

Memorandum

To: Chairman and Commissioners

Date: June 7, 2004

From: Nina Gruen
Chair, CTC Airspace Advisory Committee

File No: Ref # 4.1
Legislation
ACTION

Ref: AAC Recommendation for Commission Consideration Regarding Upcoming Legislation on Caltrans Telecommunications Program

Issue:

Should the Commission take action on Assembly Bill 1874 (Cohn), a bill that:

- states the Legislature's intent to promote the accelerated deployment of next-generation broadband networks in California, irrespective of the technological platform used to deploy those services in California, whether through wireless, Internet, cable, satellite, or telecommunications networks.

In order to support the goal of accelerated deployment of information and advanced communications services, state entities should ensure prompt access to public lands by expediting and streamlining rights-of-way access for the deployment of information and advanced communications services infrastructure.
- proposes to have the Department of Transportation (Department) approve or deny an application for an encroachment permit within 45 days of receiving a completed permit from specified telephone, telegraph and cable television operators. The current approval timeframe for all applicants is 60 days.
- would entitle a communications provider to a permit, renewable annually, for purposes of operation, repair, maintenance, or minor operation of its facilities and service connections that do not require excavation located or installed in state highways.
- retains the rights of telephone or telegraph companies to construct transmission lines and related fixtures along and upon any public road or highway or across waterways, but not in ways which impede or disturb the public use of such roads or waterways (Public Utilities Code Section 7901).

Recommendation:

The Airspace Advisory Committee (AAC) recommends that the Commission request the author of AB 1874 amend the bill to clarify that the Department shall determine the amount of consideration for the use of the state's controlled-access highway rights-of-way by a telephone, telegraph company or telecommunications provider, as permitted by Federal law.

Background:

Existing state law authorizes:

- the Department to negotiate with those seeking access to state-owned highway rights-of-way and to determine the amount of consideration for the use of the right-of-way.

- the Department to issue encroachment permits for the location in the right-of-way of any structures or fixtures necessary for telegraph, telephone, or electric power lines, as well as other appurtenances at, above or below ground.
- tele phone or telegraph companies to construct transmission lines and related fixtures along and upon any public road or highway or across waterways, but not in ways which impede or disturb the public use of such roads or waterways (Section 7901 of the California Public Utilities Code). (Caltrans argues that this section does not apply to controlled-access freeways and expressways because it was enacted prior to the advent of the freeway system. A public highway, at the time of enactment of the state law, was not defined as a controlled-access freeway).

The Federal Telecommunications Act of 1996 (Act) removed economic and legal barriers to entry in the telecommunications industry. The Act preserves the right of a state or local government to manage its rights-of-way and obtain "fair and reasonable" compensation on a competitively neutral basis. In response to the 1996 Act, the Federal Highway Administration (FHWA) relaxed its longstanding prohibition on granting longitudinal utility access to Interstate Highway System rights-of-way for telecommunications providers. The FHWA left to each state the responsibility for determining the appropriate access policy for its Interstate facilities and other limited-access highways.

Litigation:

The Department is currently in litigation with SBC (Pacific Bell v. State of California (USDC, ND Cal) 02-02500 JSW) regarding whether a telecommunication provider can use, without paying compensation, the rights-of-way on the state's controlled-access expressways and freeways. SBC contended the Department was legally barred from obtaining compensation that exceeded actual costs and later filed suit in federal court, under the Federal Telecommunications Act, seeking to enjoin collection of the fee. On July 31, 2001, SBC's motion for preliminary injunction to enjoin collection of the fee was denied and the Department's motion to have all state law claims dismissed was granted. In a similar case, the federal court ruled in March 2002 that the City of Portland could legally collect compensation pursuant to the Federal Telecommunications Act. The Portland case is now pending before the Ninth Circuit (Qwest v. City of Portland, (USDC, Oregon) Civ. No. 01-1005-JE). The bill as currently drafted appears to be at odds with current federal court deliberations and would establish state law that would authorize the use of the State's rights-of-way within its controlled-access expressways and freeways without consideration.

Since 2000, the Department has entered into nine license agreements and collected over \$10 million for the use of controlled-access freeway rights-of-way. In addition, other states such as Massachusetts, New York, Rhode Island, Maryland, Virginia, Louisiana, Illinois, Michigan, Minnesota, Wisconsin, Iowa, Utah, and Arizona have allowed fiber optics within the ir freeway rights-of-way and have received compensation. It should be noted the Department does, however, provide the use of its rights-of-way on its conventional highways (non-access controlled highways) for no charge.

Fiscal Impact:

The Department has received about \$10 million from telecommunication companies as compensation for placement of telecommunication equipment (fiber optic cable) in controlled-access highway right-of-ways. The Department has also received about \$11.2 million in compensation from companies using its rights-of-way for its wireless. If the bill passes, it could affect the state's ability to collect future compensation from companies and may also result in companies seeking reimbursement for past compensation payments. This bill could also impact the Department in terms of increased personnel needed to process the encroachment permits under the proposed timeframe of 45-day period rather than the current 60-day period.