



Allocating Public ROW Slots

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Today's voice, video and information networks attach copper twisted pairs, coaxial or fiber optic cables on utility poles used for aerial wiring, as well as placing them in underground conduits. These pathways typically utilize easements held by a utility company or governmental unit, and cross private and public property throughout a given community. The purpose of such easements is to facilitate the provision of valuable services which might be thwarted by the transaction costs of arranging individual transit agreements with property owners. In particular, some owners might "hold out" to extract rents. The aggregate cost of such payments may render network investment unprofitable.¹

A standard solution has been to declare easements available for use by qualified parties. Access is then regulated such that the cost to property owners remains slight. Users of ROWs, which include power, water, sewer, and telephone companies, developers, and governments, are liable for damages inflicted. Typically, insurance and/or bonding requirements limit the likelihood of external costs.

Local cable franchise agreements have regulated access to public easements on two premises, one of which is that available slots are scarce, and that a new operator's cables may not fit on existing poles or within underground conduits. The argument has then been extended to a claim that the government should protect this limited capacity by authorizing only preferred operators or technologies.

This approach limits entry, which is counter to the purpose of public ROWs. The proper regulatory instrument is price, ensuring that entrants pay the opportunity cost of the resources consumed.² This rule may be instituted without controlling entry via local cable TV

franchises. Imposing liability on operators for damage they inflict and for additional investments required to maintain ROWs forces incumbents and entrants to internalize the costs they impose.

Note that a monopoly franchise will not solve the public disruption externality, because monopolists will not have incentives to economize in this 'input' in the absence of liability rules that make them compensate such costs. It is true that monopoly franchises limit entry, and so limit the amount of infrastructure investment, but this is a notoriously expensive and inefficient mechanism for limiting disruption. General rules of liability accomplish that.

The price of access to ROWs is not efficiently set so as to maximize fees. In fact, the standard governmental interest alleged—"[f]ranchise fees are the rent cable operators pay for the use of public rights-of-way"³—is highly misleading. Rather than operate as a private landlord extracting profits from an owned investment, the public interest in regulating ROWs mimics competitive results, imposing *access prices equal to marginal cost*. At prices greater than this, entry is inefficiently restricted. This taxes consumers via monopoly pricing, a highly distortionary outcome.

Investments undertaken by private owners put assets in place that reap future payments, anticipated to be in excess of operating costs. These are deemed rents.⁴ Private owners attempt to maximize rents; it is the motive for investing. Public ROWs, however, are not constructed via risky capital invested by private owners, but are created by police powers of the government. It is counter-productive to maximize rent payments; it puts a dollar into one pocket (the municipality's) and takes many more out of others (belonging to the mu-

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nicipality's current and future telecommunications subscribers). There are more efficient ways to raise revenues than by taxing competitive entrants. The government, charged with acting as an agent of local residents, misappropriates public property when it views ROWs as did the late New York City Mayor John Lindsay, who stated that localities "have the right to develop public income from that asset to be used for the public good."⁵ If ROWs are treated as independent profit centers, this severely handicaps competitive entry, reducing the social benefits ROWs were designed to produce.

As a practical matter, incremental cables can always be accommodated; the relevant question is the cost. When entry occurs via existing lines, e.g., telephone company wires carrying voice, data, and video traffic, essentially no incremental space is consumed. When a separate video line is used, it must be placed some distance (assumed to be 12 inches⁶) from other communications cables (due to radio interference), and this does "consume" incremental capacity.

The operator should be liable for the cost of this consumption, which is straightforwardly achieved. Not only are entrants charged fees for occupying ROWs (utility pole attachments are regulated by federal statute⁷), but also they can (and should) shoulder costs of increasing capacity where it is necessary to do so. Where poles are crowded, "L brackets" are commonly used to create new space. In some instances, poles are replaced by larger ones. So long as liability falls on the entrant, efficient solutions obtain. By denying the entrant the opportunity to pay marginal costs, efficiency is undermined, as competitive entry is unduly restricted. General rules governing ROW use can be (and sometimes are) imposed by local, state, and federal governments. Local cable franchises are not necessary for this purpose. ★

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¹This has been called "the tragedy of the anticommons." See Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARVARD LAW REVIEW 621 (Jan. 1998) ["Heller (1998)"]; Lee Anne Fennell, *Common Interest Tragedies*, 98 NORTHWESTERN UNIVERSITY LAW REVIEW 907 (Spring 2004); Thomas W. Hazlett, *Spectrum Tragedies*, 22 YALE JOURNAL ON REGULATION 242 (Summer 2005).

²Importantly, this implies that a *competitive price* is charged for ROW access, not a monopoly price—which would create non-market failure by over-pricing (and under-utilizing) ROWs.

³National Association of Counties, The American County Platform & Resolutions 03-04, *Telecommunications & Technology* (20 July 2004) 3-4, <http://www.naco.org/ContentManagement/ContentDisplay.cfm?ContentID=14334>.

⁴Sometimes such payments are identified as "quasi rents," as re-investment (including investments going for maintenance) will only be made if sunk costs are (looking forward) recoverable.

⁵Albin Krebs, "Cities Reassured on Cable TV Rights," *New York Times* (6 Feb. 1973) ["Krebs (1973)"] 73.

⁶Federal Communications Commission, *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments, Report and Order*, CS Docket No. 97-151 (Rel. 6 Feb. 1998), 22.

⁷47 U.S.C. § 224 (2006).

