HOUSE BILL ANALYSIS
HB 2060

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

Brief Description: Concerning the use of rights-of-way in cities and counties.

Sponsors: Representatives DeBolt, Morris, Crouse, Ruderman and Poulsen

HOUSE COMMITTEE ON
TECHNOLOGY, TELECOMMUNICATIONS & ENERGY

***Meeting Date*:** January 18, 2000

***Bill Analysis Prepared by*:** Scott MacColl

***Background*:**

The siting of telecommunications facilities in public rights-of-way was a major issue during the 1998 legislative session. The bill then under consideration was ESSB 6515, which ended up going to conference committee where it died. As part of the 1998 interim plan, the Energy & Utilities Committee studied the issues related to the placement of telecommunication facilities in public rights-of-way.

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.

How 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 ultimately benefit the general public.

State Rights-of-way. No uniform policy for the siting of telecommunications facilities in state rights-of-way exists. 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.

Local Rights-of-way. No uniform municipal or county ordinance that govern facilities in local rights-of-way exists. As such, telecommunications companies that provide service in multiple local jurisdictions are concerned about the potential for uneven handed treatment.

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, as units of local government may 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 or other specified programming.

***Summary*:**

State and federal highways are exempted from the definition of right-of-way in 2060 and are not included in this bill.

This bill assigns responsibilities to either local governments or the service providers. For example, before issuing a permit, a local government must determine that approval is consistent with easement rights. The carrier is responsible for obtaining all necessary permits. The carrier is responsible for ensuring compliance with land use and construction codes, but the local government may verify compliance. The local government is to ensure facilities do not inconvenience public use of the rights-of-way, and the carriers are to cooperate.

Local governments are to provide as much advance notice as possible so that work can be scheduled and coordinated, and to keep confidential the information carriers provide regarding existing facilities and build out plans.

Service providers must also: (1) obtain permission before attaching to or using a structure in the right-of-way, whether that structure is owned by a private entity or is public property and comply with any conditions imposed; and (2) install and maintain facilities at its own expense.

Counties, Cities and Towns: Police Power

Counties, cities and towns may regulate the placement of facilities through their respective police powers, and support their decision in writing, as long as the they do not (1) prohibit the placement of all wireless or all wireline facilities within the rights-of-way; (2) act as a barrier to entry as prohibited by the Telecommunications Act of 1996; or (3) unreasonably discriminate between similarly situated service providers.

Counties, Cities and Towns: Moratoriums

This bill prohibits cities, towns and counties from placing moratoriums on the application process, construction, repairs or operation of any personal wireless facility as of April 1, 2000. Counties, cities or towns may place limited 180-day moratoriums if (1) the county, city or towns regulations have been invalidated by a court; or (2) the county was created, or the city was incorporated after April 1, 2000. This bill encourages counties, cities and towns to work with service providers to develop polices for the placement of personal wireless facilities.

Counties, Cities and Towns: Issuance or Denial Within 120 days

This bill directs counties, cities, and towns to adopt procedures to ensure the issuance or denial of a franchise or permit within 120 days of receipt of an application. The 120-day timeline does not apply if (1) it imposes barriers to entry as prohibited by the Telecommunications Act of 1996; (2) the applicant agrees; (3) permits require another governmental approval and the approval would take longer than 120 days; (4) franchise approval takes longer than 120 days; (5) impracticable due to number of applicants; or (6) a valid moratorium exists. Cities and towns are also directed to develop additional procedures for the expedition of small projects, and to provide these requirements to all applicants.

Counties, Cities and towns: Denial in Writing and Other Responsibilities
As per this bill, the denial of use of a right-of-way for installation, maintenance, or removal of facilities for telecommunications or cable services shall be in writing. Otherwise, no unreasonable denial of the use of a right-of-way is permitted. Counties, cities and towns must (1) find that permits are consistent with easement rights prior to granting approval; (2) give as much advance notice to service providers as practicable for scheduling purposes; and (3) ensure the public is not inconvenienced.

Cities and Towns: Fees and Compensation
This bill prohibits cities and towns from imposing franchise fees for the use of a right-of-way except (1) a public utility tax may be imposed and (2) actual administrative costs may be recovered. Cities and towns are not prohibited from recovering actual costs of maintenance, repair or restoration of the right-of-way that are reasonable related to the impacts of installation, maintenance and use of the facility. This bill specifically states that it is the legislative intention that cities and towns may recover both short and long-term costs as a result of these impacts, but not any additional compensation.

Counties: Contingent Compensation
This bill contains a contingent section that states unless a law is enacted prior to July 1, 1999 that grants counties excise tax authority with regard to telecommunication services, the remainder of the section, as analyzed here, will not take effect. This section of the bill prohibits counties from imposing franchise fees or any other fees not already in effect for the use of the rights-of-way except (1) a county may impose a tax on telecommunication services; and (2) actual administrative costs may be recovered. The legislative intention is the same as cities and towns wherein the recovery of costs for both short and long term costs as a result of these impacts are allowed, but not any addition compensation for the use of the rights-of-way.

Counties, Cities and Towns: No Regulations
Counties will not regulate the services or business, or the content or signals carried by service providers except where specifically authorized. In addition, counties will not create regulations that conflict with federal or state worker safety or public safety laws.

Liabilities
Liabilities of counties, cities and towns are not expanded and no new liabilities are created. Further, counties, cities and towns are not limited from requiring indemnification agreements as a condition to service provider's facilities occupying the right-of-way.

Service Providers
This bill requires service providers to (1) obtain all permits; (2) ensure compliance with land use and construction codes; (3) cooperate with county as not to inconvenience the public; (4) obtain approval of the owners of structures in the rights-of-way; obtain

approval of the governmental entity that manage the right-of-way; and (5) construct and maintain facilities at their own expense.

Public Inspection & Copying
This bill expands RCW 42.17.310 that exempts a laundry list of information from public inspection and copying. As per this expansion, the designs, drawings or maps provided by service providers with regard to existing or planned facilities to cities, towns or counties are exempt from public inspection and copying.

***Appropriation*:** None.

***Fiscal Note*:** Requested.

***Effective Date of Bill*:** Sections 4 and 12 take effect April 1, 2000. Sections 14 and 15 take effect July 1, 1999, only if a law, granting counties excise taxing authority regarding telecommunications services, is enacted before July 1, 1999. The remainder of this act takes effect immediately.