

As Passed by the House

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Am. Sub. S. B. No. 255

SENATORS Blessing, Mead, Spada, Mumper

REPRESENTATIVES Seitz, Niehaus, Hagan, Olman

A B I L L

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 80
first obtaining any requisite consent of the municipal corporation 81
owning or controlling the public way. 82

(2) Except as otherwise provided in division (C)(5) of this 83
section, a municipal corporation, not later than sixty days after 84
the date of filing by a person of a completed request for consent, 85
shall grant or deny its consent. 86

(3) A municipal corporation shall not unreasonably withhold 87
or deny consent. 88

(4) If a request by a person for consent is denied, the 89
municipal corporation shall provide to the person in writing its 90
reasons for denying the request and such information as the person 91
may reasonably request to obtain consent. 92

(5) Except in the case of a public utility subject to the 93
jurisdiction and recognized on the rolls of the public utilities 94
commission or of a cable operator possessing a valid franchise 95
awarded pursuant to the "Cable Communications Policy Act of 1984," 96
98 Stat. 2779, 47 U.S.C.A. 541, a municipal corporation, for good 97
cause shown, may withhold, deny, or delay its consent to any 98
person based upon the person's failure to possess the financial, 99
technical, and managerial resources necessary to protect the 100
public health, safety, and welfare. 101

(6) Initial consent for occupancy or use of a public way 102
shall be conclusively presumed for all lines, poles, pipes, 103
conduits, ducts, equipment, or other appurtenances, structures, or 104
facilities of a public utility or cable operator that, on the 105
effective date of this section, lawfully so occupy or use a public 106
way. However, such presumed consent does not relieve the public 107
utility or cable operator of compliance with any law related to 108
the ongoing occupancy or use of a public way. 109

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 389
section 1.59 of the Revised Code, and "right-of-way" has the same 390
meaning as in division (UU)(2) of section 4511.01 of the Revised 391
Code. 392

Section 2. That existing section 5571.16 and sections 393
4939.01, 4939.02, 4939.03, and 4939.04 of the Revised Code are 394
hereby repealed. 395

Section 3. Section 5571.16 of the Revised Code, as amended by 396
this act, shall take effect ninety days after the effective date 397
of this section. 398

Section 4. This act is hereby declared to be an emergency 399
measure necessary for the immediate preservation of the public 400
peace, health, and safety. The reason for such necessity is to 401
provide, at the earliest possible time, for resolution of 402
litigated issues concerning public ways of a municipal 403
corporation. Therefore, this act shall go into immediate effect. 404