Council Meeting Date: June 19, 2000 **Agenda Item: 6(a)**

CITY COUNCIL AGENDA ITEM
CITY OF SHORELINE, WASHINGTON

AGENDA TITLE: Summary of 2000 State Legislative Session with 32nd District Delegation
DEPARTMENT: Community and Government Relations
PRESENTED BY: Joyce Nichols, C/GR Manager

EXECUTIVE / COUNCIL SUMMARY

Senator Darlene Fairley, Representative Carolyn Edmonds and Representative Ruth Kagi will be present at your Council meeting to discuss the 2000 session of the State Legislature that adjourned in late April.

Senator Fairley, Representative Edmonds and Representative Kagi will share their impressions of the 2000 session, how the City of Shoreline will be affected by actions taken by the legislature, their assessment of emerging issues for the 2001 session, and respond to questions from your Council.

Overall, the 2000 legislative session should be considered a success for the City of Shoreline primarily due to the support and advocacy of our legislative delegation.

RECOMMENDATION: No formal Council action is required.

Approved By: City Manager LB City Attorney N/A

Council Meeting Date: June 19, 2000 **Agenda Item: 6(b)**

CITY COUNCIL AGENDA ITEM

CITY OF SHORELINE, WASHINGTON

AGENDA TITLE:	Referral to Planning Commission of Proposed Ordinance Establishing New Regulations For Siting Telecommunication Utilities Within The Public Rights- Of-Way.
DEPARTMENT:	City Manager's Office
PRESENTED BY:	Kristoff T. Bauer, Assistant to the City Manager

EXECUTIVE / COUNCIL SUMMARY

The State Legislature recently passed a new law, ESSB 6676, relating to the management of municipal right-of-way which became effective June 8, 2000. Proposed for Council consideration is an ordinance making a number of changes in existing regulations in order to implement this new legislation. On May 8, 2000 your Council adopted a 65-day moratorium on the acceptance of new franchise applications or the processing of existing applications. This moratorium is currently scheduled to end on Wednesday, July 12, 2000. The purpose of this report is to provide Council the results of staff research into this issue and to gain you Council's concurrence that the proposed ordinance should be referred to the Planning Commission.

ESSB 6676 impacts the City's regulation of the right-of-way in two different ways. First, it establishes new terminology and places new state requirements on City regulations relating to the right-of-way. As just one example, the new state law requires the City to allow wireless facilities, e.g. cellular antennas, in our rights-of-way and the City does not currently have any height limitation, notice requirements, or other regulations related to these facilities in the right-of-way. Second, it places new operational requirements on right-of-way permitting, e.g. time limits, notice requirements, and others.

The proposed ordinance predominantly focuses on the first impact by clarifying the regulations that will apply to wireless facility in the City's right-of-way in order to protect the City's interests while allowing these facilities into the right-of-way as required by the new state law. It also clarifies existing franchise application regulations and creates an alternate process right-of-way permitting process to facilitate compliance with new time limits imposed by the state law. This second area of impact is the subject of ongoing staff analysis focused on developing new administrative procedures and resources to address other issues raised by ESSB 6676 and will be the subject of a future presentation to your Council.

In response to the new state regulations, the proposed ordinance (Attachment A) does the following:

Section 1

- Clarifies the City's franchise application process as required by new state law;
- Establishes the Right-of-Way Site Permit as an alternative to the current requirement to get a general franchise (GTE and US West refuse to get one) and subsequent

specific right-of-way permits for each time they work in our right-of-way. The Right of-Way Site Permit is a marriage of the two providing the City some of the benefits of the franchise, but it is a permit (GTE and US West agree that they must comply with the City's permit requirements) that is streamlined enough to ease the administrative burden of allowing some new entrants into the right-of-way.

- ❖ Increases the deposit for getting a franchise agreement from $1,500 to $5,000 due to additional costs incurred by staff to implement new state regulations.

Sections 2 & 3

- ❖ Extends height limitations of adjacent zones into the right-of-way to ensure any new poles are either consistent with scale of neighboring buildings or follow a variance process;
- ❖ Creates a limited exception to those height limitations for facilities placed on existing structures and that do not exceed the diameter of that structure. This allows some co-located camouflaged wireless antennas into the right-of-way without a variance;
- ❖ Prohibits new poles in the right-of-way solely to support wireless facilities thereby eliminating the potential for proliferation of new poles;
- ❖ Clarifies that a franchise (or right-of-way site permit) and other applicable permits are required for wireless facilities located in the right-of-way;
- ❖ Requires support equipment for wireless facilities located in the right-of-way be placed underground to minimize aesthetic impact;

Sections 4 & 5

- ❖ Creates a Right-of-Way Site Permit applicable to utilities that do not hold a franchise thereby providing a mechanism that is less time consuming and burdensome than a franchise while protecting the City's interest in controlling our rights-of-way;

The intent of these changes is to ensure that existing wireless siting policies are applied equally to both private and public property. Right now, most wireless facilities have been on private property. As this technology proliferates, this is expected to change. They are also intended to clarify the City's franchising and right-of-way permitting processes in response to ESSB 6676 and lessons learned over the past few years. It should be noted that sections 2 through 5 amend sections of the proposed development code that have not yet been adopted, but are scheduled for adoption prior to the effective date of the proposed ordinance.

After reviewing all the necessary changes to current and newly adopted City regulations, staff believes that the proposed ordinance has reached a threshold that supports its referral to the Planning Commission as per the City Attorney's recommendation (See Attachment B). The additional time necessary to obtain review by the Planning Commission will require an extension in the current moratorium on the acceptance of new franchise applications adopted May 8, 2000. A moratorium extension has been placed on your Council's June 26th agenda for consideration.

RECOMMENDATION

This item is for discussion purposes only. Staff recommends that Council refer the proposed ordinance to the Planning Commission for its review and recommendation.

Approved By: City Manager JB City Attorney

BACKGROUND

City Policy Direction

Through past discussions and official actions, we believe the City has established a number of implicit policies regarding the management of our right-of-way. As you know, the City's right-of-way represents a valuable asset that is owned by the community. Staff utilizes your Council's past discussion and related ordinances to provide policy guidance for our daily administration of this asset. In summary form, we believe that these policies are:

1. To actively work to protect the City's investment in transportation infrastructure;
2. To ensure the safety and welfare of the public by establishing clear expectations and responsibility for actions within the City's right-of-way;
3. To manage the right-of-way asset for the benefit of it's owners, i.e. the public, by both encouraging the availability of services, and/or providing for appropriate compensation for the use of the right-of-way;
4. To serve related policies such as undergrounding; and,
5. To balance private use of this facility with public uses such as transportation and surface water management.

State and Federal Preemption

The pursuit of these policies occurs in a dynamic environment characterized by shifting state and federal regulation and increasing demands on this limited asset by new business forms. In the simple times of the not too distant past, use of the right-of-way was limited to a few heavily regulated utilities, many of which are often operated by the cities themselves. In this past environment, franchise agreements or other methods of establishing expectations regarding use of the right-of-way were less critical. Municipal authority was clear and city public works, transportation, and utility departments, and the few outside users of the right-of-way worked together on a regular basis. Coordinating activities was both easier to accomplish and less critical. These traditional utilities were stable and usually locally managed.

In 1996, the Federal Telecommunications Act blurred the line between Cable TV and telephone service and established policies focused on bringing new providers into these industries. Regulations on Cable TV were phased out, and a path toward competition in local telephone service mapped. At the same time changes in technology has created increasing demand for new services, creating new entrants and new business forms. It is not unusual for these new entrants to be wholly owned subsidiaries with no assets other than venture capital, no performance history, no local management, and no present revenue source. In the face of this dramatic change, federal law leaves municipal authority to regulate the right-of-way in place, but requires that all potential users be treated equally and that regulations must not be so onerous as to become barriers to entry.

Past State Regulation

Before the enactment of ESSB 6676, the only state law restriction on municipal authority to administer the right-of-way was a restriction on franchise fees included in

RCW 35.21.860. This law restricts the charge of a franchise fee on electrical, gas, and telephone business to one that "recovers actual administrative expenses incurred by a city or town that are directly related to receiving and approving a permit, license, and franchise, [and] to inspecting plans and construction..." These utilities (i.e. electrical, gas, and telephone business) can, in most cases, be subject to a utility tax. The one limitation on applying a utility tax is a restriction on the City's authority to tax another municipality as the City discovered during discussions with Seattle City Light.

State law currently includes a definition of "Telephone Business" and a number of other "Telephone" definitions that are not wholly consistent. We have discussed this ambiguity of whether new business types come within the definition of "Telephone Business" resulting in a restriction of the City's ability to charge a franchise fee with your Council in the past (Metricom is an example that was before your Council on June 12, 2000 for a franchise amendment related to this issue).

Another recent example of this ambiguity in state law regarding the classification of emerging industries are companies that desire to go through Shoreline laying conduit with or without fiber optic cables with no intention of providing service to anyone inside the City. The City's position is that a company must provide service within the City to fit within the definition of "Telephone Business." These companies do not have any customers in the City, so they are not "Telephone Businesses" and the City can charge a franchise fee. Their lack of customers in the City, however, makes it impossible to collect a traditional franchise fee or utility tax (which are both based on gross revenues in the City), so the City has sought other, non-traditional, forms of compensation. The US Crossing franchise (fiber optics down Aurora) provided for an in-kind franchise fee (the installation of conduit for the City's use) in accordance with this position.

State-wide Franchise Grant?

Another wrinkle in the statewide environment is provided by US West and GTE both of which assert that, as descendents of original state telephone monopoly provider, they hold a state wide franchise that exempts them from municipal franchising authority. They will get right-of-way permits when confronted, but refuse to provide information about existing infrastructure or planned infrastructure improvements, which are typically provided for in franchise agreements. This makes administering City right-of-way policy difficult and creates a potential problem in complying with federal requirements to treat similar providers equally.

City Franchises

Upon incorporation, the City of Shoreline was required by state law to recognize the existing franchise rights of current providers for the remaining term of their individual franchises with King County or for 5 years, whichever is less. Some providers operating in the City at the time of incorporation did not hold a King County franchise (US West, GTE, Seattle Water & Sewer, for example). Others held franchises that expired prior to August 31, 2000, the termination of the 5 year maximum period. The City has successfully negotiated new franchise agreements with all these providers except GTE, US West, and the Shoreline Water District, all of which currently operate without a valid franchise.

Infrastructure Information

Unlike cities with a long history, Shoreline has very little information regarding the location of utility facilities in the right-of-way. Cities with that long history have had an opportunity to develop a good database of this kind of information by tracking improvements installed pursuant to their permitting processes. Gaining this historical information from the utilities is a key part of franchise discussions. While the new franchises that have been completed to date give the City an opportunity to access this kind of information, the City has not to date had the resources to create and manage a database of information regarding the location of utility infrastructure in the right-of-way. The City is working to develop the capacity to utilize this geographic information database in the near future. Yet, US West and GTE will still be the lone holdouts – refusing to cooperate by providing the City with information regarding existing and/or planned facilities.

Current City Franchising Process

In 1996, the City adopted Shoreline Municipal Code (SMC) Chapter 12.25 relating to Right-Of-Way Use and Franchise Agreements. This chapter established the City policy of requiring the completion of some form of general agreement (typically a franchise agreement) protecting the City's interests before allowing entities to install and maintain facilities in the right-of-way. The inclusion of a Right-Of-Way Use Agreement (an alternate form of general authorization to enter the right-of-way) option in lieu of the standard Franchise Agreement was an attempt to create an alternative acceptable to US West and GTE. The intent of the Right-of-Way Use agreement was to provide general requirements and benefits for both parties without rising to the level of a franchise agreement that these two companies refused to sign. Staff worked with US West's operational staff in 1997 to develop a Right-Of-Way Use Agreement, but US West's legal representation ended discussions stating the proposed agreement looked too much like a franchise.

Both GTE and US West obtain City right-of-way permits for specific actions in the right-of-way on a site-by-site intermittent basis. Full enforcement of City regulations would both disrupt telephone service to our citizens and prompt a legal confrontation. Thus, we have not vigorously pursued this issue. The City has been working with both providers to gain compliance with the City's permit requirements without resorting to a full enforcement action.

Wireless In The Right-of-Way

In regards to wireless facilities, the City's practice has been to require all entities who want to install facilities in the right-of-way to first obtain a franchise. The only wireless provider to complete this process to date is Metricom who operates a number of small repeater antennas (about the size of a shoebox) attached to streetlights within the City. Zoning regulations do not automatically apply to the right-of-way. For this reason, current height restrictions and other regulations relating to the location and permitting of wireless facilities do not apply to the right-of-way. This is addressed by the new proposed right-of-way regulations.

ANALYSIS

ESSB 6676 – The New "Right-of-Way Bill"
The telecommunications and Cable TV industries had a number of complaints that they used to argue in support of restricting municipal authority to regulate right-of-way. These arguments can be summarized by one word, "uncertainty." Uncertainty in requirements for access to municipal right-of-way, uncertainty and inconsistency in the requirements placed upon them, and uncertainty in the availability and timing of permits to operate in the right-of-way, were all key issues raised by these industries. Their attempts to address these concerns focused in 1999 on legislation removing local regulatory authority over the right-of-way. The failure of that effort resulted in some compromise in the 2000 legislation, but the goal of increased clarity and certainty did not change. Unfortunately, while these industries sought clarity in municipal processes and timelines, they were not interested in clarifying municipal authority.

The following analysis is divided into two sections. The first identifies issues raised by the change in state law and the second describes how the proposed City ordinance responds to those issues raised that can be addressed through changes in City regulations.

Impacts and Issues Created by ESSB 6676

New Definitions
ESSB 6676 (See Attachment C) introduces a number of new terms into the dialogue of right-of-way management that are not consistent with the City's past regulations and creates some additional ambiguities in state regulations.

"Master Permit" is a new term defined as "the agreement ... whereby a city ... grant[s] general permission to a service provider to enter, use, and occupy the right-of-way..." According to this definition our City franchises and the right-of-way use agreement provided for by SMC 12.25 are both "Master Permits."

"Use Permit" is defined as the specific authorization to do work in the right-of-way at a specific location. This is the same as the "right-of-way permit" utilized by our code. ESSB 6676 establishes different process requirements for "Master Permits" (franchises) and "Use Permits" (right-of-way permits) that are discussed in the next section.

"Service Provider" is a new term in ESSB 6676 generally defining entities affected by that bill. It is a very broad definition that is not consistent with existing definitions of "Telephone Business" or other definitions related to telecommunications already included in state law. ESSB 6676 incorporates this new term into a number of existing state law provisions, including the provisions that restrict municipal authority to charge a franchise fee, that also reference "Telephone Business." Inconsistencies between these definitions are not resolved, creating new ambiguities in state regulation and municipal authority.

During bill drafting sessions on the definition "Service Provider," cities added language indicating that only entities actually providing service within the city would be "Service

Providers." This was done to exclude pass through conduit or fiber optic companies from this definition thereby excluding them from the terms of the bill. The position of cities at the table was that a company should either be a Telephone Business and a Service Provider subject to a utility tax, or be neither a Telephone Business nor a Service Provider and be subject to a franchise fee. Unfortunately, the final language apparently is not as clear on this issue as the cities hoped. Shoreline has already been contacted by a company, Metromedia, stating the position that this definition gives it the opportunity to be a Service Provider and not a Telephone Business and, therefore, exempt from both utility taxes and franchise fees. A number of cities are considering legal action to clarify this definition.

Process Requirements

ESSB 6676 establishes new franchise and right-of-way permit processing restrictions. During discussions on this bill, the industry argued for a 30-day limit on the time to process all permitting actions including franchises and right-of-way permits. Cities stuck to the distinction between franchises (Master Permits) and right-of-way or construction permits (Use Permits) making it clear that franchises, which are adopted by an ordinance, could not be provided in a 30-day period because of their complexity and the legislative process. As a result, separate sets of requirements for Master Permits (franchises) and Use Permits (right-of-way permits) are established by ESSB 6676.

Master Permit Process Requirements: ESSB 6676 affirms municipal authority to require a service provider to obtain a master permit (franchise), except those service providers with an existing statewide franchise grant[1]. In order to do so, however, a city must meet the following conditions:

- Application requirements must be available in writing:
- A completed application must be acted upon within 120 days, except:
  - With agreement of the applicant; or
  - If Council action on the application cannot be obtained within that period.
- Denial of a master permit must be supported by substantial evidence in a written record.

Service providers are also given the right to seek injunctive relief to enforce these requirements.

Use Permit Process Requirements: In regards to a Use Permit, the City must "act" upon a complete application within 30 days unless:

- The applicant agrees otherwise; or
- The applicant does not hold a Master Permit (franchise agreement).

"Act," however, is defined as either:

- A final decision to grant, condition, or deny the permit; or

[1] GTE and US West assert that they have an existing statewide franchise grant. ESSB 6676 does not say that they do, but will exempt them from municipal authority to require a Master Permit if they prove that they do have an existing statewide franchise grant.

- A written notice to the applicant of the time required to make a final decision and why the additional time is needed.

The City has a pretty good record of providing these right-of-way permits within 30 days and the notice option provides a safety valve for unusual situations or periods of high demand.

ESSB 6676 also has language allowing the service provider to request that a right-of-way permit application be acted upon in less than 30 days if the City's master permit (franchise) does not contain procedures for expedited approvals. All of Shoreline's franchises contain standard language regarding "emergency" permits.

The bill also contains a general statement that cities cannot "unreasonably deny the use of the right-of-way." This is the industry's attempt to gain a basis to challenge any city regulation that they find too onerous. The scope and impact of this general restriction is unknown.

Coordination Requirements "Duties and Opportunities"

ESSB 6676 confirms municipal authority and responsibility to coordinate and manage activities in the right-of-way. It places a new duty on cities to notify current and potential utilities the use municipal right-of-way of projects that may affect their future use of that right-of-way. If that notice and an opportunity to coordinate are not provided, then the City cannot deny a future application for a use permit based upon the failure to coordinate with city projects. To illustrate, the proposed development code contains a restriction on the cutting of asphalt within 5 years of its installation. This restriction could not provide a basis to deny permits requested by entities not notified in advance of the original pavement installation and who are not provided an opportunity to get their infrastructure in place prior to that paving. While the City already notifies franchise holders of overlay projects, the adequacy of that notice procedure and how best to ensure coordination between roads management (Public Works) and right-of-way permitting (PADS) are operational issues under review.

ESSB 6676 also clarifies some of the responsibilities of service providers. The most notable clarification is a duty to provide cities information and plans reasonably necessary to satisfy their duty to manage the right-of-way, i.e. comply with the notice and coordination duty discussed above. Taking advantage of this opportunity will require the City to begin to develop a resource of information regarding the use of the right-of-way. The new state law gives the City new leverage in attempts to get GTE and US West to provide the City information about the location of their poles, wires, and equipment as this database of information is developed and utilized to manage the right-of-way.

ESSB 6676 also clarifies the authority of cities to require utilities to relocate their facilities in the right-of-way. US West has been intermittently refusing to relocate its facilities and/or sending cities bills for the cost of relocating its facilities over the last few years. Shoreline joined a number of cities in a lawsuit against US West seeking to clarify that they did not have the right to seek recovery from cities[2]. In addition, many

[2] The cities prevailed at the trial court and the issue is currently on review by the 9th Circuit Court of Appeals.

cities have had difficulty getting utilities to relocate facilities in a timely manner leading to delays in capital improvement projects.

The bill clarifies that the City has the authority to require service providers to relocate their facilities within the right-of-way as of a specific date at the service provider's expense. The only exceptions to this authority are for underground relocations, and for relocations within 5 years of a previous relocation. If the service provider owns the utility pole, then the city requiring underground relocation must pay the difference between aerial relocation and underground relocation. If a city requires a second relocation within a 5-year period, then it must pay for the second relocation. This also places additional importance on the City's ability to track permit applications and coordinate utility construction activities with City capital improvement projects.

Wireless Facilities In The Right-of-Way

Regarding wireless telecommunication facilities, ESSB 6676 places two limitations on municipal authority stating that a city may not adopt regulations that:

- Prohibit all wireless or wireline facilities within the City: or
- Prohibit all wireless or wireline facilities within the City's right-of-way.

The City is in compliance with the first restriction through the adoption of wireless regulations relating to zoned property that does allow wireless facilities. Shoreline, also, does not currently prohibit the location of wireless facilities in the right-of-way, but the process for gaining authority to do so and applicable regulations are unclear.

Compensation For Use Of Right-of-Way

ESSB 6676 impacts compensation for use of the right-of-way in three ways. First, it amends RCW 35.21.860, which contains existing restriction on municipal authority to charge franchise fees, adding "Service Providers" to the existing list (electrical, gas, and telephone business) of those who cannot be charged a franchise fee as discussed above. Our position is that, in the application of this section, a "Service Provider" is a "Telephone Business."

Second, it provides a limited new authority to charge a site-specific fee for the utilization of the right-of-way for the installation of wireless facilities. This fee can be charged on:

- New structures in the right-of-way for providing wireless services (examples include a new monopole, and/or support equipment for an antenna):
- Replacement structures greater than 60 feet in height (if they have to replace an existing utility pole to make it strong enough to support the wireless facility, and the combined height of pole and antenna exceeds 60 feet): or,
- Facilities attached to structures owned by the City.

Other than a few street lights and some intersection signal poles, which are owned by the City, all of the utility poles are owned by Seattle City Light, GTE, or US West.

Third, it allows cities to require service providers to install conduit for the benefit of the city, but requires that the city pay for the cost of that installation and guarantee that the conduit will not be used by the city to provide Cable TV or telecommunications services as a subsidized competitor of the private providers. In addition, if the city allows another

company to utilize the conduit to provide Cable TV or telecommunications service, then it must charge a rate above a minimum rate set by the installer. This could make future agreements like that between Shoreline and US Crossing for the installation of conduit without charge or restriction unlawful. If, however, cities are successful in asserting that pass through companies, like US Crossing, are not "Service Providers," then the City could seek to duplicate this arrangement with similar companies in the future.

Proposed Ordinance

The proposed ordinance enacts recommended changes in City regulations in response to the issues raised by ESSB 6676. Not all of the issues discussed above can be addressed with new or amended regulations. These issues may require operational or administrative changes, both the subject of continued staff exploration, or may persist pending clarification through legal action or future legislative action.

New Definitions

The first section of the proposed ordinance includes several changes to SMC 12.25. One significant change is the removal of the potential for a right-of-way use agreement. We initially considered replacing this term with the new term included in ESSB 6676, "Master Permit." GTE contacted staff shortly after the bill was signed asking about ways to improve their relationship with our permitting department. We recommended that they enter into a Master Permit and, at their request, developed a draft document for their review. They cancelled meetings set to discuss the draft and the City eventually received a letter stating GTE has an existing state-wide grant and that they "will not sign the master agreement or agree to its terms" (See Attachment D). The letter does state that GTE will comply with the City's site specific permitting requirements. This is similar to the City's experience with US West, discussed above, regarding efforts to develop a right-of-way use agreement.

US West and GTE are the only companies that refuse to get a standard franchise. Given the City's experience with these companies, staff believes that the right-of-way use agreement has proved to be a failed attempt at compromise and that creating a Master Permit alternative to a franchise would be similarly unsuccessful at getting either GTE or US West to form a general agreement with the City. Given that the City's current terminology (i.e. franchises and right-of-way permit) are consistent with the new state definitions of Master Permit and Use Permit, no changes in existing terminology are recommended.

Process Requirements

As discussed above, ESSB 6676 requires that the franchise application process and requirements be available in written form. To facilitate the administrative development of a written application packet consistent with ESSB 6676, the proposed ordinance revises SMC 12.25 clarifying the City's franchising process, removing sections that, through experience of the last few years, have proved unworkable or are best covered by tailored language included in specific franchise agreements.

The requirement of ESSB 6676 that all franchise applications be acted upon within 120 days does raise operational issues. Currently all franchises are processed by staff in the City Manager's office. As such, this process is not tracked by the City's permit

tracking system and processes for determining application completeness and tracking costs have not been created. In addition, while City staff does make a concerted effort to be responsive to requests for franchises and has received positive feedback from a number of utilities, meeting this time requirement in the face of other City priorities and the increasing number of franchise applicants is problematic.

Staff is working on developing a proposal to add operational resources and change administrative procedures to address these concerns for discussion with your Council at a future workshop meeting. In addition, the proposed ordinance creates a new alternative process expected to be less administratively burdensome.

Current regulations require a general permission (franchise) and a specific site authorization (right-of-way permit). The general permission deals with general terms and conditions, indemnification, ongoing commitments to repair, requirements to provide information, or pay fees for example. The specific site authorization deals with specific traffic control requirements, and time, place, and manner restrictions. This two step process works well for most utilities, because it reduces the scope and, therefore, the effort required to process day to day right-of-way permits by placing general term and conditions in the franchise.

This process does not work for those who will not get the general permission (GTE & US West) because the City never gets the ongoing commitments normally provided by a franchise. Nor does it function efficiently for those who plan to enter the right-of-way only once or very rarely (a wireless provider planning only one antenna within the City for example). The proposed ordinance creates a new process that combines the parts of the two step process into a single step process, called a Right-of-Way Site Permit. Obtaining this permit will be more cumbersome than a standard right-of-way permit, but less cumbersome then the existing two step process.

For GTE and US West, the Right-of-Way Site Permit will include ongoing commitments similar to those provided by other utilities on all new activities in the right-of-way. This permit will be more administratively burdensome, so is likely to cost more (fees are based on actual time spent processing each application and these types of permits are expected to take longer to process). While the City's goal of a 30-day processing time for right-of-way permits remains, the 120-day or 30-day state time limits included in ESSB 6676 are not applicable to Right-of-Way Site Permits. Applicants for this kind of permit will not hold a Master Permit (franchise), so the 30 day limit to act on a Use Permit included in ESSB 6676 does not apply.

For single facility operators, the Right-of-Way Site Permit, which does not require Council action on an ordinance or publication, provides an opportunity to get through the process quicker, with less expense consistent with the goals of ESSB 6676. Staff would be responsible to ensure that activities permitted through this process are conditioned and approved in accordance with City policy. The burden on City resources would also be reduced.

The proposed changes to SMC 12.25 also include an increase in the deposit required with a franchise application from $1,500 to $5,000. This increase is in recognition of past costs associated with the adoption of a new franchise (publishing a standard

franchise agreement as required by state law costs about $2,500 depending on length) and the potential need for additional resources to meet the required timeline. Since this amount is a deposit against actual processing costs for most applicants rather than a flat fee, it is believed to be fairly safe from an I-695 challenge. Even for those applicants for whom this amount would be a fee, it appears unlikely that this change could be successfully challenged[3].

Coordination Requirements "Duties and Opportunities"
The issues raised by ESSB 6676 discussed in this section above cannot be addressed by new or amended regulation. They will require changes in management practices and resource allocations currently that are currently under development.

Wireless Facilities In The Right-of-Way
Sections 2 & 3 of the proposed ordinance (Attachment A) amend existing City wireless facility siting regulations scheduled to be re-enacted as part of the City's proposed Development Code. The proposed changes clarify the application of these siting procedures to proposed facilities in the public right-of-way making it clear that applicants for these facilities must comply with the City's franchise requirements (SMC 12.25) or the new Right-of-Way Site Permit process and building code and/or environmental regulations.

The proposed ordinance also extends the height limitations of adjacent zones into the right-of-way and requires public notice procedures for right-of-way permits for all but the smallest wireless facilities[4]. The intent of these provisions is to ensure the public an opportunity to comment on proposed facilities and to subject high impact facilities to the same variance procedures as utilized on adjacent private property. The only difference being that no administrative appeal of a denial is provided for the applicant. The rationale for not providing an appeal is that a denial of a permit to utilize public property does not interfere with a private property ownership interest. The City is simply deciding how its property can be used. An appeal of an approval by a citizen (an owner, if you will) is still provided for as a check of the administrative process.

An exemption to the height restriction of the adjacent zone is provided for wireless facilities attached to existing structures in the right-of-way that exceed those limitations. This exemption is only available to wireless facilities that do not exceed the diameter of the pole to which they are attached and don't extend the height by more than 15 feet. The City's policy of promoting co-location and camouflage, and reasonably supporting the improvement of service to the community as embodied in the prior regulation form the basis for this exemption. Most utility poles already exceed the height limitation of the adjacent zone. Without this exemption, every facility proposed to be located on top of an existing utility pole would require a variance. With this exemption, facilities that resemble an extension of the pole will not require a variance, but will still be subject to the standard permit requirements.

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[3] Current law has invalidated the public vote requirement of this initiative. Should the lower court's ruling be overturned, a retroactive order would be unlikely. Should this still occur refunding the few deposits that we may get between now and then would not be administratively difficult.

[4] The City has never received a complaint regarding the shoebox size radios utilized by Metricom.

Consistent with the City's undergrounding ordinance, no new poles are allowed in the right-of-way, thus requiring new facilities to be located on existing structures. In addition support equipment is required to be placed underground.

Compensation For Use Of Right-of-Way

ESSB 6676 does provide a limited opportunity for a new fee on wireless facilities. Your Council previously amended SMC 12.25.090 in late 1999 to clearly require compensation for use of the right-of-way when consistent with state law. Opportunities to assess this fee, however, are expected to be limited. The proposed ordinance does not allow new poles and supporting equipment is often placed on adjacent private property, and the City owns very few structure of sufficient height to be attractive to wireless providers. Regardless, provisions for this fee, when appropriate, will be included in the wireless provider's franchise agreement or right-of-way site permit.

SUMMARY

The intent of the proposed amendment is to combine a package of regulation changes to assist the City in complying with the requirements of ESSB 6676. These include adding specific regulations regarding wireless facilities in the right-of-way predominantly via incorporating existing regulations for private land by reference, clarifying the City's franchising process, and defining an alternative permitting process for limited use of the right-of-way. These changes begin the process of bringing the City into compliance with this new regulation. Additional administrative steps will need to be taken and additional resources may be needed to mitigate some of the risks and to fully capitalize on some of the opportunities provided by ESSB 6676.

RECOMMENDATION

This item is for discussion purposes only. Staff recommends that Council refer the proposed ordinance to the Planning Commission for its review and recommendation.

ATTACHMENTS

Attachment A – Proposed Ordinance Establishing New Regulations For Siting Telecommunication Utilities Within The Public Rights- Of-Way

Attachment B – City Attorney Memorandum Regarding Planning Commission

Attachment C – Engrossed Substitute Senate Bill 6676

Attachment D – Letter from David L. Mielke, GTE, National Municipal Affairs Manager

Attachment A

Proposed OrdinanceEstablishing New Regulations For Siting Telecommunication Utilities Within The Public Rights- Of-Way

Attachment A

ORDINANCE NO. ____

AN ORDINANCE OF THE CITY OF SHORELINE, WASHINGTON, ESTABLISHING NEW REGULATIONS FOR SITING TELECOMMUNICATION UTILITIES WITHIN THE PUBLIC RIGHTS-OF-WAY; AND AMENDING SHORELINE MUNICIPAL CODE CHAPTER 12.25 AND ORDINANCE 238, EXHIBIT "A" SECTIONS II 3, IV 3 B (W) 5, 6 AND VII 5 B, D.

WHEREAS, ESSB 6676 passed by the State Legislature in the 2000 Regular Session places new restrictions on municipal authority to grant access to the City's right-of-way for telecommunication and cable utilities; and

WHEREAS, ESSB 6676 requires the City to allow wireless telecommunication facilities into the City's right-of-way in accordance with City zoning regulations, and

WHEREAS, the City Council passed a moratorium on the acceptance and processing of new franchise applications for telecommunications service providers on May 8, 2000 to allow review of right-of way franchise and permit procedures in light of ESSB 6676 requirements; and

WHEREAS, the procedures of this ordinance are consistent with the requirements of ESSB 6676 and the federal Telecommunications Act of 1996; now therefore

THE CITY COUNCIL OF THE CITY OF SHORELINE, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1. Amendment. Shoreline Municipal Code Chapter 12.25 is amended as set as set forth in Exhibit A attached hereto and incorporated herein.

Section 2. Amendment. Ordinance 238, Exhibit "A" Section IV 3 B (W) 5 is amended by adding a new subsection 5 b to read as follows:

5. GROUND-MOUNTED WIRELESS TELECOMMUNICATION FACILITIES STANDARDS.

a. [unchanged]

b. No new ground-mounted wireless telecommunication facilities are allowed within the City rights-of-way.

c.~~b~~ [unchanged]

Section 3. Amendment. Ordinance 238, Exhibit "A" Section IV 3 B (W) 6 is amend to read as follows:

6. STRUCTURE-MOUNTED WIRELESS TELECOMMUNICATION FACILITIES STANDARDS.

a. Wireless telecommunication facilities located on structures other than buildings, such as light poles, flag poles, transformers, existing monopoles, towers and/or tanks shall be designed to blend with these structures and be mounted on them in an inconspicuous manner. (Figures 9 and 10.)

b. The maximum height of structure-mounted facilities shall not exceed the height limits specified for each zoning designation in this title; provided the facility may extend up to 15 feet above the top of the structure on which the facility is installed, including those built at or above the maximum height allowed in a specific zone, so long as the diameter of any portion of a facility in excess of the allowed zoning height does not exceed the shortest diameter of the structure at the point of attachment.

c. Wireless telecommunication facilities located on structures other than buildings shall be painted with nonreflective colors in a color scheme that blends with the background against which the facility will be viewed.

d. Wireless telecommunication facilities located on structures within the City of Shoreline rights-of-way shall ~~comply with right of way use permit requirements (Chapter 12.25 SMC)~~ satisfy the following requirements:

(1) Only wireless telecommunications providers holding a valid franchise in accordance with Chapter 12.25.030 shall be eligible to apply for a right-of-way permit, which shall be required in addition to other permits specified in this chapter prior to installation. Obtaining a right-of-way site permit in accordance with Title 20 may be an alternative to obtaining both a franchise and a right-of-way permit for a single facility at a specific location.

(2) All supporting ground equipment locating within a public right-of-way shall be placed underground, or if located on private property shall comply with all development standards of the applicable zone.

(3) Right-of-Way Permit applications are subject to the public notice requirements specified in Table 2 for Conditional Use Permits, except permits for those facilities that operate at 1 watt or less and are less than 1.5 cubic feet in size proposed by a holder of a franchise that includes the installation of such wireless facilities as part of providing the services authorized thereby.

(4) An applicant shall have no right to appeal an administrative decision denying a variance from height limitations for wireless facilities to be located within the right-of-way.

(5) Co-location on existing structures shall be required where feasible for all facilities locating in public rights-of-way. In the event that co-location is not proposed a detailed report substantiating lack of suitable co-location sites in the area shall be required as part of the conditional use permit application.

(6) To determine allowed height under subsection 6(b) above, the zoning height of the zone adjacent to the right-of-way shall extend to the centerline except where the right-of-way is classified by the zoning map.

Section 4. Amendment. Ordinance 238, Section VII 5 B *Regulated Activities* is amended to read as follows:

B. Regulated Activities

B-1 A Right-of-Way ~~right of way~~ Permit shall be required for all construction and usage activities within the public right-of-way as described in this section. Additional requirements for the construction and usage of the right-of-way by utility providers are located in Section 6 *Utility Standards* ~~the utilities standards in the Engineering Section~~. A financial guarantee for all construction and activities within the right-of-way shall be required, unless the director determines such a guarantee to be unnecessary.

B-2 A Right-of-Way Site Permit is a specific class of Right-of-Way Permit described in this section that may be available to entities who do not hold a valid City franchise in accordance with SMC 12.25 and are not exempted therefrom by City regulations.

B-3 City right-of-way shall not be privately improved or used for access or other purposes and no development approval shall be issued that requires use of privately maintained city right-of-way unless a permit has been issued for such use. Permits issued pursuant to this section shall not be construed to convey any vested right or ownership interest in any City right-of-way. Every right-of-way permit shall state on its face that any City right-of-way subject to the permit ~~opened pursuant to this section~~ shall be open to use by the general public except in those cases where specific conditions require the closure of the right-of-way to the public for safety reasons.

Section 5. Amendment. Ordinance 238, Section VII 5 D is amended as follows:

D. Usage of Right-of-Way

The purpose of this section is to ensure that structure or activities do not unreasonably obstruct, hinder, jeopardize, injure, or delay the use of the right-of-way for its primary functions: vehicular and pedestrian travel.

D-1.1 [No Change]

D-1.2 Specific activities requiring Right of Way Ppermits include, but are not limited to, the following:

. . .

a. special and unique structures, such as fountains, clocks, flag poles, wireless telecommunication facilities, awnings, marquees, street furniture, kiosks, signs, banners, mailboxes, and decorations;

. . .

D-1.3 A Right-of Way Site Permit may be granted for the installation of facilities as defined in SMC 12.25 at a specific location or a limited installation path , either of which requiring little or no ongoing entry rights to maintain installed facilities and where the need to obtain future permits to enter the right-of-way is limited, or when

the applicant does not desire to obtain a City Franchise. The applicability of a Right-of-Way Site Permit to a particular activity proposed for the City's right-of-way or to a particular applicant shall be an administrative decision without appeal right based upon the following criteria:

a. The scope of the activities included in the requested permit;

b. The impact of these activities on the right-of-way;

c. The ease of resolving issues related to proposed activities in the conditions of the requested permit; and

d. State and federal law.

D-1.4 The conditions of Right-of-Way Site Permits granted under this section shall include, but not be limited to, the following:

a. Scope, terms, and conditions for anticipated future maintenance activities associated with facilities installed pursuant to this type of permit; and,

b. Ongoing obligations to the City including, but not limited to, relocation, restoration, abandonment, indemnification, compensation for the use of the right-of-way consistent with SMC 12.25.090, and, for personal wireless facilities, such additional compensation allowed by state law.

Section 6. Severability. Should any section, paragraph, sentence, clause or phrase of this ordinance, or its application to any person or circumstance, be declared unconstitutional or otherwise invalid for any reason, or should any portion of this ordinance be pre-empted by state or federal law or regulation, such decision or preemption shall not affect the validity of the remaining portions of this ordinance or its application to other persons or circumstances.

Section 7. Effective Date and Publication. A summary of this Ordinance consisting of the title shall be published in the official newspaper and the Ordinance shall take effect five days after publication.

PASSED BY THE CITY COUNCIL ON JULY __, 2000

_____
Mayor Scott Jepsen

ATTEST:

_____
Sharon Mattioli
City Clerk

APPROVED AS TO FORM:

_____
Ian Sievers
City Attorney

Date of Publication: _____, 2000
Effective Date: _____, 2000

Exhibit A

Chapter 12.25

RIGHT-OF-WAY ~~USE AGREEMENTS~~ FRANCHISES

Sections:

12.25.010 Policy.

It is the policy of the city of Shoreline to require all entities installing or maintaining facilities in, on, above or below the public right-of-way to comply with an orderly process for obtaining a franchise agreement ~~or right-of-way use agreement~~ from the city. [Ord. 83 § 1, 1996]

12.25.020 Definitions.

The following terms used in this chapter ~~contained herein~~, unless otherwise indicated, shall be defined as follows:

A. "Activities" includes the installation or maintenance of any assets, structures, or facilities in the public right-of-way~~, but shall specifically not include activities authorized by a "special limited [illegible]" or "limited right-of-way permit."~~.

B. "Applicant" means the entity requesting the grant of a franchise ~~or right-of-way use~~ agreement. The applicant shall identify itself as requested herein by providing the following information:

1. Identification of a natural person shall include:

a. Name;

b. Title, if appropriate;

c. Business address;

d. Phone number;

e. Fax number if available.

2. Identification of an entity that is not a natural person:

a. Official name (i.e., the name used to identify the entity in the records of the Washington Secretary of State, or under which the entity has been granted a federal tax identification number if it is not required to file with the Secretary of State);

b. Name and address of agent registered with the Secretary of State for the acceptance of legal service if applicable;

c. Washington State unified business identifier or, if that is not available, federal tax identification number.

C. "Demonstration" means the presentation of any of the following as evidence tending to support the satisfaction of the enumerated requirement:

1. Verifiable historical data;

2. Studies or reports based upon disclosed data sources;

3. Other forms of demonstrations specifically enumerated in this chapter.

D. "Facility" includes, but is not limited to, all structures, equipment, and assets for the operation of railroads and other routes for public conveyances, for poles, conduits, tunnels, towers and structures, pipes and wires and appurtenances thereof for transmission and distribution of electrical energy, signals and other methods of communication, for gas, steam and liquid fuels, for water, sewer and other private and publicly owned and operated systems for public service.

E. "Franchise" means a contractual agreement, under the authority of RCW 35A.47.040, between a utility and the city setting forth the terms and conditions under which the city grants the utility authority to install and maintain facilities in the public right-of-way.

F. "Grantee" means an applicant that has been granted a franchise ~~or right-of-way use~~ agreement.

~~G. "Right-of-way use agreement" means a contractual agreement between a utility and the city setting forth the terms and conditions under which the city grants the utility authority to install and maintain facilities in the public right-of-way.~~

GH. "Utility" means persons or private or municipal corporations owning or operating, or proposing to own or operate, facilities that comprise a system or systems for public service. [Ord. 83 § 2, 1996]

12.25.030 Franchise ~~or right-of-way use agreement~~ required.

It shall be unlawful to construct, install, maintain or operate any facility in, on, above or below the public right-of-way without a valid franchise ~~or right-of-way use~~ agreement obtained pursuant to the provisions of this chapter and subsequent amendments. No one ~~utility~~ shall be permitted to perform activities in the public right-of-way without first obtaining a permit pursuant to ~~Chapter 12.10 SMC, Roads and bridges, or pursuant to~~ the city of Shoreline Development Code~~, when adopted~~. No ~~utility~~ one shall be granted a permit to perform any activities in, on, under, or above the public right-of-way without first obtaining and maintaining a valid franchise ~~or right-of-way use~~ agreement. All permits to work in, on, under, or above the

public right-of-way will be restricted to those practices specifically enumerated in the applicant's franchise ~~or right-of-way use~~ agreement except:

A. A permit to perform activities in the right-of-way other than the installation, construction or maintenance of Facilities or to satisfy conditions of any land-use approval related to private property adjacent to the right-of-way.

B. Entities without a valid City franchise may still be granted a Right-of-way Site Permit pursuant to Title 20.

~~A. In regards to any entity exempted from municipal franchising authority by the operation of state or federal law. Said entity must still comply with the permit requirements established by Chapter 12.10 SMC, and shall be eligible for permits as required by that chapter only if it has obtained from the city a valid "right-of-way use agreement." The procedures for gaining a "right-of-way use agreement" shall be those set out in this chapter including any applicable fee.~~

~~B. The city council may, by resolution, authorize the city manager, or his/her designee, to execute a letter of agreement exempting entities operating in the city on the effective date of the ordinance codified in this chapter from the franchise or right-of-way use agreement requirements of this section for a period not greater than one year from the effective date of the ordinance codified in this chapter. [Ord. 83 § 3, 1996]~~

12.25.040 Filing of applications.

Applications for a franchise ~~or right-of-way use~~ agreement will be considered pursuant to the procedures set forth in this chapter and amendments hereto. For good cause the city council may elect by resolution to waive any requirement set forth herein unless otherwise required by applicable law.

~~A. An application may be filed at any time or pursuant to a request for Proposals ("RFP") issued by the city.~~

~~B. The city may request additional information from an applicant for a franchise or right-of-way use agreement at any time.~~

~~C~~A. Applications shall be delivered to the city clerk, and shall be accompanied by a deposit of ~~$1,~~5,000 or, if the application is in response to a Request For Proposals (RFP) issued by the city, such other amount as set forth in the RFP. The city will apply the proceeds of the deposit, ~~or any other filing fees received~~, against the costs associated with the city's evaluation of the pending application to the extent such is required by RCW 35.21.860. The applicant shall be liable to the city for all costs reasonably associated with the processing of its application. The city shall invoice the applicant for such costs at least on a quarterly basis. All invoiced costs must be paid in full prior to the effective date of any franchise ~~or right-of-way use~~ agreement or other agreement entered into pursuant to this chapter. Nothing in this subsection will have the effect of limiting the applicant's liability for application review costs to the amount of the deposit.

D. If required by RCW 35.21.860, the city shall prepare a statement of the amount of deposit funds applied to the costs of application review as of the date the franchise ~~or right-of-way use~~ agreement is granted, or otherwise ruled on, by the Shoreline city council and refund any deposit amount in excess of costs as of that date within ~~3~~60 days thereof. The refund shall be in the form of a check or other draft on city accounts and, unless otherwise requested in writing by the

applicant, payable and mailed to the person or entity designated by the applicant. [Ord. 83 § 4, 1996]

12.25.050 Content of application.

An application made pursuant to a RFP shall contain all the information required thereby. Where an application is not filed pursuant to an RFP, it shall contain, at a minimum, the following:

A. All applicants that are not fully owned by, or a division of, a governmental agency, whether municipal, state, or federal, shall provide the following:

1. Identification of the applicant and proposed system owner, and, if the applicant or proposed owner is not a natural person, a list of all partners or stockholders holding 10 percent or more ownership interest in a grantee and any parent corporation; provided, however, that when any parent corporation has in excess of 1,000 shareholders and its shares are publicly traded on a national stock exchange, then identification of the parent corporation and its relationship to the subsidiary, if any, shall be provided.~~a list of the 20 largest stockholders of the voting stock of such corporation shall be disclosed. An application shall also include, if applicable, the identification of all officers and directors and shall state any other primary business affiliation of each.~~

2. An affirmed statement of whether the applicant, or any person controlling the applicant, or any affiliate of said controlling person, including any officer of a corporation or major stockholder thereof, has voluntarily filed for relief under any provision of the bankruptcy laws of the United States (Title 11 of the United States Code), had an involuntary petition filed against it pursuant to the Bankruptcy Code, been subject of any state law insolvency proceeding such as a transfer for the benefit of creditors, had a franchise~~or right-of-way use~~ agreement revoked, or has been found guilty by any court or administrative agency in the United States of:

a. A violation of a security or antitrust law; or

b. A felony or any other crime involving moral turpitude.

If so, the application shall identify any such person and fully explain the circumstances.

3. A demonstration of the applicant's ~~technical, legal and~~ financial ability to construct and operate the proposed system, including, at the city's option:

a. For a sole proprietorship or partnership:

i. A detailed, complete, and audited financial statement of the applicant, duly certified as true and correct by an executive officer of the company, for the five fiscal years last preceding the date of the application hereunder (three years may be substituted if five years of data is not available); or

~~b~~ii. A letter or other acceptable evidence in writing from a recognized lending institution or funding source, addressed to both the applicant and the city, setting forth the basis of a study performed by such lending institution or funding source, a statement of the criteria used to evaluate that basis, and a clear statement of its intent as a lending institution or

funding source to provide whatever capital shall be required by the applicant to construct and operate the proposed system in the city; or

~~e~~iii. A statement from an independent certified public accountant, certifying that the applicant has available sufficient free, net and uncommitted cash resources to construct and operate the proposed system in the city.

b. For a corporation publicly traded on a national stock exchange:

i. The most recent public annual report filed with the Securities Exchange Commission, or

ii. For a wholly owned subsidiary, the most recent public annual report filed with the Securities and Exchange Commission of the parent corporation along with a statement of the parents responsibility for the obligations of the subsidiary.

c. For any applicant, demonstration of an ability to obtain a bond sufficient, as determined by the Director, to ~~ensure~~ adequate performance under the terms of the franchise.

~~4. A complete list of all systems in which the applicant, controlling entity of applicant, subsidiary or affiliate of applicant or its controlling entity, or a principal thereof, holds an equity interest. For each system listed, provide the following information as appropriate:~~

~~a. Name of the system operator and location of franchise;~~

~~b. Relationship to the applicant;~~

~~c. Franchise term;~~

~~d. Date of expiration;~~

~~e. Number of subscribers;~~

~~f. Number of dwelling units passed;~~

~~g. Number of route miles;~~

~~h. Name of franchising authority, including the address, phone number, and name of the person responsible for oversight of the franchise or right-of way use agreement.~~

B. All applicants shall provide the following:

1. A description of the physical facility proposed, the area to be served, a description of the technical characteristics of the existing service facilities and a map in a digital format acceptable to the city of the proposed and existing service system and distribution scheme.

~~C~~2. A description of how any construction will be implemented, identification of areas having above ground or below ground facilities and the proposed construction schedule.

~~D~~3. A description of the proposed services to be provided over the system.

~~E~~4. Information as necessary to demonstrate compliance with all relevant requirements contained in this chapter.

~~F. A demonstration of how the proposal is reasonable to meet current and future community needs and interests.~~

~~G. A demonstration that the proposal is designed to be consistent with all federal and state requirements.~~

~~H~~5. An affidavit of the applicant, or duly authorized person, certifying, in a form acceptable to the city, the truth and accuracy of the information contained in the application and acknowledging the enforceability of application commitments.

~~I~~C. In the case of an application by an existing grantee for a renewed franchise ~~or right of way use~~ agreement, a demonstration that said grantee has substantially complied with the material terms of the existing agreement and with applicable law.

~~J~~D. Other information that the city, or its agents, may reasonably request of the applicant in a timely manner. [Ord. 83 § 5, 1996]

12.25.060 Applicant representatives.

Any person or entity who submits an application under this chapter shall have a continuing obligation to notify the city, in writing, of the names, addresses and occupations of all persons who are authorized to represent or act on behalf of the applicant in those matters pertaining to the application. The requirement to make such disclosure shall continue until the city has approved or disapproved an applicant's application or until an applicant withdraws its application. [Ord. 83 § 6, 1996]

12.25.070 Consideration of applications.

A. The city will consider each application for a new or renewed franchise ~~or right of way use~~ agreement where the application is found to be in substantial compliance with the requirements of this chapter and any applicable RFP. In evaluating an application, the city will consider, among other things: (1) the applicant's past service record in the city and in other communities, (2) the nature of the proposed facilities and services, (3) the proposed area of service, (4) the proposed rates (if applicable), (5) and whether the proposal would ~~adequately~~ serve the public needs and the overall interests of the city residents.

In addition, where the application is for a renewed franchise ~~or right of way use~~ agreement, the city shall consider whether: (1) the applicant has substantially complied with the material terms of the existing franchise ~~or right of way use~~ agreement and with applicable law, (2) the quality of the applicant's service, response to consumer complaints, and billing practices, (3) the applicant has the financial, legal and technical ability to provide the services, facilities, and equipment as set forth in the application, and (4) the applicant's proposal is reasonable to meet the future community needs and interests, taking into account the cost of meeting such needs and interests.

B. If the city determines that an applicant's proposal, including the proposed service area, would serve the public interest, it may grant a franchise ~~or right of way use~~ agreement to the applicant, subject to terms and conditions as agreed upon between the applicant and the city. No franchise ~~or right of way use~~ agreement shall be deemed granted unless and until an agreement has been

fully executed by all parties. The franchise ~~or right-of-way use~~ agreement will constitute a contract, freely entered into, between the city and the grantee. Any such franchise ~~or right-of-way use~~ agreement must be approved by ordinance of the city council in accordance with applicable law.

C. In the course of considering an application for a renewed franchise ~~or right-of-way use~~ agreement, the city council shall adhere to all requirements of applicable state and federal law. ~~Any denial of an application for a renewed franchise or right-of-way use agreement shall be based on one or more adverse findings made with respect to the factors described in subsection A of this section, pursuant to the requirements of then-applicable federal law.~~ Neither grantee nor the city shall be deemed to have waived any right it may have under federal or state law by participating in a proceeding pursuant to this subsection. [Ord. 83 § 7, 1996]

12.25.080 Length of agreement.

The period of a franchise ~~or right-of-way use~~ agreement shall be as specified in the specific agreement, but it shall not exceed 15 years. If a grantee seeks authority to operate in the city beyond the term of its franchise ~~or right-of-way use~~ agreement, it shall file an application for a new agreement not earlier than 36 nor later than 30 months prior to the expiration of its term. [Ord. 83 § 8, 1996]

12.25.090 Franchise ~~and right-of-way use agreement~~ fee.

A. All franchises ~~or right-of-way use~~ agreements executed by the city shall include terms requiring a grantee to pay a fee in consideration of the privilege granted under a franchise ~~or right-of-way use~~ agreement to use the public right-of-way and the privilege to construct and/or operate in the city. Said franchise fee shall provide the city with compensation equal to six percent of the gross revenues generated by the grantee within the city unless limited by state or federal law; provided, however, that this fee may be offset by any utility tax paid by grantee or in-kind facilities or services provided to the city. Any grantee that does not provide revenue-generating services within the city shall provide alternate compensation as set out in the franchise ~~or right-of-way use~~ agreement.

~~B. A grantee shall file, no later than May 30th of each year, the grantee's financial statements for the preceding year. If the city reasonably determines, after examination of the financial statements provided, that a material underpayment of franchise fees may exist, the city may require a grantee to submit a financial statement audited by an independent public accountant. If the city's determination of underpayment is ultimately correct, the grantee shall bear the cost of such audit.~~

~~C. The city shall have the right, upon reasonable notice and consistent with the provisions of SMC 12.25.100, to inspect a grantee's income records, to audit any and all relevant records, and to recompute any amounts determined to be payable under a franchise and this chapter.~~

~~D~~B. In the event that any franchise payment is not received by the city on or before the applicable due date, interest shall be charged from such date at the statutory rate for judgments.

~~E~~C. In the event a franchise is revoked or otherwise terminated prior to its expiration date, a grantee shall file with the city, within 90 days of the date of revocation or termination, a verified

or, if available, an audited financial statement showing the gross revenues received by the grantee since the end of the previous year and shall make adjustments at that time for the franchise fees due up to the date of revocation or termination.

~~F~~D. Nothing in this chapter shall limit the city's authority to tax a grantee, or to collect any fee or charge permitted by law, and no immunity from any such obligations shall attach to a grantee by virtue of this chapter. [Ord. 221 § 1, 1999; Ord. 83 § 9, 1996]

~~12.25.100 Required reports.~~

~~To facilitate timely and effective enforcement of this chapter and any franchise or right-of-way use agreement, and to develop a record for purposes of determining whether to renew any franchise or right-of-way use agreement, the city may, upon reasonable notice, require reports as specified in this section or as otherwise provided in the franchise or right-of-way use agreement.~~

~~A. Annual Report. Unless otherwise set forth in the franchise or right-of-way use agreement, no later than May 30th of each year, if requested by the city, a grantee shall file a written report with the city, which may include:~~

~~1. A summary of the previous calendar year's activities in development of its system.~~

~~2. A verified or, if available, an audited financial statement, which may include at the city's request a statement of income, a statement of retained earnings, a balance sheet, a statement of sources and applications of funds, a fixed asset statement showing for each account or category, the original cost and accumulated depreciation balances and activity, and a depreciation statement showing the detailed calculation of depreciation expense for the year. The statement shall include notes that specify all significant accounting policies and practices upon which it is based (including, but not limited to, depreciation rates and methodology, overhead and intrasystem cost allocation methods, and basis for interest expense). A summary shall be provided comparing the current year with previous years since the beginning of a franchise or right-of-way use agreement. The statement shall contain a summary of franchise fee payments and any adjustment thereto. In any year the city requires an audited financial statement pursuant to this subsection, and an audited financial statement in compliance with this subsection is provided by a grantee, that grantee shall not be required to submit another audited financial statement for that year which otherwise may be required by SMC 12.25.090. If reasonably deemed necessary by the city, it may request additional financial information reviewed or prepared by an independent auditor approved by the city. If the city's determination of a financial error is ultimately correct, the grantee shall bear the cost of such audit.~~

~~3. A current statement of cost of any construction by component category.~~

~~4. Information reasonably requested by the city for the purpose of enforcing any consumer protection and customer service requirements applicable to grantees, including a summary of complaints by subscribers and users, identifying the number and nature of complaints and their disposition.~~

~~5. If a grantee is a corporation, a list of officers and members of the board and the officers and board members of any parent corporation.~~

~~6. A list of all partners or stockholders holding 10 percent or more ownership interest in a grantee and any parent corporation; provided, however, that when any parent corporation has in~~

~~excess of 1,000 shareholders and its shares are publicly traded on a national stock exchange, then a list of the 20 largest stockholders of the voting stock of such corporation shall be disclosed.~~

~~7. A copy of a grantee's written customer service rules and regulations, as well as technical requirements applicable to users of the system.~~

~~8. Any additional information related to the operation of the grantee's system as reasonably requested by the city based on demonstrated legitimate need.~~

~~B. Unless otherwise set forth in the franchise or right-of-way use agreement, the city may specify the form and details of all reports, with grantee given an opportunity to comment in advance upon such forms and details. The city may change the filing dates for reports upon reasonable request of a grantee.~~

~~C. A grantee shall, annually, make available to the city for inspection a construction plan and schedule for the following 24 months.~~

~~D. Unless otherwise specified in the franchise or right-of-way use agreement, a grantee shall make available to the city for inspection and copying, as the city may request, a copy of all maps and charts of asset and system locations prepared by or for the grantee during the duration of the franchise or right-of-way use agreement.~~

~~E. The city shall have the right to inspect all construction and installation work performed by a grantee subject to this chapter as it shall find necessary to insure compliance with governing ordinances and the franchise or right-of-way use agreement, and shall have the right to inspect a grantee's system during normal business hours and upon reasonable advance notice to the grantee. [Ord. 83 § 10, 1996]~~

12.25.11~~0~~0 Franchise~~-or right-of-way use~~ agreement revocation.

A. In addition to all other rights and powers retained by the city under this chapter and any franchise~~-or right-of-way use~~ agreement issued pursuant thereto, the city council reserves the right to revoke and terminate a franchise~~-or right-of-way use~~ agreement and all rights and privileges of a grantee in the event of a substantial violation or breach of its terms and conditions. A substantial violation or breach by a grantee shall include, but shall not be limited to, the following:

1. An uncured violation of any material provision of this chapter or an uncured breach of any material provision of a franchise~~-or right-of-way use~~ agreement or other agreement issued thereunder, or any material rule, order or regulation of the city made pursuant to its power to protect the public health, safety and welfare;

2. An intentional evasion or knowing attempt to evade any material provision of a franchise~~-or right-of-way use~~ agreement or practice of any fraud or deceit upon the system customers or upon the city;

3. Failure to begin or substantially complete any system construction or system extension as set forth in a franchise~~-or right-of-way use~~ agreement;

4. Failure to provide the services promised in the application or specified in a franchise~~-or right-of-way use~~ agreement, or a reasonable substitute therefor;

5. Failure to restore service after 10 consecutive days of interrupted service, except when approval of such interruption is obtained from the city;

6. Misrepresentation of material fact in the application for, or during negotiations relating to, a franchise ~~or right-of-way use~~ agreement;

7. A continuous and willful pattern of grossly inadequate service and failure to respond to legitimate customer complaints;

8. An uncured failure to pay franchise ~~or right-of-way use~~ agreement fees as required by the franchise ~~or right-of-way use~~ agreement.

B. None of the foregoing shall constitute a substantial violation or breach if a violation or breach occurs which is without fault of a grantee or occurs as a result of circumstances beyond a grantee's reasonable control. A grantee shall not be excused by economic hardship nor by nonfeasance or malfeasance of its directors, officers, agents or employees; provided, however, that damage to equipment causing service interruption shall be deemed to be the result of circumstances beyond a grantee's control if it is caused by any negligent act or unintended omission of its employees (assuming proper training) or agents (assuming reasonable diligence in their selection), or sabotage or vandalism or malicious mischief by its employees or agents. A grantee shall bear the burden of proof in establishing the existence of such conditions.

C. Except in the case of termination pursuant to subsection (A)(5) of this section, prior to any termination or revocation, the city shall provide a grantee with detailed written notice of any substantial violation or material breach upon which it proposes to take action. A grantee shall have a period of 60 days following such written notice to cure the alleged violation or breach, demonstrate to the city's satisfaction that a violation or breach does not exist, or submit a plan satisfactory to the city to correct the violation or breach. If at the end of said 60-day period the city reasonably believes that a substantial violation or material breach is continuing and a grantee is not taking satisfactory corrective action, the city may declare a grantee in default, which declaration must be in writing. Within 20 days after receipt of a written declaration of default from the city, a grantee may request, in writing, a hearing before a "hearing examiner" as described in Chapter 2.15 SMC. The hearing examiner shall conduct a full public proceeding in accordance with applicable procedures. The hearing examiner's decision may be appealed to any court of competent jurisdiction.

The City may, in its discretion, provide an additional opportunity for a grantee to remedy any violation or breach and come into compliance with this chapter so as to avoid the termination or revocation. [Ord. 83 § 11, 1996]

12.25.1~~1~~20 Enforcement.

Any violation of any provision, or failure to comply with any of the requirements of this chapter, shall be a civil violation subjecting the offender to a civil penalty of up to $100.00 for each of the first five days that a violation exists and up to $500.00 for each subsequent day that a violation exists. Notice and order and hearing procedures, other than civil penalties, shall correspond to those established for the enforcement of Development Code violations under Title 20 ~~land use regulations by Chapter 12.10 SMC~~. Payment of any such monetary penalty shall not relieve any person of the duty to correct the violation as set forth in the applicable notice and order. Any

violation existing for a period greater than 30 days may be remedied by the city at the violator's expense. [Ord. 83 § 12, 1996]

12.25.1320 Notice.

All notices required or permitted hereunder shall be in writing and shall either be delivered in person or sent by certified or registered mail, return receipt requested, and shall be deemed received on the date of personal delivery or five days after being deposited in the mail, postage prepaid. [Ord. 83 § 13, 1996]

12.25.1430 Federal pre-emption.

Nothing in this chapter shall authorize the city to impose burdens or apply standards on the applicant beyond those permitted by federal law. [Ord. 83 § 14, 1996]

12.25.1540 Conflicts of law.

This chapter shall control over any conflicting provision of any ordinance passed prior to the effective date of the ordinance codified in this chapter. ~~The Shoreline City Development Code, when adopted, shall control over any conflicting provision(s) of this chapter.~~ [Ord. 83 § 16, 1996]

Attachment B

City Attorney Memorandum
Regarding Planning Commission

CITY OF SHORELINE

Memorandum

DATE: June 9, 2000

TO: Kristoff T. Bauer, Assistant to the City Manager

FROM: Ian Sievers, City Attorney

RE: Proposed Amendments to Title 20

CC: Tim Stewart, Planning & Development Services Director

The City has established a Planning Commission pursuant to RCW Chapter 35A.63.020 and assigned it responsibilities for recommending amendments to development regulations which implement its GMA Comp Plan and to conduct all public hearings required to be held in the course of amending the zoning code. (SMC 2.20.20.060 A, K). Sections of Title 20, the City's newly enacted Unified Development Code, regulating wireless telecommunication facilities and right-of-way permits are being amended. This code, and these sections, are development regulations which implement the utilities and land use elements of the Comp Plan (e.g. the land use element shall control general distribution and extent of uses of land for public utilities). A hearing with notice to the public is required under pre-GMA law (RCW 35.63.100 (2)) and the GMA (RCW 36.70A.140). For these reasons the regulations of the proposed ordinance must be reviewed by the Planning Commission and a recommendation forwarded to Council for final action.

Attachment C

Engrossed Substitute Senate Bill 6676

ENGROSSED SUBSTITUTE SENATE BILL 6676

AS AMENDED BY THE HOUSE

Passed Legislature - 2000 Regular Session

State of Washington 56th Legislature 2000 Regular Session

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

Read first time 02/04/2000.

AN ACT Relating to the use of city or town rights of way by telecommunications and cable television providers; amending RCW 35.21.860; adding a new section to chapter 35A.21 RCW; and adding a new chapter to Title 35 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Cable television service" means the one-way transmission to subscribers of video programming and other programming service and subscriber interaction, if any, that is required for the selection or use of the video programming or other programming service.

(2) "Facilities" means all of the plant, equipment, fixtures, appurtenances, antennas, and other facilities necessary to furnish and deliver telecommunications services and cable television services, including but not limited to poles with crossarms, poles without crossarms, wires, lines, conduits, cables, communication and signal lines and equipment, braces, guys, anchors, vaults, and all attachments, appurtenances, and appliances necessary or incidental to

the distribution and use of telecommunications services and cable television services.

(3) "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 facilities. This definition 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. 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.

(4) "Personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services, as defined by federal laws and regulations.

(5) "Right of way" means land acquired or dedicated for public roads and streets, but does not include:

(a) State highways;

(b) Land dedicated for roads, streets, and highways not opened and not improved for motor vehicle use by the public;

(c) Structures, including poles and conduits, located within the right of way;

(d) Federally granted trust lands or forest board trust lands;

(e) Lands owned or managed by the state parks and recreation commission; or

(f) Federally granted railroad rights of way acquired under 43 U.S.C. Sec. 912 and related provisions of federal law that are not open for motor vehicle use.

(6) "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. Service provider includes the legal successor to any such corporation, company, association, joint stock association, firm, partnership, person, city, or town.

(7) "Telecommunications service" means the transmission of information by wire, radio, optical cable, electromagnetic, or other

similar means for hire, sale, or resale to the general public. For the purpose of this subsection, "information" means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or any other symbols. For the purpose of this chapter, telecommunications service excludes the over-the-air transmission of broadcast television or broadcast radio signals.

(8) "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.

NEW SECTION. **Sec. 2.** 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.

NEW SECTION. **Sec. 3.** (1) 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 obtain a master permit for wireline facilities.

(a) 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.

(b) 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.

(2) 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.

(a) For the purpose of this section, "act" means that the city makes the decision to grant, condition, or deny the use permit, which may be subject to administrative appeal, or notifies the applicant in writing of the amount of time that will be required to make the decision and the reasons for this time period.

(b) Requirements otherwise applicable to holders of master permits shall be deemed satisfied by a holder of a cable franchise in good standing.

(c) Where the master permit does not contain procedures to expedite approvals and the service provider requires action in less than thirty days, the service provider shall advise the city or town in writing of the reasons why a shortened time period is necessary and the time period within which action by the city or town is requested. The city or town shall reasonably cooperate to meet the request where practicable.

(d) A city or town may not deny a use permit to a service provider with an existing state-wide grant to occupy the right of way for wireline facilities on the basis of failure to obtain a master permit.

(3) 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.

(4) 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 and burden of proof shall be as set forth in RCW 36.70C.130.

(5) A city or town shall:

(a) In order to facilitate the scheduling and coordination of work in the right of way, 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 or town. A city is not liable for damages for failure to provide this notice. Where the city has failed to provide notice of plans to open the right of way consistent with

this subsection, a city may not deny a use permit to a service provider on the basis that the service provider failed to coordinate with another project.

(b) Have the authority to require that facilities are installed and maintained within the right 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, and welfare.

(6) A service provider shall:

(a) Obtain all permits required by the city or town for the installation, maintenance, repair, or removal of facilities in the right of way;

(b) Comply with applicable ordinances, construction codes, regulations, and standards subject to verification by the city or town of such compliance;

(c) Cooperate with the city or town in ensuring that facilities are installed, maintained, repaired, and removed within the right 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, and welfare;

(d) Provide information and plans as reasonably necessary to enable a city or town to comply with subsection (5) of this section, including, when notified by the city or town, the provision of advance planning information pursuant to the procedures established by the city or town;

(e) Obtain the written approval of the facility or structure owner, if the service provider does not own it, prior to attaching to or otherwise using a facility or structure in the right of way;

(f) Construct, install, operate, and maintain its facilities at its expense; and

(g) Comply with applicable federal and state safety laws and standards.

(7) Nothing in this section shall be construed as:

(a) Creating a new duty upon city or towns to be responsible for construction of facilities for service providers or to modify the right of way to accommodate such facilities;

(b) Creating, expanding, or extending any liability of a city or town to any third-party user of facilities or third-party beneficiary; or

(c) Limiting the right of a city or town to require an indemnification agreement as a condition of a service provider's facilities occupying the right of way.

(8) Nothing in this section creates, modifies, expands, or diminishes 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 purposes.

NEW SECTION. **Sec. 4.** (1) A city or town shall not adopt or enforce regulations or ordinances specifically relating to use of the right of way by a service provider that:

(a) Impose requirements that regulate the services or business operations of the service provider, except where otherwise authorized in state or federal law;

(b) Conflict with federal or state laws, rules, or regulations that specifically apply to the design, construction, and operation of facilities or with federal or state worker safety or public safety laws, rules, or regulations;

(c) Regulate the services provided based upon the content or kind of signals that are carried or are capable of being carried over the facilities, except where otherwise authorized in state or federal law; or

(d) Unreasonably deny 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.

(2) Nothing in this chapter, including but not limited to the provisions of subsection (1)(d) of this section, limits the authority of a city or town to regulate the placement of facilities through its local zoning or police power, if the regulations do not otherwise:

(a) Prohibit the placement of all wireless or of all wireline facilities within the city or town;

(b) Prohibit the placement of all wireless or of all wireline 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; or

(c) Violate section 253 of the telecommunications act of 1996, P.L. 104-104 (110 Stat. 56).

(3) This section does not amend, limit, repeal, or otherwise modify the authority of cities or towns to regulate cable television services pursuant to federal law.

NEW SECTION. **Sec. 5.** (1) A city or town shall not place or extend a moratorium on the acceptance and processing of applications, permitting, construction, maintenance, repair, replacement, extension, operation, or use of any facilities for personal wireless services, except as consistent with the guidelines for facilities siting implementation, as agreed to on August 5, 1998, by the federal communications commission's local and state government advisory committee, the cellular telecommunications industry association, the personal communications industry association, and the American mobile telecommunications association. Any city or town implementing such a moratorium shall, at the request of a service provider impacted by the moratorium, participate with the service provider in the informal dispute resolution process included with the guidelines for facilities siting implementation.

NEW SECTION. **Sec. 6.** (1) Cities and towns may require service providers to relocate authorized facilities within the right of way when reasonably necessary for construction, alteration, repair, or improvement of the right of way for purposes of public welfare, health, or safety.

(2) Cities shall notify service providers as soon as practicable of the need for relocation and shall specify the date by which relocation shall be completed. In calculating the date that relocation must be completed, cities shall consult with affected service providers and consider the extent of facilities to be relocated, the services requirements, and the construction sequence for the relocation, within the city's overall project construction sequence and constraints, to safely complete the relocation. Service providers shall complete the relocation by the date specified, unless the city, or a reviewing court, establishes a later date for completion, after a showing by the service provider that the relocation cannot be completed by the date specified using best efforts and meeting safety and service requirements.

(3) Service providers may not seek reimbursement for their relocation expenses from the city or town requesting relocation under subsection (1) of this section except:

(a) Where the service provider had paid for the relocation cost of the same facilities at the request of the city or town within the past five years, the service provider's share of the cost of relocation will be paid by the city or town requesting relocation;

(b) Where aerial to underground relocation of authorized facilities is required by the city or town under subsection (1) of this section, for service providers with an ownership share of the aerial supporting structures, the additional incremental cost of underground compared to aerial relocation, or as provided for in the approved tariff if less, will be paid by the city or town requiring relocation; and

(c) Where the city or town requests relocation under subsection (1) of this section solely for aesthetic purposes, unless otherwise agreed to by the parties.

(4) Where a project in subsection (1) of this section is primarily for private benefit, the private party or parties shall reimburse the cost of relocation in the same proportion to their contribution to the costs of the project. Service providers will not be precluded from recovering their costs associated with relocation required under subsection (1) of this section, provided that the recovery is consistent with subsection (3) of this section and other applicable laws.

(5) A city or town may require the relocation of facilities at the service provider's expense in the event of an unforeseen emergency that creates an immediate threat to the public safety, health, or welfare.

NEW SECTION. **Sec. 7.** A city or town may require that a service provider that is constructing, relocating, or placing ducts or conduits in public rights of way provide the city or town with additional duct or conduit and related structures necessary to access the conduit, provided that:

(1) The city or town enters into a contract with the service provider consistent with RCW 80.36.150. The contract rates to be charged should recover the incremental costs of the service provider. If the city or town makes the additional duct or conduit and related access structures available to any other entity for the purposes of providing telecommunications or cable television service for hire,

sale, or resale to the general public, the rates to be charged, as set forth in the contract with the entity that constructed the conduit or duct, shall recover at least the fully allocated costs of the service provider. The service provider shall state both contract rates in the contract. The city or town shall inform the service provider of the use, and any change in use, of the requested duct or conduit and related access structures to determine the applicable rate to be paid by the city or town.

(2) Except as otherwise agreed by the service provider and the city or town, the city or town shall agree that the requested additional duct or conduit space and related access structures will not be used by the city or town to provide telecommunications or cable television service for hire, sale, or resale to the general public.

(3) The city or town shall not require that the additional duct or conduit space be connected to the access structures and vaults of the service provider.

(4) The value of the additional duct or conduit requested by a city or town shall not be considered a public works construction contract.

(5) This section shall not affect the provision of an institutional network by a cable television provider under federal law.

Sec. 8. RCW 35.21.860 and 1983 2nd ex.s. c 3 s 39 are each amended to read as follows:

(1) No city or town may impose a franchise fee or any other fee or charge of whatever nature or description upon the light and power, or gas distribution businesses, as defined in RCW 82.16.010, or telephone business, as defined in RCW 82.04.065, or service provider for use of the right of way, except ((~~that~~)):

(a) A tax authorized by RCW 35.21.865 may be imposed ((~~and~~)):

(b) A fee may be charged to such businesses or service providers that recovers actual administrative expenses incurred by a city or town that are directly related to receiving and approving a permit, license, and franchise, to inspecting plans and construction, or to the preparation of a detailed statement pursuant to chapter 43.21C RCW;

(c) Taxes permitted by state law on service providers;

(d) Franchise requirements and fees for cable television services as allowed by federal law; and

(e) A site-specific charge pursuant to an agreement between the city or town and a service provider of personal wireless services acceptable to the parties for:

(i) The placement of new structures in the right of way regardless of height, unless the new structure is the result of a mandated relocation in which case no charge will be imposed if the previous location was not charged;

(ii) The placement of replacement structures when the replacement is necessary for the installation or attachment of wireless facilities, and the overall height of the replacement structure and the wireless facility is more than sixty feet; or

(iii) The placement of personal wireless facilities on structures owned by the city or town located in the right of way. However, a site-specific charge shall not apply to the placement of personal wireless facilities on existing structures, unless the structure is owned by the city or town.

A city or town is not required to approve the use permit for the placement of a facility for personal wireless services that meets one of the criteria in this subsection absent such an agreement. If the parties are unable to agree on the amount of the charge, the service provider may submit the amount of the charge to binding arbitration by serving notice on the city or town. Within thirty days of receipt of the initial notice, each party shall furnish a list of acceptable arbitrators. The parties shall select an arbitrator; failing to agree on an arbitrator, each party shall select one arbitrator and the two arbitrators shall select a third arbitrator for an arbitration panel. The arbitrator or arbitrators shall determine the charge based on comparable siting agreements involving public land and rights of way. The arbitrator or arbitrators shall not decide any other disputed issues, including but not limited to size, location, and zoning requirements. Costs of the arbitration, including compensation for the arbitrator's services, must be borne equally by the parties participating in the arbitration and each party shall bear its own costs and expenses, including legal fees and witness expenses, in connection with the arbitration proceeding.

(2) Subsection (1) of this section does not prohibit franchise fees imposed on an electrical energy, natural gas, or telephone business, by contract existing on April 20, 1982, with a city or town, for the duration of the contract, but the franchise fees shall be considered

taxes for the purposes of the limitations established in RCW 35.21.865 and 35.21.870 to the extent the fees exceed the costs allowable under subsection (1) of this section.

NEW SECTION. **Sec. 9.** This act shall not preempt specific provisions in existing franchises or contracts between cities or towns and service providers.

NEW SECTION. **Sec. 10.** A new section is added to chapter 35A.21 RCW to read as follows:

Each code city is subject to the requirements and restrictions regarding facilities and rights of way under this chapter.

NEW SECTION. **Sec. 11.** Sections 1 through 7 and 9 of this act constitute a new chapter in Title 35 RCW.

--- END ---

Attachment D

Letter from David L. Mielke, GTE, National Municipal Affairs Manager

May 8, 2000

RECEIVED
MAY 12 2000
City Manager's Office

GTE Service Corporation
600 Hidden Ridge
Irving, TX 75038

Kristoff T. Bauer
Assistant to the City Manager
17544 Midvale Avenue North
Shoreline, WA 98133-4921

Dear Mr. Bauer:

GTE has reviewed the City of Shoreline Right of Way Use Agreement. While SB6676 allows cities to seek master use permits, it does not allow cities to require master use permits from companies, such as GTE, which have a historic state grant to use city rights of way without such a master use permit.

The City of Shoreline agreement is inapplicable to GTE as GTE has an existing state-wide grant. Therefore, GTE will not sign the master agreement or agree to its terms. However , to the extent that site specific permitting requirements are in accordance with state and federal law, GTE will comply with the City of Shoreline's site specific permitting requirements in order to construct and maintain GTE's facilities that are located in the rights-of-way.

If you have any questions please call me at 972-718-3435.

Sincerely,

David L. Mielke
National Municipal Affairs Manager

c: Judy Endejan
Jeff Maldonado
Mary Beth Scherer
Mark Simonson