

Memorandum

To: CHAIR AND MEMBERS
Airspace Advisory Committee

Date: April 2, 2003

File: AIRSPACE
Wireline Program

From: DEPARTMENT OF TRANSPORTATION
Division of Right of Way
Airspace

Subject: Fiber Update

The Department received recommended pricing for longitudinal (“corridor”) telecommunications facilities from Charles P. Bucaria, Sr., MAI who has been hired to assist the Department in developing a pricing matrix for fiber optics. The Department then mailed a notice to over 1,000 telecommunications companies advising them of our change in policy in regards to allowing placement of telecommunications facilities in our controlled access highways and asking for their input in regards to the pricing structure (see attached) We have received negative feedback from the industry (see attached). Although the Department would prefer to have more market/compensation input from the industry we have instead received their letter stating that they believe we have no legal rights to any “compensation” other than receiving reimbursement of our “costs” of administration, etc.



PETER SCHULTZE

Senior Right of Way Agent
Airspace Program
Division of Right of Way

Enclosure

DEPARTMENT OF TRANSPORTATION**DIVISION OF RIGHT OF WAY**

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March 3, 2003

California Telecommunications Companies**To Whom It May Concern:**

As you may be aware, since the effective date of Government Code Section 14666.6 on January 1, 2000, the Department has made its controlled access highways (freeways, expressways and bridges) available for longitudinal ("corridor") telecommunications installations. Traditional prohibitions on other types of utility installations have not been changed.

To date, there have been five separate license agreements, all of which have required payment of "fair and reasonable compensation" as provided for in the 1996 Federal Telecommunications Act (47 U. S. C. sec. 253 (c)). The compensation rate, to date, is a one-time payment of \$6.40 per 1 ¼" conduit or cable linear foot (whether empty or full), which the Department determined was the actuarial equivalent of 50 cents a year per 1 ¼" conduit linear foot on a thirty-year term.

Based on the success of this program to date and the continuing success of the Department's wireless licensing program, the Department is considering a more comprehensive rate schedule, and will bring a specific proposal before the Airspace Advisory Committee of the California Transportation Commission on April 10, 2003.

We are seeking input from the industry on this issue.

To insure payments are required on a "...competitively neutral and nondiscriminatory basis..." as required by federal law, it is envisioned a statewide schedule will be developed which will apply equally to all carriers, rather than having independent contracts for each segment.

Issues, which will be addressed:

1. Is it appropriate to have one statewide rate, or should the rates be geographically or population based?
2. Should rates be annual or one time (or should both options be available)?
3. Should rates be based on cable capacity?
4. How should copper wires be valued?
5. Should conduits be valued the same as fiber cables?
6. What is an appropriate length on any such license agreement?
7. What is an appropriate rate?

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March 3, 2003

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8. Should empty conduits be subject to the same rate?
9. Should the length of the installation affect pricing?

To date, our market research indicates annual rates per 1 ¼" conduit foot of \$8.00 for Toll Bridges, \$4.75 for the San Francisco Bay Area, \$2.50 for urbanized Southern California, \$2.00 for smaller urban areas, and \$1.00 for rural areas.

It is possible members of the telecommunications industry have comparable agreements, which should be considered in determining the structuring of our program to benefit the people of the State and the industry. We are willing to work with any cooperating provider to insure the confidentiality of such information, as we did when the wireless pricing schedule was developed.

Please contact Peter Schultze; Right of Way Wireline Program Lead (916-654-2346; 1120 N Street, MS 37, Sacramento, CA 95814) prior to April 4, 2003, if you would like to discuss this issue or provide information that you believe will be of assistance to the Department in continuing this program.

Sincerely,



BARRY COWAN, Chief

Office of Real Property Services and Airspace

April 4, 2003

Hand Delivered

Peter Schultze
Right of Way Wireline Program Lead
Department of Transportation, Division of Rights Of Way
1120 N Street, MS: 37
Sacramento, CA 95814

Re: March 3, 2003 Request For Comment

Dear Mr. Schultze:

AT&T, SBC, Sprint, California Cable & Telecommunications Association, Verizon California, Inc., Comcast Cable Communications, Inc., California Telephone Association, Cox California Telcom L.L.C., WorldCom, XO California, Time Warner Cable, The Volcano Telephone Company, Kerman Telephone Co., Pinnacles Telephone Co., Frontier Communications, The Siskiyou Telephone Company, Yipes Enterprise Services, Inc., Surewest Communications, Calaveras Telephone Company, Cal-Ore Telephone Co., Ducor Telephone Company, Foresthill Telephone Co., Evans Telephone Company, Happy Valley Telephone Company, Hornitos Telephone Company, Winterhaven Telephone Company, Sierra Telephone Company, Inc. and The Ponderosa Telephone Co. (collectively referred to as the "industry") submit the following joint response to the March 3, 2003 letter from Barry Cowan, Chief of the Office of Real Property Services and Airspace, requesting comments on compensation rates for longitudinal access to highways by telecommunications companies.

While the industry appreciates the Department's efforts to seek input on rights-of-way fees, the Department's letter ignores the fundamental fact that the state has no legal authority to impose non-cost based fees on telecommunications companies accessing public rights-of-way. Any attempt by the Department to impose non-cost based compensation fees – whether they are calculated on a per linear foot basis, geographic or population basis, capacity basis or any other basis – is prohibited by both state and federal law. For example, the Department's imposition of a \$6.40 per linear foot charge has absolutely no relation to the reasonable administrative costs the Department incurs in processing rights-of-way permits and is, therefore, illegal.

Government Code Section 14666.6(b) allows the Department to exact monetary consideration for access to state-owned highway rights-of-way only "to the extent permitted under existing law." The "existing law" now and at the time of enactment of this provision (January 2000) includes several state and federal law prohibitions against charging fees in excess of administrative costs.

Under California Public Utilities Code § 7901, telephone corporations may construct lines “along and upon **any** public road or highway, along or across any of the waters or lands within this State [emphasis added]” without obtaining a separate franchise or the payment of compensation for the use of such public rights-of-way. *County of Los Angeles v. Southern Cal. Tel Co.* (1948) 32 Cal.2d 378, 384. Section 7901 is a broad grant covering all state owned public rights-of-way, including controlled access highways, freeways, expressways and bridges.

Consistent with the mandate of Section 7901 is the limitation under California Streets & Highways Code § 671.1, which states that fees charged for the issuance of permits in state highways “shall not produce a total estimated revenue in excess of the estimated total cost to the department for administering the provisions of this chapter [on encroachments in state highways].” This limitation applies equally to “freeways” (*i.e.*, controlled-access rights-of-way) as well as “highways.” *See* California Streets & Highways Code § 701 (“The provisions of Article 2 [which includes Section 671.1] . . . apply to freeways.”).

Federal law also significantly limits the Department’s ability to charge non-cost based fees for rights-of-way access. Under the Telecommunications Act of 1996, any state or local fee requirement must be fair and reasonable, publicly disclosed, and nondiscriminatory. The Ninth Circuit Federal Court of Appeals, whose jurisdiction includes California, stated that for such compensation to be considered fair and reasonable, it must be based on the costs of maintaining the rights-of-way. *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1176 (9th Cir. 2001). This reasoning is consistent with a number of the other Federal Circuit Courts of Appeal that have addressed this issue.

Moreover, fees (including per linear foot charges) that are market based – *i.e.* in excess of reasonable administrative costs – and which are used for the state’s general debts and liabilities are considered taxes, which the State of California has not authorized. Fees charged by a state entity must have some reasonable relation to costs incurred and must be proportional to the services rendered and the benefits received. *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 599 (1939); *Ingels v. Morf*, 300 U.S. 290, 296-97 (1937); *Brewster v. City of Pocatello*, 115 Idaho 502, 768 P.2D 765, (1988), rehrg den (1989).

The law prohibits non-cost based fees for good reason. The telecommunications industry contributes billions of dollars to California's economy annually. Ongoing investment in the state's telecommunications network is a key driver in the state's economy and a key supplier of jobs. Today, telecommunications and technology companies that invest in bringing new services to consumers reimburse the state’s reasonable administrative costs. The situation is a win-win: the state covers its costs, jobs are created, consumers get access to new technologies and California employers gain access to new markets. California has chosen to encourage investment through this policy, and our citizens live in the most technologically advanced state in the nation because of it.

Any attempt to charge non-cost based fees to access state public rights-of-way would discourage investment and compound the state's current economic downturn. For this reason, the industry respectfully requests that the Department cease any further attempts to charge non-cost based fees to telecommunications companies accessing state public rights-of-way.

If you have any questions regarding this issue, please feel free to contact Julian Chang of AT&T at 415-442-3449 or Mark Weideman of SBC at 916-341-3414.

Sincerely,

Julian Chang, AT&T
Mark Weideman, SBC
Paul Sieracki, Sprint
Lesla Lehtonen, California Cable & Telecommunications Association
James P. Greene, Verizon California, Inc.
John A. Gutierrez, Comcast Cable Communications, Inc.
Margaret Felts, California Telephone Association
Douglas Garrett, Cox California Telcom L.L.C.
Tim Davis, WorldCom
Karen Potkul, XO California
Jeff Schwall and Roger Keating, Time Warner Cable
Earl D. Bishop, The Volcano Telephone Company
William Barcus, Kerman Telephone Co.
Steven R. Bryan, Pinnacles Telephone Co.
Brian K. Peterson, Frontier Communications
Jim Lowers, The Siskiyou Telephone Company
Larry Bercovich, Yipes Enterprise Services, Inc.
Jay Kinder, Surewest Communications
James H. Tower, Calaveras Telephone Company
Ed Ormsbee, Cal-Ore Telephone Co.
Galen Norsworthy, Ducor Telephone Company
Rose Hoeper, Foresthill Telephone Co.
Rob Sauser, Evans Telephone Company
Gail Long, Happy Valley Telephone Company, Hornitos Telephone Company and
Winterhaven Telephone Company
Harry Baker, Sierra Telephone Company, Inc.
Matthew Boos, The Ponderosa Telephone Co.