State and Local Government Role in Facilitating Access to Poles, Ducts, and Conduits in Public Rights-of-Way

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With the deployment of new communications technologies and the entry of new providers, the public spaces available for service providers to build their networks are becoming increasingly in demand and crowded. The problem is exacerbated when electric and telephone utilities, which have long used public land for their networks, refuse to negotiate with new entrants, such as broadband providers, for rights to use the utilities’ existing poles, ducts, and conduits located in public rights-of-way. Such refusals force the new entrant to install its own poles along streets where poles already exist and dig up roads and sidewalks rather than simply running its cables through existing underground routes. Local residents are unnecessarily inconvenienced, and the appearance of communities can suffer.\(^1\)

Just as important, the cost of providing services goes up when incumbent utilities refuse to lease available space. A new fiber optic network can be strung on existing poles at a cost in the range of $2 to $4 per linear foot, but if the new entrant has to install its own poles or dig its own trenches, the cost can be ten times as much.\(^2\) The process of trying to get access to existing poles, ducts, and conduits is itself an obstacle to communications competition and innovation. The Federal Communication Commission recognized this reality in its 2010 National Broadband Plan when it found that securing rights to access infrastructure in public rights-of-way can be a “difficult and time-consuming process that discourages private investment.”\(^3\)

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\(^3\) See FCC, The National Broadband Plan, [http://www.broadband.gov/plan/6-infrastructure/](http://www.broadband.gov/plan/6-infrastructure/). See Don’t Blame Big Cable. It’s Local Governments that Choke Broadband Competition, Wired.com,
There are straightforward solutions to address this problem. Pursuant to the federal pole attachments statute (Section 224 of the Communications Act), states are able to assert jurisdiction and require all owners of poles, ducts, and conduits to make those facilities available to new entrants on a non-discriminatory basis and at reasonable (cost-based) rates, terms, and conditions. In addition, state and local governments can condition use of public rights-of-way to require incumbent users of this space to share their poles, ducts, and conduits on a non-discriminatory basis and at reasonable (cost-based) rates, terms, and conditions.

Some states have adopted their own pole attachments statutes, including ones that enable new classes of communications service providers to access incumbent facilities. For instance, in 2008, under a new state statute aimed at promoting broadband deployment, the Vermont Public Service Board required utilities to afford nondiscriminatory access to entities seeking to attach their facilities to poles to offer Internet access. Similarly, Massachusetts requires that utilities permit all attachments for the transmission of intelligence via wireless communication or any television technology, in addition to telephone and cable services. Tennessee extended the federal access mandate beyond cable operators, to include all video service providers.


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4 This paper is focused only on pole, ducts, and conduits in public right-of-way. States and local governments can use their police power to regulate access to this infrastructure in private right-of-way so long as it has a sufficient basis for such action and provides just compensation where there is a taking. See Loretto v. Teleprompter, 458 U.S. 419 (1982). Many states have adopted laws mandating access by providers of cable service to multi-dwelling units or giving tenants a right to access the provider of their choice. Texas has enacted a law mandating access for providers of telecommunications services.

5 See 47 U.S.C. § 224. This provision addresses attachments by providers of cable service and telecommunications service and broadband service commingled with these services. States may use their authority apart from this provision to address attachments by standalone broadband and non-cable video providers.

6 Section 224 also applies to owners of poles, ducts, and conduits in their own private right-of-way, albeit the statute does not cover all owners of this infrastructure.

7 Section 253 of the Communications Act (47 U.S.C. § 253) prohibits a state or local government from enacting or enforcing a statute or regulation that bars an entity from providing a telecommunications service. In addition, this statute requires a state or local government to manage public rights-of-way on a nondiscriminatory basis and enables a state or local government to receive fair and reasonable compensation from telecommunications providers for use of public rights-of-way on a competitively neutral and nondiscriminatory basis.

8 See 30 V.S.A. § 209(g).


10 See 220 C.M.R § 45.03; M.G.L. c. 166, § 25A.

And Oregon requires utilities to allow any entity needing access to serve its customers to use poles, ducts, and conduits as much as practicable.\(^{12}\)

Cities too have sought to use their authority to manage their rights-of-way to enable access to facilities already located there. As noted above, regulating use of public rights-of-way is an aspect of a local government’s power to promote the health and welfare of its citizens, and cities may adopt reasonable conditions on use of right-of-way (consistent with the federal statute) that are aimed at minimizing disruption and hazards and promoting the availability of new services to residents. For example, Smyrna, Georgia requires that users of its rights-of-way share access to their poles, conduits, and related facilities.\(^{13}\) Superior, Wisconsin reserves the right to compel the joint use of poles or conduits.\(^{14}\) Many other cities require coordination between users of public rights-of-way.\(^{15}\)

In sum, state and local governments have numerous tools they can use to facilitate deployment of new communications infrastructure, which will drive the provision of innovative services and applications and foster economic development, social interaction, and citizen engagement.

Please contact the Fiber to the Home Council if you want to discuss further any of these right-of-way issues.  [www.ftthcouncil.org](http://www.ftthcouncil.org)

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\(^{12}\) See Or. Admin. R. 860-028-0060.

\(^{13}\) See Smyrna, Ga., Code of Ordinances § 90-45.

\(^{14}\) See Superior, Wis., Code of Ordinances § 2-165(b).