Mary S. Connor *Legislative Service Commission*

Am. Sub. S.B. 255

124th General Assembly
(As Passed by the General Assembly)

Sens. Blessing, Mead, Spada, Mumper

Reps. Seitz, Niehaus, Hagan, Olman

Effective date: Emergency, July 2, 2002; certain provisions effective September 30, 2002

ACT SUMMARY

- Repeals statutes concerning the use by utility service providers and cable operators of the public ways of a political subdivision, which were enacted in the 1999-2001 biennial operating appropriations act.

- Enacts new law concerning the general use of public ways owned or controlled by a municipal corporation, with certain provisions applicable to public utilities and cable operators; and declares an emergency regarding that new law for the purpose of resolving litigated issues at the earliest possible time.

- States a public policy regarding the use of municipal public ways, including among the policy objectives ensuring access to and use of public ways, recognizing municipal authority regarding such access and use and matters of local concern, and ensuring cost recovery for municipalities and public utilities.

- Establishes conditions for the use by any person of a municipal public way, including a requirement of municipal consent in accordance with the act.

- States municipal authority to regulate access to and use of municipal public ways.

- Specifies municipal authority to levy a public way fee or require nonmonetary compensation or free service for the use of a municipal public way by any person, and requires such public way fees to be based

only on incurred costs properly allocated and assigned to use of the public way.

- Authorizes the Public Utilities Commission to consider a complaint by a public utility that a municipal public way fee is unreasonable, unjust, unjustly discriminatory, or unlawful, and to prescribe a just and reasonable fee as necessary.

- Requires the Commission to suspend the public way fee provisions of a municipal ordinance for the duration of its consideration of the complaint, if the Commission finds there are reasonable grounds for the complaint.

- Authorizes a public utility subject to the Commission's rate-making jurisdiction to apply for recovery from its customers of any municipal public way fee levied after January 1, 2002, and not included in the utility's rates; restricts recovery, to customers within the municipal corporation, of any difference between a public way fee payable by the utility and determined unreasonable by the Commission pursuant to a complaint, and the reasonable fee determined by the Commission; and specifies the basis for determining and charging the recovery amount from sale-for-resale and wholesale telecommunications customers.

- Authorizes a public utility subject to the Commission's rate-making jurisdiction to apply for recovery of any public way costs *other than* public way fees, incurred after January 1, 2002, and not included in rates, by accounting for those costs as a regulatory asset and thereby deferring their recovery or, where that option is impractical or causes hardship, by recovering those costs through a charge on customers.

- Specifies the conditions under which a cable franchise, an existing franchise or agreement with a public utility, an ordinance enacted prior to September 29, 1999, and an interstate pipeline operation are exempted from or affected by the act's public way provisions.

- Amends township law, with a 90-day delay in effective date, to increase the application fee for a township highway excavation permit, to authorize the board of township trustees to require a permit for excavation in a township highway right-of-way, and to specify permitting authority relative to electric and telecommunications poles.

CONTENT AND OPERATION

The act primarily affects Ohio law concerning use of municipal public ways, but also changes existing law regarding township highway excavation, as follows.

Public ways

Prior law

The act repeals existing statutes that concern occupation or use of the public ways of a political subdivision by utility service providers and cable operators (secs. 4939.01 to 4939.04). Among other things, the prior public way law (1) declared the right of a utility service provider and a cable operator to use a public way, subject to state law, (2) prohibited discrimination against such users in the use of public ways, (3) prohibited consent for the use of a public way from being unreasonably withheld and described consent as an exercise of police power, (4) except legal requirements of a political subdivision in effect on September 29, 1999, prohibited levying any tax, fee, or charge or requiring free service or nonmonetary compensation for the use of a public way for purposes of delivering natural gas, electric, telecommunications, and cable TV services, (5) authorized nondiscriminatory construction permit fees based on the direct incremental costs of inspecting and reviewing public way use plans, and (6) established restoration to the former state of usefulness as the restoration standard for utility service providers and cable operators using a public way. Under prior law, a "utility service provider" was a natural gas company, local exchange telephone company, interexchange telecommunications company, electric company, or any other person that occupied a public way to deliver natural gas, electric, or telecommunications services.

The former public way law was enacted in the 1999-2001 biennial operating appropriations act (Am. Sub. H.B. 283 of the 123rd General Assembly). In *City of Dublin v. State*, No. 99CVH-08-7007 (Ct. of Common Pleas, Franklin County, Ohio, April 1, 2002), the public way law was held to have been invalidly enacted under the single-subject provision of Article II, Section 15(D), Ohio Constitution, and certain provisions were held to have violated the municipal powers of local self-government and police power under Article II, Section 3, Ohio Constitution.

The act

The act replaces the prior public way law with a new body of law (secs. 4939.01 to 4939.08), and declares the new public way law an emergency measure necessary for the purpose of resolving litigated issues at the earliest possible time

(Section 4). The new public way law concerns the occupation or use of the public ways of a municipal corporation by any person, although certain provisions apply to occupation or use by a public utility or cable operator.

Under the public way provisions of the act, "person" means a natural person, corporation, or partnership and also includes a governmental entity.

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

"Occupy or use" a public way means to place a tangible thing in a public way for any purpose, including, but not limited to, constructing, repairing, positioning, 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.

Under the act, a "public utility," in effect, is a telegraph, telephone, electric, gas, natural gas, pipe-line, water-works, heating or cooling, street railway, suburban railroad, interurban railroad, or sewage disposal company described under Ohio public utility law as a public utility, and includes electric cooperatives (sec. 4939.01(D); with references to secs. 4905.02, 4905.03, and 4933.81).

"Cable operator," "cable service," and "franchise" have the same meanings as in specified federal cable law. Under that law, a "cable operator" is any person or group of persons (1) that provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (2) that otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system (47 U.S.C.A. 522(5)). "Cable service" means (1) the one-way transmission to subscribers of video programming or other programming service, and (2) subscriber interaction, if any, required for the selection or use of such video programming or other programming service (47 U.S.C.A. 522(6)). In general, a "cable system" is a facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service that includes video programming and is provided to multiple subscribers within a community (47 U.S.C.A. 522(7)). A "franchise" is an initial authorization or authorization renewal that is issued by a state or local government franchising authority and allows the construction or operation of a cable system, whether that authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise (47 U.S.C.A. 522(9)). (Sec. 4939.01.)

Public policy. The act provides that it is Ohio's public policy to do all of the following: (1) promote the public health, safety, and welfare regarding access to and the occupancy or use of public ways, protect public and private property, and promote economic development in Ohio, (2) promote the availability of a wide range of utility, communication, and other services to Ohio residents at reasonable costs, including the rapid implementation of new technologies and innovative services, (3) ensure that access to and occupancy or use of public ways advances the state policies specified in Ohio alternative telephone regulation law, electric restructuring law, and natural gas alternative regulation and restructuring law, (4) recognize municipal authority to manage access to and the occupancy or use of public ways to the extent necessary with regard to matters of local concern, and to receive cost recovery for the occupancy or use of public ways in accordance with law, (5) ensure in accordance with law the recovery by a public utility of public way fees and related costs, (6) promote coordination and standardization of municipal management of the occupancy or use of public ways, to enable efficient placement and operation of structures, appurtenances, or facilities necessary for the delivery of public utility or cable services, and (7) encourage agreement among parties regarding public way fees and regarding terms and conditions pertaining to access to and the occupancy or use of public ways, and to facilitate the resolution of disputes regarding public way fees.

The act states that this policy establishes fair terms and conditions for the use of public ways and does not unduly burden persons occupying or using public ways or persons that benefit from the services provided by those occupants or users.

Statutory conditions on the use of a public way. The act prohibits any person from occupying or using a public way except in accordance with law, and prohibits any person from unreasonably compromising the public health, safety, and welfare in occupying or using a public way. (Sec. 4939.03(A) and (B).)

Additionally, the act prohibits a person from occupying or using a public way without first obtaining any requisite consent of the municipal corporation. The municipal corporation cannot unreasonably withhold or deny consent. However, other than in the case of a public utility subject to the jurisdiction and recognized on the rolls of the Public Utilities Commission (PUCO) or of a cable operator possessing a valid franchise awarded under specified federal law, a municipal corporation, for good cause shown, may withhold, deny, or delay consent based upon a person's failure to possess the financial, technical, and managerial resources necessary to protect the public health, safety, and welfare.

A municipal corporation must provide in writing its reasons for denying a request and provide such information as the person may reasonably request to obtain consent. Generally, a municipal corporation must grant or deny consent not

later than 60 days after the date of filing by a person of a completed request for consent.

The act also provides that initial consent for occupancy or use of a public way is 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 act's effective date, lawfully so occupies or uses 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. (Sec. 4939.03(C).)

Additionally, the act requires a municipal corporation to provide public utilities and cable operators with open, comparable, nondiscriminatory, and competitively neutral access to its public ways, but it expressly does not prohibit a municipal corporation from establishing competitively neutral, not unduly discriminatory priorities for that access, occupancy, or use when the public way cannot accommodate all public way occupants or users (sec. 4939.04(A)).

Statement of constitutional authority. The act states that the management, regulation, and administration of a public way by a municipal corporation with regard to matters of local concern is presumed to be a valid exercise of the power of local self-government granted by Section 3 of Article XVIII of the Ohio Constitution (sec. 4939.04(B)).

Compensation for the right to use public ways. The act prohibits a municipal corporation from requiring any nonmonetary compensation or free service, or levying any tax, for the right or privilege to occupy or use a public way, or from levying a public way fee except in accordance with the act (sec. 4939.05(A)). "Public way fee" is defined as a fee levied to recover the costs incurred by a municipal corporation and associated with the occupancy or use of a public way (sec. 4939.01).

Under the act, 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. Additionally, a municipal corporation may waive all or a portion of any public way fee for a governmental entity or a charitable organization. However, a municipal corporation cannot require any person, including a reseller, that does not occupy or use a public way owned or controlled by the municipal corporation to pay it a public way fee.

Public way fees levied by a municipal corporation must be based only on costs that the municipal corporation both has actually incurred and can clearly demonstrate are or can be properly allocated and assigned to the occupancy or use of a public way. The costs must be reasonably and competitively neutrally

allocated among all persons occupying or using public ways of the municipal corporation, including, but not limited to, persons for which payments are waived under authority described above or for which compensation is otherwise obtained. No public way fee can include a return on or exceed the amount of costs reasonably allocated by the municipal corporation to such occupant or user or pursuant to any reasonable classification of occupants or users.

A municipal corporation that levies a public way fee must establish and maintain a special fund for all such fees remitted to the municipal corporation. With respect to that special fund, the act subjects the municipal corporation to the same laws (in existing Chapter 5705.) that apply to local government tax receipts and generally pertain to establishing, paying, appropriating, and transferring funds, the use of funds under contracts, and liability for wrongful payments.

Under the act, a municipal corporation, at least 45 days prior to the date it enacts a public way ordinance, must file with the PUCO a notice that the ordinance is being considered.

Additionally, the act requires a municipal corporation that charges a franchise fee or otherwise receives free service or other nonmonetary compensation as part of a franchise between a cable operator and the municipal corporation to grant the cable operator, for the occupancy or use of a public way related to the provision of any services provided by the cable operator, a credit, offset, or deduction against any public way fee or like charge for all such payments and the retail value of the free service or other nonmonetary compensation. (Sec. 4939.05.)

The act also expressly states that nothing in it authorizes a municipal corporation to levy a fee, other than a public way fee authorized by the act, on a pipeline company or an operator of a pipeline facility regulated under a specified federal pipeline safety law, 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 (sec. 4939.08(C)).

Utility appeal of a public way fee to the PUCO. The act authorizes a public utility to appeal to the PUCO a public way fee levied against it pursuant to the enactment of an ordinance by a municipal corporation. The appeal must be made by filing a complaint that the amount of the 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 must be filed not later than 30 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 existing complaint law, which procedures include certain notice and hearing requirements (sec. 4905.26,

not in the act). The PUCO must act to resolve the complaint by issuance of a final order within 120 days after the date of the complaint's filing.

The act authorizes the suspension, by PUCO order, of the public way fee provisions of a municipal ordinance for the duration of the PUCO's consideration of a complaint, if it finds that reasonable grounds are stated for the complaint. If the PUCO so suspends an ordinance pursuant to a complaint filed not later than 30 days after the date that the ordinance first takes effect, the suspension applies 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 applies only to the public utility filing the complaint. The municipal corporation may later collect, for the suspension period, any suspended public way fee only if the PUCO finds that the public way fee is not unreasonable, unjust, unjustly discriminatory, or unlawful.

If the PUCO finds that the public way fee or classification complained of is unreasonable, unjust, unjustly discriminatory, or unlawful, it must determine by order the just and reasonable public way fee or classification. (Sec. 4939.06.)

Recovery by a public utility of public way fees. The act provides for the recovery by a public utility of public way fees levied and payable 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. The act states that "most recent," with respect to any rate proceeding, means the rate proceeding most immediately preceding the date of any final, public way fee cost recovery order.

Specifically under the act, the PUCO must authorize timely and full recovery of such public way fees for any applicant public utility subject to its rate-making jurisdiction, notwithstanding any other provision of law or any agreement establishing price caps, rate freezes, or rate increase moratoria. The cost recovery mechanism may be an adder, tracker, rider, percentage surcharge, or other mechanism. The PUCO order must specify the amount to be recovered, limit the amount to not more and not less than the amount of the total public way fee incurred, and require periodic adjustment of the mechanism based on revenues recovered.

Generally, recovery must be from all customers of the public utility. However, in the case of a public way fee determined unreasonable, unjust, unjustly discriminatory, or unlawful by the PUCO pursuant to a complaint filed by a public utility under the act, recovery of the difference between that public way fee and the just and reasonable public way fee determined by the PUCO must be from only those customers of the public utility that receive its service within the municipal corporation.

Additionally, any recovery mechanism payable by sale-for-resale or wholesale telecommunications customers must provide for recovery limited to any public way fee not included in established rates and prices for those customers and to the pro rata share of the public way fee applicable to the portion of the facilities that are sold, leased, or rented to the customers and are located in the public way. The recovery must be in a nondiscriminatory and competitively neutral manner and prorated on a per-line or per-line equivalent basis among all retail, sale-for-resale, and wholesale telecommunications customers subject to the recovery. (Sec. 4939.07(A) to (C).)

Recovery by a public utility of non-fee, public way costs. The act authorizes a public utility that is subject to the rate-making jurisdiction of the PUCO to apply to the PUCO for authority to recover any cost that is both (1) a non-fee, public way cost, that is, any cost directly incurred by the public utility as a result of local regulation of its occupancy or use of a public way, excluding any cost arising from a public way fee levied upon and payable by the public utility, and (2) 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.

Specifically under the act, the PUCO, by order and notwithstanding any other provision of law or any agreement establishing price caps, rate freezes, or rate increase moratoria, may authorize for an applicant public utility such accounting authority as may be reasonably necessary to classify any non-fee, public way cost as a regulatory asset for the purpose of recovering that cost. However, if the PUCO determines, upon the application of the public utility or its own initiative, that classification of a non-fee, public way cost 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 PUCO must establish a charge and collection mechanism to permit the public utility full recovery of that cost. Under the act, a hardship is presumed for any public utility with less than 15,000 bundled sales service customers in Ohio 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 $500,000 or 15% of the total non-fee, public way costs considered by the PUCO for the purpose of establishing rates in the utility's most recent rate increase proceeding or the rate increase proceeding of the utility's predecessor, whichever is later. (Sec. 4939.07(D).)

The act states that, with respect to an application for either recovery of a public way fee or recovery of non-fee, public way costs, a public utility cannot be required to waive any rights of recovery under the act as a condition of occupancy or use of a public way (sec. 4939.07(F)).

The act authorizes the PUCO to adopt such rules as it considers necessary to carry out the utility cost recovery provisions. The act requires an application for recovery of a public way fee or of non-fee, public way costs to include such information as the PUCO reasonably requires. It requires the PUCO to conclude its consideration of an application and issue a final order not later than 120 days after the date that the application was submitted. A final order regarding a recovery mechanism must provide for such retroactive adjustment as the PUCO determines appropriate.

The act also specifies that an application either for cost recovery of a public way fee or recovery of non-fee, public way costs must be processed as an application not for an increase in rates under existing rate-making law. Under that law, the PUCO may permit the filing of the proposed rate schedule and fix the time when it takes effect, and must set an application for hearing only if it appears that the proposal may be unjust or unreasonable (sec. 4909.18, not in the act). (Sec. 4939.07(E) and (G).)

Act's effects on cable or utility franchises or agreements and on cable operator fees. The act states that its provisions do not apply 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: (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 act's effective date, (2) the franchise or agreement authorizes the occupation or use of public ways, (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 the public way compensation provisions of the act (sec. 4939.08(A)).

Additionally, the act states that its provisions do not prohibit a municipal corporation from doing either of the following: (1) charging a cable operator a franchise fee in accordance with federal law, or (2) allowing a credit, offset, or deduction against the payment of a construction permit fee for any franchise fee a cable operator pays to the municipal corporation (sec. 4939.08(D)).

Act's effect on existing ordinances. The act provides that, with the exception of its provision authorizing a public utility to appeal a public way fee to the PUCO, it does not apply to an 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 (sec. 4939.08(B)).

Township highways

Prior law authorized a board of township trustees to require any person, firm, or corporation to obtain a permit before making an excavation in a public

highway within its jurisdiction. The act affects this authority (but delays the effective date of the changes by 90 days), by extending the permitting authority to any excavation within the highway right-of-way. "Right-of-way" is defined, in the context of the act, as land, property, or the interest in land or property, usually in the configuration of a strip, acquired for or devoted to transportation purposes and includes the roadway, shoulders or berm, ditch, and slopes extending to the right-of-way limits under the control of the board of trustees.

Additionally, however, the act exempts from the permitting authority any excavation to repair, rehabilitate, or replace a pole already installed for the purpose of providing electric or telecommunications service. It also exempts an excavation project to install five or fewer poles for the purpose of providing electric or telecommunications service, but requires the person making that excavation to provide verifiable notice of the excavation to the township clerk at least three business days before the excavation date. The act increases the permit application fee from $2 to $50, expressly including a single application for an excavation project to install six or more poles for the purpose of providing electric or telecommunications service or, notwithstanding the exemption for five or fewer poles, to install a pole associated with underground electric or telecommunications service.

Further, the act provides that the township permitting statute applies to "persons" as defined in continuing law. Accordingly, "person" includes an individual, corporation, business trust, estate, trust, partnership, and association. Currently, the township permitting statute establishes a permitting requirement for any "person, firm or corporation" and prohibits a violation of a permitting resolution by any "person." (Sec. 5571.16, with reference to secs. 1.59 and 4511.01(UU); and Section 3.)

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	04-11-02	p. 1660
Reported, S. Ways & Means	05-22-02	pp. 1799-1800
Passed Senate (33-0)	05-22-02	pp. 1807-1808
Reported, H. Public Utilities	06-18-02	p. 1905
Passed House (71-21)	06-19-02	pp. 1937-1941
Senate concurred in House amendments (31-1)	06-19-02	pp. 1935-1936

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