

# The Perils of Local Right-of-Way Regulation for Fiber Networks

Presented by:

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Tuesday 23 January 2024

# U.S. rights of way: A new regulatory thicket

- Local ROWs were traditionally regulated by franchise agreements.
- Increasingly, ROWs are being regulated by locally-enacted ordinances, which are replacing or modifying negotiated long-term agreements.
- Local Ordinances can be modified by governmental bodies without the consent of those owning, placing, or using fiber in the ROW.
- This poses perils for network owners, lessees, IRU-holders, and customers.



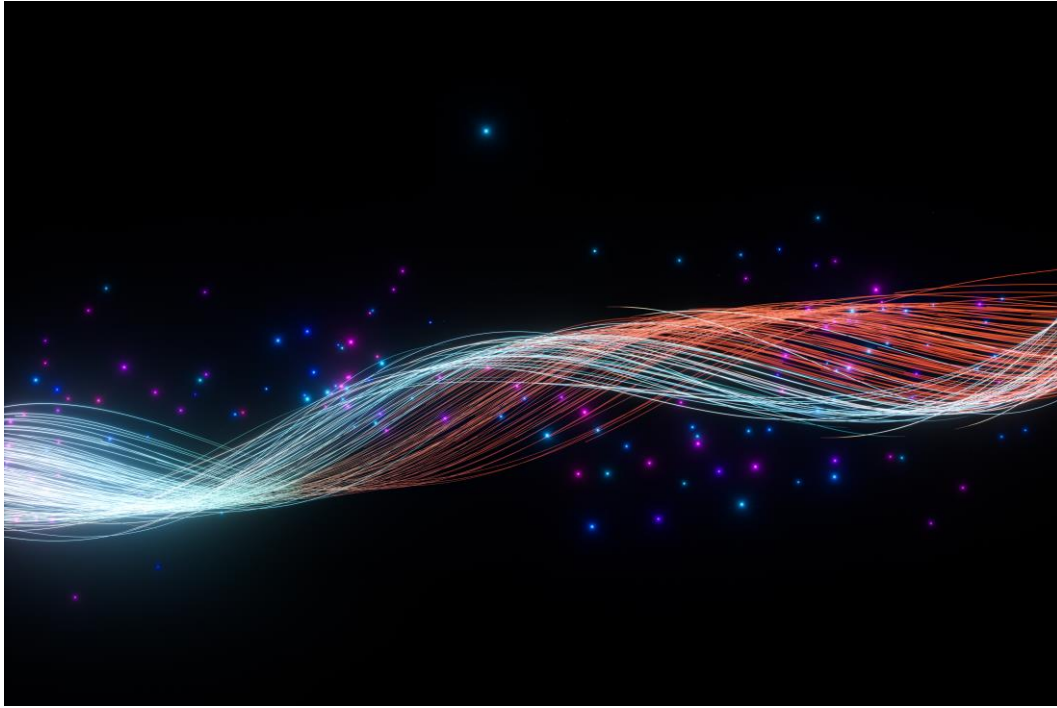
# Well-known perils of local ROW regulation

- Locality-specific application/licensing requirements
- Burdensome (and uncertain) permitting processes
- Fees on facilities occupying the ROW + taxes on services provided
- Condemnation and relocation requirements

# More well-known perils of ROW regulation

- Navigating overlapping local + state + federal regulations
- Does ROW access/use require state PUC/PSC certification as a telco?
  - Answers vary by jurisdiction (e.g., city, county, state highway authorities)
  - State certification may be practically necessary even if not formally required
- Does state law limit ROW fees or taxes on services delivered via the ROW?
  - And if so, only for certain classifications of entities (e.g., certificated telcos, ILECs)
- Understanding federal limitations and to whom they apply

# Lesser-known perils of local ROW regulation



- Extending regulations and fees to mere “**use**” of third-party fiber
- Required consent for IRUs, leases, or “**use**” of third-party fiber
- Requirements to disclose entities IRU-ing, leasing, or “**using**” fiber

# Regulating “use” of third-party fiber

- Some localities take very broad views of “use” of the ROW!
- Traditional: “Use” means physical access or occupancy of the ROW.
- Broad: “Use” includes “using” capacity or spectrum on third-party fiber with no physical impact on the ROW.
- **Example:** “[transmitting] electrons and lightwaves constitutes a use of the public rights-of-way.”

# Why does this matter? Consider fees on “use”

- **Example:** “Every person ... will pay the fee to ... **use** the right-of-way for every utility service provided ...”
- Depending on what “**use**” means, fees may apply:
  - Only to providers that physically access or use the ROW (e.g., by placing facilities in the ROW);  
*or*
  - To anyone causing data (e.g., packets) to be sent over fiber, even if the entity does not own or lease any physical facilities in the ROW or locality.



# Consent for IRU/leases or “use” of 3<sup>rd</sup>-party fiber

- Watch out for local regulations that require the local government’s consent for leases or IRUs of fiber, or even for “use” of fiber.
- **Example:** A recently-proposed code would require anyone who owns, places, or uses utility facilities (such as fiber) in the City to get “written consent of the City prior to leasing any portion of, or capacity on, its utility facilities....”



# Customer Disclosure Requirements

- **Example:** A proposed ROW code requires that entities that lease fiber or capacity, “provide to the City the name and business address of any lessees of its utility facilities” upon request, with an exception only where disclosure is prohibited by law.
- No exception applies where disclosure is prohibited by an NDA or confidentiality provision of a contract.
- This could leave lessors of fiber/capacity to choose between violating the law or breaching confidentiality terms of a contract.

# Key Limits on Local Regulation of the ROW

- Under federal law, localities cannot regulate some non-cable services provided by cable operators over a cable system.
  - 47 U.S.C. §§ 541, 544(a)
- Under federal law, local rules cannot materially inhibit the provision of telecommunications service (which may soon include broadband).
  - 47 U.S.C. § 253(a)
- Under federal law, local ROW fees must be competitively neutral and nondiscriminatory.
  - 47 U.S.C. § 253(c)

# Thank you! Any questions



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