

HOUSE BILL ANALYSIS

ESSB 6515

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).

HOUSE COMMITTEE ON ENERGY & UTILITIES

Meeting Date: February 24, 1998

Bill Analysis Prepared by: Margaret Allen (786-7110)

Background: A purpose of the federal Telecommunications Act of 1996 (Act) 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 competitively neutral— 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 state 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 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 encourage the investment in and development of telecommunications infrastructure; (4) the economic growth resulting from rights of way policies 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 in the public interest; (6) where telecommunications facilities are concerned, governments should rely on 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 right of way; and (8) fees charged by local governments for use of public rights away, and for related construction and operation permits, should not be a means of raising general revenue.

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 rights of way— include roads, streets, and highways including limited access highways, but does not include federally granted trust lands and forest board trust lands.

Authorized users must obtain installation permits as required by local governments. Authorized facilities must be maintained so as not to unreasonably interfere with the free passage of traffic, and in accordance with state laws and with appropriate codes, regulations, and standards adopted by local governments pursuant to those laws. A user's current priority in using authorized facilities located in public rights of way remains unchanged.

Limits on Governmental Regulations. Neither the state, a county, nor a municipality may adopt or enforce regulations that: (1) discriminate among 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; or (2) with the agreement of the applicant.

Franchises. To the maximum extent feasible, franchises applicable to telecommunications companies shall be used to coordinate and integrate 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.

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.

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 normal 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, inspecting plans and construction, development and maintenance of record systems and excavation authorizations systems, costs of repair or restoration of the right of way, or preparing a detailed statement under the State Environmental Policy Act.

However, a county or municipality may issue franchises and impose franchising fees for cable services, as allowed by federal law, and municipalities retain their existing taxing authority.

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.

The provisions regarding use of rights of way, limits on governmental regulations, franchises, interim procedures, wireless facilities, and compensation, are to be codified in chapter 80.36 RCW which, among other things, governs the jurisdiction of the Washington Utilities and Transportation Commission over telecommunications companies.

Appropriation: None.

Fiscal Note: Not requested.

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