

Telecommunication Infrastructure and Right-of-Way Access¹

Obtaining valid and enforceable access to rights-of-way is one of the most critical, but frequently overlooked, aspects of developing telecommunication infrastructure. In virtually every circumstance, infrastructure will be installed in both private and public rights-of-way owned or controlled by multiple entities. For example, one fiber ring may cross multiple state and local jurisdictions, each with its own fee structure as well as rules and regulations governing access. Additionally, that same fiber ring likely will be installed on private property. Authorization to use such private property frequently is provided, not by the fee simple owner of the property, but instead from some other entity which itself has obtained limited rights to use the property. Whether such permission constitutes an adequate transfer of rights raises complicated questions of property law, which are beyond the scope of this monograph. It is sufficient to comment that in all circumstances, an analysis of the rights necessary to install and operate a system requires a thorough legal review by counsel.

The following discussion focuses on the issue of access to public rights-of-way. As noted below, obtaining authorization to access public rights-of-way in Maryland is a complicated issue. Federal and State law as well as local ordinances, rules and regulations all play a role in public right-of-way access. Complicating the issue even more is the lack of uniformity and, in some circumstances, the lack of any apparent procedure, across (and sometimes even within) jurisdictions.

Access to Public Rights-of-Way

Federal Guidelines: Section 253 of the Telecommunications Act of 1996

Section 253 of the Telecommunications Act was intended to prevent state and local barriers to entry into the telecommunications market. Section 253(a) provides that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Sections 253(b) and (c) retains for state and local governments the authority to manage their public rights-of-way, but requires that management of public rights-of-way be “competitively neutral and nondiscriminatory” and that any fees assessed be “fair and reasonable.”

The ambiguities in these provisions and inconsistent court rulings have caused increased costs, delays, and in some circumstances actually prevented the deployment of certain facilities. Some of the issues which have arisen include: the discretion exercised by local authorities in the application process in whether to grant or deny right-of-way

¹ This monograph is a summary overview intended to provide current and accurate information about the subject matter covered. This overview should not be taken as legal advice. Individuals seeking specific information are encouraged to consult original sources or legal counsel. The statements expressed herein do not reflect a position or opinion of Miles & Stockbridge P.C., or of the Maryland Technology Development Group (TEDCO).

access to a carrier; the wide variety of fee methodologies imposed by local jurisdictions; and the lengthy time involved to resolve disputes.

In an August 2001 report, the Federal Communication Commission recognized four key measures with respect to access to rights-of-way: (1) permits should be issued within a fixed and reasonable time; (2) excessive revenue-based fees and per-foot charges are a barrier to development; (3) governmental entities should not use their control over rights-of-way to impose regulation on carriers; and (4) governmental entities may not discriminate in their treatment of providers over terms and conditions of access. Unfortunately, translating these broad principals into a uniform approach to public rights-of-way access remains incomplete.

Maryland's Approach

The approach to public right-of-way management taken by local county governments in Maryland varies, but there are some important consistencies. First, most counties have, at the minimum, legislation or written policies for obtaining permits to access or excavate a public right-of-way. Second, most counties require the payment of a permit fee, proof of insurance, and a bond before approval of a permit. Third, most counties view an enhanced telecommunications deployment as highly beneficial to the public, and therefore appear eager to work with telecommunications providers in constructing the necessary foundation.

There is a great divergence among the local jurisdictions in their level of sophistication and experience in dealing with public right-of-way access and telecommunications providers in particular. Frequently, local jurisdictions attempt to employ for telecommunications users the same policies and procedures adopted for general access to rights-of-way, whether or not those policies and procedures meet the often-unique issues raised in development of telecommunication infrastructure. Indeed, in counties where telecommunication infrastructure installation has yet to burgeon, there are few written policies with respect to how the rights-of-way should be managed. Other counties with high demand for rights-of-way access have drafted policies and intricate fee schedules based on various technical factors. At least one county has drafted comprehensive and specific legislation on right-of-way access by telecommunication providers, but has modified the scope of the policy. As a result, many counties have taken a reactive approach, relying on ordinances and policies already in place, but which do not address all the issues that telecommunications providers may present in the future.

Below is a sampling of the current policies for access to rights-of-way by telecommunications providers in Maryland counties.

County #1 – Northern Maryland

This Northern Maryland County has no separate telecommunications policy. Rather, it handles all access to public rights-of-way through a permits department. County ordinances require a permit for any excavation on or near a public road. The

permit process includes the submission of a written application, permit fee, and certificate of insurance. The County Commissioners review the permit application, taking into consideration whether the project request is in the public interest. The County Commissioners then approve or deny the request. There is no license fee for access to public rights-of-way.

County #2 – Northern Maryland

This jurisdiction does not have a separately stated telecommunications policy. Virtually all new major installations in the public rights-of-way require a franchise agreement. Franchises may not exceed 20 years in length, and fees are separately negotiated. The process for obtaining a franchise is relatively cumbersome and complicated and may take up to one year. This jurisdiction also has an extensive publicly owned utility infrastructure. At this time no franchise is required to obtain access to this system, rather a user may obtain a lease through a relatively simple application and approval process. Fees are set by ordinance and are paid semiannually. There is a modest bond and insurance requirement. Additional construction required to link the jurisdiction's system to the locations required by the utility can be accomplished by either a developer's agreement or a minor privilege (or a franchise as discussed above).

County #3 – Northern Maryland

This County has a separately stated policy for companies seeking access to public rights-of-way. Rights-of-way are considered "excess property" and as a result, the County has established a franchise requirement. Franchises are granted for up to 25 years. The executed application for a franchise must be accompanied by drawings submitted in electronic format. Fees are charged per linear foot and based on the zoning in the area in which the cable is to be placed. The process for obtaining a franchise includes a three week publication period and a two week public comment period. The franchise must be approved by the County Administrator, but need not obtain approval of the County Council. Depending on the scope of the project, the franchise approval process can take from two months to a year.

County #4 – Southern Maryland

Like Counties #1 and 2, this County does not have specific legislation in place to deal with requests for right-of-way access from telecommunication companies. As a result, it is anticipated by the Department of Public Works that any request by a telecommunications company for access to a public right-of-way would result in a meeting between the telecommunications company, the Director of Public Works and the County Attorney's Office on how best to approach the issue. The County does require a permit for street construction, but it is possible that an easement, franchise, or lease agreement with the County also would be required.

County #5 – Central Maryland

This County enacted an ordinance regulating the use of county owned rights-of-way by telecommunications companies doing business in the County. At the time, the ordinance was one of the most comprehensive local laws in the State of Maryland related to public right-of-way use by telecommunications providers. In Bell Atlantic-Md., Inc. v. P.G. County, 155 F. Supp. 2d 465 (2001), however, the United States District Court for the District of Maryland held that the County's ordinance was an "impermissible attempt by the County to regulate telecommunications." As a result, enforcement of the ordinance was preempted by state law, which creates and empowers the Public Service Commission ("PSC") to regulate telecommunications. Since the federal court decision, the County now handles all requests for access to public rights-of-way by telecommunication providers, or any other entity, in accordance with the October 2001 "County Policy and Specification for Utility Installation and Maintenance Permits," (the "Policy"), which is administered by the County's Department of Public Works and Transportation, Office of Engineering, Permits Division.

The Policy requires that any entity seeking access to a public right-of-way must apply for and obtain a utility work permit. Utility work permits take the form of either a Utility Installation and Upgrade Permit or a Utility Infrastructure Maintenance Permit. The Utility Installation and Upgrade Permit fees include a \$300 administration fee, inspection fees determined by the type and linear feet of installation, and an impact fee determined by the amount of pavement to be excavated. The Utility Infrastructure Maintenance Permit fees include a \$5,000 administrative fee and a maintenance fee determined by the type and linear feet of installation.

County #6 – Central Maryland

This County's Code requires that any entity requesting a right to a public right-of-way first obtain a franchise agreement. The franchise agreement process begins with application for a franchise to the County Attorney's Office. The application then must be published in local newspapers by the applicant. Upon publication and notice, the County holds a public hearing. The terms of the franchise are negotiated between the County Attorney's Office and the applicant. Generally, franchises can be granted for up to twenty-five years. Upon the recommendation of a County Executive, the agreement is submitted to the County Council for approval. Fees for the franchise are five percent of gross revenues. The franchise approval process can take anywhere from several months to a year. Upon approval of the franchise, the telecommunications provider also must submit an application for a utility permit and any necessary construction permits, with the proper fee, bond, and proof of insurance.

County #7 – Eastern Maryland

This County has no policy on extensive access to public rights-of-way. Generally, the County does not have many public rights-of-way to access. If, however, a proposal called for the extensive use of the rights-of-way system, the County would refer the proposal to the County Attorney's office for review and consideration, with possible input from the road superintendent and elected officials. Minor access to public rights-

of-way are treated by obtaining a utility permit issued by the road superintendent with the proper fee, bond, and proof of insurance.

County #8 – Eastern Maryland

In this County, the Land Use & Environment Division handles all requests for access to public rights-of-way. The County requires that anyone seeking access submit a written request that includes all details of the work, along with a fee of \$110.00. The Division will review the plans and make a site visit. If the plans are satisfactory to the Division, the request is approved.

County #9 – Western Maryland

In this County, all right-of-way matters are handled by the Real Property Administrator, in cooperation with the County Attorney. Generally, the Real Property Administrator acts as a case manager, providing step-by-step instruction, as necessary, to any entity seeking access to a right-of-way. The process involves first an application for a utility permit and \$25.00 fee, filed with the Department of Permits and Inspections. The application then is routed to the County Engineering Department for review and comment or approval. In extensive or large projects, the County Attorney is involved to provide assistance in reviewing the proposal. Once the permit is approved, and a bond or cash surety is submitted, a permit is issued. Upon satisfactory completion of the work, the Department releases the surety.

Conclusion

Despite the fact that more than 6 years has passed since enactment of the 1996 Telecommunications Act, there is still great inconsistency in the manner in which access to public rights-of-way are handled across the United States. In this regard, Maryland reflects the nation in the variety of approaches and lack of uniform policies. Certainly, a comprehensive, Statewide approach to public right-of-way management would reduce uncertainty and costs for carriers and may encourage the expansion of telecommunication infrastructure throughout the State.

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