
SENATE COMMITTEE ON GOVERNANCE AND FINANCE

Senator Mike McGuire, Chair

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***LOCAL GOVERNMENT: BROADBAND INFRASTRUCTURE DEVELOPMENT
PROJECT PERMIT PROCESSING: MICROTRENCHING PERMIT PROCESSING
ORDINANCE***

Enacts the Broadband Deployment Acceleration Best Practices Act of 2021, which allows broadband providers to choose the manner of installing fiber for broadband service.

Background

Land use regulation. The California Constitution allows a city to "make and enforce within its limits, all local, police, sanitary, and other ordinances and regulations not in conflict with general laws, known as the police power of cities." It is from this fundamental power that local governments derive their authority to activities and land uses within their jurisdictions to protect public health, safety, and welfare.

Fiber installations. Modern broadband service, whether furnished through a wired connection or wirelessly over mobile devices, requires the installation of fiber optic cables to convey data signals across a network. Companies that want to install the fiber optic infrastructure required to serve new areas or expand capacity in existing areas must apply to cities and counties for permits to install fiber in the public right of way.

State law establishes a framework, process, and procedures governing the attachment of telecommunications facilities to investor-owned utility poles and municipal utility poles, providing the California Public Utilities Commission (CPUC) the authority to establish and enforce rates, terms, and conditions for pole attachments. Under this framework, telecommunications companies may erect poles and attach to investor-owned and municipal utility poles under specified cost-based rates. However, local governments can use their police powers to regulate the time, manner, and place of pole attachments in the right of way

Traditionally, telecommunications wires have been installed aerially through attachments to utility poles or through the digging of open trenches. As an alternative to traditional trenching or boring to install fiber underground, some fiber installation companies have turned to "microtrenching." Microtrenching is a process whereby specialized machinery cuts a narrow slice out of the roadway at a depth of approximately 1-2 feet. Conduit containing fiber optic cables is laid in the small trench created, and then material is backfilled over and the trench is sealed. Microtrenching requires significantly less excavation and can be performed more quickly than open trenching, saving costs for installers.

Requirements for permitting telecommunications facilities. Several state and federal laws prescribe aspects of permitting telecommunications facilities. Two federal laws, the Telecommunications Act of 1996 and the Spectrum Act, require local governments to act within a “reasonable period of time” on permits for siting wireless facilities. The Federal Communications Commission (FCC) is responsible for administering these laws and implementing this requirement. Accordingly, in 2018, the FCC adopted a rule to clarify, among other things, the definition of a period of time that is presumed to be reasonable for various categories of wireless telecommunications facilities. Specifically, this rule establishes a so-called “shot clock” by ruling that local governments should generally approve or disapprove applications for projects within:

- 60 days for placement of a small wireless facility on an existing structure.
- 90 days for placement of any other wireless facility on an existing structure, or a deployment of a small wireless facility using a new structure.
- 150 days for a deployment of all other wireless facilities using a new structure.

The Telecommunications Act of 1996 also preempts state or local requirements that prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. However, it also provides that it doesn’t affect the authority of a state or local government over decisions regarding the placement, construction, and modification of wireless facilities, except where specifically stated.

Utility undergrounding. Undergrounding is the process of replacing overhead lines that provide services such as electricity or communications with lines located underground. Undergrounding is typically done for aesthetic or safety purposes to remove the visible overhead lines and poles or to reduce the risk of damage or fire from being exposed to the elements. Under certain CPUC rules, new developments must install underground utilities, paid for by developers. The CPUC rules also provide for the conversion of overhead facilities to underground facilities. Although the specific rules vary, Electric Tariff Rule 20 (Rule 20) governs electric utilities (other similar rules govern telephone companies). Rule 20 contains several classes of undergrounding projects—A, B, C, and in San Diego Gas and Electric’s (SDG&E) territory, D. The main differences among the classes are the purpose of the undergrounding and the share of the cost that is paid by ratepayers. The CPUC is currently in the process of revising Rule 20.

Installing utilities underground is generally much more expensive than aerial installations—on the order of ten times or more. Crown Castle, a provider of communications services to other telecommunications providers (such as wireless carriers), wants to expand their options for installing fiber in local jurisdictions.

Proposed Law

Senate Bill 378 enacts the Broadband Deployment Acceleration Best Practices Act of 2021. SB 378 allows a provider of fiber facilities to determine the method of installation of fiber and prohibits local agencies from blocking, or unreasonably discriminating against, aerial installations, open trenching or boring, or microtrenching. Where existing aboveground utilities are present, a local agency must allow fiber to be installed in the same fashion as the existing

aboveground utilities. A local agency can prohibit aerial deployment of fiber if no aboveground utilities exist pursuant to Rule 20, or if the local agency requires all utilities to relocate their existing overhead facilities underground pursuant to Rule 20.

SB 378 requires a local agency with the jurisdiction to approve excavations to allow microtrenching for the installation of underground fiber if the installation in the microtrench is limited to fiber. If the fiber installer and the local agency agree, microtrenching can be placed shallower than 12 inches deep in areas that are not beneath a paved roadway.

SB 378 applies the shot clock established by FCC rules for small wireless facilities that use an existing structure to an application for a fiber installation, but a local agency and an applicant may mutually agree on an extension of the time to approve an application.

The bill allows a local agency to charge a reasonable fee to cover the cost of processing an application for installing fiber, and authorizes a local agency to charge fees to cover the reasonable costs of expedited review, processing, and approval of an application for installing fiber, including personnel costs, if the applicant elects for expedited review. SB 378 provides that it doesn't alter state or local civil services laws.

SB 378 defines a microtrench to mean a narrow open excavation trench that created for the purpose of installing a subsurface pipe or conduit and is less than or equal to 4 inches in width and between 12 and 26 inches deep. The bill defines other terms and includes findings and declarations to support its purposes.

State Revenue Impact

No estimate.

Comments

1. Purpose of the bill. According to the author, "SB 378 is measure that is designed to help close the digital divide now and in the future. The COVID-19 pandemic has made it clear that Californians need broadband connection as quickly as possible. Laying fiber is a critical component to support broadband connection and to bring advanced, fast and reliable internet services, whether to the home, community or somewhere in between. Further, the cost of laying fiber is still the most expensive part of bringing broadband to new places. By lowering installation costs and speeding up deployment of fiber hundreds of thousands of Californians will be able to access the internet to complete their school work, access telehealth services, work remotely, and much more. This is a critical measure that can help our communities close the digital divide in a quick and cost effective way."

2. Who gets to choose? The California Constitution charges cities and counties with the responsibility and authority to look out for their residents' health, safety, and welfare. In doing so, local officials must often balance competing considerations. In the context of the installation of broadband infrastructure in the public right of way, local agencies weigh the need for affordable, reliable broadband against other concerns that can include: uses of the public right of way by other users, including residents as well as utilities such as electric, gas, and water; whether one type of installation method ensures a longer useful life for infrastructure; the timing

of other improvements to the right of way, such as repaving; and the aesthetic impacts of overburdened utility poles. Fiber installers, on the other hand, are most concerned with providing only a single service and have a profit motive that encourages them to deploy infrastructure as inexpensively as possible. SB 378 allows fiber installers to choose their preferred method of installation, including aerial installation, even where local officials determine that another method would best serve all of the needs of the community. Supporters argue that empowering providers to choose the manner of installation will result in faster, cheaper broadband deployment, while critics argue that nothing in SB 378 requires deployment in underserved areas or otherwise improve access to broadband. Does the promise of better broadband service through SB 378 merit the restrictions on local governments to ensure the welfare of their communities?

3. Digital, underground. Local governments often exercise their police powers to require new utility installations in the public right of way to be placed underground. These requirements are often enacted for aesthetic reasons. State and federal law both recognize the need for local agencies to be able to impose reasonable restrictions on the time, place, and manner of access to the public right of way, and aesthetics have been specifically recognized as a reasonable basis for a restriction (*T-Mobile West LLC v. City and County of San Francisco*, 6 Cal. 5th 1107; *City of Portland v. United States*, 2020 U.S. App. LEXIS 25553). SB 378 undermines the authority of local governments to require fiber installations to be placed underground by allowing fiber installers to choose aerial installation where other utilities exist overhead. The bill includes a limited exemption for undergrounding pursuant to Rule 20, but undergroundings through this process are rare and expensive. To maintain local governments' ability to protect the aesthetics of their communities, the Committee may wish to consider narrowing SB 378 to only require local governments to allow microtrenching, and to allow local governments to require other forms of fiber installation if they can demonstrate a specific, adverse impact to the public health or safety.

4. Buzzer beater. FCC rules establish time periods that are presumed reasonable for local governments to act on wireless facility applications. Local governments must act more quickly on smaller wireless facilities and on wireless facilities proposed for installation on existing structures before they run the risk of being considered "unreasonable." SB 378 requires local agencies to act on applications within the time period prescribed by the FCC rules for small wireless facility installations on existing structures—a 60-day period. However, a collocation of a small wireless facility on an existing structure, where other in-ground infrastructure may have already been installed, differs from fiber installations that involve laying potentially miles of fiber. Fiber installations can require extensive work to identify existing underground utilities to ensure that they aren't impaired, planning for road closures for the public, and coordinating around local road repair schedules. Furthermore, FCC rules presume that a local government has acted unreasonably if they exceed these time limits, but local governments can make their case in court that the delay was reasonable. SB 378 imposes the shortest timeframe from the FCC rules onto potentially complicated fiber installations, without the ability to argue the reasonableness of their actions. Furthermore, where the fiber is being installed to support a wireless facility, the FCC rules already apply. To ensure that local governments have adequate time to review fiber installations, the Committee may wish to consider amending SB 378 to modify or remove the bill's shot clock provisions.

5. Charter city. The California Constitution allows cities that adopt charters to control their own "municipal affairs." In all other matters, charter cities must follow the general, statewide laws.

Because the Constitution doesn't define "municipal affairs," the courts determine whether a topic is a municipal affair or whether it's an issue of statewide concern. SB 378 includes a legislative finding and declaration that installation of fiber is critical to the deployment of broadband services and other utility services, and is a matter of statewide concern. Accordingly, the bill's provisions apply to all cities and counties in California, including charter cities.

6. Mandate. The California Constitution generally requires the state to reimburse local agencies for their costs when the state imposes new programs or additional duties on them. Because SB 378 imposes new duties on local agencies with regard to the installation of fiber, Legislative Counsel says it creates a new state-mandated local program. SB 378 disclaims this mandate by saying that no reimbursement is required because local agencies can levy fees to pay for the program.

7. Double-referred. The Senate Rules Committee has ordered a double referral of SB 378: first to the Senate Governance and Finance Committee to hear issues related to local permitting, and then to the Senate Energy, Utilities, and Communications Committee.

8. Related legislation. SB 556 (Dodd) requires local governments to make available space on their traffic signal and streetlight poles for cable and phone corporations, and caps the fees that local agencies may charge for the use of such poles. SB 556 is currently pending in the Senate Energy Committee.

Support and Opposition (4/5/21)

Support: Bay Area Council; California Apartment Association; California Builders Alliance; California Building Industry Association; California Business Properties Association; California Retailers Association; California Wireless Association; Crown Castle and Its Affiliates; Greater Sacramento Economic Council; Sacramento Regional Builders Exchange; San Francisco Chamber of Commerce; Silicon Valley Leadership Group; Verizon Communications, INC. And its Affiliates; Wireless Infrastructure Association

Opposition: California Municipal Utilities Association; Northern California Power Agency; Southern California Public Power Authority

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