations (i.e. location, number of miles, competing rights-of-way, and type of use) that each entity must determine.
- It is easier to apply a linear foot fee on a fair, reasonable and competitively neutral basis.
- The linear foot fee is directly associated with the actual ROW space occupied

Although the municipal linear foot fee approach appears to be the most appropriate methodology, the final determination of valuing fees for the rental of public lands and right-of-way will be based upon what the parties can negotiate.