

As Passed by the Senate

124th General Assembly  
Regular Session  
2001-2002

Am. Sub. S. B. No. 255

SENATORS Blessing, Mead, Spada, Mumper

---

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 4939.09, 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 4939.09 of the Revised Code be enacted to 10  
read as follows: 11

Sec. 4939.01. As used in sections 4939.01 to 4939.07 and 12  
4939.09 of the 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. 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, 20

equipment, or other structures, appurtenances, or facilities 21  
necessary for the delivery of public utility or any services 22  
provided by a cable operator. 23

(C) "Person" means any natural person, corporation, or 24  
partnership and also includes any governmental entity. 25

(D) "Public utility" means any company described in section 26  
4905.03 of the Revised Code except in divisions (A)(3) and (10) of 27  
that section, which company also is a public utility as defined in 28  
section 4905.02 of the Revised Code; and includes any electric 29  
supplier as defined in section 4933.81 of the Revised Code. 30

(E) "Public way" means the surface of, and the space within, 31  
through, on, across, above, or below, any public street, public 32  
road, public highway, public freeway, public lane, public path, 33  
public alley, public court, public sidewalk, public boulevard, 34  
public parkway, public drive, and any other land dedicated or 35  
otherwise designated for a compatible public use, which, on or 36  
after the effective date of this section, is owned or controlled 37  
by a municipal corporation. "Public way" excludes a private 38  
easement. 39

(F) "Public way fee" means a fee levied to recover the costs 40  
incurred by a municipal corporation and associated with the 41  
occupancy or use of a public way. 42

**Sec. 4939.02.** (A) It is the public policy of this state to do 43  
all of the following: 44

(1) Promote the public health, safety, and welfare regarding 45  
access to and the occupancy or use of public ways, to protect 46  
public and private property, and to promote economic development 47  
in this state; 48

(2) Promote the availability of a wide range of utility, 49  
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 the consent of the municipal corporation owning or controlling the public way. 80  
81  
82

(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  
84  
85  
86

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

(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  
90  
91  
92

(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  
94  
95  
96  
97  
98  
99  
100  
101

(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  
103  
104  
105  
106  
107  
108  
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  
111  
112  
113

(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  
115  
116  
117  
118  
119  
120

(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  
122  
123  
124  
125

Sec. 4939.05. (A) A municipal corporation shall not require any nonmonetary compensation or free service 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  
127  
128  
129

(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. 130  
131  
132  
133  
134

(2) A municipal corporation may waive all or a portion of any public way fee for a governmental entity or a charitable organization. 135  
136  
137

(3) A municipal corporation shall not require any person, including a reseller, that does not occupy or use a public way 138  
139

owned or controlled by the municipal corporation to pay it a 140  
public way fee. 141

(4) A municipal corporation that charges a franchise fee 142  
related to cable service provided by a cable operator or otherwise 143  
receives free service or other nonmonetary compensation as part of 144  
a franchise between the 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 for 148  
all such payments and the retail value of the free service or 149  
other nonmonetary compensation. 150

(C) Public way fees levied by a municipal corporation shall 151  
be based only on costs that the municipal corporation both has 152  
actually incurred and can clearly demonstrate are or can be 153  
properly allocated and assigned to the occupancy or use of a 154  
public way. The costs shall be reasonably and competitively 155  
neutrally allocated among all persons occupying or using public 156  
ways owned or controlled by the municipal corporation, including, 157  
but not limited to, persons for which payments are waived as 158  
authorized by division (B) of this section or for which 159  
compensation is otherwise obtained. No public way fee shall exceed 160  
the amount of costs reasonably allocated by the municipal 161  
corporation to such occupant or user or pursuant to any reasonable 162  
classification of occupants or users. 163

(D) A municipal corporation that levies a public way fee 164  
shall establish and maintain a special fund for all such fees 165  
remitted to the municipal corporation and, with respect to that 166  
special fund, shall be subject to sections 5705.09, 5705.10, 167  
5705.14, 5705.15, 5705.16, 5705.39, 5705.40, 5705.41, 5705.44, and 168  
5705.45 of the Revised Code and any other applicable provision of 169  
Chapter 5705. of the Revised Code concerning the establishment or 170  
maintenance of a special fund. 171

(E) At least forty-five days prior to the date of enactment of a public way ordinance by a municipal corporation, the municipal corporation shall file with the public utilities commission a notice that the ordinance is being considered. 172  
173  
174  
175

**Sec. 4939.06.** (A) If a public utility does not accept a public way fee levied against it pursuant to the enactment of an ordinance by a municipal corporation, the public utility may appeal the public way fee to the public utilities commission. The appeal shall be made by filing a complaint that the amount of a public way fee, any related classification of public way occupants or users, or the assignment or allocation of costs to the public way fee is unreasonable, unjust, unjustly discriminatory, or unlawful. The complaint shall be filed not later than thirty days after the date the public utility first becomes subject to the ordinance. The complaint is subject to the same procedures as a complaint filed pursuant to section 4905.26 of the Revised Code. The commission shall act to resolve the complaint by issuance of a final order within one hundred twenty days after the date of the complaint's filing. 176  
177  
178  
179  
180  
181  
182  
183  
184  
185  
186  
187  
188  
189  
190

(B) Only upon a finding by the commission that reasonable grounds are stated for a complaint filed under division (A) of this section, the commission by order shall suspend the public way fee provisions of the municipal ordinance for the duration of the commission's consideration of the complaint. For the purpose of this division, if the commission so suspends an ordinance pursuant to a complaint filed not later than thirty days after the date that the ordinance first takes effect, the suspension shall apply to the public way fee for every occupancy or use of the public way to which the fee would otherwise apply. For any other complaint, the suspension shall apply only to the public utility filing the complaint. The municipal corporation may later collect any suspended public way fee only if the commission finds that the 191  
192  
193  
194  
195  
196  
197  
198  
199  
200  
201  
202  
203

public way fee is not unreasonable, unjust, unjustly 204  
discriminatory, or unlawful. 205

(C) If the commission finds that the public way fee or 206  
classification complained of is unreasonable, unjust, unjustly 207  
discriminatory, or unlawful, it shall determine by order the just 208  
and reasonable public way fee or classification. 209

**Sec. 4939.07.** (A) As used in this section, "most recent," 210  
with respect to any rate proceeding, means the rate proceeding 211  
most immediately preceding the date of any final order issued by 212  
the commission under this section. 213

(B)(1) Notwithstanding any other provision of law or any 214  
agreement establishing price caps, rate freezes, or rate increase 215  
moratoria, a public utility subject to the rate-making 216  
jurisdiction of the commission may file an application with the 217  
commission for, and the commission shall then authorize by order, 218  
timely and full recovery of a public way fee levied upon and 219  
payable by the public utility both after January 1, 2002, and 220  
after the test year of the public utility's most recent rate 221  
proceeding or the initial effective date of rates in effect but 222  
not established through a proceeding for an increase in rates. The 223  
recovery shall be in a nondiscriminatory and competitively neutral 224  
manner and pro rated on a per-line or per-line equivalent basis 225  
among all retail, sale-for-resale, and wholesale customers subject 226  
to the recovery. 227

(2) Any order issued by the commission pursuant to its 228  
consideration of an application under division (B)(1) of this 229  
section shall establish a cost recovery mechanism including, but 230  
not limited to, an adder, tracker, rider, or percentage surcharge, 231  
for recovering the amount to be recovered; specify that amount; 232  
limit the amount to not more and not less than the amount of the 233  
total public way fee incurred; and require periodic adjustment of 234



the mechanism based on revenues recovered. 235

(a) In the case of a cost recovery mechanism for a public way 236  
fee levied and payable by a public utility but determined 237  
unreasonable, unjust, unjustly discriminatory, or unlawful by the 238  
commission pursuant to division (C) of section 4939.06 of the 239  
Revised Code, the mechanism shall provide for recovery, only from 240  
those customers of the public utility that receive its service 241  
within the municipal corporation, of the difference between that 242  
public way fee and the just and reasonable public way fee 243  
determined by the commission under division (C) of section 4939.06 244  
of the Revised Code. 245

(b) In all other cases, recovery shall be from all customers 246  
of the public utility generally. 247

(C) In the case of recovery under division (B)(2)(a) or (b) 248  
of this section, the recovery mechanism payable by sale-for-resale 249  
or wholesale telecommunications customers shall provide for 250  
recovery limited to any public way fee not included in established 251  
rates and prices for those customers and to the pro rata share of 252  
the public way fee applicable to the portion of the facilities 253  
that are sold, leased, or rented to the customers and are located 254  
in the public way. 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  
267  
268  
269  
270

(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  
272  
273  
274  
275

(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  
277  
278  
279  
280  
281  
282  
283  
284  
285  
286  
287  
288  
289  
290  
291  
292  
293

(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  
295  
296  
297

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 the recovery mechanism specified in division  
(C) of this section shall provide for such retroactive adjustment  
as the commission determines appropriate.

298  
299  
300  
301  
302  
303  
304

(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.

305  
306  
307

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

308  
309

**Sec. 4939.09.** (A) Nothing in sections 4939.01 to 4939.07 and  
this section 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:

310  
311  
312  
313  
314

(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.

315  
316  
317

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

318  
319

(3) The public utility agrees with the applicable public way  
fees, or non-monetary 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.

320  
321  
322  
323  
324

(B) Except as otherwise provided in division (A) of section  
4939.06 of the Revised Code, nothing in sections 4939.01 to  
4939.07 and this section of the Revised Code applies to an

325  
326  
327

ordinance both governing public ways and enacted by a municipal corporation prior to September 29, 1999, unless, on or after that date, the ordinance is materially modified. 328  
329  
330

(C) Nothing in sections 4939.01 to 4939.07 and this section of the Revised Code authorizes a municipal corporation to levy a fee, other than a public way fee authorized by section 4939.05 of the Revised Code, on a pipeline company or an operator of a pipeline facility regulated under the "Accountable Pipeline Safety and Partnership Act of 1996," 110 Stat. 3793, 49 U.S.C. 60101, or on an operating partner or affiliated business unit operating under guidelines of the federal energy regulatory commission as they relate to the construction and operation of a pipeline. 331  
332  
333  
334  
335  
336  
337  
338  
339

**Sec. 5571.16.** The board of township trustees ~~may~~, by resolution, may require any person, firm, or corporation to obtain a permit before making any excavation in a public highway or highway right-of-way within its jurisdiction. The board may, as a condition to the granting of such permit: 340  
341  
342  
343  
344

(A) Require the applicant to submit plans indicating the location, size, type, and duration of the excavation contemplated; 345  
346

(B) Specify methods of excavation, refilling, and resurfacing to be followed; 347  
348

(C) Require the use of such warning devices as it deems necessary to protect travelers on the highway; 349  
350

(D) Require the applicant to indemnify the township against liability or damage as the result of such excavation; 351  
352

(E) Require the applicant to post a deposit or bond, with sureties to the satisfaction of the board, conditioned upon the performance of all conditions to such permit. 353  
354  
355

Applications for permits under this section shall be made to the township clerk upon forms to be furnished by the board. Such 356  
357

applications shall be accompanied by a fee of ~~two~~ fifty dollars, 358  
which shall be returned to the applicant if the application is 359  
denied. 360

No person shall make an excavation in any township highway or 361  
highway right-of-way in violation of any resolution adopted 362  
pursuant to this section; except that, in the case of an emergency 363  
requiring immediate action to protect the public health, safety, 364  
and welfare, an excavation may be made without first obtaining a 365  
permit, if such application is made at the earliest possible 366  
opportunity. 367

As used in this section, "right-of-way" has the same meaning 368  
as in division (UU)(2) of section 4511.01 of the Revised Code. 369

**Section 2.** That existing section 5571.16 and sections 370  
4939.01, 4939.02, 4939.03, and 4939.04 of the Revised Code are 371  
hereby repealed. 372

**Section 3.** Section 5571.16 of the Revised Code, as amended by 373  
this act, shall take effect ninety days after the effective date 374  
of this section. 375

**Section 4.** This act is hereby declared to be an emergency 376  
measure necessary for the immediate preservation of the public 377  
peace, health, and safety. The reason for such necessity is to 378  
provide, at the earliest possible time, for resolution of 379  
litigated issues concerning public ways of a municipal 380  
corporation. Therefore, this act shall go into immediate effect. 381