

An Update Summary, Comparison and Comments of the State and Federal Small Cell/Cable Franchise Laws, Rules and Proposed Rules

What follows is an attempt to provide a broad summary update. The Orders and statutes discussed include the following:

- 1) Two FCC Small Cell & Rights Of Way Access Orders;
 - a) “Moratoria Order”; FCC 3rd Report and Order and Declaratory Ruling of 8/13/2018 FCC 18-111 <https://docs.fcc.gov/public/attachments/FCC-18-111A1.pdf> and
 - b) “Small Cell Order”; FCC Declaratory Ruling and 3rd Report and Order of 9/27/2018 FCC 18-133 <https://docs.fcc.gov/public/attachments/FCC-18-133A1.pdf>
- 2) The FCC Cable Franchise “In Kind” Notice of Proposed Order (NPRM) of 9/25/2018 FCC 18-131 <https://ecfsapi.fcc.gov/file/0925046713889/FCC-18-131A1.pdf> and
- 3) Michigan’s **SB 637** now 2018 PA 365; MCL 460.1301 et seq and **SB 894** now 2018 PA 366; MCL 125.3205(1)(c) as amended and MCL 125.3514(10) as amended <http://www.legislature.mi.gov/documents/2017-2018/publicact/pdf/2018-PA-0365.pdf> and <http://www.legislature.mi.gov/documents/2017-2018/publicact/pdf/2018-PA-0366.pdf>

This summary and the referenced docs are provided by PROTEC and to a limited extent, individual communities which have otherwise supported these tracking and updating as well as other substantive efforts. If you and your community receive this material but have not yet participated in supporting same, please, get involved and lend your support. Nothing referenced here is free. **Join PROTEC** which is involved with Bloomfield Township in an effort to consider a challenge to the State laws. We need partners. **Join Smart Communities** in the FCC Appeals. Smart communities is a consortium of communities from across the country, including our Michigan coalition comprised of Bloomfield Township, MML, MTA, PROTEC Meridian Township and other silent contributors.

This update is not intended to be legal advice for any particular community, but rather, a starting point for discussion and further analysis based upon the particular facts and circumstances unique to each community.

1. TWO FCC TELECOM ROW ACCESS ORDERS ISSUED FALL 2018

The Moratoria ROW Order: Is that August 3 Order in which the FCC took aim at any local, state or federal activities that constituted a moratorium on Broadband build out. It included an adverse reference to Michigan’s seasonal road weight restriction statute, which was a featured subject of a reconsideration petition filed by Smart Communities.

Our efforts to enlist support from our MDOT and Michigan AG in opposing this FCC over reach, have to date not been responded to.

See our petition here:

https://ecfsapi.fcc.gov/file/10904323720005/Smart%20Communities_Special%20Dists_ReconPetition.pdf

Current Disposition: FCC requested holding the matter in abeyance and the US 9th Circuit Court of Appeals where, after much effort on our part, all appeals of these FCC orders are currently pending, granted that request. That abeyance is currently being revisited by the 9th Cir.

Small Cell Order: This is the key FCC ROW order dated September 27 which preempts local control of our ROW in large measure, using the term “preempt-” over 100 times throughout the order and, in many respects mirrors Michigan’s PA 365 and 366. “Smart Communities” and many other individual communities and organizations across the country filed appeals. The various appeals by municipal interests and industry were scattered across a ½ dozen federal circuits originally but are now finally and successfully where we wanted them: The 9th Circuit US Ct of Appeals. At least some of the Appeals bear File # 18-72689. While most of the appeals focus on various allegations of defects in the FCC order on “standard” administrative appeal issues, Montgomery County Md. filed an appeal which specifically and uniquely, addresses the RF Radiation health issue, a subject percolating under all of this.

A schedule for substantive briefing has been issued with those initial briefs due in April. A case management conference has been requested.

We also early on requested a stay of these FCC orders. The FCC and subsequently the 10th Cir denied same. (at one time, several of the appeals were assigned to the 10th Cir.) denied the Stay we requested. See the FCC Order here: <https://www.fcc.gov/document/order-denying-motion-stay-wt-dkt-no-17-79-and-wc-dkt-no-17-84>

A follow up motion to stay at the 9th Cir is under consideration

At this juncture, there is still some opportunity for communities to formally join the appeal as intervenors by leave or as Amicus or, to otherwise support the efforts by offering financial assist to Smart Communities. The intervenor as of right period ended January 11.

Likely Effective Date of this FCC order, absent a Stay was **January 14, 2018** for most of the Order; **April 15** is the effective date for the aesthetics parts of the order.

A comparison summary of these FCC orders and the new Michigan laws is attached which attempts to start to address the interplay between them.

2. CABLE FRANCHISE “IN KIND” NOTICE OF PROPOSED ORDER (NPRM)

This proposed order involves the proceeding in which the FCC attempts to respond to the cable industry request that it level the ROW access playing field as between the traditional telecoms and the cable industry. The cable industry argument is that as these two traditionally distinct communications industry participants converge in technology and services, they should be treated similarly in various ways, including ROW access fees. So last year, the cable side of the industry requested the same vastly reduced access fees which

various state laws like our PA 365 and 366 and the FCC Small Cell orders addressed above, which have provided the telecom side of the industry a competitive advantage to the tune of several Billion dollars annually on a national scale. The FCC responded on August 25, with the referenced NPRM which simply stated, requires that all traditional “in kind” services provided to local communities pursuant to long existing franchise agreements, now should be included as franchise fees. The effect of this radical new approach to 40 year old cable law is that such items as the market value of the PEG channel(s) in each community across the country will now be deducted from the franchise fees that have become a budget mainstay for thousands of communities. This proposal by the FCC, if adopted, would impact the approximate **100 Million dollars** in Franchise fees collected in Michigan alone by either substantially reducing and/or possible eliminating those fees.

Following issuance of this “proposed” order, numerous comments from communities across the country were filed including our own coalition’s.

Our comments are here:

<https://ecfsapi.fcc.gov/file/1115723504888/LFA%20COMMENTS%20IN%20OPPOSITION.pdf>

As one interesting point, even the comments filed by our Michigan Public Service Commission, typically an industry supporter, opposed the FCC proposed order.

The FCC is now considering the comments filed by locals and industry and, presumably issue its final order sometime in the coming weeks or months. We think sooner than later and, largely as originally written in the proposed order. We therefore believe the likely effective date, absent a stay order, is probably going to be in time to impact June 2019 quarterly cable franchise fee payments.

3. MICHIGAN’S SB 637/894/2018 PA 365 &366

These new Michigan laws, like similar laws enacted in some 20 other states, as well as like the FCC orders discussed above, substantially limit local regulation of and applicable fees and charges that can be assessed to the communication industry for Small Cells and ROW Access. These new laws, like the FCC In Kind NPRM discussed above, include allowing the cable industry “mixed use” of its cable infrastructure, specifically to allow for WIFI equipment to be hung on its existing cable lines.

The Legislature granted these laws “**immediate effect**” which results in a **March 12, 2019** effective date.

There are discussions of an appeal of these new laws. There are/have been appeals of other state laws which we are gathering in order to learn from. If your community is interested in joining such an appeal, please reach out to PROTEC, a 23 year old consortium of nearly 100 Michigan communities focused on defending our ROW. PROTEC is governed by its board including the Cities of Dearborn, Livonia and Southfield. <https://www.protec-mi.org/>

A summary of SB 637/894/2018 PA 365 &366 which attempts to start to address the interplay with the FCC orders follows.

2018 PA 365 Sections/Issues	FCC Orders Comparison
<p>Sec 1. Title and Purpose: “Small Wireless Communications Facilities Deployment Act.”</p> <p>Applies only to “Colocation” of “Small Cells”. Sec 11(2)</p>	<p>Similar- Applies to Small Cells in and out of ROW – Though most of the limitations on local govt do not apply outside the ROW – yet.</p>
<p>Sec. 3 Definitions</p> <p>-Authority: State, County, Twp, City, Village, District</p>	<p>Similar</p>
<p>Sec 5. Definitions Cont’d</p> <p>- a. Colocation Re Small Cells – “install” “maintain” “modify” “replace” “wireless facilities” on virtually any structure. Does NOT include “make ready” work or “installation” of “new” “utility poles” or “new” “wireless support structures”</p> <p>Note: Per MCL 125.3514(10), Colocation Re Traditional Macro Towers retains its traditional meaning: to attach wireless facilities ONLY on existing wireless supporting structures</p>	<p>Similar Re Small Cells. But no reservation of traditional meaning for Macro Towers</p>
<p>Sec 7. Definitions Cont’d</p> <p>-c. Micro Wireless Facility – only truly small device in Act – Measured in inches - Cable wireless facility 24’x15’x12’ + 11’ antenna – No permit or approval required – See Sec 15 (5)(c)</p> <p>- (j) Small Cell Definition does not appear limited to ROW.</p>	<p>Similar - See Cable NPRM Allowing Mixed Use of Cable infrastructure and facilities for more than traditional and franchised video service</p> <p>FCC orders may not be limited to ROW See Dec Ruling and 3rd Report and Order of 9/27/18 @ Fn 71 reproduced in part further below</p> <p>-We knew FCC wants to reach non-ROW public land with these caps on local regulation this year</p>

<p>(i) Each Antenna: 6 cu ft - no limit on number of antennas per site?</p> <p>(ii) “Other Equipment” 25 cu ft + Cap Exempt: electric meters, concealment elements, telecommunications demarcation boxes, grounding equipment, power transfer switches, cut-off switches, and vertical cable runs</p> <p>(j)(</p>	<p>“Each” Antennas: 3 cu ft/antenna – No apparent limit on number</p> <p>Other Equipment: 28 cu ft</p>
<p>Sec 9. Definitions Con’t’d</p> <ul style="list-style-type: none"> - a. Utility Pole: “is or may be used” for wireless – ANY? - b. Wireless Facility: Note what is included and what is not - c. Wireless Infrastructure Provider: Why separate from Wireless provider? - d. Wireless Provider: includes infrastructure provider 	<p style="text-align: center;">Similar</p>
<p>Sec 11. Limitations on Govt: “Except as provided...Authority...Shall not prohibit, regulate or charge for <u>colocation</u> of small cells...” (Appears to apply in and outside of the ROW to all Small cells)</p> <ol style="list-style-type: none"> 1. No regulation beyond Act 2. Facility Installation Approval only allows “colocation” <ol style="list-style-type: none"> a. does NOT authorize “services” or b. Metro Act “lines” <p>- separate franchise for service? (FCC preempted?)</p>	

<p>Sec 13. ROW Only: Annual Rate Caps on support structures (not service): No Zoning if within limits – See sec 17(1)</p> <p>These caps on rates do not appear to apply outside the ROW</p> <p>Colocation: \$20/yr</p> <p>New: \$125/yr</p> <p>2% Escalator ea. 5 yrs</p> <p>4.(a-b) Existing agreements/ordinances re new? installed and operational sites – grandfathered - subject to -agreements/ordinances termination provisions</p> <p>90-day extension for compliance with Act (6/10/19)</p> <p>5. Ht. Limit: 40' + 5' Antenna(s)</p> <p>6. Colocation on taller structures ok</p> <p>7-8. “Aesthetics”: Underground, Historic and Residential Districts:</p> <p>Underground: Regs must be reasonable, nondiscriminatory across all utilities and subject to waiver by industry request not to be denied in a discriminatory fashion</p> <p>Historic Districts: Regs must be written, reasonable, feasible, tech neutral and cannot ultimately prohibit wireless technology</p> <p>10. Provider to repair all ROW damage or Muni can assess cost of repairs</p>	<p>Suggested Annual Rates: \$270</p> <p>All rates and fees subject to actual and reasonable cost cap.</p> <p>No Grandfathering</p> <p>Ht. Limit: 50 ft or 10% more than adjacent structures = tallest adjacent structure = unlimited “Each” Antennas: 3 cu ft/antenna – No apparent limit on number</p> <p>Aesthetics: <i>“aesthetics requirements are not preempted if they are (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance.”</i></p> <p>Underground limitations: in Jeopardy</p> <p>Minimum Spacing: in Jeopardy</p>
<p>Sec 15. ROW Only: Permit Process and Limitations – No Zoning if within limits – See sec 17(1)</p> <p>Shot clocks and fee caps do not appear to apply outside the ROW</p>	<ul style="list-style-type: none"> • Small cell wireless Application: <ul style="list-style-type: none"> - Colocation: 60 days - New structure: 90 days • Non-Small Cell Application:

2.(a) No In Kinds

(d) **25 days** to raise **Incomplete App** with detailed reasons – **10 days** to raise Incomplete on subsequent submission. Clock not restarted.

(h)(i) **Colocation Application Approval or Denial within: 60 days** (+30 if others apply and muni needs more time)

(h)(ii) **New Application: 90 days** (+ same 30 days as above)

(i) **Basis for Denial:** In writing - interfere with traffic, ADA, Interfere with public infrastructure, n reasonable violate written reasonable spacing regs or other codes

(j) Applicant can refile within 30 days at no charge

(k) **Batch Applications:** single permit for up to 20 sites – (Rates and Fees the same?) (No additional time for review?)

(n) **No Moratoria**

3. (a-c) **Application Fees**

Colocation: **\$200 (+ \$300** if new utility pole)

10% escalator ea. 5 yrs

5. No Permit or Approval for:

(a) Replacements,

(b) Maintenance or

(c) **Microcells – Cable Wireless** on cable lines
- See Sec 7(c)

6. **Alternate Sites:** Muni can suggest – Subject to reasonable Provider discretion

- colocation: **90 days**

- New Structure: **150 days**

- **Incomplete** = Tolling: Renews back to 0- only if provided within 10 days of receipt
- **Not Deemed Granted - But: presumption of violation**

Mixed use Batch Applications get the longer shot clock (90 days)

No Moratoria – express or implied (Defacto)

- **May include Michigan's Seasonal Frost Freeze rules MCL 257.722**

Fees: Reasonable and approximation of actual cost

- **Application Suggested Fees:**
- **Colocation: \$500** for up to 5 apps + **\$100** for ea additional App
- **New: \$1000**
- **Annual: \$270**
 - Fees higher than the those set as presumptively reasonable by the Commission are permissible so long as it is demonstrated that the fees are:
- A reasonable approximation of costs
- Those costs themselves are objectively reasonable, and

	<ul style="list-style-type: none"> • They are no higher than fees charged to similarly-situated competitors in similar situations
<p>Sec 17. Zoning Affects small cells outside the ROW or noncompliant Small Cells in the ROW</p> <p>Hefty fee penalties for zoning</p> <p>1. If a ROW site exceeds the limitations in size etc under Sec 13(5) or Sec 15(5) , and therefore not a permitted use, the following are subject to zoning whether in or outside? the ROW? Also – No zoning re:</p> <p>(a) Modification of existing or installation of new wireless? facilities</p> <p>(b) Modification of existing or installation of new wireless support structures</p> <p>2. Zoning approval Process:</p> <p>(a-b) 30 days to raise Incomplete App with detailed reasons – 10 days to raise Incomplete on subsequent submission. Clock not restarted.</p> <p>(d) Colocation Approval or Denial: 90 days</p> <p>New Site Approval or Denial: 150 days</p> <p>Failure to meet timeline = Deemed Approved – provider to give 15 day notice of intent to install</p> <p>(3) Basis for Denial: Reasonable, Nondiscriminatory. Provider plans presumed reasonable. Need and other business reasons not relevant.</p>	<p>No Corollary other than Zoning not a defense to stated rules</p>

<p>Appearance, landscaping, setbacks fall zone etc are relevant</p> <p>(4) Application Fee:</p> <p>New or modification of existing Wireless facilities: \$500.</p> <p>New or modification of existing Wireless support structure: \$1,000</p>	
<p>Sec 19. Authority/(Govt) Owned <u>ROW</u> Poles</p> <p>1. No exclusive ROW Agreements</p> <p>2. Colocation: \$30/yr/pole - 2% Escalator ea. 5 yrs</p> <p>3.(a-b) Grandfathering? agreements/ordinances re installed and operational sites – grandfathered - subject to agreements/ordinances termination provisions</p> <p>90-day extension for compliance with Act (6/10/19)</p> <p>4. Authority/Muni must publish rates, fees within 90 days of request and provide good faith make ready charge within 60 days</p> <p>5. Authority Poles once collocated by wireless must be maintained, alternatives offered or, offered for sale to provider</p>	<p>No different rates/fees restrictions on govt owned structures</p>
<p>Sec 21. Muni Owned Electrics Anywhere – Not ROW limited</p> <p>N/A</p>	<p>N/A</p>
<p>Sec 23. Muni Owned Electrics Anywhere – Not ROW limited</p> <p>N/A</p>	<p>N/A</p>

Sec 25. “ Higher Education ” Exempt: No Muni authority over wireless University building interiors	N/A
Sec 27. Disputes: State Circuit Court where Muni exists or to Authority/Muni if quick appeal process exists	Aggrieved provider must go to Ct (State or Federal (47 USC Sec 332(C)(7)(B)(v) typical relief related to wireless) within 30 days or possibly the FCC (Sec 253(d) prohibiting a telecom service
Sec 29. (a) Indemnity (b) Insurance – But Self-insurance an option with showing of present financial ability: issues of concern here – See RF exposure issues	No corollary
Sec 31. Authority/Muni can charge/require less ☹	Similar language
Sec 33. Bonding not to exceed \$1000/site	No Corollary
Sec 35. Provider ID per site	Established by prior wireless law
Sec 37. Provider responsible for electric service	No corollary
Sec 39. Act does not impact other law re pole attachments	See
Effective Date: 3/12/2019 But see Sec’s 13(4) and 19(3) – 90 day extension for compliance with Act (6/10/19)	Effective Date: 1/14/2019 Aesthetics Eff Date: 4/14/2019
Copy: http://www.legislature.mi.gov/documents/2017-2018/publicact/pdf/2018-PA-0365.pdf	Copies: 8/3/18 Moratoria Order: https://docs.fcc.gov/public/attachments/FCC-18-111A1.pdf

	<p>9/27/18 ROW Order: https://docs.fcc.gov/public/attachments/FCC-18-133A1.pdf</p> <p>9/25/18 Cable NPRM Proposed Order: https://ecfsapi.fcc.gov/file/0925046713889/FCC-18-131A1.pdf</p>

SB 894; 2018 PA 366 Amends both the ZEA as follows

- **ZEA at MCL 125.3205(1)(c) as amended**

(1) A zoning ordinance is subject to all of the following:

(a) The electric transmission line certification act, 1995 PA 4 30, MCL 460.561 to 460.575. 5

(b) The regional transit authority act, 2012 PA 387, MCL 6 124.541 TO 124.558.

(C) THE SMALL WIRELESS COMMUNICATIONS FACILITIES DEPLOYMENT ACT.

- **ZEA at MCL 125.3514(10) as amended**

(10) THIS SECTION DOES NOT APPLY TO AN ACTIVITY OR USE THAT IS REGULATED BY THE SMALL CELL WIRELESS COMMUNICATIONS FACILITIES 21 DEPLOYMENT ACT.”

ADDITIONAL NOTES

1. FCC intends to expand Small Cell ROW orders to Macro Cells on ALL Public Property. So it is critical that we resist these current efforts to limit local control.
3. Industry suggests 60 “small” cell sites per sq mile per provider. (multiply 60x4 wireless providers and 2 major cable providers = 360/sq mile)
4. No Industry Build Out and Service Standards: None of this is going to result in “5G” in rural or poor urban centers.
5. Other FCC Orders such as the October 2014 Sec 6409 Order that allows colocation expansion of 10’ vertical and 6’ horizontal – are not necessarily eclipsed by these recent rules.

6. TO DO:

a. Study the issues and create a Community Policy Re “ROW Small Cells” based upon your community’s assessment of its needs vs the provisions of these new laws and risk of disputes

- include a cost study of processes to support fees and rates

b. Adopt your policy as a Resolution subject to amendment

c. Publish it

d. Agreements: Include Broad Indemnity (include RF issues), Reservation of Rights allowing you to take advantage of future favorable changes in “the law” and a requirement that the applicant provide you with the legal support for their application

e. JOIN: PROTEC in a challenge to the State law and PROTEC and Smart Communities in a challenge of the FCC orders re ROW and Cable Franchise Fees.