

GO Item 1
July 9, 2018
Worksession

MEMORANDUM

July 5, 2018

TO: Government Operations and Fiscal Policy Committee

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: Bill 7-18, Streets and Roads – Installation of County Communications Infrastructure

PURPOSE: Worksession – Committee should make recommendations on Bill

Expected attendees:

DTS Director Sonny Segal
DPS Director Diane Jones

Bill 7-18, Streets and Roads – Installation of County Communications Infrastructure, sponsored by Lead Sponsor Council President Riemer and Co-Sponsors Councilmembers Berliner, Elrich, Rice, and Hucker, was introduced on March 6, 2018. A public hearing was held on April 10.

Bill 7-18 would:

- (1) require the Director of the Department of Technology Services to develop and periodically update a Strategic Plan to install County communications infrastructure throughout the County;
- (2) require certain excavation projects to add the installation of County communications infrastructure at the County's expense;
- (3) establish a dig-once policy for adding the installation of County communications infrastructure in the public right of way; and
- (4) require any person who leases the County communications infrastructure to follow net neutrality.

Background

Bill 7-18 is designed to promote the extension of the County's communication infrastructure throughout the County in a cost-effective manner. First, the Director of the Department of Technology Services (DTS) must develop and periodically update a strategic plan to install County communications infrastructure. The Bill would implement the strategic plan by requiring an applicant for a permit to excavate in the County right of way to give DTS the

opportunity to decide if installing County communications infrastructure as part of the planned project would benefit the County. If so, DTS and the applicant would negotiate the incremental cost to include the County infrastructure in the project. The County would be responsible for the incremental cost.

The Bill expressly permits an applicant to contact DTS during the planning stage of a project so that the inclusion of County infrastructure can be added to the design from the beginning. The Bill would also establish the criteria for DTS to consider and set a 10-business day deadline for DTS to decide.

The Bill would also require an internet service provider who voluntarily contracts to lease the County communications infrastructure to follow net neutrality. Net neutrality is defined as:

a principle that prohibits an internet service provider from discriminating against information by blocking, slowing, prioritizing internet content, or requiring an end user to pay different or higher rates to access specific content or applications. Net neutrality does not prohibit an internet service provider from taking any action for reasonable network management purposes such as easing congestion or blocking spam.

Public Hearing

The testimony was mixed. Diane Jones, Director of the Department of Permitting Services, speaking on behalf of the Executive, opposed the Bill. See ©12-13. Ms. Jones opposed conditioning the issuance of a right-of-way permit on providing the County the opportunity to add the installation of County communications conduit to the utility project. Ms. Jones argued that the design of the project must be completed by the time the applicant submits a request for a permit. Ms. Jones also testified that the Bill would divert staff to review the more than 3000 right-of-way permits issued by DPS each year for little gain. The County's current plan is to construct only 1.14 miles of communications conduit on major roads in the next 3 years. Ms. Jones also argued that the Bill would unnecessarily delay utility projects. Ms. Jones supported the portion of the Bill that would require the Department of Technology Services to develop a strategic plan for the installation of County communications conduit.

Jerry Pasternak, PEPCO Vice President also opposed the Bill. See ©14-15. Mr. Pasternak argued that the Bill would unnecessarily delay and increase the cost of critical utility projects, put underground electric infrastructure at risk of damage by third party contractors, and raise complex contract issues. Ronan Gulstone, Washington Gas, submitted written testimony opposing the Bill for reasons similar to the objections from PEPCO. See ©16-17. Benjamin Aron, representing the trade association for the wireless communications industry, CTIA, also opposed the Bill in written testimony because of the net neutrality requirement for organizations that lease space on the County communications infrastructure. See ©18-23. Comcast also submitted written testimony opposing the Bill. See ©33-34.

Art Brodsky supported the Bill. See ©24-25. Mr. Brodsky commended the strategic plan requirement, the dig once policy, and the net neutrality. He suggested that the net neutrality be expanded to include any communications purchases made by the County. Cat Blake, Next Century

Cities (a nonprofit membership organization of 185 city, town, and county members) supported the Bill. See ©26-27. Ms. Blake argued that the dig once policy in the Bill would save money and promote the extension of the County's communications infrastructure. Andrew Afflerbach, owner of CTC technology & energy, also supported the dig once policy in the Bill. See ©28-29. We also received written testimony supporting the Bill from Harold Feld, Senior Vice President of Public Knowledge (©30-31) and from Craig Aaron, President and CEO of Free Press (©32).

Issues

1. Should the County Procurement Law apply to a contract to reimburse an applicant for the incremental cost to add County conduit to a right-of-way project?

The County Procurement Law is based upon the principle that the best value for contracted goods and services can be obtained by open competition. However, Chapter 11B already contains a list of exemptions for certain types of contracts. A contract to reimburse an applicant for the incremental cost to add County conduit to a right-of-way project should also be exempted from the open competition provisions of Chapter 11B. The dig-once policy is based on cost savings and efficiency by adding a County conduit to a project where the applicant is already digging in the street. This efficiency is best found if the applicant or the applicant's contractor builds the entire project. **Council staff recommendation:** amend the Bill to add the following exemption to §11B-4 after line 1:

11B-4. Exemptions.

- (a) This Chapter, other than Article XII, does not apply to:
 - (1) a procurement made for the employees' retirement system under procedures approved by the Chief Administrative Officer;
 - (2) obtaining the services of special legal counsel under Sections 213, 108, or 410 of the Charter;
 - (3) the procurement of an independent auditor by the County Council under Section 315 of the Charter;
 - (4) obtaining the services of an impasse neutral, mediator, or fact finder under a County collective bargaining law under procedures approved by the Chief Administrative Officer;
 - (5) obtaining copyrighted material and information which is intended for use by the public in or through a public library under procedures approved by the Chief Administrative Officer;
 - (6) obtaining electricity, natural gas, and compressed natural gas, under executive regulations;

- (7) purchasing goods or services for a County-sponsored recreational activity if the purchase is made on behalf of an identifiable group of persons who contribute funds to participate in the activity;
- (8) obtaining entertainment services, including but not limited to contracts for musical performers; [[and]]
- (9) obtaining the services of experts, consultants, and investigators by the County Attorney, whether in anticipation of litigation or in preparation for trial;
- (10) obtaining advertising services from media sources; [[and]]
- (11) a contract to reimburse an applicant for a right-of-way permit for the incremental cost of adding a County communications conduit to a right-of-way project under §49-43; and
- (12) any other procurement exempted from this Chapter by another law.

2. Should the Bill be amended to clarify the type of permit the dig-once law applies to?

The Bill would require an applicant for a permit issued for construction under §49-35. However, §49-35(a) requires a permit to construct “a road, sidewalk, shared use path, curb and gutter, driveway, or drainage structure” and §49-35(g) requires a permit to “cut a road to install or connect any underground gas, electric power, or telephone line, or any other underground infrastructure.” A right-of-way permit to cut into an existing road would be the appropriate vehicle to add County communications conduit. **Council staff recommendation:** amend lines 123, 144, 147, and 152 to clarify that the dig-once requirement applies to a right-of-way permit to cut a road issued under §49-35(g).

3. Is the dig-once policy a taking of property without just compensation?

Both Art. III, §40 of the Maryland Constitution and the 5th Amendment to the U.S. Constitution prohibit the government from taking private property for public use without just compensation. The Bill requires the applicant to “execute an agreement with the County to install the County communications infrastructure at the County’s expense.” It could be argued that paying the additional cost to install the County fiber in the applicant’s conduit does not reimburse the applicant for the lost capacity in the conduit. However, the intent of the Bill is to require the installation of a new County conduit alongside the applicant’s conduit for future County use. Therefore, reimbursement for the additional cost to the applicant to widen the trench, if necessary, and install additional conduit would be just compensation. The Bill requires the Executive to establish a method of determining incremental cost by regulation. **Council staff recommendation:** amend the Bill to clarify the intent as follows:

Amend lines 159 to 162 as follows:

- (d) DTS evaluation. Within 10 business days after receiving notice required by subsection (b), the Director of DTS must determine if the construction should include the installation of County communications infrastructure in the same trench as the applicant's conduit after considering:

4. Would the dig-once requirement unnecessarily delay utility projects?

The Executive and representatives of PEPCO and WGL opposed the Bill as an unnecessary delay to underground utility projects. They each pointed to the requirement that the applicant contact DTS at least 10 days before applying for a right-of-way permit. They argued that the project would already be designed at that time and that adding the installation of County conduit at that late time would delay the project. The Bill does include the following:

An applicant may notify the Director of DTS of its intention to apply for a permit under this subsection during the planning stages of a project to permit the possible inclusion of County communications infrastructure in the project before plans and specifications are completed.

An applicant who waits until the project is designed and the application is ready to submit would be doing this by choice. The Bill expressly permits the applicant to notify DTS as soon as they begin planning a project and requires DTS to respond within 10 business days. The Bill would only delay a project where the applicant ignores the dig-once policy and fails to contact DTS in a timely manner.

5. Should the Bill include an exclusion for emergency and small projects?

The Bill would require the Executive to adopt a regulation that includes “an automatic exemption for one or more classes of projects from the requirements of this Section.” This would permit the Executive to create an automatic exclusion for emergency and small projects. If a utility company needs to cut the street to restore service in an emergency, applying a dig-once policy is likely to cause unnecessary delay in resolving the emergency. There are also small projects that are unlikely to be of interest to the County for the extension of the County conduit. In both situations, the applicant should not be required to seek a DTS decision on adding County conduit to the project.

The Executive also argued that the Bill would require DTS to review the 3000 right-of-way permit applications received by DPS each year for little or no gain. This argument ignores the provision in the Bill described above that permits the Executive to adopt a regulation establishing classes of projects that are automatically excluded. If DTS completes a strategic plan and decides where the addition of County conduit would be beneficial, the regulation can limit the number of applications that would require review by DTS.

Council staff recommendation: amend the Bill to expressly require the regulations to define and exclude these projects as follows:

Amend lines 193-201 as follows:

- (h) Regulations. The Executive must adopt a regulation by Method 2 that includes:
- (1) a procedure for determining whether to participate in a project;
 - (2) standard County communications infrastructure specifications;
 - (3) a standard methodology for determining the incremental cost of installing County communications infrastructure in excavation projects; and
 - (4) an automatic exemption for one or more classes of projects from the requirements of this Section, including emergency utility work and small projects.

6. Should the Bill mandate net neutrality for users of the County communications system?

The Federal Communications Commission (FCC) adopted a net neutrality order, FCC Order No. 17-166 (“Restoring Internet Freedom”) on December 14, 2017. In this Order, the FCC determined that broadband Internet access is a Title I information service under the Communications Act.¹ Paragraph 194 of the FCC Order concludes that broadband Internet access service “should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements.” The FCC decided to deregulate Internet access service and expressly preempted “any state and local requirements that are inconsistent with the federal deregulatory approach we adopt today.” The deregulatory scheme adopted by the FCC repeals the prior net neutrality mandate.

Earlier this year, 21 State Attorneys General filed a petition for review of the FCC’s net neutrality order in the U.S. Court of Appeals for the D.C. Circuit. Although this petition for review has yet to be fully litigated in the federal courts, it is important to note that the D.C. Circuit upheld the FCC’s 2015 Order imposing net neutrality on Internet access providers in *United States Telecom Association v. FCC*, 825 F.3d 674 (D.C. Cir. 2016). The Court deferred to the FCC’s authority to regulate Internet access service.

The Bill would require a service provider leasing the County communications infrastructure to follow net neutrality. While one may argue that the County is acting as a market participant rather than a regulator, the market participant exception to federal preemption fails if the intent of the local law is to regulate rather than simply protect the County’s investment. It may be difficult to successfully argue that the Bill’s net neutrality provision is designed to protect the County’s communications infrastructure.

¹ 47 U.S.C. §151, *et seq.*

The net neutrality provision also may be struck down because it is not a local law. It could have a significant effect on the operations of a service provider and its customers located outside of the County.

Currently, the County does not lease its communications infrastructure to any Internet access service provider and has no current plans to do so. The only service provider who uses any portion of the County communications infrastructure does so to provide service to the County as part of the franchise agreement. Although several speakers at the public hearing argued that the net neutrality provision is a significant part of the Bill, these speakers were arguing against the national policy adopted by the FCC. The net neutrality provision in the Bill, even if upheld, would not make a significant change in the FCC deregulatory policy the speakers were challenging. The net neutrality provision in the Bill is subject to significant legal challenge and is unlikely to change the behavior of any Internet access service providers. **Council staff recommendation:** amend the Bill to remove the net neutrality provision.

7. Should the Executive have the authority to enter into a blanket agreement with WSSC instead of individual agreements for each project?

Md. Public Utilities Code Ann., §§27-101 and 27-102 expressly authorize the WSSC to enter on a public roadway to install, maintain, and operate its water and sewer system in the County. This State law requires the WSSC to notify the County before entering onto a public roadway for this purpose and permits the County to require WSSC to obtain a permit from the County before doing so. However, the County must not charge WSSC for the permit.

WSSC requested an amendment to the Bill to expressly require the Executive to enter into a blanket memorandum of agreement with WSSC that would cover the notice, DTS response, and the reimbursement of WSSC's costs to install County communications infrastructure as part of a WSSC project. This request seems reasonable. **Council staff recommendation:** amend the Bill to expressly authorize the Executive to execute a blanket memorandum of understanding with WSSC or a public utility governing the implantation of this law. This could be done as follows:

Add the following new subsection after line 192 of the Bill:

- (h) Blanket memorandum of understanding. The Executive may execute a blanket memorandum of understanding with the Washington Suburban Sanitary Commission of a public utility company governing the implementation of this Section, including:
- (1) the use of the County's Geographic Information System to locate planned work in a public roadway;
 - (2) a method of determining the cost to reimburse the WSSC or public utility company for the construction of the County communications infrastructure;
and

(3) classes of projects that are exempted from the requirements of this Section.

8. What is the fiscal and economic impact of the Bill?

The Executive Branch had not completed its work on the Fiscal and Economic Impact Statement for this Bill when this packet went to print. The Bill would require DTS to create a strategic plan for implementing the County communications infrastructure, review utility projects for inclusion of County communications infrastructure in a timely basis, and reimburse a utility for the cost to add the County communications infrastructure to a project. However, the “dig-once” policy underlying this Bill should result in some savings on individual projects because the incremental cost of adding the County communications infrastructure to an existing project should be less than a stand-alone County project.

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Bill No. 7-18
Concerning: Streets and Roads -
Installation of County
Communications Infrastructure
Revised: February 27, 2018 Draft No. 5
Introduced: April 2, 2018
Expires: September 6, 2019
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Council President Riemer
Co-Sponsors: Councilmembers Berliner, Elrich, Rice, and Hucker

AN ACT to:

- (1) require the Director of the Department of Technology Services to develop and periodically update a Strategic Plan to install County communications infrastructure throughout the County;
- (2) require certain excavation projects to add the installation of County communications infrastructure at the County's expense;
- (3) establish a dig-once policy for adding the installation of County communications infrastructure in the public right of way;
- (4) require any person who leases the County communications infrastructure to follow net neutrality; and
- (5) generally amending the law governing the installation of County communications infrastructure and the requirements for issuing a permit to excavate in the public right of way.

By amending

Montgomery County Code
Chapter 49, Streets and Roads
Sections 49-26, 49-36, and 49-43

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Sections 49-26, 49-36, and 49-43 are amended as follows:**

2 **49-26. Definitions.**

3 In this Chapter, except where specified otherwise, the following words and
4 phrases have the meanings indicated:

5 *Bikeway*[:] means any area expressly intended for bicycle travel, including any:

- 6 (a) *Shared use path*: A paved path that abuts, is contiguous with, and is a
7 part of the right-of-way for a County road or street, that is typically 10
8 feet wide but can vary between 8 feet and 14 feet wide, designated for
9 bicycles and pedestrians, that is separated from motorized traffic by a
10 curb, barrier, or landscape panel.
- 11 (b) *Shared use trail*: A paved or unpaved trail designated for bicycles and
12 pedestrians, that is not part of the right-of-way for a County road or street
13 because the trail does not abut and lie contiguous with the right of way
14 for a County road or street.
- 15 (c) *Bike lane*: A portion of a roadway designated by striping, signing, or
16 pavement markings for the preferential or exclusive use of bicycles, and
17 on which through-travel by motor vehicles is not allowed.
- 18 (d) *Shared use roadway*: A roadway open to both bicycle and motor vehicle
19 travel and which is designated as a preferred route for bicycle use by
20 warning or informational signs.
- 21 (e) *Separated bike lane*, also known as a protected bike lane or cycle track:
22 a bikeway that is physically separated from motor vehicles and pedestrian
23 facilities. The separation may be vertical, such as a curb; horizontal, such
24 as a landscape panel or parking lane; or a combination. A separated bike
25 lane may be in a one-way or two-way configuration.
- 26 (f) *Buffered bike lane*: a bikeway separated from a motor vehicle travel lane
27 with an area of striped pavement.

28 *Complete streets*[:] means streets that are planned, designed, and constructed to
 29 enable safe access for all users, including pedestrians, bicyclists, motorists, and
 30 transit riders of all ages and abilities, commercial vehicles, freight haulers, and
 31 emergency service vehicles.

32 *Complete streets infrastructure*[:] means any design feature that contributes to
 33 a safe, convenient, and comfortable travel experience, which may include such
 34 features as sidewalks; shared use paths, bike lanes, and separated bike lanes;
 35 bike stations and bike storage facilities; narrow motor vehicle lanes and tight
 36 curb radii; street trees, planting strips, and other right-of-way landscaping; curbs
 37 and accessible curb ramps; curb extensions, crosswalks, and refuge islands;
 38 raised medians; pedestrian and traffic signals, including countdown and
 39 accessible signals; signage; streetlighting; street furniture; bicycle parking
 40 facilities; stormwater management; public transportation stops and shelters;
 41 dedicated transit lanes; and traffic calming devices.

42 *Construction and constructed* include “reconstruction” and “reconstructed” but
 43 not “maintenance,” and include grading, installation of drainage structures,
 44 paving, curbs and gutters, curb returns, sidewalks, bikeways, driveway
 45 entrances, guardrails, retaining walls, sodding, and planting.

46 *County communications infrastructure* means conduits, pull boxes, and other
 47 facilities that are used by the County to provide communications services.

48 *Curb extension*[:] means an area that extends the line of a curb into a parking
 49 lane, reducing the width of a street.

50 *Curbside Width*[:] means the area beyond each curb necessary for sidewalks,
 51 shared use paths, street trees and other landscaping, streetlights, utilities, and
 52 other elements.

53 *Dedication plat*[: Any] means any plat conforming to law, duly recorded in the
 54 County land records, which has the legal effect of dedicating one or more rights-

55 of-way to public use. If the plat was recorded after the Maryland-National
56 Capital Park and Planning Commission was created, and the property is located
57 in the Commission's jurisdiction, the Commission must have approved the plat.

58 Department of Technology Services Requirements means regulations governing
59 the participation of the Department of Technology Services in construction and
60 reconstruction projects in the public right of way for the installation of County
61 communications infrastructure.

62 Design standard[:] means the standard adopted by regulation under this Article
63 for each type of road, as defined in Section 49-31, except Freeways and
64 Controlled Major Highways, which shows typical cross- sections and other
65 dimensions to which the road must conform.

66 Director[: The] means the Director of Transportation or the Director of
67 Permitting Services, as specified, and each Director's designee.

68 Drainage structure[: Any] means any culvert, bridge, storm drain, storm sewer,
69 catch basin, canal, channel, inlet, ditch, or subsurface drain, and any other
70 structure or watercourse designed to convey surface or other waters.

71 Dual road[: Any] means any road in which the travel directions are separated
72 by a median.

73 Forest conservation plan[: A] means a plan for the retention, afforestation, or
74 reforestation of forest and trees approved under Chapter 22A.

75 Ground cover[: Low-maintenance] means low-maintenance, non-invasive,
76 leafy, grassy, or woody vegetation that covers and holds soil.

77 Maximum target speed[:] means the maximum speed at which vehicles should
78 operate on a thoroughfare in a specific context, consistent with the level of
79 multimodal activity generated by adjacent land uses, to provide mobility for
80 motor vehicles and a safe environment for pedestrians and bicyclists.

81 Net neutrality means a principle that prohibits an internet service provider from
82 discriminating against information by blocking, slowing, prioritizing internet
83 content, or requiring an end user to pay different or higher rates to access
84 specific content or applications. Net neutrality does not prohibit an internet
85 service provider from taking any action for reasonable network management
86 purposes such as easing congestion or blocking spam.

87 *Pedestrian walkway*[: Any] means any sidewalk, and any other land, way, or
88 path designated by appropriate signs for a pedestrian route.

89 *Private Road*[: Any] means any street, highway, avenue, lane, alley, or viaduct,
90 or any segment of any of them, including any pedestrian walkway adjacent to
91 the private road that has not been deeded, dedicated or otherwise permanently
92 appropriated to the public for public use.

93 *Reconstruct and reconstruction* include any change in the width of a road - that
94 is, the width of the pavement or the area between curbs - but do not include
95 resurfacing a road without any change in its width.

96 *Road*[: Any] means any road, street, highway, avenue, lane, alley, bridge, shared
97 use path, sidewalk, viaduct, or any segment of any of them, and any related
98 storm drain and stormwater management facility.

99 *Sidewalk*[:] means any portion of the right-of-way for a County road or street
100 that is expressly intended as a pedestrian walkway.

101 *Specimen tree*[: Any] means any tree with a diameter measured at 4.5 feet above
102 the ground of 30 inches or more, or any tree with 75% or more of the diameter
103 of the current champion tree of that species, as designated by the County Forest
104 Conservation District Board.

105 Standard County communications infrastructure specifications means the type,
106 size, and quantity of conduits, the size and frequency of pull boxes, and any

107 other facilities that the Department of Technology Services (DTS) determines
 108 are necessary to serve the County's communications needs.

109 *Street tree*[: A] means a tree that is listed in the design standards as acceptable
 110 for planting in a public right-of-way. In a private road right-of-way or easement,
 111 a tree listed as acceptable for planting in the Planning Board technical manual
 112 for forest conservation.

113 *Subdivision*[: The] means the division or partition of a lot, tract or parcel of land
 114 into 2 or more lots, plots, sites, tracts, parcels, or other divisions for immediate
 115 or future rental, sale, or building development. Subdivision includes a
 116 resubdivision, but not a division or partition of land for agricultural purposes.

117 *Transitway*[:] means a right-of-way for use exclusively by public transit
 118 vehicles.

119 **49-36. Permit conditions and procedures.**

120 Each permit issued under Section 49-35 must be subject to the following
 121 conditions, which the permit must specify:

122 * * *

123 (i) The Director must not issue a permit for construction unless the applicant
 124 has complied with the County communications infrastructure
 125 requirements established in Section 49-43.

126 (j) If the Director finds that a person has violated the conditions of any
 127 permit, the Director may order the permittee to stop construction and may
 128 revoke the permit. The refusal of any permittee to stop construction after
 129 receiving notice of a stop-work order is a separate violation of this
 130 Article.

131 [(j)] (k) An aggrieved person may file an appeal with the County Board of
 132 Appeals from the issuance of a stop-work order or the imposition of
 133 additional conditions under this Section. The appeal must be filed with

134 the Board within 10 days after the stop-work order is issued or the
135 additional conditions are imposed.

136 **49-43. [Reserved] Installation of County Communications Infrastructure.**

137 (a) Strategic Plan. The Director of DTS must develop and periodically
138 update a Strategic Plan to install County communications infrastructure
139 throughout the County. The Strategic Plan must identify areas of the
140 County that:

141 (1) would benefit from the installation of County communications
142 infrastructure; and

143 (2) are expected to have a construction project that requires the
144 applicant to obtain a permit under Section 49-35.

145 (b) Need. The Director of the Department of Technology Services (DTS) or
146 the Director's designee must consider adding County communications
147 infrastructure to any permit issued for construction under Section 49-35
148 to create more efficient delivery of communications services to the
149 County and County residents and to limit excavation in the public right
150 of way.

151 (c) Notice to DTS. At least 10 business days before applying for a permit to
152 install underground conduits under Section 49-35, an applicant must
153 notify the Director of DTS of its intention to apply for a permit in the
154 manner specified by regulation. An applicant may notify the Director of
155 DTS of its intention to apply for a permit under this subsection during the
156 planning stages of a project to permit the possible inclusion of County
157 communications infrastructure in the project before plans and
158 specifications are completed.

159 (d) DTS evaluation. Within 10 business days after receiving notice required
160 by subsection (b), the Director of DTS must determine if the construction

161 should include the installation of County communications infrastructure
 162 after considering:

- 163 (1) the ability to place conduit over long, continuous corridors;
- 164 (2) the proximity of the project to government and community
 165 facilities requiring service;
- 166 (3) existing communications infrastructure in the vicinity;
- 167 (4) potential interest from others in using the conduit;
- 168 (5) other cost-effective alternatives in the area;
- 169 (6) capacity on utility poles in the area;
- 170 (7) risk of damage to communications infrastructure;
- 171 (8) potential delay to installing another critical infrastructure facility
 172 by adding communications infrastructure to the project; and
- 173 (9) the incremental cost of adding communications infrastructure to
 174 the project;

175 (e) DTS decision to participate. If the Director of DTS decides that the
 176 benefit of adding the installation of County communications
 177 infrastructure to the project outweighs the incremental cost, the applicant
 178 must:

- 179 (1) provide an estimate of the incremental cost to add the County
 180 communications infrastructure;
- 181 (2) include the installation of the County communications
 182 infrastructure to the plans for the project; and
- 183 (3) execute an agreement with the County to install the County
 184 communications infrastructure at the County's expense.

185 (f) DTS decision not to participate. If the Director of DTS decides that the
 186 incremental cost of adding the installation of communications

187 infrastructure to the project outweighs the benefits to the County, the
188 Director must notify the applicant of this decision.

189 (g) Net neutrality. A County contract with an internet service provider to use
190 the County communications infrastructure must require the internet
191 service provider to follow net neutrality in providing internet service to
192 any County resident.

193 (h) Regulations. The Executive must adopt a regulation by Method 2 that
194 includes:

195 (1) a procedure for determining whether to participate in a project;

196 (2) standard County communications infrastructure specifications;

197 (3) a standard methodology for determining the incremental cost of
198 installing County communications infrastructure in excavation
199 projects; and

200 (4) an automatic exemption for one or more classes of projects from
201 the requirements of this Section.

202 (i) Reports. The Director of DTS and the Director of Permitting Services
203 must jointly submit an annual report to the Executive and the Council on
204 or before each October 1 that includes:

205 (1) the number of permits to excavate in the public right of way issued
206 by the County during the preceding fiscal year;

207 (2) the number of excavation permits issued that included the
208 installation of County communications infrastructure during the
209 preceding fiscal year;

210 (3) the location and incremental cost to the County for each County
211 communications infrastructure installed during the preceding
212 fiscal year;

- 213 (4) the status of the County communications infrastructure system;
- 214 and
- 215 (5) recommendations for changes to the process.

Sec. 2. Initial Strategic Plan

217 The Director of DTS must develop the initial Strategic Plan to install County
218 communications infrastructure throughout the County required in Section 1 of this Act
219 on or before July 1, 2019.

Section 3. Effective date.

221 The amendments added by Section 1 of this Act take effect on July 1, 2018 and
222 must apply to each application for a permit to excavate in the public right of way
223 submitted after July 1, 2020.

224 *Approved:*

225

Hans D. Riemer, President, County Council	Date
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226 *Approved:*

227

Isiah Leggett, County Executive	Date
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228 *This is a correct copy of Council action.*

229

Megan Davey Limarzi, Esq., Clerk of the Council	Date
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LEGISLATIVE REQUEST REPORT

Bill 7-18

Streets and Roads – Installation of County Communications

DESCRIPTION:	Bill 7-18 would: <ol style="list-style-type: none">(1) require the Director of the Department of Technology Services to develop and periodically update a Strategic Plan to install County communications infrastructure throughout the County;(2) require certain excavation projects to add the installation of County communications infrastructure at the County's expense;(3) establish a dig-once policy for adding the installation of County communications infrastructure in the public right of way; and(4) require any person who leases the County communications infrastructure to follow net neutrality.
PROBLEM:	The County wants to extend its communications infrastructure throughout the County.
GOALS AND OBJECTIVES:	Develop a strategic plan to extend County communications infrastructure and provide a cost-effective method of implementing the plan.
COORDINATION:	DTS, DPS, County Attorney
FISCAL IMPACT:	To be requested.
ECONOMIC IMPACT:	To be requested.
EVALUATION:	To be requested.
EXPERIENCE ELSEWHERE:	To be researched.
SOURCE OF INFORMATION:	Robert H. Drummer, Senior Legislative Attorney
APPLICATION WITHIN MUNICIPALITIES:	To be researched.
PENALTIES:	Failure to receive a permit or a stop-work order.

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**TESTIMONY ON BEHALF OF COUNTY EXECUTIVE ISIAH LEGGETT
ON BILL 7-18, STREETS AND ROADS – INSTALLATION OF COUNTY COMMUNICATIONS
INFRASTRUCTURE**

Good afternoon. I am Diane Jones, Director of the Department of Permitting Services, and I am here to present testimony on behalf of County Executive Leggett on Bill 7-18. County Executive Leggett supports the intent behind the Bill but does not support Bill 7-18 because it unreasonably burdens businesses, lacks sufficient planning to be effective, and will result in delay to projects and greater costs to applicants and the County.

Bill 7-18 would impose a prohibition against issuance of right-of-way permits unless the permit applicant has given 10 days notice to the County for it to review and make a determination on whether the proposed conduit installation should include, at the County's expense, County communications infrastructure. It effectively requires the County to be provided a right of first opportunity to get public work done in connection with the private permit.

The County Executive fundamentally disagrees with the premise that permitting must be the "hook" for a joint installation. Review at permitting is simply too late in a project to require an applicant to make changes to design of a project. It is too much burden too late to be effective.

When an applicant applies to the Department of Permitting Services (DPS) for a permit to dig or do work in a County right-of-way, the applicant has already completed design and is ready to commence construction. That is *not* the time to determine if the County desires the applicant to install public conduit with the concomitant time that it takes to determine undefined "incremental costs", negotiate the terms of an agreement for such installation, revise and resubmit the plans for the revised scope of work under the permit, bid or rebid the work to be performed, resolve procurement issues, and reprioritize planned projects to fund unplanned projects. Indeed, the County may find itself defending against takings claims or worse.

As introduced, Bill 7-18 would require the Department of Technology Services (DTS) to "consider adding County Communications infrastructure to *any permit issued for construction* under Section 49-35 to create more efficient delivery of communication services ...and to limit excavation in the public right of way." Annually, DPS issues over 3000 permits for work in the public right-of-way. While perhaps unintentional, Bill 7-18 would apply effectively to all permits, diverting scarce staff resources from other critical projects, notwithstanding the fact that of these permits, approximately 50 are for private projects working in the public right-of-way and approximately 100 are for large utility projects. Realistically, this review work cannot practically be done within the 10 days required under the Bill.

In contrast, under the FiberNet Master Plan, the County expects to construct only 1.14 miles of conduit on major roads over the next three fiscal years, and the County is already reaching out to other providers to identify partners for ultraMontgomery shared conduit projects. Further, County projects for road work already include the installation of conduit for County communication facilities.

With the recent law changes resulting from the Subdivision Rewrite, there has been a significant uptick in the creation of private roads – where historically such roads would have been public. Those roads would not be subject to the provisions of Bill 7-18.

Further, given the timeframes under Bill 7-18, it is not clear when County budgeting for such projects would be made.

Executive staff has suggested that it would be better to capture a coordinated public need with a private project at the point of preliminary or sketch plan approval. In this manner it can be a condition of approval, private roads can be included, and, importantly, the applicant would have time during the more detailed design stages of a project, to work out any agreements with the Department of Technology Services. And, as previously stated, the County is already working with others to install conduit.

With respect to public utility work, a delay in permit issuance can lead to outcomes that would not be in the County or the public interest. A preferable approach would be for the Department of Technology Services to continue to work with utilities for advance notice of projects that are in planning. If a utility will not cooperate, delaying the permit is not the answer. We also suggested and support the requirement that DTS develop a strategic plan, in coordination with utilities and other stakeholders and believe that is the best approach to accomplish the goals of Bill 7-18.

The County Executive is also concerned that the manner in which Bill 7-18 is captioned and advertised does not provide meaningful notice to those who may be impacted as to its content and effect. This bill is a burden on the permit process for the applicant and is the antithesis of "streamlining" – something the County has dedicated extensive work to achieving.

Finally, the Office of the County Attorney has prepared and sent to Council a bill review memo addressing a number of legal issues raised by Bill 7-18.

We appreciate the opportunity to share the Executive's views and will continue to work with Council to further the Council's and the Executive's mutual objectives.

Jerry Pasternak
Vice President

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701 Ninth Street NW
Washington, DC 20068-0001

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April 10, 2018

Montgomery County Council
100 Maryland Avenue
Rockville, Maryland 20850

Re: Bill 7-18
Streets and Roads- Installation of County Communications Infrastructure

Dear Council President Riemer and Councilmembers:

The Potomac Electric Power Company ("Pepco") submits these comments in opposition to Bill 7-18, Streets and Roads – Installation of County Infrastructure.

This bill seeks to extend the County's communications infrastructure by requiring the Director of the Department of Technology Services ("DTS") to develop a strategic plan and by granting the Director the authority to require applicants for a right-of-way permit to (i) provide an estimate of the cost to add County communications infrastructure to its excavation project, (ii) include the installation of County communications infrastructure to the plans for the excavation project, and (iii) execute an agreement with the County to install communications infrastructure at the County's expense.

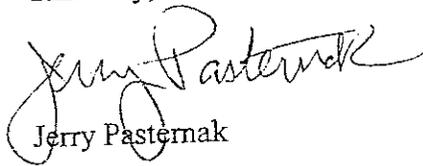
Although the goal of extending the County's communications infrastructure is a laudable one, the process mandated by Bill 7-18 is seriously flawed. This bill would (i) delay the completion of critical underground projects designed to enhance the reliability and resiliency of the electric grid, (ii) drive up the costs of these projects, (iii) place electric infrastructure at an unnecessary risk of third-party contractor cuts and dig-in, and (iv) raise complex project and contract management issues, including responsibility and accountability for the successful initiation, planning, design, monitoring, controlling and closure of the County communications infrastructure component of the project.

Moreover, the bill is unnecessary. Pepco and Montgomery County have long engaged at the staff and field levels in a collaborative effort during the design, engineer, permit and construction phases of underground projects. As part of this collaboration, Pepco provides project information to the County that can be used to inform strategic planning by DTS. These exchanges recognize that at times Pepco can accommodate a request to include communication infrastructure in our excavation projects but that the work often occurs in underground locations that have size and scale limitations that do not support inclusion of communication infrastructure.

Montgomery County Council
April 10, 2018
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Thank you for the opportunity to present these comments, and we look forward to working with you as Bill 7-18 goes through the legislative process.

Sincerely,



Jerry Pasternak



101 Constitution Avenue, NW
Washington, DC 20080
www.washingtongas.com

BILL NO./TITLE: 7-18, Streets and Roads – Installation of County Communications Infrastructure

SPONSOR: Council President Riemer

CONTACT PERSON: Ronan Gulstone 202-672-3998

DATE: April 10, 2018

POSITION: Oppose

Council President Riemer, and members of the County Council for Montgomery County, Maryland, my name is Ronan Gulstone, Manager, State Government Relations and Public Policy, for Washington Gas. I am respectfully opposing Bill 7-18.

Bill 7-18 would require any company installing underground conduit to provide notice at least 10 days before applying for a permit to the Director of Technology Services and wait up to 10 days from the notice for a determination on whether the County would like to install its conduit during our construction. If conduit is determined to include natural gas facilities, Washington Gas is concerned that the requirements under the proposed section 49-43, Installation of County Communication Infrastructure, may significantly impact our operations.

Washington Gas' concerns can be broadly split into three categories; delays in permit approvals and project completions, increases in cost, and increased safety risks. A brief description of each follows.

Delays in Permit Approvals and Project Completion. The requirements in this measure have the potential to delay the length of time it takes for Washington Gas to obtain required permits from the County. Additionally, if the County determines that our project presents an opportunity to install communication infrastructure, our projects could be delayed further by a host of issues which we have no control over. Waiting for a third-party to install conduit near or around our conduit will require additional time before we can close out our installations.

Increases in Cost. Though the legislation proposes that the County will install the conduit at their expense, in practice there are likely to be issues with what the actual additional cost is for widening our excavation. Additionally, should the installation of conduit cause our project to take longer to close out, there may be issues regarding recovering costs for the additional time that we have our employees and/or contractors out in the field.

Increased Safety Risks. Washington Gas is committed to being a safe and reliable partner with the County. One of our greatest concerns, anytime anyone digs, is that they may breach our facilities and cause a leak. Placing any conduit near or around our infrastructure significantly increases that risk, and can also make it more difficult for us to replace our upgrade our facilities in the future.

I thank the Council for its time and attention to this testimony, and look forward to discussing our concerns further with the Committee.



**Testimony of
Benjamin Aron
In Opposition to Montgomery County Council Bill 7-18
CTIA**

Before the Montgomery County Council

April 10, 2018

Chair, Vice Chair, and members of the council, on behalf of CTIA, the trade association for the wireless communications industry, I am here to testify in opposition to Montgomery County Council Bill 7-18. CTIA and its member companies support a free and open internet. To further that goal, we believe that a national regulatory framework with uniform and generally applicable competition and consumer protections is a proven path for ensuring a free and open internet while enabling innovation and investment throughout the internet ecosystem. CTIA and its member companies also support a federal legislative solution to enshrine open internet principles. CTIA, however, respectfully opposes piecemeal state or local regulation of this interstate service, including this legislation.

The mobile wireless broadband marketplace is competitive and continuously changing. It is an engine of innovation, attracting billions of dollars in network investment each year, and generating intense competition to the benefit of consumers. From the beginning of the Internet Age in the 1990s, the Federal Communications Commission (FCC) applied a regulatory framework to internet service that allowed providers to invest, experiment, and innovate. In that time, an entire internet-based economy grew. But in 2015, the FCC took a much different approach, applying 80-year-old common-carrier mandates meant for traditional monopoly public utilities, despite the fact that internet

services are nothing like public utility offerings such as water or electricity or even landline telephone service.

In 2017, the FCC's *Restoring Internet Freedom Order* reversed that 2015 decision, finding that application of those 1930s utility-style rules to the internet services of today actually harms American consumers. The FCC cited extensive evidence showing a decline in broadband infrastructure investment – an unprecedented occurrence during an era of economic expansion. In the mobile broadband market alone, annual capital expenditures fell from \$32.1 billion in 2014 to \$26.4 billion in 2016. This slowdown affected mobile providers of all sizes and serving all markets. For example, small rural wireless providers noted that the 2015 decision burdened them with unnecessary and costly obligations and inhibited their ability to build and operate networks in rural America.

The FCC's overbroad prohibitions on broadband providers harmed consumers in other ways, too—particularly with respect to innovation. For example, after the 2015 Order, the FCC launched a yearlong investigation of wireless providers' free data offerings, which allow subscribers to consume more data without incurring additional costs. The risk of FCC enforcement cast a shadow on mobile carriers' ability to innovate, compete and deliver the services that consumers demanded. In addition, the inflexible ban on paid prioritization precluded broadband providers from offering one level of service quality to highly sensitive real-time medical applications and a differentiated quality of service to email messages. The FCC's 2017 *Restoring Internet Freedom Order* takes a different path – one that will benefit consumers and enable new offerings that

support untold varieties of technological innovations in health care, commerce, education, and entertainment.

Based on the way some people have talked about the *Restoring Internet Freedom Order*, you might think that the FCC eliminated federal rules that had always applied to internet services and that the federal government has left consumers without any protections. But that is just not the case. The internet was not broken before 2015, and it will not break because of the FCC's most recent decision.

The FCC has simply restored the same national regulatory framework that applied before 2015, which is credited with facilitating the internet-based economy we have today. Under that national regulatory framework, mobile wireless broadband providers have every incentive to invest in and deliver the internet services that consumers demand. In fact, there have been virtually no instances in which U.S. mobile broadband providers blocked traffic or prevented consumers from going where they wanted to on the internet. The truth is that, in a competitive market like wireless, mobile broadband providers have no incentive to block access to lawful internet services, and if they did, their customers would simply switch providers.

Further, the FCC's *Restoring Internet Freedom* clearly provides consumers with legal protections that complement the competitive forces in play. First, the FCC retained the "transparency" rule that was adopted under President Obama's first FCC Chairman in 2010 and maintained in the 2015 decision, which requires broadband providers to publicly disclose extensive information about their performance, commercial terms of service, and network management practices to consumers and internet entrepreneurs. If

a broadband provider fails to make the required disclosures it will be subject to enforcement by the FCC.

Second, under a recent Court of Appeals decision, the reclassification of internet access as an information service rather than a utility-style common carrier service, like landline telephone service, gives the Federal Trade Commission (FTC) authority to police broadband offerings in applicable cases. This extends to any unfair and deceptive practices, including but not limited to, any violation of the transparency rules. The FTC is the nation's lead consumer protection agency, but the 2015 decision had stripped away its authority to police any broadband providers.

Third, the Department of Justice enforces federal antitrust laws, which, as the *Restoring Internet Freedom Order* emphasizes, preclude anticompetitive network management practices. For example, a broadband provider may not anticompetitively favor its own online content or services over the content or services of third parties, or enter into an agreement with other broadband providers to unfairly block, throttle, or discriminate against specific internet content.

Finally, the FCC made clear in the 2017 *Restoring Internet Freedom Order* that generally applicable state laws relating to fraud, taxation, and general commercial dealings apply to broadband providers just as they would to any other entity doing business in a state, so long as such laws do not regulate broadband providers in a way that conflicts with the national regulatory framework to broadband internet access services. This ruling reaffirmed the FCC's 2015 decision that states and localities may not impose requirements that conflict with federal law or policy, but may otherwise enforce

generally applicable laws. Thus, the Maryland Attorney General remains empowered to exercise consumer protection authority.

In short, Montgomery County consumers are well protected against anti-competitive or anti-consumer practices. They enjoy protections provided by the FCC, the FTC, federal antitrust law, and – importantly – existing Maryland state law. On the other hand, state-specific and local net neutrality rules imposed on broadband providers would harm consumers, and would – along with other state and local mandates – create a complex “patchwork quilt” of requirements that would be unlawful.

The FCC's 2017 *Restoring Internet Freedom Order* explains that broadband internet access is an inherently interstate and global offering. Internet communications delivered through broadband services almost invariably cross state lines, and users pull content from around the country and around the world – often from multiple jurisdictions in one internet session. Any attempt to apply multiple states' or local requirements would therefore be harmful to consumers for the same reasons the FCC's 2015 rules were harmful, in addition to the fact that those requirements will be at best different and at worst contradictory.

These problems multiply in the case of mobile broadband: questions will arise over whether a mobile wireless broadband transmission is subject to the laws of the state where users purchased service, where they are presently located, or even where the antenna transmitting the signal is located. State-by-state and locality-by-locality regulation even raises the prospect that different laws will apply as the user moves between states and localities. For example, a mobile broadband user could travel

through multiple states or counties during a long train ride, even the morning commute, subjecting that rider's service to multiple different legal regimes even if the rider spent that trip watching a single movie. Such a patchwork quilt of disparate regulation is untenable for the future success of the internet economy.

Moreover, the FCC found broadband-specific state and local laws would be unlawful. The *Restoring Internet Freedom Order* exercised the agency's preemption powers under the U.S. Constitution and federal law. It held that state or local laws that impose net neutrality mandates, or that interfere with the federal preference for national regulation of broadband internet access, are impermissible.

Ultimately, Congress may decide to modify the existing federal regulatory framework for broadband internet access, and some members of Congress have already introduced legislation addressing these matters. CTIA has called on Congress to enact legislation for the internet ecosystem that promotes a free and open internet while enabling the innovation and investment we need for tomorrow. Nevertheless, today, state-by-state or local regulation of broadband internet access services would harm consumers and conflict with federal law.

In closing, it is unnecessary to pass state legislation on this issue due to the strong consumer protections currently in place and national wireless providers agreeing not to block or throttle lawful content. Accordingly, we respectfully ask that you not move Bill 7-18. Thank you for the opportunity to testify today.

Statement of Art Brodsky
Before the Montgomery County Council
April 10, 2018
Bill 7-18

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President Riemer, Vice-president Navarro and members of the Council, I am here this afternoon to support bill 7-18 and to urge its adoption with a couple of modifications.

I'm Art Brodsky, and I've been involved with telecommunications policy for longer than I would like to admit.

Communications networks are the lifeblood of the 21st-century economy. Knowing what capacity the County has and where we have it is essential to making the maximum and best use of the rights-of-way and conduit that the County owns.

That's why the idea of a strategic plan to look at where we are now, and where we want to be is such a great idea. This is the kind of, forward-looking legislation that shows the outside world that Montgomery County is technologically sophisticated and eager to retain and to attract those businesses which value the networks and services that can be made available here.

Strategic plans can be valuable tools to bringing order out of confusion, developing policy and producing rewarding outcomes. The Council has approved such a plan sponsored by Councilmember Berliner dealing with hunger in the County and has another before it sponsored by Councilmember Berliner and Councilmember Hucker dealing with economic prosperity.

Similarly, making certain that the potential for including County communications infrastructure in a construction on County rights-of-way makes a lot of sense.

Let me focus on the major policy piece of this bill, dealing with Net Neutrality.

It is unfortunately a fact of life these days that policies normally considered the responsibility of the Federal government are being taken up by states and localities. Issues such as protecting the environment and preserving health care which should be the responsibility of Federal agencies are instead being destroyed by those agencies.

Net Neutrality fits into that category. Since the Federal Communications Commission decided in December to repeal the rules that protect Internet users, and that includes most of us, states have stepped into the breach in a couple of ways.

The governor of Montana, a state with roughly the same population we have in Montgomery County, issued an executive order requiring Net Neutrality in communications services purchased by his state government.

Similar orders have been signed in Hawaii, New Jersey, New York and Hawaii.

Washington State has passed legislation to guarantee Net Neutrality. According to the National Conference of State Legislatures, as of last week legislators in 28 states have introduced 65 bills requiring internet service providers to ensure various net neutrality principles.

While I commend you for basing Net Neutrality in this bill on access to County conduit, I point out that all of the executive orders and many of the bills being considered elsewhere base their authority to impose Net Neutrality within procurement procedures. In other words, any communications services the County buys must be from a carrier that abides by Net Neutrality.

My first recommendation is that you add language to the bill similar to that found in other orders and legislation. I have attached a couple of examples to my testimony submitted today (as opposed to that sent in ahead of time). My discussions with telecommunications attorneys have persuaded me that this is the most legally sound way to proceed.

My second recommendation is that you include an enforcement clause for the Net Neutrality provisions in the bill. Again, in many cases, the orders and legislation delegate the exact mechanism to the relevant administrative body. I suggest that there will be many examples of how others are doing it so that the County Executive and his departments, including the County Attorney, Department of Technology Services and Office of Consumer Protection, should be able to come up with a reasonable solution.

Thank you again for your time and attention.

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**Testimony of Next Century Cities
Presented by Cat Blake
Policy and Program Manager, Next Century Cities
Before the
Montgomery County Council
April 10, 2018**

Hello, and thank you for the opportunity to present testimony today on behalf of Next Century Cities in support of Bill 7-18.

My name is Cat Blake, and I am the Policy and Program Manager for Next Century Cities - a nonprofit membership organization with 185 city, town, and county members. Our members are local municipalities that want to ensure that all have access to fast, affordable, reliable broadband.

Our members have created, refined, and adopted a variety of policy solutions to reduce the cost and time restraints of broadband deployment and to foster competitive marketplaces in their communities. Dig Once policies have been powerful drivers of many of our communities' success across the country. Because construction costs represent the most expensive line item in a broadband deployment budget, as opposed to the fiber and conduit itself, a Dig Once policy is a common sense method of reducing capital costs and streamlining new broadband deployments.

Santa Monica, California adopted a Dig Once policy 20 years ago that coordinated fiber and conduit installation with other capital projects, or in joint trenching with other entities. The policy reduced the cost of laying fiber by up to 90 percent.¹ Now the city both leases access to private ISPs - creating competition for consumers - and uses its conduit and fiber to connect more than 100 buildings and deliver wireless connectivity in major corridors.

Lincoln, Nebraska created a 350 mile conduit network along abandoned water lines, traffic conduit, electric conduit, and gas lines. The city has since leased out the conduit to seven different carriers and generates nearly a half a million dollars per year in lease revenue.² The city is predicting over \$1 million in annual revenue for 2019.

Dig Once vastly reduces the cost of communications infrastructure deployment. Early placement of conduit can be estimated to save anywhere from \$30,000 to \$100,000 per mile compared to the costs of revisiting streets and digging them up again.³ A report by consulting firm CTC Technology & Energy estimated that the cost of a provider or locality pulling fiber in *existing* conduit is 10 percent of the cost of underground construction *without* the conduit.⁴

¹ <http://ilsr.org/wp-content/uploads/2014/03/santa-monica-city-net-fiber-2014-2.pdf>
² <https://muninetworks.org/content/transcript-community-broadband-bits-episode-228>
³ <http://ilsr.org/wp-content/uploads/2014/03/santa-monica-city-net-fiber-2014-2.pdf>
⁴ <http://www.ctcnet.us/wp-content/uploads/2014/01/GigabitCommunities.pdf>

By lowering cost of deployment, Dig Once breaks down barriers of entry for new market entrants, creating a competitive marketplace that ultimately can result in more options, lower prices, and higher quality of service for consumers.

Finally, Dig Once can also greatly reduce strain on a community by minimizing traffic, noise, and safety concerns of constant construction work.

Next Century Cities sees Dig Once as a proactive common sense policy that would promote investment in Montgomery County, and we support this legislation. Thank you.

ctc technology & energy

engineering & business consulting

Testimony of Andrew Afflerbach, Ph.D., P.E.

Mr. President, and members of the Council, my name is Andrew Afflerbach and I am a Montgomery County resident. I own a Kensington-based engineering company specialized in broadband and telecommunications technology and policy. I have worked for dozens of cities, states and national governments and have a global view of broadband and telecommunications issues.

I am testifying today in support of Bill 7-18 because, based on my experience, there is significant net benefit in "dig once" practices for increasing the quantity and quality of broadband services, and for reducing the impact on roads and rights-of-way.

From a technical and financial point of view, the majority of the cost of utility construction is the cost of labor and of cutting and restoring and maintaining the street or sidewalk. Therefore, it is often worth constructing extra capacity each time you construct. Based on construction costs in a range of projects, the cost of construction that is coordinated with other utility construction is 10 to 50 percent of the cost of a dedicated construction project.

This cost difference is why governments at all levels are taking action to have additional communications conduit or fiber optic cable constructed in coordination with road and utility projects.

In Hong Kong, for example, the government requires utilities and service providers to notify all other providers of a plan to conduct a road opening and coordinate the construction and costs with the other providers. After this coordination, service providers can buy or lease the constructed conduit, but may not open the road for 1 to 5 years (depending on the road type).

The U.S. National Broadband Plan recommended that Congress "consider enacting 'dig once' legislation applying to all future federally funded projects along rights-of-way (including sewers, power transmission facilities, rail, pipelines, bridges, tunnels and roads)."

When Virginia Power notified Arlington County of a large-scale power construction project in the downtown and Pentagon area, the County worked with Virginia Power to develop a joint construction project, in which Virginia Power constructed conduit and placed fiber optic cable in parallel with the power project, and Arlington County paid the incremental cost. The fiber is now a resource both for County government and economic development use.

Facing congestion in the rights-of-way, crushingly high cost of construction and restoration, and a need for greater broadband capacity and competition, the City and County of San Francisco adopted a Dig Once ordinance, under which the City developed a database of upcoming road and utility projects—by

the City, Pacific Gas & Electric, and the telecommunications providers—and evaluated them based on a carefully developed set of criteria to minimize costs, maximize the benefit, and minimize disruption, and minimize the impact on the other projects, and set aside a budget for conduit construction.

Based on my experience, the most successful Dig Once initiatives are those that take care to focus on the specific needs of the community. Some communities are relatively “built out” in broadband and are mostly focused on limiting the impact on the roads. Others have significant new greenfield construction and want to make sure that new areas have the foundation for competitive broadband services, as well as backbone for potential future 5G technologies and the Internet of Things. Others are creating new developments in place of old commercial and residential areas, and are widening roads and burying aerial utilities.

It is also crucial to focus on areas where Dig Once conduit will really be used and not waste effort or money. Dig Once is not simply a matter of throwing an extra pipe into a trench. Rather, installing the extra capacity will require engineering, planning, and potentially widening a trench. The incremental cost can still be tens of thousands of dollars per mile.

Good engineering and construction practices will make the conduit useful. A good design will include places to access communications conduit and means of pulling cables through the conduit. Good planning will include a procedure for accessing the conduit in coordination with other users of the conduit. Well-designed conduit will be capable of subdivision to create room for multiple providers.

Best practices also include consultation with potential users of the conduit—this will help determine 1) where service providers, government agencies, and others anticipate needing fiber capacity, 2) the amount of capacity they expect to need, and 3) what they will connect to the conduit (e.g., a few large buildings, all the homes/businesses on the street, or wireless small cells on poles).

Advance planning is important, because it can enable the County and the constructor of the utility or the road to better refine the design and figure out cost-sharing.

Road, transit, public utility (such as WSSC), and power projects often take months or years to plan and build. While not the only dig once options, these may provide a robust entry point into dig once and, like the Arlington County/Virginia Power initiative, provide an early success.

Finally, delaying or doing nothing will result in waste—given the ongoing improvements and new construction of roads and utilities, opportunities will be missed, unless the County takes stock of these opportunities, examines the benefits and costs of dig once, and takes action as appropriate.

Thank you for your time and the opportunity to speak.

April 9, 2018

Hans Reimer
President
Montgomery County Council
County Office Building
100 Maryland Ave, 4th Floor
Rockville, MD 20850

Re: Support for Bill 7-18

Dear President Reimer:

I write on behalf of Public Knowledge in support of Bill 7-18, “Streets and Roads – Installation of Country Communications Infrastructure.”¹ Our organization has long supported both network neutrality and “dig once” infrastructure access as important policies to promote universal, affordable broadband access. As Senior Vice President of Public Knowledge, and as a resident of Montgomery County, I strongly urge that Council adopt Bill 7-18 to promote competition in the provision of broadband and “over the top” (OTT) broadband services.

On March 2, 2018, I testified before the Education, Health and Environmental Affairs Committee of the Maryland Senate in support of MD S. 287. That bill would require that any broadband provider contracting with the State of Maryland must observe net neutrality. As I stated then, the State of Maryland has important reasons for wanting to ensure a neutral Internet. Additionally, despite claims from industry opponents, nothing in the existing FCC net neutrality repeal preempts a state or local government from conditioning acceptance of a voluntary benefit on conditions that will protect consumers and promote competition. I attach my March 2 testimony in support of S. 287, in the hope you will find it helpful in consideration of similar issues related to Bill 7-18.

One difference between Bill 7-18 and MD S. 287, which weighs even more in favor of Bill 7-18, is the reliance on access to community infrastructure as the trigger for the County’s proposed net neutrality requirement. In addition to the benefits to neighborhoods from “dig once” policies in the form of minimizing disruption and noise, access to the proposed infrastructure helps to stimulate competition by dramatically lowering the cost of deploying competing network infrastructure. Nothing requires the County to provide a benefit to ISPs that refuse to operate their networks in a neutral manner. Even more so than choosing to compete for a state or local contract, a decision to access County-created conduit is entirely within the discretion of the ISP. Even if one were to accept the argument that net neutrality obligations impose a burden on ISPs, a highly dubious proposition refuted by the fact that ISPs have

¹ Public Knowledge is a 501(c)(3) based in Washington D.C. that works to support freedom of expression, an open Internet, access to affordable communications tools and creative works. More information about Public Knowledge is available on our website, www.publicknowledge.org.

operated under some form of net neutrality regulation since the days of the dial-up Internet, it is up to the individual ISP to determine if the purported burden outweighs the very real cost savings of access to County-created conduits. Any ISP that thinks otherwise can continue to operate under exactly the same rules, in exactly the same environment, in which they operate today.

In the even you have any further questions, please feel free to contact me at (202) 861-0020.

Respectfully submitted,

/s/ Harold Feld
Senior Vice President
PUBLIC KNOWLEDGE



April 10, 2018

Montgomery County Council
100 Maryland Ave.
Rockville, MD 20850

Members of the County Council:

As a Bethesda resident and the president and CEO of Free Press, an organization long dedicated to defending the free and open internet, I'm writing to support your efforts to protect Net Neutrality.

In the months since the Federal Communications Commission abandoned its Net Neutrality rules and abdicated its duty to protect internet users, there's been a nationwide groundswell of support for Net Neutrality. Ordinary people have demanded that their municipalities, cities, counties, and states step into the void left by the FCC.

The FCC's actions last year were misguided, arbitrary and capricious. In 2015, the FCC had made the right and legally sound choice to strengthen Net Neutrality rules under Title II of the Communications Act, safeguarding how the internet has worked since its inception. The FCC's old rules prevented ISPs from blocking and throttling websites and from enacting paid-prioritization schemes that create fast lanes for the biggest companies while undermining small businesses and independent voices.

Unfortunately, the FCC under Chairman Ajit Pai moved in December to dismantle these fundamental protections. As the FCC is now unwilling to prevent ISPs from enacting their most damaging plans, the public is looking for leaders at every level of government to protect their rights.

I'm proud to say Montgomery County has been a leader in protecting our rights online. Along with 50 other cities and counties, Montgomery County joined a day of action last year demanding that Pai not dismantle the rules. Unfortunately, he did not listen.

While we need federal action to protect all internet users, this measure will send a strong message to the FCC and Congress: that the people of Montgomery County want access to a free and open internet and will take action to protect their rights. It signals to phone and cable companies that they must not discriminate or manipulate our online experiences. I applaud your efforts to protect Net Neutrality and hope they will serve as an example for the rest of the country.

Sincerely,

Craig Aaron
President and CEO
Free Press / Free Press Action Fund
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**MONTGOMERY COUNTY COUNCIL BILL 7-18: STREETS & ROADS – INSTALLATION OF
COUNTY COMMUNICATIONS INFRASTRUCTURE**

INVESTMENTS IN MARYLAND

JULY 5, 2018

OPPOSE

TESTIMONY SUBMITTED BY COMCAST

Bill 7-18- Streets and Roads—Installation of County Communications Infrastructure, would require that any company performing certain excavations in Montgomery County (County) Rights-of –Way (“ROW”) must add County communications infrastructure at the time of the project. Comcast opposes this proposed legislation for the following reasons. We are concerned that the practical effect of this bill as presented will be to add unnecessary delay and cost to critical infrastructure projects that the company performs on a regular basis in the County, resulting in slower, higher-cost access by County residents to critical services. In addition, there are several questions and concerns that remain unresolved with Bill 7-18 that we outline in more detail below.

Implementation of Bill 7-18 could drastically increase the length of time it currently takes providers to secure permits to do work in the County’s ROW (from 15-30 days to 25-50 days). Additional engineering designs, expanding trenches and negotiating “incremental costs” would all contribute to delays and increased costs for our infrastructure projects. These delays and increased costs would have the unfortunate consequence of making Montgomery County less competitive when it comes to the quick and timely deployment of critical services, including access to high-speed broadband infrastructure. We are also concerned about the potential for accidental cuts to its network by external contractors working on County installed co-located infrastructure.

Further, it is our understanding that it is the County’s intent to potentially lease this additional capacity to third-party providers that will compete with Comcast and other broadband providers in the County. The requirement that the County pay incremental costs only, in effect, creates an unfair subsidy for these third-party entities. Comcast has invested millions of private capital dollars in Montgomery County to provide ultra-fast, high-quality broadband to County residents and currently competes on a level playing field with other broadband providers in the County. This bill would devalue this investment and deter future investment. Moreover, Comcast has concerns as to whether the Department of Technology Services (DTS) and the potential third-party competitor would have access to competitively sensitive information as a result of this construction process.

In addition to the issues raised above, there are several administrative and process related questions that remain unresolved and unclear with Bill 7-18. These issues include:

- whether emergency work in the ROW would be exempt;
- definition of emergency work;
- process to resolve disagreements between the County and the Provider relating to reimbursements;
- time-frame to negotiate a fair and equitable reimbursement;
- clarity regarding whether or not the County would reimburse the ROW operator for the costs involved in drafting engineering plans to accommodate County infrastructure in the event the County determines not to move forward with the infrastructure installation; and
- treatment and process for handling unanticipated costs.

Comcast has invested millions of dollars of private capital in Montgomery County. This investment has helped to make Montgomery County one of the most connected communities in the United States whose residents have access to some of the fastest broadband speeds available anywhere in the country today. This competitive advantage, made possible by the investment of millions of dollars of private capital from multiple providers over many years, helps the County attract companies and nurture an innovative and entrepreneurial economy that greatly benefits the residents of Montgomery County.

We respectfully urge the Council to withdraw Bill 7-18 so as to not discourage private investment in the County and create delays and added costs to infrastructure expansion throughout the County. Thank you.