HOUSE BILL REPORT
ESSB 6676

As Reported By House Committee On:
Technology, Telecommunications & Energy

Title: An act relating to the use of city or town rights of way by telecommunications and cable television providers.

Brief Description: Concerning the use of public rights of way in cities and towns.

Sponsors: Senate Committee on Energy, Technology & Telecommunications (originally sponsored by Senators Finkbeiner and Brown; by request of Governor Locke).

Brief History:
Committee Activity:
Technology, Telecommunications & Energy: 2/22/00, 2/25/00 [DPA].

Brief Summary of Engrossed Substitute Bill
(As Amended by House Committee)

- Cities and towns are required to give access to public rights of way, including access to wireless services, and cannot exclude wireless through zoning.
- A process for expedited permitting is created, with a 120-day time line for the initial master permit, and a further expedited 30-day time line for a use permit.
- Denials or delays of either permit must be in writing, and are subject to administrative review.
- Cities and towns are not permitted to compete with telecommunication or cable businesses using those businesses' excess access.
- Cities and towns may lease out access owned by service providers in the right of way to other service providers.
- Proprietary information of a company doing business in the right of way is not subject to the open public records act.
- Relocation requested by a city or town must be completed by the service provider by an agreed upon date unless a service provider shows it cannot meet the date using best efforts.
- Cities must pay for the additional incremental cost for aerial to underground relocation for service providers that have an ownership share of the pole, or as provided for in the tariff, if less.
- The charges that cities can impose on wireless facilities are clarified.

HOUSE COMMITTEE ON TECHNOLOGY, TELECOMMUNICATIONS & ENERGY

Majority Report: Do pass as amended. Signed by 14 members: Representatives Crouse, Republican Co-Chair; Poulsen, Democratic Co-Chair; DeBolt, Republican Vice Chair; Ruderman, Democratic Vice Chair; Bush; Cooper; Delvin; Kastama; McDonald; Mielke; Morris; Reardon; Thomas and Wolfe.

Staff: Scott MacColl (786-7106).

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 1999 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 of Amended Bill:

A new process is set up regarding rules and processes for cities and towns to allow access to the right of way. A requirement for expedited permitting is created, which includes a
120-day time line for an initial master permit, and a further expedited 30-day time line for a use permit. Cities and towns are not permitted to compete with telecommunication or cable businesses using the service provider's excess access, however, cities and towns may lease out excess access owned by service providers in the right of way to other service providers. Counties are excluded from this requirement, and wireless services are included as one of the parties.

Cities & Towns: Master Permits and Use Permits

A new expedited process for right of way permitting for cities and towns is created in which a service provider must receive a master permit to locate facilities in the right of way. If a master permit is requested, a city or town must act upon the application within 120 days. Service providers with an existing statewide grant, based on a predecessor telephone or telegraph company's existence at the time the state constitution was adopted, are not required to apply for a master permit.

Once a service provider holds a master permit, then the service provider is only required to receive a use permit to install, repair or remove facilities in the right of way.
A use permit request must be acted upon within 30 days unless a service provider agrees to an alternative time frame. If a denial or extension is necessary, the city or town must notify the service provider in writing, and the decision is subject to administrative appeal. A city or town may not deny a use permit to a service provider with an existing statewide grant based on the failure to obtain a master permit.

Cities and Towns: Permit Denial and Appeal

Cities and towns are granted express authority to issue or deny permits for the use of the right of way for cable or telecommunication services. If a master permit authorizing access to the right of way is denied, the city or town must support the decision with substantial evidence in writing. A service provider that is denied a master permit, or has waited longer than 30 days for a use permit, may take action to seek injunctive relief.

Cities and Towns: Moratoriums

Cities and towns are prohibited from placing or extending a moratorium on the application, construction, maintenance, repair, extension, or operation of any facilities for personal wireless services.

Cities and Towns: Zoning

Cities and towns have express authority to regulate the placement of facilities in the right of way through local zoning. However, cities and towns are not allowed to adopt regulations that:

a) impose requirements that regulate the services or business operations of a service provider;
b) prohibit the placement of any wireless or wireline facilities within the right of way or within the city or town;
c) conflict with federal or state laws, rules or regulations that specifically apply to design, construction or operation of facilities; or
d) regulate services provided based upon the content or kind of signals carried.

The act in no way alters cities or towns authority to regulate the cable television services pursuant to federal law.

City and Towns: Liabilities

Liabilities of cities or towns are not expanded and no new liabilities are created for third party users of the right of way. Further, no limit has been placed on the right of a city or town to require an indemnification agreement as a condition of a service provider's facility occupying the right of way.

City and Towns: Responsibilities

No new responsibilities are created for cities and towns for construction of facilities or to modify the right of way to accommodate such facilities. Cities and towns may require service providers at their own cost to relocate facilities within the right of way when necessary for alteration of the right of way. Notification of need must be made as soon as possible, and in calculating the time line the service provider shall be consulted.

Relocation requested by a city or town must be completed by the service provider by an agreed upon date unless a service provider shows it cannot meet the date using best efforts. Cities must pay for the additional incremental cost for aerial to underground relocation for service providers that have an ownership share of the pole, or as provided for in the tariff, if less.

To facilitate scheduling and coordination of work in the right of way, cities and towns are required to provide as much advance notice as reasonable of plans to open the right of way for service providers already in the right of way. Cities and towns may establish a procedure for the filing of those advance plans by service providers and other users of the right of way.

Cities and Towns: Excess Access in the Right of Way

Cities and towns may require that service providers that are constructing or relocating ducts in public rights of way provide the city or town with excess access. However, the city or town may not require the service provider to grant access to its access structures or vaults.

The city or town must enter into a contract with the service provider that is filed with the Utilities and Transportation Commission, which is required by statute for telecommunication service contracts. If the excess access is to be used by any other cable or telecommunications provider, the service provider is to be fully reimbursed for the costs. The city or town may not use the additional conduit or duct space or access to structures to provide telecommunication or cable services for hire, sale, or resale to the public.

Therefore, cities and towns are allowed to lease out excess access to other telecommunication or cable companies, however cities and towns are not allowed to provide telecommunication or cable services themselves using the excess access.

Cities and Towns: Franchise Fees

Service providers in the right of way are not allowed to be charged a franchise fee. A fee may only be charged to service providers that access the public right of way that:

a) recovers actual administrative expenses;
b) is a tax permitted by state law (Public Utility Tax);
c) are franchise requirements and fees for cable television (authorized by federal legislation); or
d) are for site specific charges on wireless facilities charged by cities for:

(i) Placement of new structures in the right of way regardless of height, unless the relocation is a result of a mandatory relocation, in which there is only a charge if the previous location was being charged;

(ii) Placement of replacement structures when replacement is necessary for installation or attachment of wireless facilities and the overall height of the replacement structure and wireless facility is over 60 feet; and

(iii) Placement of wireless facility on structures owned by a city or town located in the right of way, however no charges apply to wireless facilities on existing structures, unless the structure is owned by a city or town.

A city or town is not required to approve the wireless use permit absent an agreement. If the parties are unable to agree on the site specific charges, the service provider may submit the charge amount to binding arbitration to decide appropriate charges. Cost of the arbitration must be shared equally, and each party pays for its own legal expenses.

Service Providers: Responsibilities

Service providers are required to:

a) obtain necessary permits;
b) comply with applicable ordinances, codes and regulations;
c) provide information and plans as necessary to enable a city or town to ensure scheduling and coordination of work in the right of way, including provisions for advanced planning when notified by a city or town;
d) cooperate with the city or town to ensure that facilities do not inconvenience the public use of the right of way;

e) obtain written approval of the facility owner if it is not owned by the service provider

prior to using the structure;
f) construct, operate and install facilities at its expense; and
g) comply with applicable federal and state safety laws and standards.

Open Public Records and Inspection

An additional exemption is added to the requirement that all public records are available for inspection and copying. Proprietary designs, drawings, or maps of existing or planned facilities in connection to a master permit are exempt from the open public records act. Information regarding the location of existing facilities and information provided in a use permit application is not proprietary and is considered public.

Within 10 days of a request, the service provider must respond in writing regarding the continuing need for confidentiality, which is then presented to the requester. In an action to compel disclosure, the service provider must be joined as a party with the city or town to demonstrate the need for confidentiality.

Amended Bill Compared to Engrossed Substitute Bill: The definition of what is included within the definition of a structure in the right of way includes poles and conduits. Also, entity's that are exempt from the provisions of a master permit are defined to be a service provider with an existing statewide grant based on a predecessor telephone or telegraph company's existence at the time of adoption of the Washington State Constitution.

Relocation requested by a city or town must be completed by the service provider by an agreed upon date unless a service provider shows it cannot meet the date using best efforts. Cities must pay for the additional incremental cost for aerial to underground relocation for service providers that have an ownership share of the pole, or as provided for in the tariff, if less.

Site specific charges for wireless facilities may be charged by cities for:

(i) The placement of new structures in the right of way regardless of height, unless the relocation is a result of a mandatory relocation, in which there is only a charge if the previous location was being charged;

(ii) Placement of replacement structures when replacement is necessary for installation or attachment of wireless facilities and the overall height of the replacement structure and wireless facility is over 60 feet; and

(iii) Placement of wireless facility on structures owned by a city or town located in the right of way, however no charges apply to wireless facilities on existing structures, unless the structure is owned by a city or town.

Appropriation: None.

Fiscal Note: Not requested.

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

Testimony For: (Concerns) There is scientific evidence showing that cell tower waves can be dangerous. Who will be liable if these are found to be dangerous? Why does this bill not apply to state highways?

This bill needs statewide franchise clarification, it needs assurances that damage claims are not contemplated, it needs to protect existing contracts, and include poles and lines. There are a number of cities that are involved in legal battles with US West over relocation. Cities need certainty for capital improvement projects as to when relocations occur. This is important for concurrency requirements set in the growth management act. The cities are caught between the relators/builders and utilities.

There is a lot of right of way along state highways and a city under 50,000 has no control over those. The committee should consider changing that piece. The cities would like the same ability as the Department of Transportation has to permit rights of way.

Federal code states that local jurisdictions cannot deny wireless permits for health hazard reasons. There should no exemptions for any wireless companies from paying compensation.

If a city requests a move from aerial to underground wires, the city must pay. However, putting wires underground saves money in the long run, and it is a benefit to the industry.

Testimony Against: None.

Testified: (Support) Tim Sullivan, city of University Place.

(Support with concerns) Toni Potter, League of Women Voters.

(Concerns) Bob Mack, cities of Spokane and Tacoma; Kristoff Bauer, city of Shoreline; Doug Levy, cities of Everett and Kent; and Mike Ryherd, cities of Federal Way and Anacortes.