

# As Passed by the House

124th General Assembly

Regular Session

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Am. Sub. S. B. No. 255

SENATORS Blessing, Mead, Spada, Mumper

REPRESENTATIVES Seitz, Niehaus, Hagan, Olman

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## A BILL

To amend section 5571.16, to enact new sections 1  
4939.01, 4939.02, 4939.03, and 4939.04 and sections 2  
4939.05, 4939.06, 4939.07, and 4939.08; and to 3  
repeal sections 4939.01, 4939.02, 4939.03, and 4  
4939.04 of the Revised Code to revise certain 5  
statutes governing the use of public ways and to 6  
declare an emergency. 7

### BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

**Section 1.** That section 5571.16 be amended and new sections 8  
4939.01, 4939.02, 4939.03, and 4939.04 and sections 4939.05, 9  
4939.06, 4939.07, and 4939.08 of the Revised Code be enacted to 10  
read as follows: 11

**Sec. 4939.01.** As used in sections 4939.01 to 4939.08 of the 12  
Revised Code: 13

(A) "Cable operator," "cable service," and "franchise" have 14  
the same meanings as in the "Cable Communications Policy Act of 15  
1984," 98 Stat. 2779, 47 U.S.C.A. 522. 16

(B) "Occupy or use" means, with respect to a public way, to 17  
place a tangible thing in a public way for any purpose, including, 18  
but not limited to, constructing, repairing, positioning, 19

maintaining, or operating lines, poles, pipes, conduits, ducts,  
equipment, or other structures, appurtenances, or facilities  
necessary for the delivery of public utility services or any  
services provided by a cable operator.

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(C) "Person" means any natural person, corporation, or  
partnership and also includes any governmental entity.

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(D) "Public utility" means any company described in section  
4905.03 of the Revised Code except in divisions (A)(3) and (10) of  
that section, which company also is a public utility as defined in  
section 4905.02 of the Revised Code; and includes any electric  
supplier as defined in section 4933.81 of the Revised Code.

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(E) "Public way" means the surface of, and the space within,  
through, on, across, above, or below, any public street, public  
road, public highway, public freeway, public lane, public path,  
public alley, public court, public sidewalk, public boulevard,  
public parkway, public drive, and any other land dedicated or  
otherwise designated for a compatible public use, which, on or  
after the effective date of this section, is owned or controlled  
by a municipal corporation. "Public way" excludes a private  
easement.

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(F) "Public way fee" means a fee levied to recover the costs  
incurred by a municipal corporation and associated with the  
occupancy or use of a public way.

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**Sec. 4939.02.** (A) It is the public policy of this state to do  
all of the following:

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(1) Promote the public health, safety, and welfare regarding  
access to and the occupancy or use of public ways, to protect  
public and private property, and to promote economic development  
in this state;

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(2) Promote the availability of a wide range of utility,

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communication, and other services to residents of this state at 50  
reasonable costs, including the rapid implementation of new 51  
technologies and innovative services; 52

(3) Ensure that access to and occupancy or use of public ways 53  
advances the state policies specified in sections 4927.02, 54  
4928.02, and 4929.02 of the Revised Code; 55

(4) Recognize the authority of a municipal corporation to 56  
manage access to and the occupancy or use of public ways to the 57  
extent necessary with regard to matters of local concern, and to 58  
receive cost recovery for the occupancy or use of public ways in 59  
accordance with law; 60

(5) Ensure in accordance with law the recovery by a public 61  
utility of public way fees and related costs; 62

(6) Promote coordination and standardization of municipal 63  
management of the occupancy or use of public ways, to enable 64  
efficient placement and operation of structures, appurtenances, or 65  
facilities necessary for the delivery of public utility or cable 66  
services; 67

(7) Encourage agreement among parties regarding public way 68  
fees and regarding terms and conditions pertaining to access to 69  
and the occupancy or use of public ways, and to facilitate the 70  
resolution of disputes regarding public way fees. 71

(B) This policy establishes fair terms and conditions for the 72  
use of public ways and does not unduly burden persons occupying or 73  
using public ways or persons that benefit from the services 74  
provided by such occupants or users. 75

**Sec. 4939.03.** (A) No person shall occupy or use a public way 76  
except in accordance with law. 77

(B) In occupying or using a public way, no person shall 78  
unreasonably compromise the public health, safety, and welfare. 79

(C)(1) No person shall occupy or use a public way without first obtaining any requisite consent of the municipal corporation owning or controlling the public way. 80  
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(2) Except as otherwise provided in division (C)(5) of this section, a municipal corporation, not later than sixty days after the date of filing by a person of a completed request for consent, shall grant or deny its consent. 83  
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(3) A municipal corporation shall not unreasonably withhold or deny consent. 87  
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(4) If a request by a person for consent is denied, the municipal corporation shall provide to the person in writing its reasons for denying the request and such information as the person may reasonably request to obtain consent. 89  
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(5) Except in the case of a public utility subject to the jurisdiction and recognized on the rolls of the public utilities commission or of a cable operator possessing a valid franchise awarded pursuant to the "Cable Communications Policy Act of 1984," 98 Stat. 2779, 47 U.S.C.A. 541, a municipal corporation, for good cause shown, may withhold, deny, or delay its consent to any person based upon the person's failure to possess the financial, technical, and managerial resources necessary to protect the public health, safety, and welfare. 93  
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(6) Initial consent for occupancy or use of a public way shall be conclusively presumed for all lines, poles, pipes, conduits, ducts, equipment, or other appurtenances, structures, or facilities of a public utility or cable operator that, on the effective date of this section, lawfully so occupy or use a public way. However, such presumed consent does not relieve the public utility or cable operator of compliance with any law related to the ongoing occupancy or use of a public way. 102  
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Sec. 4939.04. (A)(1) A municipal corporation shall provide public utilities or cable operators with open, comparable, nondiscriminatory, and competitively neutral access to its public ways. 110  
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(2) Nothing in division (A)(1) of this section prohibits a municipal corporation from establishing priorities for access to or occupancy or use of a public way by a public utility or cable operator when the public way cannot accommodate all public way occupants or users, which priorities as applied to public utilities or cable operators shall not be unduly discriminatory and shall be competitively neutral. 114  
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(B) The management, regulation, and administration of a public way by a municipal corporation with regard to matters of local concern shall be presumed to be a valid exercise of the power of local self-government granted by Section 3 of Article XVIII of the Ohio Constitution. 121  
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Sec. 4939.05. (A) A municipal corporation shall not require any nonmonetary compensation or free service, or levy any tax, for the right or privilege to occupy or use a public way, and shall not levy a public way fee except in accordance with this section. 126  
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(B)(1) A municipal corporation may levy different public way fees based upon the amount of public ways occupied or used, the type of utility service provided by a public utility, or any different treatment required by the public health, safety, and welfare. 131  
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(2) A municipal corporation may waive all or a portion of any public way fee for a governmental entity or a charitable organization. 136  
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(3) A municipal corporation shall not require any person, 139

including a reseller, that does not occupy or use a public way 140  
owned or controlled by the municipal corporation to pay it a 141  
public way fee. 142

(4) A municipal corporation that charges a franchise fee or 143  
otherwise receives free service or other nonmonetary compensation 144  
as part of a franchise between a cable operator and the municipal 145  
corporation shall grant the cable operator, for the occupancy or 146  
use of the public way related to the provision of any services 147  
provided by the cable operator, a credit, offset, or deduction 148  
against any public way fee or like charge for all such payments 149  
and the retail value of the free service or other nonmonetary 150  
compensation. 151

(C) Public way fees levied by a municipal corporation shall 152  
be based only on costs that the municipal corporation both has 153  
actually incurred and can clearly demonstrate are or can be 154  
properly allocated and assigned to the occupancy or use of a 155  
public way. The costs shall be reasonably and competitively 156  
neutrally allocated among all persons occupying or using public 157  
ways owned or controlled by the municipal corporation, including, 158  
but not limited to, persons for which payments are waived as 159  
authorized by division (B) of this section or for which 160  
compensation is otherwise obtained. No public way fee shall 161  
include a return on or exceed the amount of costs reasonably 162  
allocated by the municipal corporation to such occupant or user or 163  
pursuant to any reasonable classification of occupants or users. 164

(D) A municipal corporation that levies a public way fee 165  
shall establish and maintain a special fund for all such fees 166  
remitted to the municipal corporation and, with respect to that 167  
special fund, shall be subject to sections 5705.09, 5705.10, 168  
5705.14, 5705.15, 5705.16, 5705.39, 5705.40, 5705.41, 5705.44, and 169  
5705.45 of the Revised Code and any other applicable provision of 170  
Chapter 5705. of the Revised Code concerning the establishment or 171

maintenance of a special fund. 172

(E) At least forty-five days prior to the date of enactment 173  
of a public way ordinance by a municipal corporation, the 174  
municipal corporation shall file with the public utilities 175  
commission a notice that the ordinance is being considered. 176

**Sec. 4939.06.** (A) If a public utility does not accept a 177  
public way fee levied against it pursuant to the enactment of an 178  
ordinance by a municipal corporation, the public utility may 179  
appeal the public way fee to the public utilities commission. The 180  
appeal shall be made by filing a complaint that the amount of a 181  
public way fee, any related classification of public way occupants 182  
or users, or the assignment or allocation of costs to the public 183  
way fee is unreasonable, unjust, unjustly discriminatory, or 184  
unlawful. The complaint shall be filed not later than thirty days 185  
after the date the public utility first becomes subject to the 186  
ordinance. The complaint is subject to the same procedures as a 187  
complaint filed pursuant to section 4905.26 of the Revised Code. 188  
The commission shall act to resolve the complaint by issuance of a 189  
final order within one hundred twenty days after the date of the 190  
complaint's filing. 191

(B) Only upon a finding by the commission that reasonable 192  
grounds are stated for a complaint filed under division (A) of 193  
this section, the commission by order shall suspend the public way 194  
fee provisions of the municipal ordinance for the duration of the 195  
commission's consideration of the complaint. For the purpose of 196  
this division, if the commission so suspends an ordinance pursuant 197  
to a complaint filed not later than thirty days after the date 198  
that the ordinance first takes effect, the suspension shall apply 199  
to the public way fee for every occupancy or use of the public way 200  
to which the fee would otherwise apply. For any other complaint, 201  
the suspension shall apply only to the public utility filing the 202

complaint. The municipal corporation may later collect, for the 203  
suspension period, any suspended public way fee only if the 204  
commission finds that the public way fee is not unreasonable, 205  
unjust, unjustly discriminatory, or unlawful. 206

(C) If the commission finds that the public way fee or 207  
classification complained of is unreasonable, unjust, unjustly 208  
discriminatory, or unlawful, it shall determine by order the just 209  
and reasonable public way fee or classification. 210

**Sec. 4939.07.** (A) As used in this section, "most recent," 211  
with respect to any rate proceeding, means the rate proceeding 212  
most immediately preceding the date of any final order issued by 213  
the public utilities commission under this section. 214

(B)(1) Notwithstanding any other provision of law or any 215  
agreement establishing price caps, rate freezes, or rate increase 216  
moratoria, a public utility subject to the rate-making 217  
jurisdiction of the commission may file an application with the 218  
commission for, and the commission shall then authorize by order, 219  
timely and full recovery of a public way fee levied upon and 220  
payable by the public utility both after January 1, 2002, and 221  
after the test year of the public utility's most recent rate 222  
proceeding or the initial effective date of rates in effect but 223  
not established through a proceeding for an increase in rates. 224

(2) Any order issued by the commission pursuant to its 225  
consideration of an application under division (B)(1) of this 226  
section shall establish a cost recovery mechanism including, but 227  
not limited to, an adder, tracker, rider, or percentage surcharge, 228  
for recovering the amount to be recovered; specify that amount; 229  
limit the amount to not more and not less than the amount of the 230  
total public way fee incurred; and require periodic adjustment of 231  
the mechanism based on revenues recovered. 232

(a) In the case of a cost recovery mechanism for a public way 233

fee levied on and payable by a public utility but determined 234  
unreasonable, unjust, unjustly discriminatory, or unlawful by the 235  
commission pursuant to division (C) of section 4939.06 of the 236  
Revised Code, the mechanism shall provide for recovery, only from 237  
those customers of the public utility that receive its service 238  
within the municipal corporation, of the difference between that 239  
public way fee and the just and reasonable public way fee 240  
determined by the commission under division (C) of section 4939.06 241  
of the Revised Code. 242

(b) In all other cases, recovery shall be from all customers 243  
of the public utility generally. 244

(C) In the case of recovery under division (B)(2)(a) or (b) 245  
of this section, the recovery mechanism payable by sale-for-resale 246  
or wholesale telecommunications customers shall provide for 247  
recovery limited to any public way fee not included in established 248  
rates and prices for those customers and to the pro rata share of 249  
the public way fee applicable to the portion of the facilities 250  
that are sold, leased, or rented to the customers and are located 251  
in the public way. The recovery shall be in a nondiscriminatory 252  
and competitively neutral manner and prorated on a per-line or 253  
per-line equivalent basis among all retail, sale-for-resale, and 254  
wholesale telecommunications customers subject to the recovery. 255

(D)(1) Notwithstanding any other provision of law or any 256  
agreement establishing price caps, rate freezes, or rate increase 257  
moratoria, a public utility subject to the rate-making 258  
jurisdiction of the commission may file an application with the 259  
commission for, and the commission by order shall authorize, such 260  
accounting authority as may be reasonably necessary to classify 261  
any cost described in division (D)(2) of this section as a 262  
regulatory asset for the purpose of recovering that cost. 263

(2) A cost eligible for recovery under this division shall be 264  
only such cost as meets both of the following: 265

(a) The cost is directly incurred by the public utility as a result of local regulation of its occupancy or use of a public way or an appropriate allocation and assignment of costs related to implementation of this section, excluding any cost arising from a public way fee levied upon and payable by the public utility. 266  
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(b) The cost is incurred by the public utility both after January 1, 2002, and after the test year of the public utility's most recent rate proceeding or the initial effective date of rates in effect but not established through a proceeding for an increase in rates. 271  
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(3) If the commission determines, upon an application under division (D)(1) of this section or its own initiative, that classification of a cost described in division (D)(2) of this section as a regulatory asset is not practical or that deferred recovery of that cost would impose a hardship on the public utility or its customers, the commission shall establish a charge and collection mechanism to permit the public utility full recovery of that cost. A hardship shall be presumed for any public utility with less than fifteen thousand bundled sales service customers in this state and for any public utility for which the annualized aggregate amount of additional cost that otherwise may be eligible for such classification exceeds the greater of five hundred thousand dollars or fifteen per cent of the total costs that are described in division (D)(2)(a) of this section and were considered by the commission for the purpose of establishing rates in the public utility's most recent rate increase proceeding or the rate increase proceeding of the public utility's predecessor, whichever is later. 276  
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(E) Any application submitted to the commission under divisions (B) to (D) of this section shall be processed by the commission as an application not for an increase in rates under section 4909.18 of the Revised Code. The application shall include 294  
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such information as the commission reasonably requires. The  
commission shall conclude its consideration of the application and  
issue a final order not later than one hundred twenty days after  
the date that the application was submitted to the commission. A  
final order regarding a recovery mechanism authorized pursuant to  
this section shall provide for such retroactive adjustment as the  
commission determines appropriate.

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(F) A public utility shall not be required to waive any  
rights under this section as a condition of occupancy or use of a  
public way.

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(G) The commission may issue such rules as it considers  
necessary to carry out this section.

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**Sec. 4939.08.** (A) Nothing in sections 4939.01 to 4939.07 of  
the Revised Code applies to a franchise or to any agreement with a  
public utility or cable operator, for the balance of its term, if  
the franchise or agreement meets all of the following:

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(1) The franchise was granted, or the agreement was  
authorized by ordinance or otherwise and was entered into, by a  
municipal corporation prior to the effective date of this section.

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(2) The franchise or agreement authorizes the occupation or  
use of public ways.

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(3) The public utility agrees with the applicable public way  
fees, or nonmonetary compensation, if any, or the cable operator  
pays the applicable fee or utilizes the credit, offset, or  
deduction specified in division (B)(4) of section 4939.05 of the  
Revised Code.

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(B) Except as otherwise provided in division (A) of section  
4939.06 of the Revised Code, nothing in sections 4939.01 to  
4939.07 of the Revised Code applies to an ordinance both governing  
public ways and enacted by a municipal corporation prior to

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September 29, 1999, unless, on or after that date, the ordinance 328  
is materially modified. 329

(C) Nothing in sections 4939.01 to 4939.07 of the Revised 330  
Code authorizes a municipal corporation to levy a fee, other than 331  
a public way fee authorized by section 4939.05 of the Revised 332  
Code, on a pipeline company or an operator of a pipeline facility 333  
regulated under the "Accountable Pipeline Safety and Partnership 334  
Act of 1996," 110 Stat. 3793, 49 U.S.C.A. 60101, or on an 335  
operating partner or affiliated business unit operating under 336  
guidelines of the federal energy regulatory commission as they 337  
relate to the construction and operation of a pipeline. 338

(D) Nothing in sections 4939.01 to 4939.07 and this section 339  
of the Revised Code prohibits a municipal corporation from doing 340  
either of the following: 341

(1) Charging a cable operator a franchise fee in accordance 342  
with the "Cable Communications Policy Act of 1984," 98 Stat. 2779, 343  
47 U.S.C.A. 542; 344

(2) Allowing a credit, offset, or deduction against the 345  
payment of a construction permit fee for any franchise fee a cable 346  
operator pays to the municipal corporation. 347

**Sec. 5571.16.** The board of township trustees ~~may~~, by 348  
resolution, may require any ~~person, firm or corporation~~ person to 349  
obtain a permit before making any excavation in a public highway 350  
or highway right-of-way within its jurisdiction, except an 351  
excavation to repair, rehabilitate, or replace a pole already 352  
installed for the purpose of providing electric or 353  
telecommunications service. The board may, as a condition to the 354  
granting of such permit: 355

(A) Require the applicant to submit plans indicating the 356  
location, size, type, and duration of the excavation contemplated; 357

(B) Specify methods of excavation, refilling, and resurfacing 358  
to be followed; 359

(C) Require the use of such warning devices as it deems 360  
necessary to protect travelers on the highway; 361

(D) Require the applicant to indemnify the township against 362  
liability or damage as the result of such excavation; 363

(E) Require the applicant to post a deposit or bond, with 364  
sureties to the satisfaction of the board, conditioned upon the 365  
performance of all conditions to such permit. 366

Applications for permits under this section shall be made to 367  
the township clerk upon forms to be furnished by the board. Such 368  
applications, including, but not limited to, a single application 369  
for an excavation project to install six or more poles for the 370  
purpose of providing electric or telecommunications service or to 371  
install a pole associated with underground electric or 372  
telecommunications service, shall be accompanied by a fee of ~~two~~ 373  
fifty dollars per application, which fee shall be returned to the 374  
applicant if the application is denied. Except as otherwise 375  
provided in this section, no application or fee shall be required 376  
for an excavation project to install five or fewer poles for the 377  
purpose of providing electric or telecommunications service, but 378  
the person making that excavation shall provide verifiable notice 379  
of the excavation to the township clerk at least three business 380  
days prior to the date of the excavation. 381

No person shall make an excavation in any township highway or 382  
highway right-of-way in violation of any resolution adopted 383  
pursuant to this section; except that, in the case of an emergency 384  
requiring immediate action to protect the public health, safety, 385  
and welfare, an excavation may be made without first obtaining a 386  
permit, if such application is made at the earliest possible 387  
opportunity. 388

As used in this section, "person" has the same meaning as in section 1.59 of the Revised Code, and "right-of-way" has the same meaning as in division (UU)(2) of section 4511.01 of the Revised Code.

**Section 2.** That existing section 5571.16 and sections 4939.01, 4939.02, 4939.03, and 4939.04 of the Revised Code are hereby repealed.

**Section 3.** Section 5571.16 of the Revised Code, as amended by this act, shall take effect ninety days after the effective date of this section.

**Section 4.** This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for such necessity is to provide, at the earliest possible time, for resolution of litigated issues concerning public ways of a municipal corporation. Therefore, this act shall go into immediate effect.