Telecommunications Franchising and Beyond: Complying with ESSB 6676 (Chapter 83, Laws of 2000), Washington's New Municipal Right of Way Telecommunications Act

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I. Legislative Background

On March 7, 2000 the Washington State Legislature passed ESSB 6676 and sent it on to the Governor. The bill passed by a 41-4 vote in the Senate and 95 - 3 vote in the House of Representatives. Governor Locke signed ESSB 6676 into law on March 24, 2000. This new law becomes effective on June 8, 2000. ESSB 6676 (Chapter 83, Laws of 2000) will be codified in Titles 35 and 35A of the Revised Code of Washington.

ESSB 6676 was the result of several years of negotiations between representatives of local government and the telecommunications industry. These negotiations began after Senator Finkbeiner introduced SB 6515, a very pro-industry telecommunications bill, in the January 1998 Legislative Session. Billed as Washington State's answer to the Federal Telecommunications Act of 1996, SB 6515 would basically have stripped local governments of control of rights of ways. A group of cities and counties banded together in opposition to SB 6515. We were successful in killing that bill in a close vote in the House of Representatives.

While SB 6515 was pending in the House, Representatives Larry Crouse, Eric Poulson, Richard DeBoldt, all members of the House Technology, Telecommunications and Energy Committee, convened a series of meetings to hear the viewpoints from the telecommunications industry and from local government about what the State Representatives perceived to be obstacles which local governments had or were erecting to the rapid deployment of new telecommunications facilities. After listening to representatives from both cities and counties, the leadership of the House Technology, Telecommunications and Energy Committee, became convinced that the telecommunications industry and local governments would be best served if representatives from industry and local government worked among themselves to try to forge a compromise bill.

During the Summer and Fall of 1998, there were several meetings among representatives of local government to formulate a unified local government position about telecommunication right of way issues. Due to the different taxing authorities of cities and counties - counties cannot impose a utility tax - it became apparent that county representatives would not be able to find a common ground with the telecommunications industry unless counties received new taxing authority. There was also a split among the counties with some of them wanting new taxing authority and others opposed. The end result was that by mutual agreement among cities, counties, the telecommunications industry and the House leadership, county specific

provisions were stripped out of the telecommunications right of way bill.

As negotiations continued between the telecommunications industry and city representatives during late 1998 and the Spring and Summer of 1999, the House Technology, Telecommunications and Energy continued to host meeting with representatives of cities and towns and the telecommunications industry in an effort to forge a compromise. David Danner from Governor Locke's Office began regularly attending these meeting. House Committee staff prepared several draft right of way bills at the request of Representatives.

One of the biggest stumbling blocks to reaching a compromise was the compensation issues. Several cities wanted specific authority to impose per linear foot charges against telecommunications providers who were exempt from city utility taxes. A utility tax can only be assessed against revenues derived from providing services within a city. For service providers who merely pass through a city without providing any service therein, no utility tax can be assessed. Other cities were not concerned with pass through providers which had pole mounted lines but were seriously troubled by repeated right of way cuts to accommodate pass through telecommunications providers. Those cities see real costs without any express cost recovery mechanism.

While there were several drafts of HB 2060 (a predecessor to ESSB 6676) which contained proposed language regarding recovery of degradation fees, by the Fall of 1999 it became obvious the neither cities nor industry would be able to agree on any particular language. House Committee members opposed draft language which would have required the House Technology, Telecommunications and Energy Committee House Energy, Technology and Telecommunications Committee to study the issue and report back recommendations about how cities could be fairly compensated for degradation to rights of way caused by the numerous telecommunications providers who wish to locate underground facilities within city rights of way. The leadership of the House Committee urged cities and industry to attempt to forge a compromise on this issue by themselves.

Ultimately in the round robin negotiations between industry and the cities in the Fall of 1999, it became obvious that no compromise could be reached on this issue. Cities reserved the right to impose degradation fees as a matter of local ordinance. Industry agreed that no language on the degradation issue in the bill was better than unacceptable language.

When cities questioned whether the remaining portions of the bill were sufficient to get municipal support, the House Technology Committee leadership reminded everyone that getting a telecommunications right of way bill out was a high priority and that the House leadership was determined to put this issue to rest in the 2000 Legislative Session. Dave Danner of the Governor's Office reiterated the Governor's intent to get such a bill through this year. City representatives also saw similar earnestness in Senator Lisa Brown, the Chair of the Senate Energy, Technology and Telecommunications. The overwhelming votes to pass the

legislation bespeaks somewhat of the legislative weariness of working on this issue for three years.

II. Compliance Issues for Cities and Towns

A. APPLICABILITY OF ESSB 6676

1. What cities? What telecommunications franchises? What requirements?

ESSB 6676 is limited to Washington cities and towns. Sections 1 - 7 and Section 9 of the Act will be codified as a new chapter of Title 35. Section 8 of the Act amends RCW 35.21.860. Section 10 adds a new section to RCW 35A.21 making all of the provisions of the Act applicable to code cities. As part of the general law, the new Act is applicable to all Washington cities and towns.

Section 9 of the Act is a savings clause. Section 9 states, "This act shall not preempt specific provisions in existing franchises or contracts between cities or towns and service providers." (Emphasis added). Inferentially, if a presently existing franchise or contract between a city or town and a telecommunications service provider is silent on any of the provisions contained in this new Act, then the Act will apply.

ESSB 6676 requires cities and towns to have procedures for the approval and processing of telecommunications permits which are consistent with this new state law. Section 2 states, "A city or town may grant, issue or deny permits for the use of the right of way by a service provider for installing maintaining, repairing, or removing facilities for telecommunications services or cable television services pursuant to ordinances, consistent with this act." Section 2 uses terms "permits," "right of way," "service provider," "facilities," "telecommunications services" and "cable television services" which are defined terms in Section 1 of the Act.

ESSB 6676 defines two permits, a master permit and a use permit, which some, but not all, telecommunications service providers must have before they are entitled to locate identified facilities in the public rights of way of cities or towns. Master permits and use permits are discussed at greater length below. The other defined terms of Section (1) of the Act bear some examination.

Section 1(5) defines right of way. Generally right of way means land acquired or dedicated for public roads or streets which is open and improved for motor vehicle use by the travelling public. Unopened right of way, state highways, and publicly owned land are excluded from the definition.

Section 1(6) defines service providers. "Service provider" means every corporation, company, association, joint stock association, firm, partnership, person, city, or town owning, operating

or managing any facilities used to provide and providing telecommunications or cable television service for hire, sale or resale to the general public..." (Emphasis added). Key words in this definition are "to provide and providing telecommunications or cable television service." The words "and providing" were added at the insistence of several cities that wanted to avoid including "dark fiber" companies from the definition of service providers. If a company wants to dig up city streets and lay conduits and pull dark fiber through the conduits, presumptively it is not a service provider and is exempt from this Act.

Another key term in Section 1(6) is the requirement that the telecommunications service be for hire, sale or resale to the general public. Municipal institutional networks or traffic signalization systems are exempt from the Act. Similarly a private company that wishes to cross a public right of way with telecommunications facilities to serve private company needs is exempt.

The remaining definitions in Section 1, Section 1(1) "cable television service," Section 1(2) "facilities," Section 1(4) "personal wireless services," and Section 1(7) "telecommunications service," are broad.

2. How ESSB 6676 preserves existing municipal authority over telecommunications service providers.

The new Act preserves some, but not all, of existing municipal authority over telecommunications service providers. Some of the sections preserving existing authority are:

- Section 3(5)(b) which reserves municipal authority to require that telecommunications facilities be installed and maintained within public rights of way in such a manner and at such points so as not to inconvenience the public use of the right of way or to adversely affect the public health, safety or welfare.

- Section 3(6)(a) - (c) which reserves city or town authority requiring telecommunications service providers to: (1) obtain all necessary permits from the city or town; (2) comply with all applicable ordinances, construction codes, regulations and standards including verification by the city or town of such compliance; and (3) cooperate with cities and towns in ensuring that telecommunications facilities do not inconvenience the public use of the right of way or adversely affect the public health, safety or welfare.

- Section 3(7)(a) - (c) preserves existing municipal authority by recognizing that this new Act does not: (1) obligate cities or towns to either (a) construct facilities for service providers or (b) modify the right of way to accommodate telecommunications facilities; (2) create, expand or extend any liability of a city or town to any third-party user of facilities or third-party beneficiary; or (3) limit a city or town's right to require an indemnification agreement from a telecommunications service provider before facilities

are installed in rights of ways.

- Section 3(8) recognizes that this Act does not create, modify, expand, or diminish a priority of use of the right of way by a service provider or other utility, either in relation to other service providers or in relation to other users of the right of way for other uses.

- Section 4(2) generally preserves local zoning authority over telecommunications facilities but imposes some restrictions which are discussed below.

- Section 4(3) preserves local authority to regulate cable television services pursuant to the authority granted in federal law.

- Section 6(1) generally reserves municipal authority to require telecommunications service providers to relocate facilities when reasonably necessary for construction, alteration, repair or improvement of the right of way for purposes of public welfare, health or safety. However, there are some limits that are discussed below.

- How ESSB 6676 changes municipal regulation of service providers.

ESSB 6676 also changes the scope of municipal regulations of telecommunications service providers by imposing new limitations. Some of the sections imposing new restrictions on local authority are:

- Section 2 requires cities and towns to grant, issue, or deny permits pursuant to ordinances consistent with the Act.
- Section 3(1) - (4) require cities and towns to: (1) process master permits and (2) use permits pursuant to the procedures of the Act; (3) supply a written record supported by substantial evidence if a master permit is denied; and (4) be prepared to defend an appeal, at which injunctive relief can be granted against the local government, if a master permit or a use permit is denied.

- Section 3(6)(g) may impose a new restriction upon wholly local safety codes being applied to telecommunications facilities.

- Section 4(1)(a) - (d) impose restrictions on city or towns ordinances or regulations that: (1) regulate the business operations or services of telecommunications providers unless authorized by state or federal law; (2) conflict with federal or state laws, rules or regulations pertaining to (a) the design, construction, and operation of facilities or (b) worker safety laws or regulations; regulate the services based upon the content or kind of signals that are carried or are capable of being carries over the facilities; and (4) unreasonably deny the use of the right of way by a service provider for installing facilities for telecommunications or cable television services.

- Section 4(2)(a) - (c) imposes restrictions on the zoning and police powers of cities or towns. A city or town may not: (1) prohibit the placement of all wireless or all wireline telecommunications facilities within city borders; (2) prohibit the placement of all wireline or all wireless facilities within public rights of ways, with a very limited exception; or (3) violate Section 253 of the Telecommunications Act of 1996.
- Section 5 imposes a restriction on the adoption of city or town moratoriums on accepting applications, processing applications, and granting applications for personal wireless services unless the city or town abides by the guidelines for facilities siting implementation agreed to by the FCC Local and State Government Advisory Committee, the Cellular Telephone Industry Association and the American Mobile Telecommunications Association on August 5, 1998.

- Section 6(2) imposes a new obligation on cities and towns to notify both current telecommunications service providers using municipal rights of way and a select group of service providers who register with the City Clerk of plans to open public rights of ways.

- Section 6(3)(a) - (c) imposes new restrictions on relocation requests by cities and towns to telecommunications service providers requiring them to relocate their facilities. Cities or towns must: (1) avoid asking a service provider to relocate the same facility within a five year period; (2) pay the incremental cost of under-grounding, or any applicable tariff rate, whichever is less, versus the costs of an aerial to aerial relocation for service providers with an ownership share of the aerial supporting structures; and (3) pay for the costs of relocations requested "solely for aesthetic reasons."

B. TELECOMMUNICATION PERMITTING UNDER THE ACT

1. Granting Master Permits or Franchises to Telecommunications Service Providers

What is a master permit? " 'Master permit' means the agreement in whatever form whereby a city or town may grant general permission to a service provider to enter, use, and occupy the right of way for the purpose of locating [telecommunications] facilities." Section 1(3). (Emphasis added).

Is a franchise a master permit? Yes, except for cable television franchises. "This definition ['master permit'] is not intended to limit, alter, or change the extent of the existing authority of a city or town to require a franchise ... For the purposes of this subsection, a franchise, except for a cable television franchise, is a master permit. A master permit does not include cable television franchises." Section 1(3) (Emphasis added).

Why are cable television franchises not master permits? Cable television franchises typically take longer than 120 days to negotiate. Therefore they were exempted from the expedited processing and approval requirements for master permits or franchises in ESSB 6676, Chapter 83, Laws of 2000. However, holders of valid cable television franchises are entitled to expedited processing for use permits under Section 3(2)(b).

Are US WEST and GTE exempt from the master permit requirement? Arguably "Yes" for *wireline* facilities. A definite "No" for *wireless* facilities. This issue was one of the most contentious issues discussed during three years of negotiations. Language addressing the US WEST/GTE claims of statewide constitutional franchises appears in Sections 1(3), 3(1) and 3(2). Section 1(3) states " ... This definition ['master permit'] is not intended to limit, alter or change the extent of the existing authority of a city or town to require a franchise nor does it change the status of a service provider asserting an existing state-wide grant based on a predecessor telephone or telegraph company's existence at the time of the adoption of the Washington state Constitution to occupy the right of way." (Emphasis added). Section 3(1) states "Cities and towns may require a service provider to obtain a master permit. A city or town may request, but not require, that a service provider with an existing state-wide grant to occupy the right of way to obtain a master permit for wireline facilities." (emphasis added). Taken together these sections would allow a city or town to require either US WEST or GTE to prove that it has an existing state-wide grant (based on a predecessor telephone or telegraph company's existence at the time of the adoption of the Washington state Constitution to occupy the right of way) before US WEST or GTE would be exempt from a master permit for *wireline* facilities. There is no exemption for either US WEST or GTE for *wireless* facilities which they wish to locate within rights of ways. A city or town can require US WEST and GTE to obtain a master permit or a franchise before they locate *wireless* facilities in rights of ways.

What does ESSB 6676 change about franchises or master permits for telecommunications service providers? ESSB 6676 imposes new procedural requirements and processing deadlines cities and towns must meet for franchise or master permit applications. It also allows telecommunications service provider to appeal the denial of a master permit or a franchise to the Superior Court.

What procedural and processing requirements does ESSB 6676 impose? Section 3(1)(a) states

"The procedures for the approval of a master permit and the requirements for a complete application for a master permit shall be available in written form." (Emphasis added). This means that each city or town must have a clear written explanation available of (1) what is required for a complete application for a master permit or a franchise for a telecommunications service provider and (2) how master permits or franchises are approved.

What expedited deadlines for processing/approving telecommunications franchises or master permits does ESSB 6676 impose? Generally approval must come within 120 days after the filing of a complete application. Section 3(1)(b) states, "Where a city or town requires a master permit. The city or town shall act upon a complete application within one hundred twenty days from the date a service provider files the complete application for the master permit to use the right of way, except: (i) with the agreement of the applicant; or (ii) where the master permit requires action of the legislative body of the city or town and such action cannot reasonably be obtained within the one hundred twenty day period."

Is the denial of a master permit or a telecommunications franchise or the unreasonable failure to act on a master permit or a telecommunications franchise subject to judicial appeal? Yes. Section 3(3) states, "The reasons for a denial of a master permit shall be supported by substantial evidence contained in a written record. A service provider adversely affected by the final action denying a master permit, or by an unreasonable failure to act on a master permit as set forth in subsection (1) of this section, may commence an action within thirty days to seek relief, which shall be limited to injunctive relief."

How can a city or town adequately document the record regarding either the denial of a permit or a claim that it has unreasonably failed to act on a master permit or a franchise? When a city or town receives a complete application for a master permit or a telecommunications franchise it should begin documenting a record with

all drafts of the franchise or master permit which are exchanged between the city or town and the telecommunications provider, a log of the negotiating sessions, and the reasons why the city or town is insisting upon the provisions which are contained in any drafts of a master permit or franchise proposed by the city or town. Before the 120 day processing period is up the city or town should bring the master permit or franchise before the City or Town Council or Hearing Examiner, if applicable, and create a record. If the legislative body or hearing examiner denies the master permit, the City Attorney should draft findings of fact and conclusions of law to support the reasons for the denial.

Why is the 120 day processing periods for master permits or franchises important? Careful attention should be given to the 120 day processing period and any extensions to the 120 day period agreed to by the applicant. All extensions to the 120 day processing period should be in writing signed by the telecommunication service provider. Because a telecommunications service provider must file an appeal of "... an unreasonable failure to act on a master permit..." within 30 days after the 120 day processing period has expired, it is important to substantiate in a written record all agreed to extensions of the 120 day processing period.

Why is the appeal of a denial of a master permit or franchise limited to injunctive relief? The purpose of this is to eliminate any claim based on state law that the denial of a master permit or a franchise caused a telecommunications service provider to suffer damages, e.g., because it was not able to compete in a market, provide service to particular customers, incurred attorneys fees, etc. Relief was limited to injunctive relief by compromise of the negotiating parties.

Is granting a master permit exempt from the State Environmental Policy Act (SEPA)? Under WAC 197-11-800(24)(h) all grants of franchises by agencies to utilities are exempt from SEPA. The grant of a master permit by a city or a town should be similarly exempt.

2. Granting Use Permits to Telecommunications Providers

What is a Use Permit ? Section 1(8) states, " 'Use permit' means the authorization in whatever form whereby a city or town may grant permission to a service provider to enter and use the specified right of way for the purpose of installing, maintaining, repairing, or removing identified facilities." (Emphasis added). Cities have different names for the individual permits which they require telecommunications service

providers to secure before they install facilities at a specific location. The definition of use permits is intentionally broad to encompass any existing local government permits that perform this function.

How does a use permit differ from a master permit? ESSB 6676 attempts, in the pro-competitive, deregulatory, anti-State sanctioned local telephone service monopoly telecommunications world created by the Telecommunications Act of 1996, to parallel as much as possible the common law of franchising and the local ordinances relating to construction and street use permits that is familiar to local governments. Traditionally a privately owned utility wishing to occupy public rights of way first has to obtain a franchise from a city or town. The franchise sets general terms and conditions upon which the utility may occupy public rights of way. When the utility wishes to install a certain facility at a specific location, cities and towns typically require a construction permit, a street use permit, a right of way permit or some other named permit. The granting of a franchise was a legislative action while the issuance of a construction permit, street use permit, right of way use permit, etc., was typically an administrative action. ESSB 6676 incorporates franchises into *master permits* and incorporates administratively issued construction permits, street use permits and right of way use permits into *use permits* . While franchises take a while to negotiate, most Washington cities and towns have been issuing construction, street use, right of way use permits to telecommunications service providers either over the counter or within a couple of days. ESSB 6676 recognizes that distinction by granting a longer time to negotiate telecommunications franchises but a shorter period for use permits.

How does a telecommunications use permit relate to variances, conditional use permits, or special use permits, etc.? Use permits are designed to be consistent with the permits, however named, by which local governments have been traditionally been permitting telecommunications facilities to be installed, maintained, repaired, or operated at a particular location. The expedited processing time requirement imposed by ESSB 6676 is consistent with permits requiring only administrative approval issued by a local government only after a telecommunications service provider has obtained a master permit or franchise. The use permit does not supplant variances, conditional use permits, special use permits or other forms of discretionary land use approvals that may be prerequisites before identified telecommunications facilities can be installed at a specific location.

Is granting a use permit exempt from the State Environmental Policy Act

(SEPA) and the Shoreline Management Act (SMA)? It depends upon the location of the facility and whether the facility is a *wireline* or a *wireless* telecommunications facility. For *wireline* facilities see WAC 197-11-800 (24) Utilities which states, "The utility-related actions listed below shall be exempt, except for installation, construction or alteration on lands covered by water. The exemption includes installation and construction, relocation when required by other governmental bodies, repair, replacement, maintenance, operation or alteration that does not change the action from an exempt class. (a) All communica-tions lines, including cable TV, but not including communications towers or relay stations. (Emphasis added). For *wireless* facilities see WAC 197-11-800 (27) Personal wireless service facilities which exempts from SEPA certain: (1) "microcells" not attached to residences or schools; and (2) other personal wireless service that are not microcells but are to be located in commercial, industrial, manufacturing, forest or agricultural zones and not affixed to residences or schools; and (3) involves constructing a personal wireless service tower less than sixty feet in height that is located in a commercial, industrial, manufacturing, forest or agricultural zone.

Does ESSB 6676 specifically require cities and town to spell out the requirements for a complete application for and the processing procedures for a telecommunications use permit? No. There is no parallel provision to Section 3(1)(a) for use permits. Section 3(1)(a) requires cities and towns to provide in written form the requirements for a complete application for a master permit and the procedures for the approval of a master permit.

Should cities or town spell out in written form the requirements for a complete application for and the procedures for processing a telecommunications use permit?

Absolutely yes. A telecommunications use permit is intended to be an administratively issued permit. Most telecommunications use permits will not require a discretionary land use decision. Under ESSB 6676 such permits should be issued within thirty days of receipt of a complete application to holders of master permits or franchises. If a city or town has not already done

so for right of way use, street use or a street construction permit, it should adopt written procedures for processing telecommunications use permits and the requirements for a complete application for such a permit. Some telecommunications use permits will require discretionary land use decisions to be made in conjunction with the issuance of the permit. Cities and town planning under GMA are familiar with the consolidated permit processing/SEPA review under RCW 36.70B. Issuing use permits for telecommunications facilities should be either integrated into a city or town's consolidated permit processing system or a parallel processing system should be created.

How long does a city or town have to process a use permit? Generally a city or town has thirty (30) days to process a use permit for a service provider with a master permit. Section 3(2). If the master permit does not specifically address expedited processing, a telecommunications service provider with a master permit may request in writing even faster processing. A city or town shall reasonably cooperate to meet the expedited use permit request where practicable. Section 3(2)(c).

Does ESSB 6676 impose a thirty day processing deadline for a variance, a conditional use, or other discretionary land use permit application being considered in conjunction with a telecommunications use permit? No. ESSB 6676 was designed to expedite administrative permits, not discretionary land use permits. Section 3(2) imposes a general thirty day period to "act" on a permit. In most cases to "act" will be a decision to issue or deny a permit. However Section 3(2)(a) states that "act" includes notifying "...the applicant in writing of the amount of time that will be required to make the decision and the reason for this time period." If a city or town knows that a use permit application filed by a service provider also will require issuing a discretionary land use permit which takes longer than thirty days to process, the city or town should give written notice to the service provider of the length of time it will take to complete the processing of the use permit application. Better yet, a city or town should tie the "complete application" requirement for a telecommunications use permit to filing complete applications for any necessary land use application which must be considered in conjunction with the telecommunications use permit.

Must a city or town issue use permits to US WEST or GTE for wireline facilities within thirty days? No. Section 3(2) states "A city or town may require that a service provider obtain a use permit. A city or town must act

on a request for a use permit by a service provider within thirty days of receipt of a completed application, unless a service provider consents to a different time period or the service provider has not obtained a master permit requested by the city or town. (Emphasis added). Under Section 3(1) a city or a town may request, but not require, that a service provider with an existing state-wide grant to occupy the right of way obtain a master permit for *wireline* facilities. Presumably US WEST and GTE will assert that they have such a state-wide right. After a city or town has requested US WEST or GTE to obtain a master permit for *wireline* facilities, the city or town may lawfully take up to 120 days for processing use permits for US WEST and GTE. This provision was a legislative inducement for US WEST and GTE to cooperate with cities and town by securing master permits or franchises prior to asking for use permits for *wireline* facilities.

Can a city or town require US WEST or GTE to obtain a master permit or a franchise before the city or town will issue a use permit for wireline facilities? Perhaps. The answer is uncertain. ESSB 6676 attempts to be neutral and not decide the issue of who, if anyone, is a service provider "...with an existing state-wide grant to occupy the right of way for wireline facilities..." Section 3(2)(d). See also, Sections 1(3) and 3(1) and the discussion of master permits, *supra* . All of these sections need to be read in conjunction with each other. Cities and towns can require US WEST and GTE to obtain master permits or franchises for *wireless* facilities under the plain language of Section 3(2)(d).

What should a city or town do if it wishes to deny an application for a use permit?

Section 3(4) states that "A service provider adversely affected by the final action denying a use permit may commence an action within thirty days to seek relief, which shall be limited to injunctive relief. In any appeal of the final action denying a use permit, the standard for review shall be as set forth in RCW 36.70C.130." Therefore, a city or town should take steps to develop an adequate record of the reasons for the denial of a use permit. The best way of doing this is either to integrate telecommunications use permits into the city or town's integrated permit-processing scheme or establish a parallel system for processing telecommunications use permits. Make an immediate administrative decision about the use permit and provide for an expedited open record appeal before the city or town's hearing examiner. Section 3(2)(a). Reliance solely upon the documents contained in the city or town's administrative file of a telecommunications use permit application for an appeal under Section 3(4) will rarely be adequate. To permit effective judicial review under RCW 36.70C.130, the

reviewing court will need findings of fact and conclusions of law which support the denial. Administrative files are typically silent about the reasons for a denial.

What happens if a City, town, or some other interested party wishes to appeal a decision that grants or denies a telecommunications use permit? ESSB 6676 is silent on appeals filed by either by a city or by some other interested party of a decision to grant or deny a telecommunications use permit. Section 3(4) allows service providers to file an appeal within thirty days of a decision denying the issuance of a use permit. A service provider is limited to injunctive relief against the city or town that denied the use permit. Presumptively an Equal Protection analysis requires that a city, town, or other interested party also be allowed thirty days to appeal from a decision to issue or deny a telecommunications use permit. The best way that a city or town can end uncertainty, protect the right of appeal for itself, and protect the interests of third parties affected by a telecommunication use permit decision, is to establish procedures which parallel the issuance of telecommunications use permits with the city or town's consolidated permit processing system. The city or town should specifically provide for some kind of an appeal. Unless the telecommunications use permit application triggers a land use decision that can be appealed as a matter of right under the Land Use Petition Act (LUPA), care should be taken to avoid giving service providers, the city or other interested parties an opportunity to claim attorneys fees and costs on appeal. If a telecommunications use permit application triggers a land use decision that may be appealed under the LUPA statute, any attorneys fees and costs award will be limited to that portion of the relief that stems from the land use decision. The telecommunications use permit denial may only be addressed by the court by injunctive relief. Section 3(4).

Is a city or town exposed to a damage remedy if it issues or denies a telecommunications use permit? No. At least not a claim brought by a telecommunications service provider. Section 3(4) limits telecommunications providers to injunctive relief in the event of the appeal of a denial of a use permit. Presumptively, the Act, the city or town's comprehensive plan and zoning codes as well as common law right of way principles provide a shield from any claim against the city or town brought by an abutting property owner that the issuance of a telecommunications use permit to locate facilities in a specific right of ways constitutes a compensable takings. Neither a city or town nor a telecommunications service provider is entitled to any attorneys fees or costs on the appeal of a denial of a telecommunications use permit unless the permit is consolidated with a land use permit appeal pursuant to the LUPA (RCW 36.70C) statute. The negotiating parties specifically determined to

not incorporate the denial of a use permit into the LUPA statute. The LUPA statute's burden of proof and evidentiary burden were borrowed by analogy but an appeal of a denial of a telecommunications use permit was never intended to be a LUPA appeal. The Act is silent about appellate procedures. Court rule making will be important.

C. ZONING UNDER THE NEW TELECOMMUNICATIONS ACT

While the new Act generally preserves local zoning and police powers, Section 4(2)(a) and (b) impose some restrictions. Arguably Section 4(2)(a) does not impose a new restriction on cities and towns. Section 4(2)(a) can be viewed as merely as a restatement of rights recognized elsewhere. Article XII, Section 19, of the Washington State Constitution has been construed to recognize a right of wireline telephone and telegraph service providers to use public rights of way subject to legislative control. Thus, a city wide ban on all wireline telecommunications facilities whether they were located within rights of way or on private property would appear to most observers to be a novel proposition under Washington municipal law. Similarly, 47 USC Section 332(c)(7)(b) of the Telecommunications Act of 1996 would appear to bar a city-wide ban on personal wireless service facilities.

Section 4(2)(b), however, is most certainly new, particularly as it relates to wireless facilities. Section 4(2)(b) restricts a city or town from prohibiting the placement of "... all wireless ... facilities within city or town rights of way, unless the city or town is less than five square miles in size and has no commercial areas, in which case the city or town may make available land other than city or town rights of way for the placement of wireless facilities." The five square mile exemption was successfully argued for by the City of Medina. Medina argued that it has already accommodated seven wireless telecommunications providers on municipally owned land other than rights of way and that it should not be required to locate new facilities in rights of way.

Section 4(2)(b) should have a modest impact on cities and towns. Allowing a personal wireless service provider as defined in Section 1(4) of the Act in any one zone of a city or town should meet the requirements of the statute. Thus, allowing a provider like Metricom that provides wireless data services by attaching lunch box size wireless telecommunications facilities to streetlights in a commercial zone of a city or town would constitute compliance with this section.

If there are any cities and towns, however, which have not yet provided for the appropriate zoning of wireless telecommunications facilities, they could be in for a surprise. Cities and towns need to make sure that their zoning codes provide for some zone within the city or town where wireless telecommunications services can locate. Take particular care to make certain that wireless radio zoning ordinances allow such facilities to be installed somewhere in the rights of way of the city or town.

Every city or town should remember two important facts. First, the wireless telecommunications network of most of the wireless service providers in this country are predicated on facilities located either on private land or affixed to public or private buildings. The presently existing wireless network is not predicated on locating wireless facilities within municipal rights of ways. ESSB 6676 could change that if cities and towns do not take appropriate steps to limit the incursion of personal wireless service facilities into municipal rights of way. Second, most municipal zoning maps exempt rights of ways. Traditionally rights of ways serve as boundaries between zoning districts. Cities and towns should take a pro-active approach and reexamine height, bulk and other restrictions on power poles, telephone poles, etc., in the rights of way of the city or town. Wireless telecommunications providers may soon be asking for a telecommunications use permit - an administrative permit - to attach facilities to existing poles. Every city or town should make sure that it has zoning regulations governing the height and size dimensions for personal wireless service antennas and the height, size dimensions and regulations identifying the location where equipment cabinets, power supplies, amplifiers, receivers and transmitters, etc., must be located for personal wireless services that a service provider wishes to locate within a right of way.

Existing power, light and telephone poles have suddenly become attractive to personal wireless telecommunications service providers. Every city and towns should scrutinize their zoning codes to make sure that there are height limitations on power, light and telephone poles in each zone of a city. Cities and towns should also make sure that there is some criteria for allowing the replacement of existing poles and the placement of new power, light and telephone poles. Pay particular attention to making sure that zoning and other codes provide that no new poles can be constructed in any part of a city or town that has already "gone underground."

D. MANAGING RIGHTS OF WAY UNDER THE NEW ACT

1. **Planning public works projects under the Act**

   Section 3(5)(a) does impose a substantive new noticing requirement upon public works projects. Section 3(5)(a) requires that cities or towns "... provide as much advance notice as reasonable of plans to open the right of way to those service providers who are current users of the right of way or who have filed notice with the clerk of the city or town within the past twelve months of their intent to place facilities in the city of town." Presumptively, the notice from the telecommunications provider must be of their intent to locate facilities within city or town right of ways.

   Section 3(5)(a) means that cities and towns will have to establish a procedure to provide actual notice to current service providers and to those service providers registered with the city or town clerk of plans to "open" rights of ways. All major city or town road improvement projects that entail opening public rights of way fall within this

provision.

Failure to abide by Section 3(5)(a) has real consequences for a city. While failure to provide the required notice does not open the city or town up to a damage claim, it does mean that the municipal government may not prevent the service provider from locating facilities underground in the same right of way.

2. **Pavement Management Systems: Extra Conduit**

Section 7 provides a new right under state law to allow cities and towns to require telecommunications service providers to install extra conduit at a reduced cost to the local government if the provider has opened a particular right of way. The provider may charge the city only the incremental cost for adding such additional conduits as the city may require. However, if the city or town leases out the conduit to another telecommunications service provider, the city will have to pay the fully allocated costs to the original provider that installed the conduit. While this provision is not a money-maker for cities and towns it may prevent excessive right of way cuts. It also could present a modest revenue source for those cities and towns who effectively anticipate future telecommunications service needs. At a minimum cities and towns may wish to utilize this provision to minimize road cuts at busy intersections.

3. **Compensation for certain new wireless facilities located within rights of way.**

Section 8(1)(e) is a modest amendment to RCW 35.21.860. It adds a new subsection allowing cities and towns to recover "a site specific charge" for the use of the right of way for wireless telecommunications facilities. The argument made by cities for adding this section is twofold. First, the national wireless telephone network has developed without the use of public rights of way. A representative of Sprint noted during the negotiations that 99% of their national wireless telecommunications network does not rely upon facilities located within public rights of way. Testimony about this fact was introduced by cities in testimony before both the House and Senate Committees considering telecommunications legislation during the 1999-2000 Legislative Session. Second, the cities and towns expressed a concern that unless they were able to charge an appropriate market based fee that there would be no incentive for wireless facilities to continue to be located on private property. Thus, cities and towns insisted upon a market-based fee to prevent a massive relocation of wireless facilities from private property where the service providers are already paying for leases to public rights of way.

The devil is in the details, however, and cities and towns need to carefully consider Section 8 (1)(e)(ii) and (iii) to make sure that municipal zoning and other codes are adequate to allow the city or town to make appropriate right of way lease fee recovery. MRSC will be a good place to centralize city and town information about appropriate fees to charge wireless telecommunication service providers who wish to locate facilities within rights of way. To

prevent a standoff - an inability to agree on a fee that effectively could result in a violation of Section 4(2)(b) - GTE insisted on a mandatory arbitration provision. This is incorporated in the paragraph following Section 8(e)(iii).

III. Future Challenges

The passage of ESSB 6676 presents both challenges and opportunities for cities and towns. There are new opportunities for revenue from leases of wireless sites within rights of way and city owned conduits. There are multiple challenges of permitting, public works road improvement planning, etc. The bill was a compromise and no doubt bears some of the hallmarks of one.

A group of city attorneys have been meeting at MRSC to help identify some of the issues presented by this legislation and assemble some model franchises, application forms, etc., which cities and towns may wish to use to come into compliance with this new law. Jim Doherty has been coordinating these efforts. As items are assembled, Jim will post them on MRSC's web page.

Finally, as we contemplate $10 billion IPOs for a single wireless carrier and recall the small army of paid industry lobbyists which cities and counties saw during the three years of negotiations surrounding this bill, it continues to strike me that Washington cities, towns and counties need to rethink how we approach telecommunications legislative issues.

The deployment of advanced telecommunications services is at the heart of the New Economy. The telecommunications industry has millions, if not billions, of dollars at stake in some of these negotiations. We, on the local government side, need to rethink how we will develop legislative strategies. The dissension we witnessed within the ranks of cities over this bill leads me to conclude that local governments ought to consider building a stronger and more permanent network of municipal telecommunications attorneys who can help guide the legislative agenda for cities.

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1 Tim Sullivan is the City Attorney for University Place, Washington. Tim, a licensed ham radio operator, has a longstanding interest in telecommunications issues. He writes about and has spoken at several CLE's on telecommunications and right of way issues. Tim is an active member in the National Association of Telecommunications Officers and Advisors (NATOA); WATOA, its Washington affiliate; and the Rainier Communications Commission, a Pierce County cable television regulatory body. He participated in the city - industry negatiations on SB 6515, HB 2060 and ESSB 6676. Any views expressed herein are personal and do not necessarily represent the views of the City of University Place, its elected officials, officers and staff. Tim can be reached at tim_sullivan@ci.university-place.wa.us.