

CHAPTER 4939: USE OF MUNICIPAL PUBLIC WAY

4939.01 Municipal public way definitions.

As used in sections 4939.01 to 4939.08 of the Revised Code:

(A) "Cable operator," "cable service," and "franchise" have the same meanings as in the "Cable Communications Policy Act of 1984," 98 Stat. 2779, 47 U.S.C.A. 522.

(B) "Occupy or use" means, with respect to a public way, 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.

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

(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.

(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.

(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.

Effective Date: 07-02-2002

4939.02 State policy.

(A) It is the public policy of this state 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, to protect public and private property, and to promote economic development in this state;

(2) Promote the availability of a wide range of utility, communication, and other services to residents of this state 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 sections 4927.02, 4928.02, and 4929.02 of the Revised Code;

(4) Recognize the authority of a municipal corporation 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;

(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.

(B) 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 such occupants or users.

Effective Date: 07-02-2002

4939.03 Prohibited conduct concerning public ways.

(A) No person shall occupy or use a public way except in accordance with law.

(B) In occupying or using a public way, no person shall unreasonably compromise the public health, safety, and welfare.

(C)(1) No person shall occupy or use a public way without first obtaining any requisite consent of the municipal corporation owning or controlling the public way.

(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.

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

(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.

(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.

(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.

Effective Date: 07-02-2002

4939.04 Management, regulation, and administration of public ways by municipal corporations.

(A)(1) A municipal corporation shall provide public utilities or cable operators with open, comparable, nondiscriminatory, and competitively neutral access to its public ways.

(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.

(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.

Effective Date: 07-02-2002

4939.05 Levy of public way fees by municipal corporation.

(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.

(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.

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

(3) A municipal corporation shall not 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.

(4) 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 shall grant the cable operator, for the occupancy or use of the 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.

(C) Public way fees levied by a municipal corporation shall 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 shall be reasonably and competitively neutrally allocated among all persons occupying or using public ways owned or controlled by the municipal corporation, including, but not limited to, persons for which payments are waived as authorized by division (B) of this section or for which compensation is otherwise obtained. No public way fee shall 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.

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

(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.

Effective Date: 07-02-2002

4939.06 Appeal of levy of public way fee.

(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.

(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, for the suspension period, any suspended public way fee only if the commission finds that the public way fee is not unreasonable, unjust, unjustly discriminatory, or unlawful.

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

Effective Date: 07-02-2002

4939.07 Application to recover fees and costs.

(A) As used in this section, "most recent," with respect to any rate proceeding, means the rate proceeding most immediately preceding the date of any final order issued by the public utilities commission under this section.

(B)(1) Notwithstanding any other provision of law or any agreement establishing price caps, rate freezes, or rate increase moratoria, a public utility subject to the rate-making jurisdiction of the commission may file an application with the commission for, and the commission shall then authorize by order, timely and full recovery of a public way fee levied upon and payable 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.

(2) Any order issued by the commission pursuant to its consideration of an application under division (B)(1) of this section shall establish a cost recovery mechanism including, but not limited to, an adder, tracker, rider, or percentage surcharge, for recovering the amount to be recovered; specify that amount; 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.

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

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

(C) In the case of recovery under division (B)(2)(a) or (b) of this section, the recovery mechanism payable by sale-for-resale or wholesale telecommunications customers shall 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 shall 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.

(D)(1) Notwithstanding any other provision of law or any agreement establishing price caps, rate freezes, or rate increase moratoria, a public utility subject to the rate-making jurisdiction of the commission may file an application with the commission for, and the commission by order shall authorize, such accounting authority as may be reasonably necessary to classify any cost described in division (D)(2) of this section as a regulatory asset for the purpose of recovering that cost.

(2) A cost eligible for recovery under this division shall be only such cost as meets both of the following:

(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.

(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.

(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.

(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 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.

(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.

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

Effective Date: 07-02-2002

4939.08 Exceptions for prior franchises or agreements.

(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:

(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.

(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 division (B)(4) of section 4939.05 of the Revised Code.

(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 September 29, 1999, unless, on or after that date, the ordinance is materially modified.

(C) Nothing in sections 4939.01 to 4939.07 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.A. 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.

(D) Nothing in sections 4939.01 to 4939.07 and this section of the Revised Code prohibits a municipal corporation from doing either of the following:

(1) Charging a cable operator a franchise fee in accordance with the "Cable Communications Policy Act of 1984," 98 Stat. 2779, 47 U.S.C.A. 542;

(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.

Effective Date: 07-02-2002

5571.16 Obtaining permit before installing driveway culvert or making excavation in township highway or highway right-of-way.

The board of township trustees, by resolution, may require any person to obtain a permit before installing a driveway culvert or making any excavation in a township highway or highway right-of-way within its jurisdiction, except an excavation to repair, rehabilitate, or replace a pole already installed for the purpose of providing electric or telecommunications service. The board, as a condition to the granting of the permit, may do any of the following:

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

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

(C) Require the use of warning devices it considers necessary to protect travelers on the highway;

(D) Require the applicant to indemnify the township against liability or damage as the result of the installation of the culvert or as a result of the excavation;

(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 in the permit.

Applications for permits under this section shall be made to the township fiscal officer upon forms to be furnished by the board. Applications, including, but not limited to, a single application for an excavation project to install six or more poles for the purpose of providing electric or telecommunications service or to install a pole associated with underground electric or telecommunications service, shall be accompanied by a fee of fifty dollars per application, which fee shall be returned to the applicant if the application is denied. Except as otherwise provided in this section, no application or fee shall be required for an excavation project to install five or fewer poles for the purpose of providing electric or telecommunications service, but the person making that excavation shall provide verifiable notice of the excavation to the township clerk at least three business days prior to the date of the excavation.

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

As used in this section, "person" has the same meaning as in section 1.59 of the Revised Code, and "right-of-way" has the same meaning as in division (UU)(2) of section 4511.01 of the Revised Code.

Effective Date: 03-31-2003; 12-20-2005