

HOUSE BILL REPORT

ESSB 6515

As Reported By House Committee On:

Energy & Utilities
Transportation Policy & Budget

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].

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).

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 Amended Bill: The Legislature makes numerous findings, including that: (1) due to technological developments, telecommunications are increasingly important to the state's residents and economy, and massive investment will be required to make new technologies available throughout the state; (2) it is necessary to clarify policies on public rights of way; (3) government policies for the use of public rights of way should preserve a safe and efficient transportation system and encourage the investment in and development of telecommunications infrastructure; (4) the economic growth resulting from rights of way policies, that are consistent with the state's transportation needs and encourage the deployment of telecommunications infrastructures, will create new jobs and business opportunities, produce better service and lower prices for consumers, and benefit state and local government through the availability of improved services and the creation of a larger, more stable revenue base; (5) government is responsible for protecting rights of way for public purposes, and the use of rights of way for telecommunications facilities is important for the protection and advancement of the public's welfare; (6) where telecommunications facilities are concerned, governments should rely on construction and development regulations that apply generally and uniformly to construction both inside and outside the public right of way, and franchises should be used only to coordinate regulations, permits, and the requirements of other applicable laws; (7) local governments should establish uniform, clear, competitively neutral, and nondiscriminatory rules for use of the public rights of way; and (8) fees charged by local governments for use of public rights away, and for related construction, maintenance, and operation permits, should not be a means of raising general revenue. No provision in the bill is to be construed as changing the existing authority of state or local governments to regulate through the exercise of their police power.

Use of Rights of Way. An authorized user may place authorized facilities in, upon, over, under, along, across, and through public rights of way. An "authorized user" is any person providing telecommunications or cable television service to the public. "Authorized facilities" are all the plant, equipment, fixtures, antennas, and other facilities necessary to furnish, deliver, and use telecommunications services. "Public right of way" includes roads, streets, and highways including limited access highways, but does not include structures located within the right of way, federally granted trust lands and forest board trust lands. "Public right of way" also does not include private property except to the extent easement rights have been granted for roads, streets, and highways.

Authorized users must obtain installation permits as required by local governments. Authorized facilities must be maintained so as not to incommode the public use of the right of way, and in accordance with state laws and with appropriate codes, regulations, and standards adopted by local governments pursuant to those laws. An authorized user must maintain its authorized facilities so that they continue to meet safety laws and

standards. A wireless facility may not obstruct views of significant landmarks or scenery. A user's current priority in using authorized facilities located in public rights of way remains unchanged.

The local jurisdiction must notify adjoining property owners when an authorized facility is to be placed in the public right of way. Before issuing a permit, the state or local government must find that siting authorized facilities in the right of way is consistent with the terms of any easement granting a public right of way through private property.

Limits on Governmental Regulations. Neither the state, a county, nor a municipality may adopt or enforce regulations that: (1) discriminate among similarly situated authorized users or authorized facilities; (2) conflict with federal and state public service laws, or with laws and regulations that specifically apply to the design, construction, and operation of authorized facilities, or with federal or state safety laws and regulations; (3) regulate services based on the content or kind of signals carried over the telecommunications facilities unless specifically authorized to do so by federal or state law; (4) regulate the services and business operations of the authorized user unrelated to the use of rights of way, unless specifically authorized by law; or (5) provide for a period in excess of 120 days for processing permit applications, or otherwise unreasonably delay work on authorized facilities in public rights of way. These limitations do not apply where the regulation: (1) is necessary to assure cooperation of work within the right of way, to provide for reasonable opportunities for scheduling work, and does not impose unreasonable barriers to entry; and (2) with the agreement of the applicant.

Franchises. To the maximum extent feasible, franchises applicable to telecommunications companies shall be used to coordinate construction and development regulations and permits, and requirements imposed under other laws relating to streets, roads, and highways. Franchises are not to be used to duplicate requirements.

However, a county or municipality may issue franchises and impose franchising fees for cable television services, as allowed by federal law.

Interim Procedures. Counties and municipalities are encouraged to develop procedures for interim authorizations for processing applications for permits, and for the installation of authorized facilities, where it is likely to take more than 120 days to complete an agreement.

Wireless Facilities. In addition, counties and municipalities are encouraged to work together and with industry to develop, by January 1, 1999, a model ordinance for siting wireless telecommunications facilities.

The state, counties, or municipalities may not place moratoriums on applications to site authorized wireless communications facilities, or on the construction, maintenance,

repair, replacement, extension, operation, or use of such facilities. This limitation applies to moratoriums 120 days after the adoption of a model ordinance, or on April 1, 1999, whichever occurs first. Existing moratoriums may not be extended upon expiration.

A municipality incorporated more than 120 days following the adoption of a model ordinance, or after April 1, 1999, whichever occurs first, may impose one moratorium for a maximum of 180 days. The moratorium may not be extended.

The provisions limiting or prohibiting moratoriums expire April 2, 2004.

Local governments must provide a streamlined review process for applications to site small wireless or hidden authorized facilities.

Compensation. The state, a county, or municipality, may not demand or accept any compensation from an authorized user for use of a public right of way other than established, industry standard charges, and may not demand provision of in-kind services without compensation or at below-market rates, unless the charge or other compensation is imposed generally and uniformly on projects outside of public rights of way.

Charges or other compensation may not recover more than the direct administrative expenses actually incurred by the governmental entity in receiving and approving a construction or development permit including the costs of notifying adjoining property owners, inspecting plans and construction, maintaining records of facilities located in the right of way, or preparing a detailed statement under the State Environmental Policy Act. The authority of a state or local government with respect to the repair or restoration of rights of way is unaffected.

Other. Statutes applicable to counties and municipalities regarding streets, roads, and bridges, and under the Growth Management Act, Planning Enabling Act, and State Environmental Policy Act, still apply.

A person concerned about an authorized facility in a right of way may file a report with the clerk of the board of county commissioners or the city or town clerk. If the concern is about an authorized facility in a state-managed right of way, the clerk must forward a copy of the report to the appropriate agency.

Municipalities retain their existing taxing authority.

Amendment Compared to Engrossed Substitute Bill: Besides making numerous technical and clarifying changes, the striking amendment does the following:

Findings. Deletes a reference to private industry in a finding that massive investment is needed in telecommunications infrastructure. Changes references to the need to

"coordinate and integrate" to simply "coordinate" policies. Adds references to the importance of a safe and efficient transportation system. Makes more explicit the kinds of costs that will be considered the actual costs for which the state or local government is entitled to recover, such as restoration of the roadway.

Definitions. Exempts from the definition of public right of way: (1) lands managed by the Parks and Recreation Commission; and (2) private property except to the extent easement rights have been granted for roads, streets, and highways.

Use of Rights of Way. Makes explicit that the installation, maintenance, and use of authorized facilities is at the authorized user's expense. Adds provisions that the right to use a right of way does not extend to the right to attach to structures (such as utility poles) already located within the right of way. Adds language that the provisions of the bill do not expand the potential liability or duties of the state or a local government regarding the installation, maintenance, or removal of authorized facilities. Requires authorized users to maintain authorized facilities so that those facilities continue to meet safety laws and standards.

Requires the state or local government to make a finding that the siting permit is consistent with the terms of any easement granted in private property. Requires local governments to notify adjoining landowners when authorized facilities are to be constructed in public rights of way.

Governmental Regulation. Makes explicit that the state or a local government may not discriminate among similarly situated authorized users, and that franchises may not be used to duplicate requirements already imposed by other laws. Provides that requirements that apply to cable service providers will continue to be governed by federal law and existing franchise agreements. Provides for concerns about authorized facilities in public rights of way to be filed with the local government in which the right of way is located, and for the local government to forward the filing to the state agency if the authorized facility is located in state-managed public right of way.

Wireless Facilities. Adds an expiration date of April 1, 2004, to the section prohibiting moratoriums on the siting of wireless service facilities. Prohibits wireless facilities from interfering with views of significant scenery or landmarks.

Requires local governments to provide a streamlined administrative review process for applications to site small or hidden wireless service facilities in a public right of way.

Compensation. Changes a reference to "normal" charges to "established, industry standard" charges. Includes details of what costs may be recovered by the state or local government.

Other. Changes codification directions. Instead of being codified in chapter 80.36 RCW ("Public Utilities - Telecommunications"), most of the substantive provisions of the bill will be codified as a new chapter in Title 47 RCW ("Public Highways and Transportation"). Adds a severability clause.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Bill: Ninety days after adjournment of session in which bill is passed.

Testimony For: 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.

Testimony Against: 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.

Testified: 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).

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).

Summary of Recommendation of Committee on Transportation Policy & Budget Compared to Recommendation of Committee on Energy & Utilities: A Telecommunications Right of Way Advisory Committee (TRWAC) is established to develop a telecommunication facility siting ordinance applicable to counties, cities and towns. The advisory committee is comprised of members from the House and Senate Transportation Committees, House Appropriations Committee, Senate Ways and Means Committee, Governor's office, Department of Transportation, and Department of Information Services. The advisory committee will also review and make recommendations on the appropriate types of costs, fees and compensation that can be derived from use of public rights of way. Finally, the TRWAC will recommend methods for restricting the use of moratoria on the development of telecommunication facilities. The advisory committee will make recommendations to the Legislative Transportation Committee by December 1, 1998.

Until April 1, 1999, (when it is expected that a model ordinance will be in place), cities and towns are limited in the types of fees they can impose for use of the public right of way by telecommunication providers. Cities can recover direct administrative expenses

and other ongoing costs, but have no authority to require additional compensation other than the costs specified in the legislation. After this date, cities adopting the model ordinance will be permitted to impose costs, fees and other compensation as provided by the model ordinance.

Counties, cities and towns are restricted from imposing development moratoria on the siting of wireless telecommunication facilities once a model ordinance has been adopted. There are exceptions to allow newly-incorporated cities to use a moratorium until the new city establishes its development regulations. This restriction on the use of moratoria expires on October 1, 2003.

Counties, cities and towns are prohibited from installing, or causing to be installed, infrastructure for the purpose of allowing a county, city or town to provide telecommunication or cable television service to the general public. This prohibition expires on October 1, 2003.

The intent section is updated to reflect the status of recent court cases and FCC rulings. Definitions are provided for limited access highways. Language restricting the development regulations of counties, cities and towns is removed. Language granting telecommunication service providers a right to access state, county, city and town-owned rights of way is removed. Language preventing counties and the state from recovering compensation for use of their rights of way is removed. The type of costs allowable to cities in exchange for granting access to their rights of way to telecommunication service providers is specified. The restrictions on moratoria are modified. An advisory committee and a process for developing a model ordinance for use by counties, cities and towns are established. Local governments are prohibited from developing telecommunications infrastructure for purposes of providing competing service to the general public.

Appropriation: None.

Fiscal Note: Not requested.

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

Testimony For: 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.

Testimony Against: 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.

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: 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 Shaul, 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).