S T A T E O F N E W Y O R K

4759

2009-2010 Regular Sessions

I N A S S E M B L Y

February 6, 2009

Introduced by M. of A. MORELLE, ORTIZ, SCHIMMINGER -- Multi-Sponsored by -- M. of A. COOK, DelMONTE -- read once and referred to the Committee on Corporations, Authorities and Commissions

AN ACT to amend the general municipal law and the highway law, in relation to enacting the "broadband deployment act" and to provide for the rapid deployment of broadband telecommunications facilities and infrastructure in this state

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Legislative intent. In 1996, the United States Congress adopted the Telecommunications Act of 1996, which addresses, in part, the availability of state and local rights-of-way to telecommunications providers. Cities, towns and villages in New York state have long been responsible for the acquisition, care, management and use of their highway, roads, streets, avenues and property under article 9 of the state constitution and implemented by section 10 of the municipal home rule law and the statutes of local government. While municipal control over rights-of-way is an essential component of municipal home rule in the state of New York, the legislature must also recognize the important federal, state and local interests in facilitating the rapid deployment of competitive telecommunications facilities and infrastructure in this state by prohibiting the undue restraint and regulation of access to and use of rights-of-way, easements, or public places. Encouraging a rational build-out of a state-of-the-art telecommunications infrastructure will ensure that every person has access to broadband information networks, improve opportunities for economic development and the delivery of essential services including education and health care, encourage the introduction of new services, the entry of new providers, and the development of new technologies.

S 2. Short title. This act shall be known as and may be cited as the "broadband deployment act".

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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S 3. The general municipal law is amended by adding a new article 13-E to read as follows:

ARTICLE 13-E
BROADBAND DEPLOYMENT ACT

SECTION 300. DEFINITIONS.
301. GRANT OF FRANCHISE.
302. REGULATIONS GOVERNING OCCUPATION OF RIGHTS-OF-WAY, EASEMENTS OR PUBLIC PLACES.
303. FEES.
304. CONFIDENTIAL BUSINESS INFORMATION.

S 300. DEFINITIONS. WHERE USED IN THIS ARTICLE, THE FOLLOWING WORDS AND PHRASES SHALL HAVE THE MEANINGS SET FORTH IN THIS SECTION UNLESS THE CONTEXT CLEARLY INDICATES OTHERWISE.

1. "MUNICIPALITY" MEANS A CITY, TOWN OR VILLAGE, OR SUBDIVISIONS THEREOF.

2. "TELECOMMUNICATIONS PROVIDER" OR "PROVIDER" MEANS A PERSON OR AN AFFILIATE OF THE PERSON EACH OF WHICH FOR COMPENSATION PROVIDES INTRASTATE, INTERSTATE, OR INTERNATIONAL TELECOMMUNICATIONS SERVICES OR DEPLOYS FACILITIES USED DIRECTLY OR INDIRECTLY IN THE PROVISION OF SUCH TELECOMMUNICATIONS SERVICES.

3. "FRANCHISE" MEANS A FRANCHISE, LICENSE, PERMIT OR OTHER AUTHORIZATION ISSUED BY A MUNICIPALITY TO A TELECOMMUNICATIONS PROVIDER FOR ACCESS TO AND USE OF ANY RIGHTS-OF-WAY, EASEMENTS, OR PUBLIC PLACES UNDER ITS CONTROL AND JURISDICTION.

4. "PERSON" MEANS AN INDIVIDUAL, CORPORATION, PARTNERSHIP, ASSOCIATION, GOVERNMENTAL ENTITY, OR ANY OTHER LEGAL ENTITY.

S 301. GRANT OF FRANCHISE. 1. EXCEPT AS OTHERWISE PROVIDED IN THIS ARTICLE, A MUNICIPALITY SHALL GRANT A FRANCHISE FOR ACCESS TO AND THE ONGOING USE OF ALL RIGHTS-OF-WAY, EASEMENTS, AND PUBLIC PLACES UNDER ITS CONTROL AND JURISDICTION TO TELECOMMUNICATIONS PROVIDERS. A PROVIDER'S RIGHT TO ACCESS AND USE A RIGHT-OF-WAY, EASEMENT, OR PUBLIC PLACE SHALL NOT BE UNREASONABLY DENIED, RESTRICTED, OR CONDITIONED BY A MUNICIPALITY.

2. THIS SECTION SHALL NOT LIMIT A MUNICIPALITY'S RIGHT TO REVIEW AND APPROVE A PROVIDER'S ACCESS TO AND ONGOING USE OF A RIGHT-OF-WAY, EASEMENT, OR PUBLIC PLACE OR LIMIT THE MUNICIPALITY'S AUTHORITY TO PROTECT, TO THE EXTENT NECESSARY, THE HEALTH, SAFETY, AND WELFARE OF THE PUBLIC, PROVIDED THAT SUCH ACTIVITIES ARE COMPETITIVELY NEUTRAL AND NONDISCRIMINATORY AS TO ALL PROVIDERS, AND OTHERWISE COMPLY WITH THE PROVISIONS OF THIS ARTICLE.

3. A MUNICIPALITY SHALL APPROVE OR DENY ACCESS UNDER THIS SECTION WITHIN SIXTY DAYS FROM THE DATE A PROVIDER FILES AN APPLICATION FOR A FRANCHISE FOR ACCESS TO A RIGHT-OF-WAY, EASEMENT, OR PUBLIC PLACE. IF A MUNICIPALITY HAS NOT ACTED UPON SUCH APPLICATION WITHIN SIXTY DAYS OF THE DATE OF SUCH APPLICATION, HAS DENIED SUCH APPLICATION, OR HAS GRANTED SUCH APPLICATION ON CONDITIONS THAT THE PROVIDER BELIEVES TO BE UNLAWFUL UNDER THIS ARTICLE, THE PROVIDER SHALL HAVE THE RIGHT TO BRING AN ACTION IN ANY STATE COURT OR AT THE NEW YORK PUBLIC SERVICE COMMISSION TO DETERMINE WHETHER THE MUNICIPALITY'S FAILURE TO ACT, DENIAL OF THE APPLICATION, OR IMPOSITION OF CONDITIONS IS CONSISTENT WITH THIS ARTICLE. A MUNICIPALITY MAY REQUIRE AS A CONDITION OF THE FRANCHISE THAT A BOND BE POSTED BY THE PROVIDER, WHICH SHALL NOT EXCEED THE REASONABLE COST, TO ENSURE THAT THE RIGHT-OF-WAY, EASEMENT, OR PUBLIC PLACE IS RESTORED TO ITS ORIGINAL CONDITION IMMEDIATELY PRIOR TO THE PROVIDER'S ACCESS AND USE.

4. A MUNICIPALITY SHALL NOT REQUIRE A FRANCHISE OR CHARGE ANY FEE FOR A TELECOMMUNICATIONS PROVIDER TO:

(A) ACCESS OR USE THE RIGHTS-OF-WAY OR EASEMENTS OF OTHERS;

(B) ACCESS, USE, OR ACQUIRE THE FACILITIES OF OTHER PROVIDERS LAWFULLY FRANCHISED; OR

(C) ACQUIRE TELECOMMUNICATIONS SERVICES FROM ANOTHER PROVIDER.

S 302. REGULATIONS GOVERNING OCCUPATION OF RIGHTS-OF-WAY, EASEMENTS OR PUBLIC PLACES. 1. ANY RULES OR REGULATIONS ADOPTED BY A MUNICIPALITY WHICH GOVERN THE OCCUPATION OR USE OF ITS RIGHTS-OF-WAY, EASEMENTS, OR PUBLIC PLACES BY TELECOMMUNICATIONS PROVIDERS, AND ANY CONDITIONS OF A FRANCHISE GRANTED UNDER SECTION THREE HUNDRED ONE OF THIS ARTICLE OR APPLICATION REQUIREMENTS FOR SUCH FRANCHISE, SHALL BE COMPETITIVELY NEUTRAL AND NONDISCRIMINATORY AS TO ALL PROVIDERS AND SHALL BE SPECIFICALLY RELATED TO THE DIRECT AND DEMONSTRABLE EFFECTS OF IMPACTS RESULTING FROM A PROVIDER'S ACCESS TO, USAGE OF, OR PLACEMENT OF OR MAINTENANCE OF FACILITIES IN, ANY SUCH RIGHT-OF-WAY, EASEMENT, OR PUBLIC PLACE.

2. EXCEPT AS PROVIDED IN SUBDIVISION ONE OF THIS SECTION, A MUNICIPALITY MAY NOT USE ITS AUTHORITY OVER ITS RIGHTS-OF-WAY, EASEMENTS, OR PUBLIC PLACES AS A BASIS FOR ASSERTING OR EXERCISING REGULATORY CONTROL OR JURISDICTION OVER A PROVIDER WITH RESPECT TO ITS BUSINESS ACTIVITIES INCLUDING, BUT NOT LIMITED TO, ITS OPERATIONS, SYSTEMS, QUALIFICATIONS, SERVICES, SERVICE QUALITY, SERVICE TERRITORY, AND RATES.

3. A TELECOMMUNICATIONS PROVIDER'S AGREEMENT TO, OR NEGOTIATION OF, A FRANCHISE OR ANY CONDITIONS CONTAINED THEREIN, SHALL NOT LIMIT OR OTHERWISE BE DEEMED A WAIVER OF THE PROVIDER'S ABILITY TO OBTAIN ADMINISTRATIVE OR JUDICIAL REVIEW OF THE FRANCHISE OR ANY CONDITIONS CONTAINED THEREIN.

4. A MUNICIPALITY MAY ONLY REQUIRE THE RELOCATION OF A TELECOMMUNICATION PROVIDER'S FACILITIES TO THE EXTENT NECESSARY TO PROTECT THE PUBLIC SAFETY AND HEALTH, AND SUCH NEED SHALL BE SUPPORTED BY DEMONSTRABLE EVIDENCE. A MUNICIPALITY SHALL NOT REQUIRE THE RELOCATION OF A PROVIDER'S FACILITIES IN ORDER TO ACCOMMODATE THE PROPOSED CONSTRUCTION OR DEPLOYMENT OF ANOTHER TELECOMMUNICATIONS PROVIDER. ANY RELOCATION OF FACILITIES SHALL BE IMPOSED ON A COMPETITIVELY NEUTRAL AND NONDISCRIMINATORY BASIS.

S 303. FEES. 1. ANY FEES OR ASSESSMENTS IMPOSED BY A MUNICIPALITY FOR A FRANCHISE SHALL BE IMPOSED ON A NONDISCRIMINATORY AND COMPETITIVELY NEUTRAL BASIS AND SHALL NOT EXCEED THE ACTUAL AND DIRECT COSTS TO THE MUNICIPALITY IN GRANTING THE FRANCHISE, OR THAT ARE NECESSARY TO PROTECT THE PUBLIC HEALTH, SAFETY OR WELFARE BY RESTORING THE RIGHTS-OF-WAY, EASEMENTS, OR PUBLIC PLACES USED BY A PROVIDER TO THE CONDITION THAT EXISTED IMMEDIATELY PRIOR TO THE PROVIDER'S USE. SUCH FEES MUST BE DEMONSTRABLE AND MUST BE EQUITABLE AMONG USERS OF THE RIGHTS-OF-WAY, EASEMENTS, OR PUBLIC PLACES.

2. A MUNICIPALITY MAY NOT OTHERWISE LEVY ON A PROVIDER A FEE REQUIREMENT FOR THE PROVISION OF IN-KIND SERVICES OR ANY OTHER CHARGE FOR OPERATING AS A PROVIDER WITHIN THE JURISDICTION OF THE MUNICIPALITY OR OTHERWISE RELATED TO USING ITS RIGHTS-OF-WAY, EASEMENTS, ROADS, HIGHWAYS OR PUBLIC PLACES, INCLUDING ANY FEE BASED ON A PROVIDER'S REVENUES OR PROFITS.

3. FEES AND COSTS ASSESSED BY A MUNICIPALITY SHALL BE REASONABLY RELATED IN TIME TO THE OCCURRENCE OF THE COSTS.

4. ANY TELECOMMUNICATIONS PROVIDER MAY APPLY TO A MUNICIPALITY TO BRING AN EXISTING FRANCHISE INTO COMPLIANCE WITH THIS ARTICLE, OR AFTER NINETY DAYS SHALL HAVE THE RIGHT TO CHALLENGE SUCH FRANCHISE, OR ANY

TERMS OR CONDITIONS CONTAINED THEREIN, IN ANY STATE COURT OR AT THE NEW YORK PUBLIC SERVICE COMMISSION.

5. IN A SUCCESSFUL ADMINISTRATIVE OR JUDICIAL ACTION BY A TELECOMMUNICATIONS PROVIDER AGAINST A MUNICIPALITY FOR A VIOLATION OF THIS ARTICLE, SUCH PROVIDER MAY RECOVER FROM THE MUNICIPALITY COURT COSTS AND REASONABLE ATTORNEY'S FEES AT TRIAL AND ON APPEAL.

S 304. CONFIDENTIAL BUSINESS INFORMATION. 1. ANY PROPRIETARY CONFIDENTIAL BUSINESS INFORMATION OBTAINED FROM A TELECOMMUNICATIONS PROVIDER BY A MUNICIPALITY RELATING TO AN APPLICATION FOR OR GRANT OF A FRANCHISE IS CONFIDENTIAL AND MAY NOT BE USED FOR ANY OTHER PURPOSES, INCLUDING, BUT NOT LIMITED TO, COMMERCIAL OR COMPETITIVE PURPOSES, NOR MAY THE CONFIDENTIAL BUSINESS INFORMATION BE DISCLOSED TO ANY THIRD PARTY.

2. FOR THE PURPOSES OF THIS EXEMPTION, "CONFIDENTIAL BUSINESS INFORMATION" INCLUDES ANY PROPRIETARY OR OTHERWISE CONFIDENTIAL INFORMATION OR DOCUMENTATION, INCLUDING MAPS, PLANS, BILLING AND PAYMENT RECORDS, TRADE SECRETS, OR OTHER INFORMATION RELATING TO THE PROVISION OF OR FACILITIES FOR COMMUNICATIONS SERVICE THAT IS INTENDED TO BE AND IS TREATED BY THE COMPANY AS CONFIDENTIAL AND IS NOT OTHERWISE PUBLICLY AVAILABLE AS REQUESTED BY THE MUNICIPALITY.

3. NOTHING IN THIS SECTION EXPANDS THE INFORMATION OR DOCUMENTATION THAT A MUNICIPALITY MAY PROPERLY REQUEST UNDER APPLICABLE LAW PURSUANT TO REGULATION OF ITS RIGHTS-OF-WAY.

S 4. The second undesignated paragraph of section 52 of the highway law, as amended by chapter 297 of the laws of 1972, is amended to read as follows:

The commissioner of transportation shall establish regulations governing the issuance of highway work permits, including the fees to be charged therefor, a system of deposits of money or bonds guaranteeing the performance of the work and requirements of insurance to protect the interests of the state during performance of the work pursuant to a highway work permit. With respect to driveway entrance permits, the regulations shall take into consideration the prospective character of the development, the traffic which will be generated by the facility within the reasonably foreseeable future, the design and frequency of access to the facility, the effect of the facility upon drainage as related to existing drainage systems, the extent to which such facility may impair the safety and traffic carrying capacity of the existing state highway and any proposed improvement thereto within the reasonably foreseeable future, and any standards governing access, non-access or limited access which have been established by the department of transportation. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, THE ISSUANCE OF A WORK PERMIT UNDER THIS SECTION BY THE COMMISSIONER OR HIS OR HER DULY DESIGNATED AGENT TO A TELECOMMUNICATIONS PROVIDER AS DEFINED BY SECTION THREE HUNDRED OF THE GENERAL MUNICIPAL LAW, THE TERMS OF SUCH PERMIT, THE APPLICATION REQUIREMENTS FOR SUCH PERMIT, FEES ASSOCIATED WITH THE ISSUANCE OF SUCH PERMIT, OR ACTIVITIES UNDERTAKEN PURSUANT TO SUCH PERMIT, SHALL BE SUBJECT TO THE TERMS AND PROVISIONS APPLICABLE TO MUNICIPALITIES UNDER ARTICLE THIRTEEN-E OF THE GENERAL MUNICIPAL LAW.

S 5. Section 136 of the highway law is amended by adding a new subdivision 7 to read as follows:

7. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, THE ISSUANCE OF A WORK PERMIT UNDER THIS SECTION BY THE COUNTY SUPERINTENDENT OR HIS OR HER DULY DESIGNATED AGENT TO A TELECOMMUNICATIONS PROVIDER AS DEFINED BY SECTION THREE HUNDRED OF THE GENERAL MUNICIPAL LAW, THE TERMS OF SUCH PERMIT, THE APPLICATION REQUIREMENTS FOR SUCH PERMIT, FEES ASSOCIATED WITH THE ISSUANCE OF SUCH PERMIT, OR ACTIVITIES UNDERTAKEN PURSUANT TO

SUCH PERMIT, SHALL BE SUBJECT TO THE TERMS AND PROVISIONS APPLICABLE TO MUNICIPALITIES UNDER ARTICLE THIRTEEN-E OF THE GENERAL MUNICIPAL LAW.

S 6. This act shall take effect immediately.