

SENATE BILL REPORT

SB 6042

As Reported By Senate Committee On:
Transportation, March 10, 1997

Title: An act relating to telecommunications access to limited-access highway rights-of-way.

Brief Description: Regulating telecommunications access to limited-access highway rights-of-way.

Sponsors: Senators Wood, Horn and Haugen.

Brief History:

Committee Activity: Transportation: 3/6/97, 3/10/97 [DPS].

SENATE COMMITTEE ON TRANSPORTATION

Majority Report: That Substitute Senate Bill No. 6042 be substituted therefor, and the substitute bill do pass.

Signed by Senators Benton, Vice Chair; Wood, Vice Chair; Goings, Haugen, Heavey, Horn, Jacobsen, Morton, Prentice, Rasmussen and Sellar.

Staff: Jennifer Joly (786-7305), Gene Schlatter (786-7316)

Background: The Federal Telecommunications Act of 1996 seeks to remove regulatory barriers and encourage competition among telecommunications carriers. The federal act has important implications for the Washington State Department of Transportation (WSDOT); it impacts both the present and future right-of-way management policies and procedures of the WSDOT.

Currently, state law allows WSDOT the authority to grant "franchises" for use of utilities on state highway rights-of-way. The existing state law limits compensation to WSDOT's administrative costs of granting the franchises. It also provides that relocation costs caused by highway repairs or improvements be borne by the franchisee. In keeping with Federal Highway Administration (FHWA) policy, WSDOT's current utility accommodation policy keeps the interstate free of encumbrances, unless directly transportation related, with a few unusual exceptions approved by the FHWA. On non-limited access highways, the policy is significantly more open, allowing the installation of virtually any utility, provided reasonable safety criteria are met.

The Federal Telecommunications Act permits states to receive "fair and reasonable compensation" from telecommunications carriers, on a "competitively neutral and nondiscriminatory basis," for use of public rights-of-way. However, none of these terms are defined in the act. Additionally, the federal act preserves the authority of WSDOT to manage its rights-of-way and to impose on a "competitively neutral basis" requirements "necessary to preserve and advance universal service, protect the public safety and welfare,

ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

WSDOT has a number of unsolicited pending requests from telecommunication carriers for access to its limited access rights-of-way.

The 1996 Supplemental Transportation Budget required WSDOT to develop a plan for considering accommodation of telecommunication facilities within limited access rights-of-way. In response to this budget proviso, WSDOT issued a Telecommunications Report to the Legislative Transportation Committee (LTC) in December 1996. Additionally, the LTC commissioned a consultant to prepare a discussion paper outlining policy issues and potential courses of action for telecommunications access. These efforts identified the following principal policy issues to be addressed by the Legislature: (1) whether the state should allow access to its limited access rights-of-way; (2) if the Legislature opts to provide access, what should it charge, e.g., if compensation above administrative costs is charged, what is "fair and reasonable" compensation for purposes of the Federal Act; (3) what type of compensation should be accepted (e.g. cash, in-kind telecommunication services, or a combination thereof); (4) how to establish access on a "competitively neutral" basis; and (5) whether changes should be made regarding utility accommodation on non-limited access rights-of-way.

In recent weeks, a Telecommunications Working Group, comprised of five Senators and six Representatives, has convened to work on this proposed legislation.

Summary of Substitute Bill: WSDOT's grant of a right-of-occupancy to telecommunications carriers on limited-access highway rights-of-way must be competitively neutral, and preserve safety and operational performance.

No grant of a right-of-occupancy to a telecommunications carrier may establish a relationship that would cause WSDOT to be deemed a telecommunications carrier.

Contracts for right-of-way access must be separately negotiated with each telecommunications company.

When necessary to ensure effective management of the limited access right-of-way, WSDOT may limit the number and type of telecommunications facilities in the right-of-way. Additionally, WSDOT may condition access to the right-of-way on the sharing of telecommunications facilities between, or among, competing telecommunications carriers.

WSDOT must exact fair and reasonable compensation for use of its limited access rights-of-way. In determining fair and reasonable compensation, WSDOT must, to the extent practicable, examine compensation agreements between telecommunications carriers and private landowners. The compensation may be both cash and in-kind, but in no event may it consist exclusively of an indirect arrangement for the provision of in-kind telecommunications services. Any arrangement by which the department receives in-kind telecommunications services in exchange for access to limited-access rights-of-way is deemed a procurement subject to review by the Information Services Board. Revenues from cash compensation must be deposited in the motor vehicle fund. Any consideration received by WSDOT must be publicly disclosed. WSDOT must consult with and provide an opportunity

to respond to telecommunications/right-of-way compensation proposals to the Telecommunications/Right-of-Way Advisory Panel.

The membership of the Telecommunications/Right-of-Way Advisory Panel is as follows: (1) two members of the House Transportation Policy and Budget Committee, one from each political party, as appointed by the Speaker of the House of Representatives; (2) two members of the Senate Transportation Committee, one from each political party, as appointed by the President of the Senate; (3) one member of the House Appropriations Committee, as appointed by the Speaker of the House of Representatives; (4) one member of the Senate Ways and Means Committee, as appointed by the President of the Senate; (5) two representatives of the Governor; (6) the Secretary of the Department of Transportation; and (7) the Director of the Department of Information Services. Alternates or designees may also substitute for the aforementioned members.

Existing franchise agreements with telecommunications carriers on limited access rights-of-way are not subject to the provisions of this act until such time as their franchise agreements expire.

Existing or future franchise arrangements with non-telecommunications utilities are not affected.

Substitute Bill Compared to Original Bill: The following definitions are added to the bill: "right of occupancy," "telecommunications carrier," and "telecommunications service." The definition of "telecommunications" is altered.

Rather than forbidding ownership of telecommunications equipment installed on DOT rights-of-way, the bill specifies that no grant of a right-of-occupancy to a telecommunications carrier may establish a relationship that would cause WSDOT to be deemed a telecommunications carrier.

In determining fair and reasonable compensation, WSDOT shall, to the extent practicable, examine compensation arrangements between telecommunication carriers and private land owners.

The following members of the Telecommunications/Right-of-Way Advisory Panel are eliminated: a member of the House Energy and Utilities Committee; a member of the Senate Energy and Utilities Committee; the State Treasurer; the Director of the Office of Financial Management; the Chairperson of the Information Services Board; the Director of the Department of Revenue; and the Governor-appointed, citizen member. The following members are added to the Advisory Panel: one member of the House Appropriations Committee; one member of the Senate Ways and Means Committee; and two representatives of the Governor.

Rather than final approval authority, the Advisory Panel is given "rights of consultation and opportunities to respond" to telecommunications/right-of-way compensation proposals. Final approval authority is vested in the WSDOT.

Instead of forbidding WSDOT to condition access on the obligatory sharing of telecommunication facilities, WSDOT may require the sharing of facilities between or among

competing telecommunications carriers when necessary to ensure effective management of the right-of-way.

Existing franchise agreements with telecommunication carriers in limited access rights-of-way are not subject to the provisions of the act until such time as their existing franchise agreements expire.

Existing RCW sections pertaining to utility franchises are updated such that references to "telephone and telegraph" are changed to "telecommunications."

The WSDOT's current authority to negotiate air space leasing is not impacted by this bill.

Appropriation: None.

Fiscal Note: Requested on March 3, 1997.

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

Testimony For: SB 6042 represents a cautious, flexible approach to the largely uncertain framework established by the Federal Telecommunications Act. This bill will permit WSDOT to respond to the numerous requests for access to its limited access rights-of-way. The cellular industry is willing to pay fair market value for the siting of cellular towers.

Testimony Against: The provision of telecommunications services to the state in exchange for access to the right-of-way should not be permitted. Allowing for in-kind barter arrangements may violate the federal act by creating a barrier to entry to those carriers unable to provide the service sought by the state. Excessive fees for access to the right-of-way will violate the federal act. The bill should more explicitly describe which routes are limited access and the process by which they are so designated. The Telecommunications/Right-of-Way Advisory Panel is another unneeded regulatory body with too much of a vested interest in maximizing revenue to the motor vehicle fund.

Testified: Senator Wood, prime sponsor (pro); Skip Burch, WSDOT (pro); David Danner, DIS (pro); Teresa Osinski, WUTC (pro w/concerns); Steve Gano, AT&T (pro w/concerns); Ron Main, WA State Cable Association (pro w/concerns); Bruce Shaull, Sprint (con); Terry Vann, WITA (con).