

Metro Act and DAS/Small Cells in our Rights of Way

Introduction—The Metro Act

PA 48 of 2002 was enacted in response to a push by the wireline telecommunications industry for simpler and more uniform rights of way (ROW) access and regulation. The industry sought new and upgraded internet access lines (both traditional copper and newer fiber) and wanted to deregulate access to municipal rights of way pursuant to the Michigan Constitution of 1963 Art 7 Sec 29. The industry claimed its efforts to upgrade telecommunications data services were being hampered by inconsistent and confusing local rights of way access requirements. The industry desired one-stop shopping and wanted it at the State level only, with little or no fees. The Michigan Municipal League, the Michigan Coalition to Protect Public Rights of Way (PROTEC), and other municipal interests resisted this effort, arguing that while all stakeholders desired these telecommunications upgrades, the unique issues from community to community across the State did not translate well to a one size fits all regulatory scheme. More densely populated communities with more complex existing rights of way infrastructure and associated costs, require providers/installers of telecommunications infrastructure to share those proportionately greater costs. Following contentious negotiation, and several lawsuits and claims litigated in the courts and at the Michigan Public Service Commission between the industry and several cities, the Legislature passed 2002 PA 48. The Act generally provides:

- The Act applies to wireline telecommunication industry wires or lines above or below ground;
- A 5 cent/foot annual fee plus a one-time \$500 application fee;
- A 45-day municipal shot-clock to grant or deny applications;
- Substantial penalty provisions for violations; and
- **Specifically excludes wireless facilities including equipment cabinets and poles.**

As a result of PA 48, disputes over wireline access to municipal rights of way have largely quieted over the last decade. Meanwhile, statewide revenues, which started at about \$20 million in 2003 have risen to about \$30 million due to increasing numbers of linear feet of telecommunications lines across the state. However, this compensation still equals less than 1/4 of what market rates and other States consider to be appropriate in the year 2002 and today. It is generally conceded that larger communities suffer the greatest loss due to the complexities and higher costs of their rights of way issues. The League and PROTEC continue to explore avenues to increase ROW compensation under PA 48 of 2000.

Recent Metro Act and DAS/Small Cells

Since 2014 the telecommunications wireless industry (entities closely related to the wireline industry discussed above) has been seeking the same limited compensation and regulation for wireless infrastructure access to our ROW. Distributed Antenna Systems (DAS) or Small Cell systems typically involve a network of antennas, linked by fiber strung underground or between utility poles, and ultimately connected to a central point, which might be a traditional macro cellular tower or other hub-center.

While the industry has claimed ROW access under the Metro Act for these antennas and poles, the Act specifically excludes application to wireless infrastructure as wireless has historically been governed exclusively by the Federal Communications Commission (FCC) and Congress. An early attempt by the industry to utilize an unsupported ruling by the former Metro Authority (Determination #1) was soundly defeated at PROTEC's insistence, by the new Local Community Stabilization Authority in the Fall of 2016, relegating the Determination to historical status only. This change was a result of efforts by PROTEC and

the League in bringing attention to the inconsistency between the authorizing statute and errant regulation.

In 2016, Mobilite on behalf of Sprint, petitioned the FCC seeking quick, easy, and cheap access for its **120' towers** in municipal ROW, claiming these were "small cells." The League, PROTEC, and many other organizations locally, regionally, and nationally actively successfully opposed that effort.

In 2018, the Wireless Telecommunications Industry and Cable/Video Industry teamed up and convinced the FCC to issue its Small Cell Order <https://www.fcc.gov/document/fcc-facilitates-wireless-infrastructure-deployment-5g> and, in Michigan and several other states, succeeded in passage of 2018 PA 365 or similar legislation, both of which authorized Wireless Facility access to our ROW for minimal compensation to local community owners of that ROW and with very little regulation. PROTEC resisted both and, with MML and a host of organizations across the country, appealed that FCC Order and won the point in the U.S. 9th Circuit Ct of Appeals, Cert denied by the U.S. Supreme Court, that **local zoning prevailed over the one size fits all aspect of the FCC Order.**

Currently, Small Cells facilities on 40-foot poles, measuring more than 30 cubic feet in size, are permitted on very minimal applications with short shot clocks for municipal approval. Compensation is essentially nonexistent.

See the PROTEC website at <https://www.protec-mi.org/> for copies of Small Cell agreements and updates.

Fact Sheet provided by Mike Watza of Kitch Drutchas Wagner Valitutti & Sherbrook and General Counsel to PROTEC.