

HOUSE BILL REPORT

ESSB 6515

As Passed House - Amended:

March 6, 1998

Title: An act relating to franchises and the use of public rights of way.

Brief Description: Regulating franchises and the use of public rights of way.

Sponsors: Senate Committee on Energy & Utilities (originally sponsored by Senators Strannigan, Finkbeiner, Morton and Swecker).

Brief History:

Committee Activity:

Energy & Utilities: 2/24/98, 2/25/98 [DPA];

Transportation Policy & Budget: 3/2/98 [DPA(TRPB w/o EN)s].

Floor Activity:

Passed House - Amended: 3/6/98, 58-40.

HOUSE COMMITTEE ON ENERGY & UTILITIES

Majority Report: Do pass as amended. Signed by 10 members: Representatives Crouse, Chairman; DeBolt, Vice Chairman; Mastin, Vice Chairman; Morris, Assistant Ranking Minority Member; Bush; Delvin; Honeyford; Kessler; Mielke and B. Thomas.

Minority Report: Do not pass. Signed by 3 members: Representatives Poulsen, Ranking Minority Member; Cooper and Kastama.

Staff: Margaret Allen (786-7110).

HOUSE COMMITTEE ON TRANSPORTATION POLICY & BUDGET

Majority Report: Do pass as amended by Committee on Transportation Policy & Budget and without amendment by Committee on Energy & Utilities. Signed by 15 members: Representatives K. Schmidt, Chairman; Hankins, Vice Chairman; Mielke, Vice Chairman; Mitchell, Vice Chairman; Backlund; Buck; Cairnes; Chandler; DeBolt; Johnson; Radcliff; Robertson; Skinner; Sterk and Zellinsky.

Minority Report: Do not pass. Signed by 11 members: Representatives Fisher, Ranking Minority Member; Cooper, Assistant Ranking Minority Member; Constantine; Gardner; Hatfield; McCune; Murray; O'Brien; Ogden; Romero and Wood.

Staff: Jeff Doyle (786-7322).

Background: A purpose of the federal Telecommunications Act of 1996 is to encourage competition in the telecommunications industry, in part by removing regulatory barriers that might prevent an entity from providing telecommunications service. While the act prohibits state or local legal requirements that are "barriers to entry," the act explicitly preserves state and local authority to manage public rights of way on a nondiscriminatory basis, and to require "fair and reasonable compensation" from telecommunications service providers, as long as the required compensation is competitively neutral and nondiscriminatory. What might constitute "a barrier to entry," "fair and reasonable compensation," or competitive neutrality is undefined.

The act requires state and local governments to process applications to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is filed, and to support any denial of such a request with substantial evidence in a written record.

One provision of the act can be read as promoting the use of public rights of way for siting telecommunications facilities, as it directs the Federal Communications Commission to provide technical support to states to encourage states to make rights of way available for the placement of wireless service facilities.

The terms under which public rights of way should be made available to telecommunications service providers has become an increasingly contentious issue. One viewpoint is that rights of way are public assets purchased with tax dollars, and the general public, not private profit-making corporations, should benefit from the acquisition of those rights of way. An opposite viewpoint is that public rights of way should be made available at cost to telecommunications service providers, who are themselves taxpayers, to encourage the deployment of telecommunications infrastructure and the development of competition which, it is contended, will ultimately benefit the general public.

State Rights of Way. There is no uniform policy for the siting of telecommunications facilities in state rights of way. Statutes authorize the Washington State Department of Transportation (WSDOT) to grant utilities franchises to use state highway rights of way, but prohibit the WSDOT from charging more than administrative costs and for restoration of highway facilities necessitated by installation or relocation of facilities. In contrast, the Department of Natural Resources (DNR) must manage trust lands under its jurisdiction to make money for trust beneficiaries (such as school construction), so the DNR charges telecommunications companies to site facilities on trust lands.

During the past year, the WSDOT and wireless service providers developed a model leasing agreement to govern the siting of wireless facilities in WSDOT rights of way.

Local Rights of Way. There also is no uniform municipal or county ordinance governing the siting of telecommunications facilities in local rights of way, a situation about which telecommunications companies providing service in multiple local jurisdictions have expressed concern.

By law, counties may establish franchises for the placement of utility facilities on county road rights of way and bridges. Franchise fees are not specifically limited by statute, and franchisees are responsible for the costs of relocation due to roadway improvements.

Municipalities may grant franchises, but are only authorized to charge for administrative costs.

Cable Franchises. Local franchising authorities, which are units of local government (sometimes joint between a city and county), grant nonexclusive cable franchises. As part of a franchise agreement, a local franchising authority may impose franchising fees and require a cable company to carry public, education, and governmental (PEG) or other specified programming.

Summary of Bill: The state, cities and counties are prohibited from unreasonably denying telecommunication providers access to public rights of way. The telecommunication provider must comply with the applicable land use and construction codes, regulations, standards and leases and franchise requirements. If an application for a permit is denied, the reasons for the denial must be clearly stated in writing.

The types of regulations cities and counties can adopt and impose upon telecommunication providers for use of public rights of way are restricted. Local governments may not adopt regulations that conflict with, or duplicate, regulations already required by the Washington Utilities and Transportation Commission, state or federal law. Local governments may not use the permit process to regulate the services or content being transmitted over telecommunication facilities. Counties, cities and towns retain their ability to regulate placement of the facilities through local zoning ordinances so long as they do not completely prohibit the placement of telecommunication facilities within the jurisdiction and do not unreasonably discriminate between A similarly situated@ telecommunication users or facilities.

Beginning April 1, 1999 (or sooner if a model ordinance is adopted), local governments are prohibited from placing a moratorium on the siting of wireless facilities (including "cellular towers"). Exceptions are made for newly-incorporated cities that are in the process of developing their zoning ordinances. The prohibition on the use of moratoria by local governments expires on October 1, 2003.

The state of Washington, counties, cities and towns are required to adopt procedures that enable the issuance or denial of permits within 120 days from initial filing of a permit application.

Unless the legislative body of a local government has taken action prior to January 1, 1998, counties, cities and towns are prohibited from installing telecommunication facilities for the purpose of providing for-profit services to the general public. This provision would not impact the city of Tacoma, which has already taken such action.

Counties, cities and towns are prohibited from imposing charges in excess of allowable costs in exchange for granting access to public rights of way for telecommunication providers. The only types of costs allowable are for: direct administrative expenses actually incurred in reviewing and approving the permit; any maintenance, repair or restoration expenses directly related to the impact of the telecommunication facility; and preparing a detailed statement required under RCW 43.21C RCW, the State Environmental Policy Act. These provisions do not prohibit a county, city or town from collecting franchise fees or other charges that have been agreed to with a telecommunication provider.

The Telecommunications Right of Way Advisory Panel is directed to develop policies and provisions for state (but not county and city) rights of way. The panel has representation from House and Senate Transportation Committees and Fiscal Committees, the Governor's office, and state agencies. A final report is due December 1, 1998.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Testimony For: (Energy & Utilities) This bill keeps all current zoning and land use authority in place. This bill encourages economic development while allowing the state and local governments to recover their actual costs for allowing telecommunications facilities into the right of way. The entire telecommunication industry supports this bill, which will increase competition. Government should not compete with telecommunications service providers. Protracted negotiations in multiple individual jurisdictions raise costs ultimately borne by consumers. Companies should not have to pay disproportionate fees when they make little use of the rights of way. It was never the intent of the federal Telecommunications Act of 1996 to allow local governments to charge for use of the rights of way. The bill does not alter ongoing cable franchises, or requirements such as PEG programming. There is no more direct or powerful tool government has to encourage investment in telecommunications, to bring customers more choices and lower rates.

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facilities into the right of way. The entire telecommunication industry supports this bill, which will increase competition. Government should not compete with telecommunications service providers. Protracted negotiations in multiple individual jurisdictions raise costs ultimately borne by consumers. Companies should not have to pay disproportionate fees when they make little use of the rights of way. It was never the intent of the federal Telecommunications Act of 1996 to allow local governments to charge for use of the rights of way. The bill does not alter ongoing cable franchises, or requirements such as PEG programming. There is no more direct or powerful tool government has to encourage investment in telecommunications, to bring customers more choices and lower rates.

Testimony Against: (Energy & Utilities) This is a usurpation of the authority of local governments. Whether telecommunications facilities should be allowed into the a public right of way should be decided in the local community. The need for this bill has never been made clear; it does not appear to address concerns about uniformity. Local governments will not be able to recover ongoing maintenance or other costs. The issue of allowing the use of the public right of way without any compensation of any kind raises major philosophical issues. It is wrong for telecommunications companies to pay nothing to install equipment in public rights of way. More research is needed regarding the safety of radio frequency exposure. This will result in an environmental nightmare for some neighborhoods. This bill will cause property values to drop. This is supposedly a bill for consumers yet we are the consumers and we don't want it. The bill places the state's transportation needs and telecommunications needs on equal footing, yet transportation needs are primary and the reason the rights of way were acquired in the first place. The WSDOT developed, in good faith, a model leasing agreement with the wireless service providers and this bill eliminates that agreement. Limited access highways should be treated separately from other roadways.

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This legislation is in violation of Article 2, section 40 (restrictions on use of highway funds), and Article 8, sections 5 and 7 (lending of credit for private profit), of the state constitution.

Testified: (Energy & Utilities) Michael Shaw, Washington Association of Counties (con); George Walk, Pierce County Government Relations (con); Steve Gano, AT&T Wireless (pro); Rosemary Williamson, GTE (pro); Mark Simonson, GTE (pro); Terry Vann, Washington Independent Telephone Association (pro); Skip Haynes, Rainier Group (pro); Jay Wakefield, NOISE (Neighborhoods Opposed to Interstate Sound Exposure) (con); Mike Layton, Coalition of Washington Communities (con); Susan Lawrence, Citizens First (Washington State) (con); Esther Finzel, private citizen (con); Patty Christison, private citizen, (con); Henry Paulmon, private citizen (con); Kirk Wines, city of Medina (concerns); Al King, Washington State Department of Transportation (con); Bruce Shaull, Sprint (pro); Ron Main, Washington Cable Communications Association (pro); Mike Woodin, AT&T (pro); Judith Endejan, Metricom (pro); Roger Wright, city of Richland (concerns); Victoria Lincoln, Association of Washington Cities (concerns); Matt Lampe, city of Seattle (concerns); and Tom Walker, U. S. West (pro).

(Transportation Policy & Budget) Mike Woodin, AT&T (pro); Ron Main, Washington Cable Association (pro); Tom Walker, U.S. West (pro); Michael Shaw, Washington Association of Counties (con); Marlin Blizinsky, King County (con); Jan Shabro, Pierce County Council (con); J. D. Anderson, Stevens County commissioner (con); Judy Endejan, Metricom (pro); Bruce Shaull, Sprint (pro); Don Dennis, PTI Communications (pro); Terry Vann, Washington Independent Telephone Association (pro); Tim Sullivan, University Place (con); Daniel Becker, city of Medina (con); Kirk Wines, city of Medina (con); Matt Lampe, city of Seattle (concerns); Chris Lunn, Creative Community Access Television (con); Steve Gano, AT&T Wireless (pro); Laura Altshul, Western Wireless (pro); Al King, WSDOT (con); Ian MacGowan, American Electronics Association (pro); Rosemary Williamson, GTE (pro); Susan Lawrence, Citizens First (con); and Henry Paulman, T.R.U.S.T. (Tolls Represent Unfair State Taxes) (con).